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An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from *Campbell v. Acuff-Rose Music, Inc.*

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COMMENTS

AN APPROPRIATE(D) PLACE IN TRANSFORMATIVE VALUE: APPROPRIATION ART'S EXCLUSION FROM *CAMPBELL v. ACUFF-ROSE MUSIC, INC.*

INTRODUCTION

Campbell v. Acuff-Rose Music, Inc.[1] could very well go down in jurisprudential history as the case that shepherded copyright law's entry into the postmodern era. In holding that a rap version of Roy Orbison's song "Oh, Pretty Woman" may be a fair use of the copyrighted tune, the Court shifted its emphasis from the secondary work's commercial nature to its "transformative value"—the parody's creation of "new insights and understandings" of the original target.[2] In so doing, the Supreme Court abandoned a rigid interpretation of fair use and ensured that even "commercial" parodies may be immune from copyright infringement.

The Supreme Court's salutary elimination of the commercial presumption, however, is limited to works that convey a parodic purpose. Consequently, while *Acuff-Rose* has rescued one form of valuable artistic expression from an outmoded view of creative value, it nonetheless implicitly excluded appropriation art from fair use protection. By carving out a plàce for commercial parodies, the decision essentially split the universe of creative re-use into acceptable parodies and non-parodic works, which are frowned upon as impermissible commercial copying. Thus, the Court ignored the transformative value of a creative work that criticizes without parodying its target and

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[1] 114 S. Ct. 1164 (1994).

[2] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

allowed a presumption to remain against the work's commercial character, thereby jeopardizing its immunity as fair use. Since appropriationist works are not parodies and often entail substantial replication of a copyrighted work's expression for profit, they are likely to receive no protection under *Acuff-Rose*. Indeed, Justice Kennedy's concurrence clearly states that a secondary work made for profit, no matter how creative, is not a fair use unless it evinces a parodic function.[3] This supports the Second Circuit's decision in *Rogers v. Koons*, which held that Jeff Koons's appropriationist art work *String of Puppies* infringed its target.[4]

The act of artistic appropriation is a progressive, pervasive and effective mode of criticism and comment,[5] and therefore should be protected by copyright.[6] A system by which to judge an appropriationist work's use of copyrighted material is essential to preventing a chilling effect on this mode of discourse.[7]

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[3] *Acuff-Rose*, 114 S. Ct. at 1180-81 (Kennedy, J., concurring).

[4] 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992); *see also Acuff-Rose*, 114 S. Ct. at 1180 (citing *Koons*).

[5] Appropriation deserves adequate protection primarily because it provides a unique and valuable method for social criticism. *See* E. Kenly Ames, *Beyond* Rogers v. Koons: *A Fair Use Standard For Appropriation*, 93 COLUM. L. REV. 1473, 1479 n.25 (1993). Considering copyright's goals of protecting new forms of expression and new creative developments, the appropriative act deserves fair use's coverage not only for existing schools of postmodernism, but also as a creative dynamic used in future artistic movements. *Id.* Historically, imitation, and even strict replication, has been practiced in one form or another by visual artists as far back as the Impressionists and Cubists. For example, compare Claude Monet's *Bathing at la Grenouillère* (1896) with Pierre Auguste Renoir's *La Grenouillère* (1869), Monet's *Sailboats at Argenteuil* (1874) with Renoir's *Sailboats at Argenteuil* (1874), Pablo Picasso's *Accordionist* (1911) with Georges Braque's *Le Portugais (The Emigrant)* (1911-12), and Picasso's *Ma Jolie (Woman with a Zitner or Guitar)* (1911-12) to Braque's *Man with a Guitar* (1911). In literature, Shakespeare's works most often took from the plays and stories of other authors. For example, *The Merchant of Venice* borrowed its basic story line, which includes an Italian gentleman who provides his adopted son with the necessary funding from a Jewish usurer to finance a trip to a maiden's distant island, from *Il Pecorone* ("The Dunce") by Ser Giovanni Fiorentino, as well as the persona of Shylock from Christopher Marlowe's *The Jew of Malta*. THE RIVERSIDE SHAKESPEARE 251 (G. Evans ed., 1974). Compare also Shakespeare's *Titus Andronicus* (1593-94) with Ovid's *Metamorphoses* (1567), and Shakespeare's *Much Ado About Nothing* (1598-99) to Spenser's *The Faerie Queene* (1590).

[6] Article I, section 8 states: "The Congress shall have 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." U.S. CONST. art. I, § 8.

[7] Two commentators have argued that because appropriationist art functions

Absent such a framework, courts may conclude that nonparodic appropriationist work lacks the transformative value necessary to bring it within the fair use privilege. Given that all contemporary art is essentially commercial, such a conclusion could reduce all appropriationist replication to illicit copying.

Part I of this Comment discusses the theoretical framework behind the act of appropriation primarily in the context of contemporary art, and outlines the philosophical and practical differences between appropriation and parody. Part I also emphasizes that the public value of appropriation lies in its communicative function: the very act of appropriation operates as language with which creators speak to and about their audiences. Such communication takes on an interactive dimension that has led, in many cases, to a more direct relationship between the creative arts and popular culture, inevitably increasing the public's exposure to the arts.

Next, Part II analyzes how basic principles of copyright law discourage appropriationist artists from working within this creative genre. Part III describes the statutory requirements of the fair use exception and how the defense, in principle, was created to nurture artistic movements like appropriationism. Part III also reviews the state of fair use and appropriation art before and after the Supreme Court's decision in *Acuff-Rose*.

Part IV concludes with a discussion of how *Acuff-Rose* may inhibit appropriationist art. By juxtaposing the fair use standard developed in *Acuff-Rose* to the facts in *Rogers v. Koons*, this section shows how a transformative value test is suitable for appropriationist art only when such works are acknowledged as separate from parody. This Note suggests that recognizing such a category facilitates an equitable balance between the copyright holder and the contemporary artist's interests. Indeed, debate over the most pragmatic mechanism by which to monitor such uses has just begun.[8] Yet, if the legal commu-

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as semiotic discourse, the First Amendment should protect this mode of speech. *See* Patricia A. Krieg, Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565 (1984); Martin H. Smith, Note, *The Limits of Copyright: Property, Parody and the Public Domain*, 42 DUKE L.J. 1233 (1993).

[8] *See* Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y 93 (1994) (re-

nity fails to acknowledge that appropriation benefits the public by creating a closer relationship between art and society, courts and legislators are not likely to devise a scheme to allow appropriationists to work without fear of impending law suits. In the wake of the Supreme Court's recent decision, the critical and social value of appropriationist uses remains unaddressed.

I. THE IMPORTANCE OF APPROPRIATION

> Prior to the Pop Artists, and particularly Andy Warhol, the reigning attitude in the world of art was that of the Abstract Expressionists. Their idea was that America was a benighted, crassly commercialized, rather horrible place, and that the artist could only turn his back as best he could and avert his eyes from this side of the modern world. Warhol came along as part of a slightly younger generation, and his idea was, "Oh, it's so horrible, I love it."[9]

Appropriation is one of the most pervasive modes of contemporary artistic expression in large part because it is so effective as a form of communication.[10] Appropriation acts as a kind of enhanced language in which the artist makes the audience aware of the significance of otherwise commonplace and increasingly obscured objects. Everyday images such as soup cans, flags, cigarette packages, money, movie stars, comic strips and even shopping bags—the representations of which ordinarily serve as cultural symbols—are transformed into a language through which these artists communicate their message. The modes of representation of these objects and the level of their incorporation varies widely. Yet the creative significance of all forms of appropriation—whether collage or replication—derives from its ability to speak critically of the society in which both the public and the artist live.

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viewing three basic property theories by which to evaluate how best to accommodate appropriationist uses under copyright law); Robert A. French, Note, Rogers v. Koons: *Artistic Appropriation and the Fair Use Test*, 46 OKLA. L. REV. 175 (1993) (evaluating three model approaches to a fair use review of visual arts); Heather J. Meeker, Note, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195 (1993) (considering the availability of alternative remedies to the fair use defense in the visual arts).

[9] SUPERSTAR: THE LIFE AND TIMES OF ANDY WARHOL (1990) (quoting Tom Wolfe).

[10] The term "appropriation" will be used in this Comment to mean unauthorized copying of all or most of a copyrighted image's expression by a contemporary artist.

In the visual arts—the medium on which this Note concentrates—such close ties with the everyday world were being developed as early as the Dadaist movement and Marcel Duchamp's Ready-made.[11] Since 1914, the artistic currents of Dada, Constructivism, the Bauhaus, and Pop art all led artists to collect real-life objects and present these pieces not only as the subjects of their art, but often as the art itself.[12] Artists such as Robert Rauschenberg, Richard Hamilton, Peter Blake, Jasper Johns, Claes Oldenberg, James Rosenquist, Red Grooms and Jim Dine widened creative access to the world that surrounded them by working "in the gap between art and life."[13] Similarly, for postmodern artists, real-life objects signify both mass culture and serve as the pieces that comprise our modern sense of reality. These objects, or signs, replace the natural world mirrored in canvases and sculptures of the past, so that "[t]he referent in postmodern art is no longer 'nature,'

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[11] An example of a Ready-made sculpture is Duchamp's *Fountain* (1917), a manufactured urinal that, once signed by the artist and proclaimed as his work, was spontaneously transformed into art.

[12] GINA PISCHEL, A WORLD HISTORY OF ART 658 (rev. ed. 1975) (describing Duchamp's Ready-mades as "[t]he artists' reaction to the American myth of mechanization as the solution to all problems"); *cf.* Benjamin H.D. Buchloh, *Allegorical Procedures: Appropriation and Montage in Contemporary Art*, ARTFORUM, Sept. 1982, at 43; Hans Haacke, *In the Vice*, ART J., Fall 1991, at 49; Marcia E. Vetrocq, *Vexed in Venice*, ART IN AMERICA, Oct. 1990, at 152. In 1955, Jasper Johns' *Flag* was a major contribution in introducing the concept of appropriation to American art. Pop artists like Robert Rauschenberg, Andy Warhol and Roy Lichtenstein employed appropriation techniques by juxtaposing commodity images with "mechanically produced high-cultural icons." Buchloh, *supra*, at 46. More recently, Hans Haacke has directed his art at corporate targets like Mobil Oil Company and Phillip-Morris Company to protest what he calls the "corporate takeover of culture." Haacke, *supra*, at 51. Jac Leirner uses a patchwork of Bolla wine, Marlboro, Kaufhof and Toys-R-Us logos sewn in a plastic quilt to highlight the replacement of cultural value with market value, while Alain Clairet's bar code paintings broach the issue of commercialization in the arts. Vetrocq, *supra*, at 159. For a critical discussion of how the artistic principle of reality is often used to convey specific social and political messages in contemporary art, see Eric Troncy, *Being Positive Is the Secret of the 90s: A Comment on the Politically Correct Epidemic*, FLASH ART, May/June 1992, at 96 (arguing that much of contemporary art, in using real-world objects to critique real world problems, tends to convey only those moral messages that are politically correct: "The problem seems to be that people want some art in reality and even a little reality in art, providing . . . that it represents a bid to build a better world, about which everybody has a different idea. The apparent obstinacy of a better world nowadays transforms social protest into an artistic motor with discrimination, injustice, and segregation fueling the production of art.").

