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Appropriation and Transformation

Darren Hudson Hick*

*Susquehanna University, darrenhick@hotmail.com

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Abstract

The recent decision in Cariou v. Prince has reinvigorated a pressing issue for the contemporary movement of appropriation art: how can art which is defined by its taking from other artworks hope to survive in the world of copyright? In this article, I consider the legal history leading to the Cariou case, including a series of suits brought against appropriation artist Jeff Koons, as well as strategies proposed by several theorists for accommodating appropriation art within the law. Unfortunately, largely due to vagaries of the law and the misunderstood nature of appropriation art, the matter remains unresolved. I argue that, by investing borrowed material with new ideas, appropriation artists create new expressions and so transform their original sources. Being in line with the Constitutional mandate of copyright law, I suggest that such works of appropriation art be treated as presumptively fair uses.

KEYWORDS: copyright, appropriation, transformation, art

Appropriation and Transformation

Darren Hudson Hick*

I. APPROPRIATION ART

In a little, largely-overlooked paperback anthology published in 1973, there is an essay on New England artist Hank Herron.[1] Herron, the article tells us, for his one-man show had reproduced the entire oeuvre of minimalist painter and printmaker Frank Stella.[2] In so doing, Herron was judged to have created something *more* than Stella: "in their real meanings, these objects are Stellas *plus*."[3] The crucial difference between an original Stella and a visually indistinguishable Herron, we are told, comes on further consideration of the artists' respective projects: "one begins to be more profoundly conscious of and receptive to a radically new and philosophical element in the work of Mr. Herron that is precluded in the work of Mr. Stella, i.e., the denial of originality."[4]

* Assistant Professor of Philosophy at Susquehanna University, Selinsgrove, Pa.

1 Cheryl Bernstein, *The Fake as More*, *in* IDEA ART: A CRITICAL ANTHOLOGY 41, 41 (Gregory Battcock ed., 1973).

2 *See id.* at 42.

3 *Id.* at 42.

4 *Id.* at 44–45.

With his method and apparent philosophical approach, Herron would be characterized today as an appropriation artist—if he existed, which he didn't. Nor did the attributed author of the article, Cheryl Bernstein. Both Herron and Bernstein were inventions of art historian, Carol Duncan, a hoax that went undetected for over a decade.[5] On this realization, one might think that Duncan's game was a clever *reductio ad absurdum*, taking the direction of postmodern art to its hypothetical end to illustrate the inanity of the whole project. And this may have been the case. But, perhaps unknown to Duncan, the fictional Herron's project largely parallels the work of real-life artist Elaine Sturtevant, active at the time of Duncan's writing, and probably the earliest artist to be labeled an appropriation artist.[6] Although she did not attempt to reproduce any single artist's body of work, Sturtevant (as she prefers to be called) reproduced works by the likes of Roy Lichtenstein, Jasper Johns, Andy Warhol, and yes, Frank Stella.[7] Typically, Sturtevant would repaint another artist's painting from memory, usually inserting some hidden "error" in her version.[8] However, in one famous case, Sturtevant obtained from Warhol the silkscreens he used to create his series of "Flowers" prints, and used these to create indistinguishable duplicates.[9] When her 1967 reproduction of Claes Oldenburg's *Store* incited hostility from the

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[5] Duncan's hoax was ultimately uncovered by another art historian, Thomas Crow. *See* Thomas Crow, *The Return of Hank Herron*, *in* ENDGAME 11, 11–16 (Yve-Alain Bois et al. eds., 1986). Duncan has caught many in her web. *See, e.g.*, Alan Tormey, *Transfiguring the Commonplace*, 33 J. AESTHETICS & ART CRITICISM 213, 214 (1974) (quoting "critic Cheryl Berstein"); Gregory L. Ulmer, *Borges and Conceptual Art*, 5 BOUNDARY 2 845, 847 (1977) (same); Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J.175, 231 n.231 (1990) (citing Bernstein).

[6] *See* Bruce Hainley, *Erase and Rewind*, FRIEZE, June 6, 2000, *available at* http://www.frieze.com/issue/article/erase_and_rewind/77. Sturtevant herself has resisted this label.

[7] *See* Dan Cameron, *A Conversation: A Salon History of Appropriation with Leo Castelli and Elaine Sturtevant*, 134 FLASH ART 76, 76 (1988), *available at* http://www.flashartonline.com/interno.php?pagina=articolo_det&id_art=816&det=ok&title=A-CONVERSATION; Hainley, *supra* note 6.