[13] DAVE MARSH, BEFORE I GET OLD 168 (1983) (quoting Robert Rauschenberg).

but the closed system of fabricated signs that make up our environment."[14]

Such a rejection of the formalism of modern art and an embracing of popular symbols is central to postmodern artists' redefinition of artistic expression in contemporary society. These artists condemn those traditional artistic principles that insulate art from its social context. As a result, equipped with the vocabulary of pop culture, contemporary art has achieved its greatest popularity by shedding the common understanding of "high art" as an elitist pursuit. In this way contemporary art has used familiar images to become more accessible to the public at large.[15] By increasing public access to artistic ideas and subject matter, art reproductions have facilitated the spread of appropriation art in the marketplace. Art as commodity is no longer limited to the sale of the art piece itself, but has extended to the mass-marketing of the art work's image.

These commercial copies add yet another dimension of replication to the appropriationist act of popular image reproduction by simultaneously returning the new altered image to the lexicon of popular culture.[16] By doing so, these copies also

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[14] *See* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 111 (1989).

[15] *See* Marcia Tucker, *Foreword* to ART AFTER MODERNISM: RETHINKING REPRESENTATION, at vii (Brian Wallis ed., 1984); Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS (1969); Ames, *supra* note 5, at 1480-81; Carlin, *supra* note 14, at 104. Benjamin Buchloh traces the historical roots of this revolution of public perception of art when he comments on art historian Walter Benjamin's theory of montage:

> The beginning of the Modernist avant-garde comes at the historical turning point where, under the impact of the rising participation of the masses in collective production, the traditional models that had served in the character formation of the bourgeois individual were rejected in favor of models that acknowledged the social facts of a historical situation where the sense of equality had increased to such a degree that equality was gained even from the unique, by means of reproduction. This perceptual change denied unique qualification and it dismantled by implication the hierarchical ordering system of the bourgeois character structure. This transformation of the individual psyche as well as that of larger social structures was anticipated in new techniques and strategies of montage, in which a new tactility established a new physiology of perception.

Buchloh, *supra* note 12, at 46. Carlin discusses Benjamin's view of how mass reproduction began to affect art by stating that "[t]he technology of mass media changed the relationship of the masses to art in [Benjamin's] view, thus creating new, democratic possibilities for cultural production." Carlin, *supra* note 14, at 104 n.4.

[16] This dialectic of re-use, in which appropriationist pieces are, in turn, recy-

increase the danger that the law will refuse to protect contemporary artistic expression by finding it to be no more than plagiarism for profit. Ironically, when the danger that an appropriationist will be enjoined from creating her works heightens, appropriation's communicative power spreads as such pieces are duplicated for public consumption or re-use by other creatives.[17]

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cled as pop symbols and replicated on consumer products, has led artists like Andy Warhol to abandon the role if appropriationist in favor of guarding his own proprietary interests. *See* Hughes v. Design Look Inc., 693 F. Supp. 1500 (S.D.N.Y. 1988) (holding that the defendant could not be enjoined from using Warhol works, such as "Green Coca-Cola Bottles" (1965) and "Campbell's Soup" (1965), for which it received permission from museum copyright holders, on its yearly calendar products, because an artist's right to control use of his or her work is relinquished once the copyrights to those works are conveyed to another).

[17] Pop art has influenced the ways in which rock music and musicians have marketed their work, themselves and their concert merchandise. *See* MARSH, *supra* note 13, at 170; TONY STEWART, COOL CATS: TWENTY-FIVE YEARS OF ROCK 'N' ROLL STYLE 16, 42-45 (1982). Groups like The Who, The Jam, Blondie and Generation X have replicated Pop art tokens to image and icon on shirts worn on-stage or in publicity shots and, in some instances, used these emblems as the background visual material of live performances. Pop art's effect on rock music perhaps exemplifies the convergence of "high art" and pop culture. For Pop art not only influenced rock and roll as a commodity, but also at times supplied the thinking behind what rock music could be capable of musically:

> More than anything, pop art and the new rock music of the sixties shared a creative, affirmative, imaginative response to the new technology. How does the painter paint in a society where the dominant symbols have been created and disseminated by advertising hucksters, often expropriating recent avant-garde techniques? How does the musician compose when what's being heard is not the instrument or the orchestra but the noise that the instrument and/or orchestra makes, many times removed, on a piece of black plastic with a context of its own? *Just by raising such questions, pop [art] gave itself more access to the society as a whole than art had in many decades—and more leverage upon that society.* And in its performances—the 'happenings'—it brought high art closer to show biz than anyone had dared in more than a century. This is what John Russell refers to as the "element of exorcism" in pop, and it functions as effectively in a Who 45 as in an Oldenberg sculpture, as provocatively in a recording like Dylan's "I Want You" as in one of Roy Lichtenstein's comic book paintings . . . . Thus were barriers—between art objects and everyday stuff, between the theory of avant-garde viewers and unaesthetic masses, between high culture and low, between respectability and trash—not simply eradicated but demolished.

MARSH, *supra* note 13, at 169 (emphasis added). Artist/author Dan Graham observed that the punk movement's rejection of the sixties' cult of the pop music "superstar" echoed Pop art's rejection of Abstract Expressionist notions of authorship and the "cult of the heroic." Dan Graham, *The End of Liberalism*, *in* Rock My Religion 77 (Brian Wallis ed., 1993).

Appropriation in contemporary art has been defined as an allegorical process through which the artist uses symbols of popular culture as parables of conspicuous consumption.[18] The pervasive and ubiquitous nature of mass-marketed items transform these products into shared signifiers of reality. The allegorical act entails extracting a signifier from everyday life, and in turn reinjecting it without alteration into the context of art, so that the work achieves the potency of the symbolic in a minimalistic rhetoric of power.[19] By placing a universal object such as Duchamp's Ready-made in the context of a gallery, the artist simultaneously appropriates a sign's already laden popular significance and reinvests new meaning in the object as testament to the vices or virtues of modern society.[20] Shifting the context of the image in this way transforms the meaning of the original image by forcing the viewer to reevaluate his or her former, most often unconscious, understanding of the image.[21]

This process of transevaluation is what makes art valuable. Art is fundamental to society precisely because of its ability to challenge old understandings, what Marcie Hamilton has called a "reorientation experiment."[22] Thus, appropriation should not be mistaken for plagiarism. By recontextualizing the image, the artist has, in fact, transformed and altered it in an attempt to force viewers to see the original work and its significance differently. In turn, the audience is reoriented to view not only the object, but to observe anew the positioning of boundaries between the piece and the space that surrounds it; between the art work and itself.[23]

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[18] Buchloh, *supra* note 12, at 46. The term "allegorical" is used in this Comment to refer to the appropriation process of borrowing everyday symbols without altering them, and using the communicative power of these symbols to convey the artist's own creative message. For discussions of Postmodern Art's use of allegory, see Craig Owens, *The Allegorical Impulse: Toward a Theory of Postmodernism, in* ART AFTER MODERNISM: RETHINKING REPRESENTATION 203 (Brian Wallis ed., 1984).

[19] *See* Anna C. Chave, *Minimalism and the Rhetoric of Power*, ARTS MAG., Jan. 1990, at 44-63. Art critic Benjamin Buchloh describes this postmodern use of allegory as: "[t]he transformation of commodity to emblem . . . [which] came full circle in the Ready-mades of Duchamp, where the willful declaration of the unaltered object as meaningful and the act of appropriation allegorized creation by bracketing it with the anonymous mass-produced object." Buchloh, *supra* note 12, at 46.

[20] Ames, *supra* note 5, at 1481-82.

[21] Ames, *supra* note 5, at 1481-82.

[22] Hamilton, *supra* note 8, at 101.

[23] *See* Rudolf Arnheim, *Art Among the Objects, in* TO THE RESCUE OF ART:

The artist's critique of the symbolic object, however, whether celebratory or condemning often does not speak to the viewer by way of artistic authorship.[24] In rejecting the modernist tradition of creative authorship as the sine qua non of works of art, postmodern artists remove nearly all personal identification from their pieces.[25] Instead, with little or no alteration of the appropriated subject, intended messages are conveyed through the language of the signifier in a merging of mass culture and fine art.[26] Postmodern artists deliberately abstain from altering the appropriated symbol or adding stylistic marks that would identify the artist's authorship in the piece because, by principle, the symbol's own vocabulary is the means by which the artist conveys the allegorical message.[27]

TWENTY-SIX ESSAYS 7, 10 (1992). Arnheim focuses on the significance of context in art:

> What character traits enable objects to play their active part? Remember that in the artistic practice of the last few centuries the objects populating paintings and sculpture and even architecture and the performing arts have lost much of the broader environment with which they used to interact. Within a single painting, to be sure, the figures of a dramatic scene, the apples and bottles of a still life, or the shapes of an abstract composition respond to one another; but the frame is the limit of this small world. The work of art has become a mobile facility belonging nowhere and ready to be put anywhere. Its effect on its surroundings is accidental, and the surroundings' influences on the work are unpredictable. Compare this vagrancy of paintings in our time with the established place of the mosaics on the walls of a Byzantine church or the stained glass windows of a Gothic cathedral, where the pictures were indispensable components of their setting and received their meaning from their setting. The same is true for sculpture, music, buildings, theater, and dance. By now, the single art object, instead of being supported in its particular function by its place and time, is expected to carry a total and complete message against the opposition of an incongruous neighborhood.

Id.

[24] *See* Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 6 (1992).

[25] *Id.* at 3-6 (explaining the importance of the artist's anonymity in appropriation works). Greenberg states: "These artists . . . strive to erase all authorship from their work, replacing individual signature with trademarks of mass-produced commodities. In so doing, they radically deny the notion of 'creative authorship' as a principle and as a definitional codification for works of art."

[26] Buchloh, *supra* note 12, at 47.

[27] The works of artists Barbara Kruger and Sherry Levine best exemplify this principle of appropriationist art. *See* JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 236 (1991). Gaines discusses how Kruger and Levine use problems of prohibited uses and the confines of possession and authorship as the objects of their art:

The principle behind such an intentional absence of authorship is significant because artists risk copyright infringement when they subvert conventional notions of originality through appropriation. An artist may hide from infringement liability when exhibiting these works within the creative sanctuary of a gallery or museum,[28] however, mass-marketing of the allegorical pieces increases the likelihood of liability since it puts intellectual property laws to "the stiffest test of 'free commercial speech.'"[29] Before *Acuff-Rose*, this was so because, most often, an automatic presumption of unfair use arose any time a secondary work, which inhabited space in the marketplace, earned a commercial designation. Since the Supreme Court's recent decision, artists still face this risk because the transformative value test established in *Acuff-Rose* only considers the quantitative or visible alterations to the image that may be reasonably perceived.[30] Absent additional stylistic marks that would clearly comment on the original target, then, when an appropriated work is placed on the market for profit, its commercial nature is of renewed importance to courts once the piece has seemingly failed to contribute to the original

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> Kruger's mock-up collages work by refusing the myth of artistic originality, by refusing to start from scratch, showing us instead that we must use existing, available signs. As she pastes together advertising images and "found" graphics, Kruger creates objects that are received as "art" but that nevertheless gesture toward the impossibility of "creation." Levine's work is also a testament to the inevitability of generic borrowing, to the possibility of the total exhaustion of signs and the consequent impossibility of producing anything entirely new. Part of the power of Levine's work is in the way it works and keeps on working as conceptual art. (One never has to see her masterpieces of photography reframed in order to appreciate their concept).

Id. This need for total replication is comparable to, and yet forges beyond, textual examples used by literary critics to convey a theory. Quoting text enables the critic to illustrate theoretical observations with greater ease and accuracy and often serves as an essential step in an explication of the text. For an appropriationist, replicating copyrighted images shares in this process of explication, but also differs from practices of literary criticism because the former communicates critical messages exclusively by way of the appropriated piece whereas the latter uses the borrowed text to buttress, elucidate or galvanize the secondary author's exposition. To the appropriationist, the weight and significance of the artistic message are most fully effected through the author's silence and the image's own communicative power.

[28] *Id.*

[29] *Id.*

[30] 114 S. Ct. at 1175-77.

work. And yet, appropriation practices, which are based on the idea that fundamental perceptions of everyday society can only be disrupted by recontextualizing these images *in toto*, lead artists to *abstain* from adding stylistic marks to their pieces or altering original images in order to effectively transform their original meanings.[31] Thus, for adequate artist protection, the

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[31] Ames, *supra* note 5, at 1482.

> For appropriation to function, the artist must take an image that already exists as a recognizable part of collective culture, challenging ideas about ownership and originality in the process. If the artist were to create her own original piece in the style of the sort of work she was interested in appropriating, and then create a secondary work based on that piece, she would not have appropriated that image because she would not have performed the crucial act of "seeing" the image and its meaning differently than its creator or its previous viewers did. The critical effect of the translation of one person's work into the next person's would be lost.

Id. The theory behind appropriation is similar to the musical goals of digital sampling, where replication of an original piece juxtaposed with new material builds new works because both attempt to achieve the same transevaluation of original material. Also like appropriationism, sampling serves to express musically the same critical commentary on the songwriter's environment as appropriationism does in the visual arts. Ames, *supra* note 5, at 1483. The medium of digital sampling, however most often takes less from an original work than a visual artist. Steven R. Gordon & Charles J. Sanders, *The Rap on Sampling: Theft, Innovation, or What?*, *in* ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 207 (1989); Jeffrey H. Brown, Comment, *"They Don't Make Music the Way They Used To": The Legal Implications of "Sampling" in Contemporary Music*, 1992 WIS. L. REV. 1941. In fact, sampling has been compared to an explication of quoted material in a literary work. Ames, *supra* note 5, at 1483. For a discussion on the difference between appropriationist techniques and literary explications of quoted material, see *supra* note 27. Thus, because it can affect its goal with less material from an original song, musical sampling does not challenge current copyright laws in the same way as visual appropriation.

A more accurate musical equivalent to visual appropriation is John Oswald's *Plunderphonics*, music that is made by appropriating the entirety of existing songs and altering the form of the source material to challenge the ways in which audiences listen to music:

> Oswald has used a variety of tools and techniques from archaic to futuristic: he varies the speed of the turntable, slices up analog tape, builds an "imaginary orchestra" in which each virtual musician plays only one note (*klangfarbenprobe*); builds a jazz quartet from four separate and unrelated solo performances; presents ambiguous information to a computer; loads fragments of the Beatles' "Birthday" into a sampling keyboard; instructs live musicians to play along with an Elvis Presley record, instructs other musicians to play along with those tracks, then wild-tracks the once removed tracks on top of an edited version of the Presley cut without the intermediary material. And so on.

David Gans, *Michael Jackson's Face*, WIRED, Feb. 1995, at 138. Unlike ordinary digital sampling that incorporates pieces of others' recording to build new works, *Plunderphonics* borrow whole pieces of music (expressly acknowledging the appro-

elimination of indicia of authorship and the routine of wholesale incorporation necessitate a broad and flexible interpretation of transformative value.

When the Supreme Court sought to protect commercial parodies by expanding the possibilities for fair commercial criticism, however, it saved no ostensible place in transformative value for appropriation. Although appropriation shares certain characteristics with parody, these genres are actually quite different. Courts and commentators often have merged the two improperly.[32] Traditionally parody has been understood as a literary form based in satire where the parodist comments humorously and critically on a specific work through imitation.[33] Parody "transforms all or a significant part of an original work of authorship into a derivative work by distorting or closely imitating it, for comic effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable."[34] By way of replicating the original, a parody exposes the original work's flaws.[35] Characteristically, such exposure arises through humor where the original, typically serious work is made ridiculous through "mocking imitation."[36] While courts refrain from evaluating

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priation and crediting these sources on the liner notes of the CD) and, like appropriation in the visual arts, makes explicit to the audience elements in source material that are "often ignored or obscured in the highly derivative world of mass-marketed culture." *Id.* at 137. Oswald's musical adjustments are essentially the very recontextualizations that signs and symbols undergo once they are presented in galleries and museums.

[32] Smith, *supra* note 7, at 1233; *see also* Rogers v. Koons, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

[33] Beth W. Van Hecke, Note, *But Seriously, Folks: Toward a Coherent Standard of Parody as Fair Use*, 77 MINN. L. REV. 465 (1992). Although both parody and satire ridicule their targets, parody differs from satire, as well as burlesque and irony, because it uses the act of imitation to effect its criticism. *Id.* at 465 n.1.

[34] Melanie A. Clemmons, *Author v. Parodist: Striking a Compromise*, 46 OHIO ST. L.J. 3, 12 (1985) (arguing that an inadequate understanding of the principles and dynamics of parody has led courts reviewing copyright claims to overemphasize the significance of the parody's economic harm to the original author and to create new and varied fair use considerations, resulting in reactive and inconsistent case law).

[35] 11 OXFORD ENGLISH DICTIONARY 257 (2d ed. 1989) (defining parody as "imitation of a work more or less closely modelled on the original, but so turned as to produce a ridiculous effect"). The roots of parody exist in the Greek *parodeia*, defined as "a song sung alongside another." 7 ENCYCLOPEDIA BRITANNICA 768 (15th ed. 1975).

[36] Ames, *supra* note 5, at 1501 (quoting Sheldon N. Light, *Parody, Burlesque,*

the parodic work,[37] the success of the parody often is measured by whether the work achieves the intended purpose of provoking laughter.[38]

Unlike appropriation, parody's distinguishing characteristics contribute to the ultimate aesthetic and legal success of these works. To be effective, the parody's audience must recognize both the subject of the parody and its satirical additions. In *Acuff-Rose*, the Supreme Court defined a parodist's claim to fair use of existing material as "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."[39] Thus, although a parody, by definition, must mimic an original, it must also criticize the original to justify the intentional replication so that an audience is alerted that the parody is a new and separate work.[40] The simultaneous and contradictory purpose of parody is to target the original work for satire and thus invoke the original, while simultaneously investing new meaning in the original through humor or criticism.[41] This kind of dual

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and the Economic Rationale for Copyright, 11 CONN. L. REV. 615, 616 (1979)).

[37] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits."). Despite Justice Holmes's statement in *Bleistein*, a court's attitude towards the parody at issue often will determine whether the infringing use will be tolerated upon review of the fair use factors. In MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981), the Second Circuit held that plaintiff's copyrighted song *Boogie Woogie Bugle Boy* was infringed by defendant's parodic song *Cunnilingus Champion of Company C*, which was performed in the show *Let My People Come—A Sexual Musical*. The Court found that defendant's song did not fulfill the necessary requirements of a parody, but the court used a superficial analysis to conclude that since the plaintiff and defendant were both "in the entertainment field," the poorly constructed parody harmed the original's market. *Id.* at 185. Encapsulating its distaste, the Second Circuit commented: "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain and then escape liability by calling the end result a parody or satire on the mores of society." *Id.* For other illustrations of how judicial aversion often determines the course of a fair use review, see Van Hecke, *supra* note 33, at 481-84; *see also* Ames, *supra* note 5, at 1501. For a critical assessment of judicial consideration of the content of a parody in the area of trademark law, see Robert N. Kravitz, *Trademark, Speech and the "Gay Olympics" Case*, 69 B.U. L. REV. 131 (1989).

[38] Ames, *supra* note 5, at 1501.

[39] 114 S. Ct. at 1172.

[40] *Id.*

[41] Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, 886 F.2d 490, 494 (2d Cir. 1989) (holding that parody of plaintiff's student summaries did not in-

identification of both the original source and secondary work, combined with a parody's comedic effect, determines, not only the artistic success of the parody, but its acceptance under law.[42]

Taking into account the dual purpose of parody, courts have recognized that the parodist must take a certain portion of an original to effectively "conjure up" the target of criticism and commentary.[43] The Supreme Court has held that in gen-

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fringe plaintiff's trademark).

[42] As the Second Circuit stated: "a parody must convey . . . that it is the original, but also that it is not the original and is instead a parody. To the extent that it does only the former but not the latter, it is not only a poor parody but also vulnerable under . . . law." *Cliffs Notes*, 886 F.2d at 494.

[43] *See, e.g.*, Berlin v. E.C. Publications, 329 F.2d 541, 543 (2d Cir. 1964) (holding that defendant's parodic transformations of plaintiff's songs (for example, turning *A Pretty Girl Is Like a Melody* into *Louella Schwartz Describes Her Malady*) were not a "passing off" of the original since "brief phrases of original lyrics were (only) occasionally injected into the parodies"), *cert. denied*, 379 U.S. 822 (1964); Columbia Pictures Corp. v. NBC, 137 F. Supp. 348, 351 (S.D. Cal. 1955) (holding that Sid Caesar's parody of *From Here to Eternity* took only that amount "sufficient to cause the viewer to recall and conjure up the original"); Loew's, Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165 (S.D. Cal. 1955) (holding that permissible latitude to recall or conjure up plaintiff's original was grossly exceeded), *aff'd sub. nom.*, Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956) (per curiam), *aff'd by an equally divided Court*, 356 U.S. 43 (1958); *see also* Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986); Warner Bros. v. ABC, 720 F.2d 231 (2d Cir. 1983); MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981); Elsmere Music v. NBC, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam), *cert. denied*, 439 U.S. 1132 (1980); Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); Tin Pan Apple v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, 642 F. Supp. 1031 (N.D. Ga. 1986).