[8] Bill Arning, *Sturtevant*, 2 J. CONTEMPORARY ART 39, 46 (1989); Cameron, *supra* note 7.

[9] *See* Cameron, *supra* note 7; Hainley, *supra* note 6.

art community (and particularly from Oldenburg himself),[10] Sturtevant disappeared from the art world for over a decade, during which time a number of young artists took up the task of art appropriation.[11]

Appropriation art traces its conceptual origins back to an artistic movement and to a philosophical paradigm shift.[12] The artistic movement in question began with the "readymades" of Marcel Duchamp, works consisting entirely of ordinary objects found or purchased by the artist, and presented largely unchanged as art.[13] Duchamp's most famous readymade, *Fountain*, consists of a common porcelain urinal, upended, and signed with the pseudonym, "R. Mutt 1917."[14] Duchamp's work presented a conceptual breakthrough in modern art, opening the doors for artists to *select* objects from the world around them, rather than *fabricating* paint, clay, and bronze into new art objects.[15]

The philosophical origin of appropriation art came half a century later, in a 1967 essay by Roland Barthes, "The Death of the Author."[16] In the famous essay, Barthes rails against the age-old notion that the author or artist is the arbiter of a work's meaning.[17] So far as meaning is concerned, Barthes suggests, the author "dies" when the work is released to the public, and becomes just another reader.[18] Another philosopher, Michel Foucault, following the same line of thought, suggests that *imposing* an author—a Romantic invention, he asserts—on a work limits the meaning of the work.[19] On this basis, authors and artists began to

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10 *See* Cameron, *supra* note 7.

11 *See* Hainley, *supra* note 6

12 *See* Francis M. Naumann, *Duchamp, Marcel*, *in* GROVE ENCYCLOPEDIA OF AM. ART 97, 102 (Joan M. Marter ed., 2011); *Appropriation*, MoMALearning, http://www.moma.org/learn/moma_learning/themes/pop-art/appropriation (last visited Jan. 28, 2013).

13 *See* Naumann, *supra* note 12, at 97, 102.

14 *See* Naumann, *supra* note 12, at 100.

15 *See, e.g.*, Naumann, *supra* note 12, at 101.

16 *See* ROLAND BARTHES, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142, 142, 146 (1977).

17 *See id.* at 142, 143, 148.

18 *See id.* at 142, 148.

19 *See* MICHEL FOUCAULT, *What is an Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 124, 134, 137–38 (Donald F. Bouchard ed., 1977).

question the nature of authorship, and attempted to distance themselves from it.[20] One might have difficulty labeling Duchamp's readymades "art,"[21] or question the validity of Barthes' and Foucault's claims,[22] but the influence of Duchamp and Barthes is, in a word, inestimable.

While Sturtevant was on hiatus, a number of New York artists began experimenting with art appropriation.[23] Sherrie Levine, perhaps best known for her series "After Walker Evans," famously re-photographs others' photographs[24]—in this case, the depression-era portraits taken by Evans. Richard Prince became famous re-photographing advertisements—especially Marlboro ads depicting the "Marlboro Man"—cropping out visual and textual indications that these *were* advertisements.[25] Jeff Koons, meanwhile, turned to what he took to be objects of everyday commercial banality, his most famous work being a 1986 stainless-steel replica of an inflatable toy rabbit, *Rabbit*.[26] For those familiar with copyright law, it will perhaps seem ironic that the legal troubles for appropriation artists began in earnest when they *strayed* from such straightforward appropriation.[27]

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[20] *See* Sherri Irvin, *Appropriation and Authorship in Contemporary Art*, 45 BRIT. J. AESTHETICS 123, 123–24, 126 (2005).

[21] *See* Naumann, *supra* note 12, at 98; Rob Sharp, *The Loo that Shook the World: Duchamp, Man Ray, Picabi*, INDEPENDENT (Feb. 20, 2008), http://www.independent.co.uk/arts-entertainment/art/features/the-loo-that-shook-the-world-duchamp-man-ray-picabi-784384.html. However, a 2004 survey of British art experts named *Fountain* the most influential work in the history of modern art. *See Duchamp's Urinal Tops Art Survey*, BBC NEWS (Dec. 1, 2004, 5:56 PM), news.bbc.co.uk/2/hi/entertainment/4059997.stm.

[22] Many have. *See* E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION 1–4 (1967).