The extent of replication was limited, however. In *Air Pirates*, the Ninth Circuit held that a comic book publisher's parody of Walt Disney's Mickey Mouse character was an unfair use because defendant took more from the original Disney character than was necessary to conjure up the copyrighted work. *Air Pirates*, 581 F.2d at 757-58. The court ruled that a parodist should be limited to borrowing only as much as is necessary to conjure up and satirize the original work. *Id.* at 758. Given Mickey Mouse's widespread popularity and given the parodist's narrow goal of satirizing Mickey's innocent personality, the court determined that the defendant only needed a little of the original to achieve its purpose. *Id.* Thus, the Ninth Circuit concluded that the defendant's substantial use of the copyrighted character had no other purpose than to "track Disney's work as a whole as closely as possible," and ultimately purloin the original. *Id.*

Fisher v. Dees held that, given the relative difficulty of parodying musical works, a musical parodist has some license to develop a "closer" parody of the original song. 794 F.2d at 439; *see also Elsmere*, 623 F.2d at 253 n.1. This leeway to appropriate more than a fleeting evocation of the original was qualified, however. In *Elsmere*, the Second Circuit noted that more extensive use would only be

eral copying the "heart" of or the essence of a work militates against a finding of fair use[44] and that "the more substantial the appropriation from the copyrighted work, the less likely fair use will be considered a defense."[45] In addition, the Court has required that the original be, at least in part, the target of the parody,[46] and that the parody "contribute[ ] something new for humorous effect or commentary."[47] Even if these conditions are met, however, the parody still may not use so much of the original that it becomes substantially similar and competes with the copyrighted work.[48] Essentially, the parody must not only distinguish itself from the original target by borrowing copyrighted material in a critical, productive or transformative way, but also must not impinge on copyright's creative incentives to the original's owner without justification.[49]

While some forms of appropriation art and parody serve the same critical function, these two modes of criticism comprise different genres. Although each "re-uses" existing works, they differ in their intended purpose and form of commentary. The most fundamental difference is that appropriation employs allegory while parody uses humor. Though the act of appropri-

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fair if the parody builds on the original by, at the very least, using the primary work as a "known element of modern culture . . . [to] contribut[e] something new for humorous effect or commentary." 623 F.2d at 253 n.1. In *Fisher*, the Ninth Circuit limited the musical parodist's license to copy by holding that the parodist's desire to perfectly parody the original should be balanced against the copyright owner's right to its original expression. 794 F.2d at 439.

[44] Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 564-66 (1985); *accord* Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177 (5th Cir. 1980).

[45] Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156, 1179 (W.D.N.Y. 1982).

[46] *Koons*, 960 F.2d at 310.

[47] *Acuff-Rose*, 114 S. Ct. at 1176.

[48] *Warner Bros.*, 654 F.2d at 211.

[49] Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 565 (1985) (stating that "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone's else's copyrighted expression"); *see also* Leval, *supra* note 2, at 1112. *But see* Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 146 (S.D.N.Y. 1990) (stating that liability should not be imposed on a work that incorporates the expression of another even if the use impinges upon the market of the original but conveys fair criticism of the appropriated excerpt).

ation often may give a humorous effect, an appropriationist's intention is not to be funny, but rather to communicate serious and critical messages by recontextualizing otherwise familiar images.[50] Further, unlike parody, an allegorical piece does not require identification of source and artistic authorship to be effective.[51] The act of appropriation creates new meanings in original images by creating new contexts and by deliberately erasing all signatures of authorship. In contrast, a parody inevitably must reveal itself as a separate and secondary entity to its target as all parodies possess the demarcations of their authors.

Appropriation, which has been called "parasitic,"[52] does not share a secondary relation to its original target like that found in parody.[53] John Carlin illustrates this point:

> [w]hereas parody is a degraded version, dependent almost entirely on its source for its significance, *appropriation is, by design, the conceptual equal of its source.* Appropriation transcends parody because it is a well-grounded and conscious attack on traditional notions of originality and authorship in art. Appropriation is one of the most important conceptual strategies in late twentieth-century art because it underscores the role of the artist as the manipulator or modifier of existing material, rather than as the inventor or creator of new forms.[54]

This conceptual equality between the appropriated piece and the original causes legal dangers for contemporary artists when courts collapse an allegorical use into parody.[55] Once

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[50] Ames, *supra* note 5, at 1501.

[51] Carlin, *supra* note 14, at 129 n.106.

[52] Carlin, *supra* note 14, at 125.

[53] Carlin, *supra* note 14, at 129 n.106.

[54] Carlin, *supra* note 14, at 129 n.106 (emphasis added). This need not be a repudiation of copyright. Carlin's description can be seen as, and was in fact intended to be, a call for copyright's modification to embrace new forms of artistic expression.

[55] This problem was most apparent in Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), where the Second Circuit, although recognizing that Koons's work belonged to a school of appropriation, ultimately found that it was not a valid use because its message was not effectively conveyed according to parody's definition. *Id.* at 309-11.

Louise Harmon argues that the act of appropriation should be considered a form of parody because the former's critical purpose mirrors the latter's ultimate goal: "Parody of something larger than another work of art serves a much more ambitious, critical function: to force scrutiny of our culture and values, and the choices we have made." Louise Harmon, *Law, Art and the Killing Jar*, 79 IOWA L.

the appropriationist piece fails to meet the definition of a parody, the artist may not assert copyright's fair use defense to protect the art work as publicly useful communication and criticism.

The requirement of conceptual equality further threatens appropriationist techniques because appropriation intentionally violates the basic copyright principle that only an original work's *ideas* may be re-used by a subsequent creator. An allegorical use requires that the entirety of its copyrighted expression be copied to convey the idea of the symbol.[56] Replication of the idea of an everyday signifier alone is insufficient since the expression and idea of the symbol have become inseparable. Thus, even though judicially created exceptions for parody exist to allow parodists to borrow a certain amount of an original's expression, these exceptions fail to protect an appropriationist who must replicate a much larger portion of a copyrighted original to convey a creative message.[57]

In addition to appropriationism's conflation of idea and

REV. 367, 395 (1994). Harmon's criticism of the law's treatment of appropriation art focuses on courts' inflexibility in keeping the definition of parody narrow. *Id.* at 393. This Comment argues, instead, that persuading courts to acknowledge that the allegorical act operates independently from parody deflates the potential that an art work on review will be misunderstood. A separate definition for appropriation would reduce the likelihood that an appropriative piece will be deemed unfair once the expectation of a standard parodic effect is imposed.

[56] For a more thorough discussion of copyright's idea/expression dichotomy in relation to appropriation and allegorical replication, see *infra* text accompanying notes 71-76. Due to contemporary art's infiltration into the consumer market, appropriationists become even more vulnerable to copyright laws when an appropriation art work is itself multiplied or is copied on postcards, posters and t-shirts. In these instances, the de facto rule that intellectual property infringement may be contained by limiting the copy to a "one time use" does not save from liability any artist who agrees to mass market her work. Under copyright law, multiple copies of an art work compound an artist's liability because they increase the likelihood that a court will find bad faith in the intentional replication of another's property without seeking permission. Multiple copies also severely restrict the availability of a fair use defense to artists absent a traditional and explicit reference to the original. *See Koons*, 960 F.2d at 310-11. Similarly, in trademark law, the risk of liability from commercial reproductions arises when the appropriated trade symbol is widely exposed to public consumers who would likely confuse the work with the trademark's original source.

[57] Courts determine whether a parody is a fair use by imposing a standard that allows a parodist to take only those elements of the original that function to recall or conjure up the original work for the efficacy of the parody. For a more thorough discussion of the "conjure up" test, see *supra* notes 43-49 and accompanying text.

expression, the third prong of the fair use test—the amount and substantiality of the use[58]—creates an additional hurdle to fair use acceptance. Under a fair use inquiry, judicially created exceptions that allow a parodist to use more of an original than ordinarily permitted do not aid appropriationists in defending their work. In fact, if courts reviewing appropriationist claims look for parodic instead of allegorical elements, the work is likely to be considered beyond the scope of parody and more detrimentally a taking performed in bad faith.[59]

II. BACKGROUND OF COPYRIGHT LAW

A. *Copyright's Purpose: A Delicate Equilibrium*

The owner of copyright for an original image possesses a proprietary interest in the intangible value of the work's expression. This proprietary interest is of an intellectual nature and, therefore, is subject to regulations. Copyright law attempts the elusive task of protecting an owner whose property, although never "consumed by use," would decrease in value if exploited by illicit copying.[60] To encourage future creations for the public interest, copyright law grants an author exclusive rights of ownership[61] and protects an owner's economic interests by containing any use—whether strictly commercial or

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[58] 17 U.S.C. § 107(3) (1988).

[59] *See Koons*, 960 F.2d at 971; *see also* Loew's, Inc. v. CBS, 131 F. Supp. 165, 181 (S.D. Cal. 1955).

[60] *See* Edwin C. Hettinger, *Justifying Intellectual Property*, PHIL. & PUB. AFF., Winter 1988, at 31-52 ("[Intellectual objects] are non-exclusive: they can be at many places at once and are not consumed by their use. . . . The possession or use of an intellectual object by one person does not preclude others from possessing or using it as well.").

[61] This stands in stark contrast to trademark law in which the primary motive is to ensure that a mark's commercial language is protected for the sake of the owner's investment in the symbol or slogan. Thus, trademark and copyright law diverge in the focus that each places on commercial uses. Since trademark law serves to guard a mark's efficacy to communicate within a commercial dialogue, it may only regulate injurious and unauthorized commercial uses. Trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view. Tyrone Tasker, *Parody or Satire as a Defense to Trademark Infringement*, 77 TRADEMARK REP. 216, 230-31 (1986).

not—that might impede the owner's market and potential profits.[62] By granting an author a limited monopoly over his or her work, economic incentives ultimately encourage progress in the arts.[63]

Copyright's vigilance, however, must be balanced with the need to keep the flow of available creative sources free for alternative artistic use, *even at the price of a copyright owner's economic interests*.[64] In *Acuff-Rose*, the Supreme Court confirmed this limitation on the copyright monopoly, but, to date, this check does not prevent a chilling of appropriationist speech. Because copyright law has failed to devise a mechanism by which to understand their work, appropriationists risk its violation. Copyright law misunderstands or ignores appropriationism's artistic purpose when it ultimately deems it

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[62] *See* Sony Corp. of America v. Universal City Studios, 464 U.S. 417 (1984). In *Sony*, the Court stated that in light of copyright's intention to provide economic incentives to authors, whether the copied use is itself commercial or noncommercial should not determine whether the use will be deemed fair. Rather, the determinative inquiry should be whether the use will impinge upon the author's market. "The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit." *Id.* at 450-51.

[63] The Constitution provides that "The Congress shall have power . . . To 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." U.S. CONST. art. I, § 8, cl. 1 & cl. 8. Although the underpinnings of such a limited monopoly include the Lockean argument of labor justification—where one is deserving of the fruits of one's labor since one owns the body with which such fruits were cultivated—the predominant argument is one of social utility. Given the utilitarian justification for section eight, perhaps the most logical basis for copyright is that the greater good of publicly available intellectual products justifies providing incentives to individual creators to supply these goods. Lacking such incentives, authors would have no reason to sacrifice their time, energy and money to create these products. Hettinger, *supra* note 60, at 33.

[64] *Acuff-Rose*, 114 S. Ct. at 1178; *see also* Zechariah Chafee Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511 (1945) ("The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if an author had a complete monopoly on everything in his book."); Emerson v. Davies, 8 F. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845); Carey v. Kearsley, 4 Esp. 170, 170 Eng. Rep. 679, 681 (K.B. 1803) ("while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science").

nothing more than a commercial use.[65] A fair, consistent and practical definition of appropriatist allegory, combined with a workable approach to separating such artistic objectives from commercial interests, is essential to its survival.

B. *Limits On Copyright Monopoly: The Idea/Expression Dichotomy*

Section 106 of the 1976 Copyright Act enumerates the five exclusive rights granted to copyright holders.[66] The owner's

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[65] Courts have found plainly commercial works to be fair use. Twin Peaks Prods., v. Publications Int'l, 996 F.2d 1366 (2d Cir. 1993) (citing Consumers Union v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983)) (holding that advertisement incorporating *Consumer Reports* recommendation was a fair use), *cert. denied*, 469 U.S. 823 (1984); Warner Bros. Inc. v. ABC, 720 F.2d 231, 242 (2d Cir. 1983) (holding television series that parodied Superman a fair use); Elsmere Music, Inc. v. NBC, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (*Saturday Night Live* skit parodying the song, *I Love New York*, held to be fair use); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544-45 (2d Cir.) (holding that *Mad Magazine* parody of Irving Berlin songs was a fair use), *cert. denied*, 379 U.S. 822 (1964). In contrast, some courts have argued that an advertising use, due to its commercial nature, is never a "proper purpose" under § 107 of the Copyright Act in terms of its critical or educational value. *Consumers Union*, 724 F.2d at 1046 (Oakes, J., dissenting from denial of rehearing in banc). The label of "commercial exploitation" seems to be used by courts to indicate that a commercial use has infringed upon the plaintiff's own right to capitalize on her work through reproductions or derivative uses. It is difficult, however, to distinguish the above-cited, permissively commercial cases from other uses found by courts to be commercially exploitive. *Compare* Iowa State Univ. Research Found., Inc. v. ABC, 621 F.2d 57, 61 (2d Cir. 1980) (holding network telecast using clips of wrestler film was "commercial exploitation"); *and* Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) (publication incorporating Rosenberg letters could constitute "commercial exploitation"), *cert. denied*, 434 U.S. 1013 (1978); *with* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429 (6th Cir. 1992) (finding that "[i]t is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use"), *rev'd*, 114 S. Ct. 1164 (1994). Upon close comparison, it seems that those uses, which the Circuit found publicly useful, either because the information appropriated needed to be publicly disclosed or because the parody at issue was socially valuable, were allowed the fair use privilege despite their commercial characteristics. Those uses deemed "commercially exploitive" were labeled as such because the defendants' works did not seem publicly valuable to the court, not because the uses were, in fact, any more commercially abusive than a permissible commercial use.

[66] Section 106 lists the following rights:

> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes,

right to reproduce her work and the right to make derivative copies are the two statutory rights with the greatest impact on appropriationist artists.[67] These rights of authorship are not absolute, as the Act allows for some creative borrowing. The Copyright Act imposes specific requirements on a copyright owner who brings an action to enjoin infringing uses or for damages.[68] These restrictions function to limit the duration of copyright ownership,[69] require copied portions of a work to bear a substantial similarity to the original, extend protection only to a work's expression, and exclude copies deemed to be fair use.[70] However, three of these four limitations—the idea/expression dichotomy, the requirement of substantial similarity, and the exception of fair uses—allow a copyright holder to enjoin an appropriationist's work, thereby discouraging other artists from experimenting with innovative modes of expression.

The idea/expression dichotomy, which states that a copyright holder only may limit subsequent use of the expression and not the holder's ideas, does not save appropriationists who creatively communicate by recontextualizing the totality of another's expression, from liability. A copyright holder's monopoly is limited primarily by the tenet that only a work's expression may be protected. Because ideas must remain free for future public use, a person may not restrict their alternative uses. Expression, on the other hand, bears the original and

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and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1988).

[67] Greenberg, *supra* note 24, at 23.

[68] 17 U.S.C. §§ 501-510 provide entitlements and remedies to owners whose copyrights have been infringed. A copyright holder would potentially have the right, under §§ 502 through 509, to enjoin an appropriationist's work, impound and dispose of copies of the work, receive actual and statutory damages and profits resulting from the infringement, as well as costs of litigation and attorney's fees, and bring criminal charges against the artist. Section 506 is particularly onerous for appropriationists since subsection (a) specifically delineates wilful infringement for purposes of commercial advantage or financial gain as the prerequisite elements of the criminal offense. For a more detailed discussion on copyright remedies against appropriationist uses, see Carlin, *supra* note 14, at 111-13.

[69] 17 U.S.C. §§ 301-305.

[70] Van Hecke, *supra* note 33, at 468-70.

individual mark of its author and so deserves the economic ownership that protection affords. The distinction between idea and expression has led one court to comment that "[t]he 'market place of ideas' is not limited by copyright because copyright is limited to protection of expression."[71]

Yet, appropriation art undermines the validity of this argument. Since the allegorical process entails appropriating the entirety of a copyrighted image's expression, copyright law presently limits the intellectual market place by stifling significant ideas that contemporary art seeks to communicate. In pictorial works, the idea in the work, or its "iconographic content,"[72] is free for use since such thematic elements reoccur in many works and are part of the public realm.[73] For appropriationists, however, the idea projected by the appropriated image is conveyed effectively only when the totality of the image's expression is exactly replicated. Thus, appropriationism requires merging elements of idea and expression.[74] The danger of this conflation is that, because for allegory "the mode of expression is essential to the idea expressed,"[75] appropriationist art creates a *prima facie* case of infringement. In allegory, both access to the original and substantial similarity are established easily.[76]

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[71] Sid & Marty Krofft Television Prods. v. McDonalds Corp., 562 F.2d 1157, 1170 (9th Cir. 1977).

[72] Krieg, *supra* note 7, at 1570 n.27 (quoting E. PANOFSKY, MEANING IN THE VISUAL ARTS 26-30 (1955) (defining iconographic content as "the subject matter or theme of a work as opposed to its form")).

[73] Krieg, *supra* note 7, at 1570.

[74] Krieg, *supra* note 7, at 1571 ("The artist incorporates the appropriated work into a separate expressive form that is dependent upon, but not limited by, its past mode of expression. The resulting product is not a mere copy, which we may legitimately prohibit, but an entirely new expression which the law should serve to protect."). Nimmer has maintained that the idea/expression dichotomy is ineffective in the field of visual work. 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT, § 203 (1989).

[75] Krieg, *supra* note 7, at 1573.

[76] Greenberg, *supra* note 24, at 25. Determining substantial similarity in the area of allegorical appropriation would not be a disputed factual issue for a court since the appropriationist act entails literal and wilful replication. In such an instance, a court immediately could find that an appropriationist had copied an original's expression and move directly to a fair use inquiry. *See, e.g.*, *Koons*, 960 F.2d at 307.

> We agree that no reasonable juror could find that copying did not occur in this case. First, this case presents the rare scenario where there is direct evidence of copying. Koons admittedly gave a copy of the

III. THE FAIR USE DEFENSE

Given copyright's inherent restrictions on appropriationist techniques as a result of the idea/expression dichotomy and the standard of substantial similarity, the fair use defense provides one of the only protections for appropriationists against copyright claims.[77] In fact when Congress created Section 107 to codify the fair use exception, it deliberately included the kind of flexibility in application necessary to promote progress

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> [plaintiff's] photograph to the Italian artisans with the explicit instruction that the work be copied. . . . [F]urther, even were such direct evidence of copying unavailable, the district court's decision could be upheld in this case on the basis that defendant Koons' access to the copyrighted work is conceded, and the accused work is so substantially similar to the copyrighted work that reasonable jurors could not differ on this issue.

Id. Ordinarily, a review of a copy's substantial similarity to the original requires tests such as that of "abstraction" or "pattern," expression versus idea, and total look and feel. *See* Baker v. Selden, 101 U.S. 99 (1880); Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541 (2d Cir. 1959); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[77] It has been proposed that, rather than attempt to fit appropriation within fair use, a kind of compulsory licensing scheme, similar to § 115 in the area of phonorecords and premised on the "takings clause" of the Fifth Amendment, could be implemented legislatively that would avoid the difficult task under a fair use review of judicial differentiation between an appropriationist replication and illicit copying. With such a provision in place, the appropriationist artist would pay a statutorily determined fee, but would not have to rely on the original author's permission. Hamilton, *supra* note 8, at 115; *see also* Meeker, *supra* note 8, at 233. While this may be a good alternative, challenges of implementation exist regarding monitoring and administrative costs. Although section 115 was enacted by Congress to alleviate "monopolistic control of music for recording purposes," Meeker, *supra* note 8, at 233, the provision, with specific requirements of thirty-day notice to the Copyright Office and a penalty that precludes the opportunity to obtain a license if notice is not given, is rarely ever used. Nearly all licenses that are issued to secondary users are based upon the business rules and contracts of music publishing companies or agencies that control license issuance and royalty collection of their publisher principals. Thus, even if Congress implemented a statutory compulsory licensing scheme for the visual arts, it is possible that the law would be rendered useless, and that, instead, corporate rules and practices would police appropriative works. This scheme could also prove to be expensive since obligations of payment in hiring an agency or creating a company to monitor and collect fees would ultimately fall on the artist. Although the "takings clause" proposal may be a viable alternative, this Comment argues that such appropriative works would best be reviewed under a fair use test because careful case-by-case judicial review will prompt courts to take advantage of the flexibility of the fair use factors to arrive at an equitable holding under the circumstances of each creative use. This approach would also eliminate financial and administrative costs, as well as problems of statutory obsolescence reflected in section 115.

in the arts.[78] The Supreme Court has confirmed such codified flexibility by stating that fair use is "an 'equitable rule of reason,' which 'permits 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.'"[79]

Section 107's flexibility results from the fact that rather than provide a strict definition of a fair use, its preamble merely lists examples of uses that courts may consider fair.[80] The list of fair uses is quite broad and generally the examples provided are characteristically productive ones endowing benefits to the public. The plain language of the statute reveals that general appropriative uses that serve as criticism or comment may fit the fair use exemption. Thus, even uses not mentioned by Congress may be deemed fair. A final finding of fair use depends, however, upon the application of four determinative factors:[81]

> (1) the purpose and character of the use, including whether such use is for a commercial or nonprofit purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used relative to the copyrighted work as a whole; (4) the effect of the use upon the potential market for or value of the copyrighted work.[82]

Congress provided these factors to guide courts making fair

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[78] H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 66 (1976); S. REP. NO. 94-473, 94th Cong., 1st Sess. 62 (1975). The legislative reports provide: "The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute." *Id.*

[79] Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984)).