[23] *See* Andrew Russeth, *The Original: Doing the Elastic Tango with Sturtevant*, GALLERISTNY (May 8, 2012, 6:16 PM), http://galleristny.com/2012/05/the-original-doing-the-elastic-tango-with-sturtevant/ (interviewing Sturtevant and discussing the rise of appropriation art during her hiatus).

[24] *See* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 137–38 (1988).

[25] Klaus Ottmann, *Prince, Richard*, *in* GROVE ENCYCLOPEDIA OF AM. ART 194, 194 (Joan M. Marter ed., 2011).

[26] *See* Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992).

[27] See Carlin, *supra* note 24, at 137 (noting that some appropriation artists have drawn legal attention which has not made it to court. Levine, for instance, reportedly ceased re-photographing images by photographer Edward Weston when Weston's estate threatened to sue).

II. LEGAL TROUBLES

Jeff Koons' exhibition, "The Banality Show," opened at New York's Sonnabend Gallery in 1988.[28] For the show, Koons had commissioned a number of three-dimensional sculptures in wood and porcelain from artisans around the world. The sculptures are based on images of popular culture Koons had culled from postcards, cartoon strips, and elsewhere.[29] The Banality Show immediately garnered no fewer than three copyright infringement suits against Koons and the gallery.[30] The first of these centered on Koons' sculpture, *String of Puppies*, a life-sized painted wooden sculpture (in four editions) depicting, from the knees up, a couple sitting on a bench holding a litter of eight blue puppies with comically large noses.[31] The couple is dressed in brightly colored clothes, with daisies in their hair.

String of Puppies was based on a black-and-white photograph by Art Rogers, "Puppies," which had originally been commissioned by an acquaintance of Rogers', and later licensed by Museum Graphics for a notecard.[32] Koons purchased a copy of the card at a commercial card shop, believing it "typical, commonplace and familiar"—a paradigm of popular commercial culture.[33] Koons tore the copyright notice from the card and sent it along with an enlarged photocopy and a chart to the Demetz Studio in Ortessi, Italy, with instructions to craft a sculpture of the couple and puppies depicted in the photograph.[34] Koons oversaw the sculpting and painting of *String of Puppies*, providing written instructions specifying that, aside from the color, the puppies'

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28 *See Rogers*, 960 F.2d at 304.

29 *See* United Feature Syndicate Inc., v. Koons, 817 F. Supp. 370, 372 (S.D.N.Y. 1993) (explaining the artistic intent and materials used by Koons in "The Banality Show").

30 *See, e.g.*, Rogers, 960 F.2d at 305; *United Feature Syndicate, Inc.*, 817 F. Supp. at 372; *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).

31 *See Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

32 *See Rogers v. Koons*, 960 F.2d at 304.

33 *See id.* at 305.

34 *See id.* at 305.

noses, and the daisies, the sculpture should accurately replicate the scene depicted in the photograph.[35]

Rogers learned of Koons' sculpture in 1989 and filed suit against Koons and the Sonnabend Gallery, alleging copyright infringement and unfair competition.[36] The district court found that *String of Puppies* did, indeed, infringe on Rogers' photograph, and did not qualify as a fair use.[37] The court granted summary judgment and ordered Koons and the Sonnabend Gallery to turn over all infringing articles to Rogers, and enjoined the defendants from making, selling, lending, or displaying any copies of the sculpture, or any other derivative works based on "Puppies."[38] Koons appealed and the court of appeals affirmed the district court's decision.[39]

Koons' central defense was made on the basis of fair use, centrally arguing that *String of Puppies* qualified as a parody,[40] specifically "a satire or parody of society at large."[41] A defense of fair use rests on § 107 of the Copyright Act of 1976, which lays out four non-exclusive, non-exhaustive factors upon which consideration of "fair" use traditionally rests: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the work used, and (4) the effect of the use on the market value of the original.[42]

Arising from the 1841 case of *Folsom v. Marsh*,[43] the fair use doctrine was ultimately codified in the Copyright Act to help balance creators' interests with those of the users of copyrighted works in situations where strictly enforcing copyright would

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35 *See id.* at 305.

36 *See id.*

37 *See Rogers v. Koons*, 751 F. Supp. at 480.

38 *See id*. at 306.

39 *See id*.

40 Koons also argued that what he copied from "Puppies" did not meet the definition of an original work of authorship under the law. *See id.* at 309. On the long-established basis of *Burrow-Giles Lithograph Co. v. Sarony* (11 U.S. 53 (1884)), however, the district court found the contents of "Puppies" protected by copyright, and the court of appeals confirmed. *See id.* at 306–08.