[80] The preamble reads:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

17 U.S.C. § 107.

[81] S. REP. NO. 94-473, 94th Cong., 1st Sess. 62 (1975) ("[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence.").

[82] The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding is made upon consideration of all the above factors. 17 U.S.C. § 107.

use findings. Courts also may look to additional factors not listed specifically in the statute.[83] Nevertheless, a court typically will not consider an appropriationist work that is considered criticism or comment under Section 107's preamble fair use unless it meets the four statutory conditions.[84]

Upon finding that a work's purpose fulfills the preamble, however, a court should not apply Congress's list as a strict and rigid formula. Justice Story described the essential purpose of the fair use test as one that requires courts to "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[85] For a fair use analysis to be effective, courts must compare the degree of intrusion upon an artist's incentive to produce the original work with the public contribution the appropriationist work makes as criticism or comment. The four statutory factors should not operate as a checklist by which only the secondary work's commercial aspects are weighed against its critical purpose. Rather, the factors should guide courts as they thoroughly explore the critical merit of the piece, including the purpose of each specific use of the copyrighted expression,[86] and the contribution,

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[83] H.R. REP. NO. 102-836, 102d Cong., 2d Sess. 9-10 (1992) (stating that the intent behind the phrase "all the above factors" was to "encompass the terms 'including' and 'such as' embodied in the preamble to Section 107, terms that are defined in Section 101 of title 17 as being 'illustrative and not limitative.' Thus, for unpublished works as for all other copyrighted works, the courts *must* consider all four statutory factors, but they may, at their discretion, consider any other factors they deem relevant." (emphasis added)).

[84] In *Acuff-Rose*, the Supreme Court most recently confirmed that uses, such as parodies, mentioned in the preamble do not warrant presumptive findings of fair use. 114 S. Ct. at 1174. Earlier, the Court in Harper & Row v. Nation Enters., 471 U.S. 539 (1985), specifically rejected the notion that defendant's purpose of news reporting and fulfillment of one of § 107's illustrative examples created a presumption of fair use where the first fair use factor could automatically weigh in the magazine's favor. The Court in *Harper & Row* stated: "the examples enumerated in § 107 . . . give some idea of the sort of activities the courts might regard as fair use under the circumstances. This listing was not intended to be exhaustive, or to single out any particular use as presumptively a 'fair' use. . . . The fact that an article arguably is 'news' and therefore a productive use is simply one factor in a fair use analysis." *Id.* at 561.

[85] Leval, *supra* note 2, at 1105 (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

[86] Leval, *supra* note 2, at 1112 ("Courts must consider the question of fair use for each challenged passage and not merely for the secondary work overall. . . .

either visually or effectually, the piece makes through its replication of the copyrighted image.

In contrast to Justice Story's encapsulation of fair use, two leading Supreme Court cases before *Acuff-Rose—Sony Corp. of America v. Universal Studios, Inc.*[87] and *Harper & Row v. Nation Enterprises*[88]—subsequently had been interpreted improperly to narrow § 107 to such a degree that a secondary work's existence on the market often determined the success of an infringement claim. Since these cases involved strict, noncreative commercial copying and the first-time news publication of literature, they contributed little to exploring the artistic function of a secondary work that existed beyond its commercial character. However, in response to *Sony* and *Harper & Row*, lower courts had reduced what should have constituted a multi-dimensional discussion of parody claims to one basic inquiry: the commercial nature of the work.[89]

Traditionally the fair use defense has been an exception to a copyright owner's creative monopoly. In fact, the Copyright Act does not preclude a fair use determination in a commercial context. Yet in general both *Harper & Row* and *Sony* made the burden of proving fair use much harder to meet once a use's commercial purpose was established.[90] Two of the four fair use factors take the commercial aspects of the copy into account: the first, the purpose and character of the use, and the fourth, the effect of the use upon the potential market or value of the copyrighted work.[91] Although the Court weighed these

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Simply to appraise the overall character of the challenged work tells little about whether the various quotations of the original author's writings have a fair use purpose or merely supersede.").

[87] 464 U.S. 417 (1984).

[88] 471 U.S. 539 (1985).

[89] *See* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 677 (1993).

[90] *See Sony*, 464 U.S. at 451 ("A commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."); Stewart v. Abend, 495 U.S. 207, 238 (1990) (declaring the fourth factor "'the most important, and indeed, central fair use factor'" (quoting 3 NIMMER, *supra* note 74, § 13.05[A], at 13-81); Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1035 (W.D. Ga. 1986) ("In other infringement cases, the commercial nature of the use has been found . . . to be 'especially significant, if not determinative' and 'militates quite strongly against a finding of fair use.'").

[91] *See supra* text accompanying note 82 (listing four factors).

factors heavily in its fair use determinations, ultimately the copy's effect on the owner's potential market determined the success of the secondary user's defense.[92]

In *Sony*, the Supreme Court reviewed the noncommercial nature of using betamax recordings of television programs for private home viewing. The Court found that unless a use is a nonprofit activity, every commercial appropriation of copyrighted material is presumptively unfair.[93] What this "*Sony* presumption" required of the plaintiff in proving a detrimental economic effect—the fourth fair use factor—was a showing by a mere preponderance of the evidence that some meaningful likelihood of future harm existed.[94] Easing the plaintiff's task of meeting this low burden of proof, the Court expressly provided that even if the plaintiff lacked evidence of potential harm, such a likelihood would be presumed if the defendant's use was for commercial gain.[95] Once courts applied this presumption to parody claims, the likelihood of a defendant's success decreased significantly despite the secondary work's artistic or critical value, if the parody shared in certain commercial characteristics. In these instances, both the first and fourth fair use factor weighed heavily against the parodist. Even more onerous to commercial parodies was the possibility that a court would equate a parodist's deliberate act of copying with an intention to commercially exploit the original. This equation would eclipse a fair use defense altogether, even if the use had not harmed the plaintiff's market.[96]

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[92] *See Harper & Row*, 471 U.S. at 568-70; *Sony*, 464 U.S. at 451-53.

[93] *Sony*, 464 U.S. at 449.

[94] *Id.* at 451.

[95] *Id.*

[96] Two district court decisions that dealt with commercial uses in the area of parody reveal the ease with which courts find commercial exploitation. Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 1036 (N.D. Ga. 1986), held that defendant's parody of Cabbage Patch Dolls on commercially distributed sticker-cards was not a fair use and granted plaintiff's motion to enjoin the cards. The court found that the defendant's use was not a parody that merited a fair use defense since "the primary purpose behind defendant's parody [was] not an effort to make a social comment but [was] an attempt to make money," and "[t]he basic concept behind the defendant's stickers is aimed at capitalizing on the Cabbage Patch craze." *Id.* at 1034. Thus, equipped with a finding of bad faith and, in the absence of any meaningful analysis of the plaintiff's market harm, the court held for the plaintiff. *Id.* at 1040.

Tin Pan Apple, Inc. v. Miller Brewing Co., 737 F. Supp. 826 (S.D.N.Y. 1990), followed *Original Appalachian Artwork*'s reasoning when it held that defendant's

The Supreme Court reaffirmed the *Sony* commercial presumption in *Harper & Row*. In that case, Harper & Row sued the Nation for publishing the "heart" of Gerald Ford's unpublished manuscript. The Court held that, despite the story's newsworthiness and public utility, the Nation had supplanted Harper & Row's commercially valuable right of first publication and thus was subject to a *Sony* presumption.[97] The Court rejected the defendant's argument that because the quotations had not been published for purely commercial reasons, they were not strictly of a commercial nature.[98] Rather, the Court found that, in seeking to "scoop" the forthcoming publication, "the Nation's use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication."[99] Capturing the essence of commercial disadvantage to the copyright owner, the Supreme Court stated that a finding of commercial use arises not when "the sole motive of the use is monetary gain, but [when] the user stands to profit from exploitation of the copyrighted material without paying the customary price."[100]

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beer commercial, which parodied the rap group Fat Boys, infringed plaintiff's copyright. *Id.* at 833. On concluding that the use did not constitute a parody, the court rejected Miller Brewing Co.'s fair use defense on the ground that "the commercial's use was entirely for profit: to sell beer." *Id.* at 832. Both the *Original Appalachian Artwork* and *Tin Pan Apple* courts concluded that the defendants' uses were unfair not by way of a market-share analysis, but by presuming that the defendants' bad faith was commercially exploitive.

[97] *Harper & Row*, 471 U.S. at 562.

[98] *Id.*

[99] *Id.*

[100] *Id.* The definition of a commercial use in copyright law has varied in its emphasis on the defendant's motivations, the kind of market harm, either actual or potential, that the defendant's use caused the plaintiff, and the causal connection between the defendant's use and the plaintiff's injury. Two pre-1976 Copyright Act cases that more fully discuss commercial uses are Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (holding that defendant's use of excerpts from medical doctor's book in cigarette advertisement was an unfair use since it caused actual damage to doctor's reputation by making it appear that he voluntarily "commercialized" his scientific work, thus retarding the work's sale) and Loew's Inc. v. CBS, 131 F. Supp. 165 (S.D. Cal. 1955) (holding that Jack Benny's parody of the film *Gaslight* infringed its copyright and was not a fair use because the parody had potential of sharing in original's market), *aff'd sub nom.*, Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.*, CBS v. Loew's Inc., 356 U.S. 43 (1958).

> The mere absence of competition or injurious effect upon the copyrighted work will not make a use fair. The right of a copyright proprietor to exclude others is absolute and if it has been violated the fact that the

In terms of its usefulness to a parody's claim to fair use, *Harper & Row* overemphasized the importance of income from sales of a defendant's work to a copyright owner and the financial advantage to the defendant user of free use of the copyrighted work.[101] The decision failed to appreciate that a defendant's motivations often include a conglomeration of creativity and finance. Instead, the Court focused too strictly on the secondary user's potential profit and increased the likelihood that any commercially valuable use of a copyrighted work that lacked the owner's permission was vulnerable to a "commercially exploitive" designation.[102]

Because the Supreme Court was limited to a review of the facts in *Sony* and *Harper & Row*, it never stressed the value of the purely artistic or creative expression in a secondary user's work. The Court did not provide a more detailed analysis of the artistic intentions that lead a defendant to create a given work and did not address issues of commercialism and substantial taking in parody until eight years later in *Acuff-Rose*.[103]

In *Acuff-Rose*, the defendant, 2 Live Crew, wrote a rap version of Roy Orbison's and William Dees's song "Oh, Pretty

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infringement will not affect the sale or exploitation of the work or pecuniarily damage him is immaterial.

Id. at 184. The court in Rosemont Enter. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), provided one hopeful definition of a commercial use by recognizing that a defendant's motivations share in both artistic and commercial interests. *Rosemont* held that an unauthorized publication of Howard Hughes's biography was a fair use since the public benefit of the biography's information outweighed the plaintiff's interest in containing defendant's potential profits.

> Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market . . . has no bearing on whether a public benefit may be derived from such a work. . . . We conclude that whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use.

Id. at 307.

[101] Patry & Perlmutter, *supra* note 89, at 683.

[102] And yet, because appropriationist art, as well as conventional parodies, tend to criticize or poke fun at the original, to require the copyright holder's permission to use the work imposes a chill on these uses as copyright owners will seldom allow their works to be targeted. *See* Van Hecke, *supra* note 33, at 489.

[103] 114 S. Ct. 1164 (1994).

Woman," which credited both Orbison and Dees as writers of the original work. After the album was released, the defendants requested permission to parody the Orbison hit, but the plaintiffs refused and sued for copyright infringement. After a district court found the work to be a fair use and the Sixth Circuit reversed,[104] the Supreme Court unanimously held that, despite *Sony* and *Harper & Row*'s commercial definitions, a commercial parody that possesses transformative value nonetheless may be considered a fair use of copyrighted material.[105]

Essentially, the Court recognized that even though a first factor inquiry into the purpose and character of the defendant's use must consider the work's commercial component, this commercial investigation is merely one aspect of a first factor inquiry: "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of use bars a finding of fairness."[106] In so doing, the Supreme Court prevented a commercial presumption from overrunning a review of the use's critical merits and broadened the scope of a first factor inquiry to include the transformative value test first conceived by Judge Pierre Leval.[107]

The Court declared that transformative value is discerned by examining "whether the new work merely 'supersede[s] the

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[104] Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150 (M.D. Tenn. 1991). The district court held that the defendant's rendition of "Oh, Pretty Woman" was a parody of the original that constituted fair use. On appeal the Sixth Circuit reversed and remanded the district court's finding on the ground that the lower court erred when it characterized the defendant's use as a parody in the popular sense, and not according to the strict legal definition. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1437 (6th Cir. 1992). The Sixth Circuit, based on its analysis of the character of the defendant's work under the first prong of the fair use test, concluded that the district court placed insufficient emphasis on the command of *Harper & Row*. *Id.* Given the defendant's commercial purpose, and its substantial taking of Orbison's song, the Sixth Circuit determined that the parody was unfair.

[105] *Id.* at 1177-78.

[106] *Id.* at 1174.

[107] Leval, *supra* note 2, at 1111. Judge Leval proposed the standard of transformative value to clarify that fair use's purpose of protecting an original author's market would remain intact if courts allowed secondary authors to use copyrighted material in a manner that "adds value to the original—[where] the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings."

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."[108] Applying this definition to the rap song, the Court found that because the nature of 2 Live Crew's use was parodic and served to transform the original work "by shedding light on [the original work], and, in the process, creating a new one,"[109] considerations of commercialism were less likely to weigh against the fairness of the use.[110]

Part of the Court's consideration of the transformative nature of the rap song was focused on how much of the original song was used. Addressing the third fair use factor concerning the amount and substantiality of a parody's taking, *Acuff-Rose* provided a reasonableness standard to identify a parody's critical value to the original work.[111] The Court stated that "[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived."[112] In the instant case, the Court held that the rap song's marriage of "reference and ridicule" distinguished the work as a parody.[113] Furthermore the rap song's initial targeting of the original and subsequent satirical additions served to make the form and content of the original work appear ridiculous, so that the secondary use bore sufficient direct criticism of the original. By using only the amount of the original necessary to conjure up the target to its audience,[114] the secondary use therefore transformed "Oh, Pretty Woman" into a new and different parodic work.[115]

According to the *Acuff-Rose* Court, applying the *Sony* presumption against commercial uses without questioning its transformative value would swallow the fair use exception because it would exclude any critical commentary created for profit from using the defense. The Court asserted that the *Sony* statement—"every commercial use of copyrighted materi-

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[108] *Acuff-Rose*, 114 S. Ct. at 1171.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 1175.
[112] *Id.* at 1173.
[113] *Acuff-Rose*, 114 S. Ct. at 1173.
[114] *Id.* at 1176.
[115] *Id.* at 1177.

al is presumptively . . . unfair"[116]—was not a per se rule and should not be given dispositive weight when determining the fair use of a parody.[117] Rather, the commercial nature of the work should merely *tend* to weigh against a finding of fair use.[118]

In *Acuff-Rose*, however, the Supreme Court also held that if a parodic transformative use is not *reasonably perceived* and the amount of a secondary user's taking is substantial, a commercial finding may significantly weigh against the use.[119] Thus, in the area of appropriationist art, if a court finds that an allegorical work reveals little or no physical alteration of the copyrighted image and adds no explicit criticism of the original composition, the work's commercial aspects bear increased significance in a fair use determination under the first and third fair use factors. In *Acuff-Rose*, the Supreme Court confirmed *Harper & Row*'s holding that the fourth factor inquiry entails consideration, not only of the extent of market harm "caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[120] Further, the Court held that, although a *Sony* presumption or inference of market harm could not be applied to the fourth factor in the area of parody, the presumption *should* be applied in instances of verbatim copying of the original for commercial purposes.[121]

Thus, a literal reading of *Acuff-Rose* could render the decisions a monument only to those creative uses that effect criticism in the most readily apparent modes. Most onerous for appropriationists is a court's failure to recognize their allegorical strategy. This is because the reasonably perceived standard hinges a successful defense on the relative obtuseness

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[116] *Sony*, 464 U.S. at 451.

[117] *Acuff-Rose*, 114 S. Ct. at 1174.

[118] *Id.* (emphasis added).

[119] *Id.* at 1172. "If . . . 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 another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger." *Id.*

[120] 114 S. Ct. at 1177.

[121] *Id.*

or acumen of a court as the perceiver of art. As a consequence, absent an understanding of allegorical language, the Supreme Court's holdings in *Sony* and *Harper & Row* regarding literal and exact duplication of copyrighted expression are likely to create a commercial presumption against appropriation pieces on the basis of the fourth fair use factor. The Court's opinion indicates a belief that duplication of the entirety of the original for commercial use would "supersede the objects of the original" and "serve as a market replacement for it."[122] Thus, once a court excludes an appropriationist piece from the realm of parody, a *Sony* inference of market harm would allow a finding of unfair use on the basis of the presumed harm to an original work's actual or potential markets.

In sum, although *Acuff-Rose* provides better guidelines for evaluating the critical content and public benefit of commercial parodies, they are of limited use to works that do not clearly fulfill a court's traditional parodic expectations. Expanding the scope of inquiry under the first fair use factor to include reviewing a work's transformative value, apart from its commercial purpose, may very well save commercial parodies from an automatic commercial presumption. However, the Supreme Court's insistence that a secondary use must physically alter or add stylistic marks to the original piece to be considered truly transformative drastically limits alternative creative criticism and commentary that should also be eligible under fair use.

IV. THE EXCLUSION OF APPROPRIATION ART FROM *ACUFF-ROSE*: APPLYING THE SUPREME COURT'S ANALYSIS TO *ROGERS V. KOONS*

Juxtaposing *Acuff-Rose*'s findings with the facts and opinion of the Second Circuit in *Rogers v. Koons* illustrates the legal hazards for appropriation artists that still remain despite the Supreme Court's holding. *Koons* involved the issue of copyright infringement in the defendant's sculpture entitled *String of Puppies*.[123] Jeff Koons had appropriated a black and white photograph by Art Rogers, which depicted a couple seated on a park bench surrounded by eight puppies. Koons had instructed

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[122] *Id.*

[123] Rogers v. Koons, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

his artisans to copy the image in the photograph in the form of a sculpture. The subsequent work was exhibited in a New York exhibition entitled, *The Banality Show*. The appropriationist work was comprised of a newly clown-faced couple ecstatically embracing eight blue puppies. The sculpture, constructed from polychrome and wood, altered not only the medium and size of the original photo, but changed the entire feel of the original image. In the style of many appropriation artists, Koons used the banal or universal aspects of the photo to emphasize its generic significance, or insignificance, as kitsch.[124]

When Koons attempted to insulate himself from Rogers's copyright suit by claiming that the sculpture was a parody of the original, the court denied him the fair use defense because it found that Koons's work fell drastically short of the definitional requirements of a parody.[125] Further, the court found that Koons's sculpture had used the entirety of the photograph's expression to pass off the image as his own and exploit it for profit.[126] The Second Circuit held that, because the piece and its reproductions were sold for profit, the use was presumptively unfair and impinged upon Rogers's potential market in bad faith.[127]

Strikingly similar to the reasonably perceived standard applied in *Acuff-Rose*, the Second Circuit in *Koons* asserted that a parody of a copyrighted work is permitted only if it is self-evident to the viewer.[128] Upon a brief assessment of the critical nature of the sculpture, the court concluded that, not only was the appropriation unsuccessful as a parody, but that it was not a parody at all.[129] Finding that the work utterly lacked any traditional satirical connection or secondary relation to the photograph, the court further interpreted the absence of an explicit reference as proof that Koons's appropriation attempted to portray the original as his own. The court thus concluded that the work was barren of all critical insight

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[124] For a side-by-side view of the Rogers's photograph and a photograph of Koons's sculpture, see Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense after* Rogers v. Koons, 59 BROOK. L. REV. 373 (1993).

[125] *Koons*, 960 F.2d at 310.

[126] *Id.* at 308.

[127] *Id.* at 312.

[128] *Id.* at 310.

[129] *Id.*

and the result of wilful plagiarism.[130]

The *Acuff-Rose* decision did not correct this sort of judicial misunderstanding. Despite the fact that the first factor of the fair use defense provides for critical exploration of the secondary work, the Supreme Court's determination that transformative value must be reasonably obvious increases the likelihood that courts may casually dismiss the artistic merit in these works. The Second Circuit, in fact, purported to accept that Koons belonged to an artistic movement that sought to comment on the quality of a society saturated in mass media images and commodities.[131] Yet, despite this outward acceptance, it never attempted to accommodate the practice without imposing a standard that required the use to give off a parodic effect.[132] As in *Koons*, under *Acuff-Rose*, as long as what is deemed reasonable are those creative strategies that make their targets obvious and adjust criticism to be digested easily, new avenues for social comment will be restricted to commercial, and thus, unfair designations.