41 *See id.* at 309.

42 *See* 17 U.S.C. § 107 (2006).

43 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

hinder, rather than advance, the "Progress of Science and useful Arts"[44] that copyright law was designed to promote.[45] Nothing in the Act specifies that the four factors should be considered of equal weight, nor whether they should be considered individually or holistically.[46] Rather, the fair use doctrine was designed for maximum flexibility, requiring case-by-case analysis by the judiciary.[47]

Section 107, which encodes the fair use doctrine, explicitly cites "purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research" as examples of presumptively fair uses.[48] This illustrative list has made special room for cases of parody, taken to be a valuable form of criticism, and central to the purposes of fair use.[49] Parody has come to be roughly defined, for legal purposes, as a work which, in imitating a preexisting work, ridicules that very work.[50] The first of the four factors—the purpose and character of the use—explicitly considers "whether such use is of a commercial nature."[51] Commercial uses have been established by the Supreme Court as presumptively unfair.[52] However, where a work is found to be parodic, its

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[44] U.S. CONST. art. I, § 8, cl. 8.

[45] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (Blackmun, J., dissenting).

[46] *See* 17 U.S.C. § 107 (2006) (failing to state how the four factors of fair use should be utilized); *see also Sony Corp. of Am.*, 464 U.S. at 476.

[47] This flexibility has resulted in what at least one court calls "the most troublesome [doctrine] in the whole of copyright." Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939); *see also* Darren Hudson Hick, *Mystery and Misdirection: Some Problems of Fair Use and Users' Rights*, 56 J. COPYRIGHT SOC'Y U.S.A. 485, 485 (2009).

[48] 17 U.S.C. § 107 (2006).

[49] *See, e.g.*, Campbell v. Acuff-Rose Music, 510 U.S. 569, 569 (1994) (finding that "parody, like other comment and criticism, may claim fair use."); MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (holding that an allegedly infringing song was an infringement of the copyrighted song because it did not constitute as fair use since it was not a parody of the copyrighted material).

[50] *See MCA, Inc.*, 677 F.2d at 184–85 (explaining that a song sung to the tune of a copyrighted song by a satirical comedy program was a parody).

[51] 17 U.S.C. § 107 (2006).

[52] *See* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (explaining that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright").

commerciality has generally been considered a non-issue.[53] The second factor is traditionally taken to distinguish between works of fact and works of fiction, such that the more "creative" the original, the more this factor tends to weigh against a finding of fair use.[54] In cases of parody, however, the original is usually a creative work, and so, given the potential cultural value of parody, this factor tends to be disregarded in parody cases.[55] The third factor asks what, and how much, of the original has been taken in a secondary work.[56] Because parody, by its nature, typically requires substantial copying—and often copying the "heart" of the work—courts have generally given leeway in the amount copied for a parody such as would be required to conjure up the original work.[57] Finally, the fourth factor asks about the effect of the secondary use on the market value of the original.[58] Although the purpose of criticism—parody included—is often to devalue the original, the Supreme Court has found that parody that *suppresses* sales of the original is permissible, whereas works that, by copying, *usurp* the original are not.[59]

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[53] *See Campbell*, 510 U.S. at 584–85 (explaining that the "commercial . . . character of a work is 'not conclusive' (quoting *Sony Corp.*, 464 U.S. at 448) but rather a fact to be 'weighed along with others in fair use decisions'" (quoting H.R. REP. NO. 94-1476, at 66 (1976)); *see also* Roxana Badin, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from Campbell v. Acuff-Rose Music, Inc.*, 60 BROOK. L. REV. 1653, 1653 (1995) (explaining that the Supreme Court's "elimination of the commercial presumption . . . is limited to works that convey a parodic purpose.").

[54] *See* New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D. N.J. 1977) (finding that defendants had "greater license . . . under the fair use doctrine" to use portions of a copyrighted work that was more a factual work than a creative work).

[55] *See Campbell*, 510 U.S. at 586 (explaining that the second factor regarding the nature of the work is not "ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.")

[56] *See* 17 U.S.C. § 107 (2006).

[57] *See Campbell*, 510 U.S. at 588 (explaining that "parody presents a difficult case" because it "necessarily springs from recognizable allusion to its object through distorted imitation. . . . it must be able to 'conjure up' at least enough of that original work to make the object of its critical wit recognizable").