Indeed, the complete absence of a meaningful review of the dynamics of Koons's allegorical piece tarnished the court's entire fair use analysis. Following the requisites of Section 107, the court never discussed whether the artist's intention to create the sculpture was aimed at commentary and criticism.[133] Once the Second Circuit concluded that the sculpture

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[130] *Id.* at 310.

[131] *Koons*, 960 F.2d at 310.

[132] *Id.* at 309-10. Unlike strict appropriationist artists, Koons actually altered and changed many aspects of Rogers's photograph. The appropriation, as sculpture, was posed in an entirely different medium than the original photo, the faces of the seated couple were painted in clown features, daisies were placed in their hair, the puppies were colored blue, and the mood of the original image was drastically altered:

> Not only the placement of the figures, but also the lighting and expression of Koons's sculpture, are radically different from Roger's underlying photograph. Koons has changed the medium, scale, colors, expression, overall mood and artistic content of the photograph. Indeed, those aspects of Rogers's piece which the court viewed as "original" are no longer apparent in Koons's sculpture. Gone is the "charming" and cuddly warmth of Rogers's photograph, and in its place is a garish, perhaps horrifying, perhaps hilarious image.

Greenberg, *supra* note 24, at 27.

[133] Section 107 of the Copyright Act provides that:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or

bore no traditional resemblance to parody, any further discussion of the sculpture's critical or artistic value no longer seemed necessary.[134] However, the court's belief that the sculpture failed to directly target Rogers's photograph did not justify denying the sculpture an otherwise statutorily required evaluation of its critical merits. As one commentator has noted,

> [n]either the Copyright Act nor its legislative history limit an artist to commenting on or criticizing only the underlying copyrighted work. It seems apparent, instead, that criticism and commentary are meant to encompass all forms of criticism and commentary, so as not to restrict freedom of expression impermissibly."[135]

If *Acuff-Rose* had held that a review of a secondary work's transformative value did not depend on the obviousness of its criticism or its conventional resemblance to parody, appropriationists would have a forum, otherwise required by the Copyright Act, in which its particular kind of criticism could be judged fairly. However, *Acuff-Rose* does not compel a court, influenced by the blatantly commercial nature of an artwork and resistant to its artistic "quality," to undergo this statutorily mandated assessment. The Second Circuit's decision illustrates this point. The court justified its finding that the first fair use factor weighed against Koons by pointing to the sculpture's lack of obvious parodic qualities and Koons's "bad faith" in profiting from the appropriation.[136] Indeed, the court

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> by any other means specified by that section for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

17 U.S.C. § 107.

[134] With respect to the first fair use factor, the purpose and character of the use, the court concluded that: "[t]he problem in the instant case is that even given that 'String of Puppies' is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph 'Puppies' itself. We conclude therefore that this first factor of the fair use doctrine cuts against a finding of fair use." *Koons*, 960 F.2d at 310. Lynne Greenberg captured the irony of this conclusion best when she wrote: "By refusing to recognize the critical nature of the work, the court emphasized its unsuitability to act as an art critic. In order to be deemed a 'proper' criticism, a work had best be a rather obvious parody of the underlying work—otherwise, the court may miss the critical nature of the work altogether." Greenberg, *supra* note 24, at 29.

[135] Greenberg, *supra* note 24, at 30.

[136] The Second Circuit justified this finding of bad faith by evidence that Koons never asked Rogers for permission to copy the work and that the artist tore the copyright notice off the postcard reproduction of *Puppies* when giving the card to

determined that the appropriationist sculpture was a commercial exploitation of Rogers's original photograph even before it embarked on its inquiry as to whether the sculpture supplanted the potential market for the original.[137]

Acuff-Rose's holding does not correct the propensity to follow such faulty logic. It furthermore never prevents a *Sony* presumption from excusing courts of ever having to evaluate whether, in fact, an appropriationist art work supersedes the original object by replacing its actual or potential markets. In *Koons*, when the court ultimately approached the issue of actual or potential market harm to the original photograph, it failed to recognize that Koons, in fact, had never usurped Rogers's right of first publication or that Koons's sculpture, a work in a completely different medium, did not in any way compete with a black and white photograph.[138] Significant to

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his artisans. *Koons*, 960 F.2d at 308-09. The Ninth Circuit, however, in Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986), held that failure to request a copyright holder's permission or a holder's express refusal to grant permission does not establish a defendant's bad faith.

[137] *Koons*, 960 F.2d at 312. On the subject of commercial uses, the Second Circuit has stated that it rejects a fair use defense only in those instances when it has found that a work may be categorized as a "commercial exploitation." Commercial use alone does not automatically lead to a finding of infringement by exploitation. It would seem that before the Second Circuit could conclude that a use was commercially exploitive, it would first have to explore whether the use, in fact, impinged upon the plaintiff's potential market for the original. *See* Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 562 (1985). Furthermore, even if *Sony* and *Harper & Row* provide that economic harm may be presumed from the commercial nature of the defendant's use, it would only be proper that the court clearly state its intention to accept this presumption rather than carelessly label commercial uses exploitive before addressing the use's harmful economic effects. "A critical inquiry under [the fourth fair use] factor then is whether defendants Koons and Sonnabend planned to profit from their exploitation of *Puppies* without paying Rogers for their use of his photo—that is, whether Koons' work is primarily commercial in nature. We have already concluded that it is." *Koons*, 960 F.2d at 312.

[138] Greenberg, *supra* note 24, at 30. Greenberg accurately points out that, in failing to consider that Rogers had licensed his right to reproduce the photograph and had commercialized it, the court ignored the economic and utilitarian principles which justify the fair use defense.

> The author of an unpublished work is entitled to a presumption of unfairness for an unauthorized taking, in recognition that the author has not yet reaped the benefits of his or her artistic labor. There would be an economic disincentive to create if another could usurp the artist's right to enjoy these benefits, for example, by publishing the work first. Thus, the typical copyright infringement action grows out of the unauthorized commercial exploitation and dissemination of an artistic work by a third party.

a thorough review of market harm is the fact that Koons's sculpture was a commissioned, limited-edition work that was not marketed in the form of postcard reproductions—the kind of market in which Rogers's photograph was distributed. Instead, the court focused its inquiry on whether Koons planned to profit from the sculpture without paying Rogers for the use—a question inappropriate to a fourth factor consideration, and one that had already been addressed under the court's first factor analysis. Moreover, the court's standard for reviewing economic harm did not account for the sculpture's ability to substitute and satisfy the market demand for the original. Rather, the Second Circuit merely concluded that the sculpture threatened general economic harm to the original.[139] In fact, this form of "dilution," from a copyright point of view, is—absent a moral rights claim[140]—legitimate for the very reason that its restriction would chill freedom of critical expression.

Had Koons's sculpture been reproduced and mass marketed, as many popular artistic works have been recently, the court could have found justifiably that the "String of Puppies" supplanted the demand for the original photograph. In such an instance, remedial measures could be undertaken either to require Koons to obtain a license for the original work (without the original artist's permission but for a reasonable fee), or to credit the source of the underlying work at the bottom of the reproduction. The danger of the Second Circuit's decision is that the court never allowed for fair solutions to be considered. Far from equitably balancing the rights and needs of both artists, the court's holding, antithetical to copyright law's purpose, stifled creative expression.

Courts instead could limit commercial exploitation by applying an effective, but reasonable standard to evaluate economic harm.[141] Rather than apply a cursory review that merely questions whether the copyright owner has suffered

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Id.

[139] *Koons*, 960 F.2d at 312.

[140] *See* 17 U.S.C. § 106A (Supp. II 1990) (giving visual artists the right to protect the integrity of a work).

[141] Van Hecke, *supra* note 33, at 486-87; *see also* Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

any economic loss, courts should focus on whether the appropriation art work actually or potentially serves as a substitute for the original or its derivative works.[142] Thus, the fourth factor of the fair use defense would continue to protect the owner's economic incentives, while an appropriationist artist's freedom to create would be protected by the first fair use inquiry. Absent a *Sony* presumption against the appropriationist use, applying a market substitution standard most accurately would define market harm because of its ability to identify when an appropriationist work satisfies the public's demand for the original, and thus infringes a copyright holder's justifiable monopoly.

CONCLUSION

Copyright law's ultimate purpose is to foster new creative works. One of the ways to ensure this is through a limited monopoly. This monopoly, however, must be balanced against equally important concerns of artistic freedom of experimentation. The obstacle that confronts copyright law at present is the task of making a difficult choice. It is a question that entails either deciding that appropriationism too radically undermines convention for the law to adjust or committing to the work of respecting the subversion. The appropriationist strategy is neither entirely new to the arts nor is it any longer limited to the theoretical pursuits of a few artists. Like a language, it communicates criticism, praise, condemnation and celebration, and its transformative value can be best understood when it is allowed to speak. Which alternative the law chooses will largely determine the value of *Acuff-Rose* to the arts. If a literal approach to *Acuff-Rose* is inimical to appropriationist works, their exclusion from fair use is far from inevitable. Given the

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[142] *See* Van Hecke, *supra* note 33, at 486-87. Van Hecke discusses two standards that courts presently use to evaluate economic harm: the first standard looks at the competition between the original and the parody, and the second reviews the adverse effect on the original's market value. Both standards have hurt parodists, and will continue to harm appropriationist artists, since the former test requires only a conclusory analysis, most often arising after the use has been judged on its social or artistic value, and the latter allows courts to "consider adverse impact from any and all sources, including economic loss and reputational damage from a biting or unwholesome parody."

potential frequency of copyright infringement suits against appropriationist artists, and the fact that the Supreme Court merely addressed the narrow question of commercial parodies, approached with a view to adjust copyright law to the demands of art in progress, the *Acuff-Rose* decision may be interpreted as a broad formulation of fair use that embraces appropriationist principles. The Supreme Court, in fact, stated that fair use should not be susceptible to bright line rules, and instead, should be interpreted according to a case-by-case analysis.

Moreover, *Acuff-Rose* serves to admonish future courts not to interpret fair use's statutory factors too narrowly. As the Court made clear, section 107 provides that parody is merely one instance, among many, of fair use. When the Supreme Court accepted Judge Leval's transformative value test, it also embraced the aesthetic principle that a secondary user may legitimately use imitation to communicate new meaning about its target without the effect of superseding it—a dynamic central to appropriationism. Indeed, *Acuff-Rose* confirmed that replicating the "heart" of an original work to express a critical message is the very point of genres that operate by way of reuse.

The spirit of *Acuff-Rose* suggests that law should not automatically presume with syllogistic simplicity that a creative work that copies significant portions of a copyrighted original and exists commercially alongside that original is presumptively an unfair use. Thus, *Acuff-Rose* can and should be expanded to include appropriation art as a valid category of transformative use. Subsequent court decisions, either committed to artistic progress or resistant to it, will determine the degree to which the Supreme Court's decision will foster its development.

Roxana Badin[143]

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