[58] *See* 17 U.S.C. § 107 (2006).

[59] *See Campbell*, 510 U.S. at 591–92 (explaining that "when a lethal parody . . . kills demand for the original, it does not produce a harm cognizable under the Copyright Act. . . . [T]he role of the courts is to distinguish between '[b]iting criticism that [merely suppresses] demand [and] copyright infringement[, which] usurps it." (quoting Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986))..

On these bases, once it is established that a secondary use is parodic in nature, much in the fair use doctrine is interpreted by the courts to align in favor of the use.[60] In the case of *Rogers v. Koons*, however, the court found that *String of Puppies* did *not* qualify as parody under the law:

> It is the rule in this Circuit that satire need not be only of the copied work and may, as appellants urge of "String of Puppies," also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work. . . . We think this is a necessary rule, as were it otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large. If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use—without insuring public awareness of the original work—there would be no practicable boundary to the fair use defense. . . . The 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.[61]

Without the label of "parody" to align them in favor of the secondary work, all four factors of fair use were found to weigh against *String of Puppies*, and Koons' use of the photograph was found to be unfair and infringing.[62] The decision seemed to signal

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[60] *See* Berlin v. E. C. Publ'ns., Inc., 329 F.2d 541, 545 (holding that "where . . . the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper."); Hick, *supra* note 47, at 499 (stating that the fair use doctrine does allow for parody).

[61] Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992)

[62] *See id.* at 310–12 (finding that "the first factor of the fair use doctrine cuts against a finding of fair use . . . th[e second] factor militates against a finding of fair use . . . no reasonable jury could conclude that Koons did not exceed a permissible level of copying

a death knell for appropriation art.[63] Art theorists reeled. Lynne A. Greenberg summarized the outlook: "[T]he effect of the case is to act as a powerful check on appropriation artists. Because the stakes under copyright law for appropriating imagery from a copyrighted work are now so high, it is likely that many artists will steer clear of using such techniques in their future work."[64]

With *Rogers v. Koons* decided, Koons' other pending cases fell much the same way. His porcelain sculpture, *Wild Boy and Puppy*, was found to have infringed on the character Odie from the *Garfield* comic strip,[65] and another work, *Ushering in Banality*—a wooden sculpture of two Putto-like figures helping a boy push an enormous pig—was found to infringe on a photograph by Barbara Campbell.[66] Perhaps surprisingly, then, the Koons decisions appear not to have dissuaded appropriation artists in their activities, though it did make them a little more savvy when it came to the law.[67] Koons began licensing copyrighted materials

under the fair use doctrine . . . there is simply nothing in the record to support a view that Koons produced 'String of Puppies' for anything other than sale as high-priced art.").

63 *See, e.g.*, Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, 60 OCTOBER MIT PRESS 82, 102 (1992) (explaining how *Rogers v. Koons* "raises a number of important and troubling questions about the legal status of artistic appropriation, and it may set an important precedent with respect to the appropriation of images in works of art. . . . The decision is particularly troubling given the way in which strategies of appropriation have often performed a critical function"); Ronald Sullivan, *Appeals Court Rules Artist Pirated Pictures of Puppies*, N.Y. TIMES, April 3, 1992, *available at* http://www.nytimes.com/1992/04/03/nyregion/appeals-court-rules-artist-pirated-picture-of-puppies.html (stating that the ruling of *Rogers v. Koons* "would have a chilling effect on artistic freedom.").

64 Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 32–33 (1992).

65 *See* United Features Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993). Here, Koons attempted an argument that such characters as Odie, due to their cultural pervasiveness, had become "public figures" and had "a factual existence as such" which entitled them to more limited copyright protection (*Id*. at 380), despite Koons' own claim that he was not familiar with the character (*See id.* at 384).

66 *See* Campbell v. Koons, No. 91 Civ. 6055, 1993 WL 97381, at *2–3 (S.D.N.Y. Apr. 1, 1993) (holding that "Koons' use of Campbell's photograph to make 'Ushering in Banality' was completely unauthorized. . . . [His] infringement was clearly willful.").

67 *See* E. Kenly Ames, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1485 (1993) (explaining that the "unsettled state of law has meant that artists have often faced a significant amount of complaint and resistance from the copyright holders of the works they appropriate. The legal uncertainty could clearly work to the artists' advantage at time"); Laura Gilbert, *No*

for his works, obtaining permission from many copyright holders, including United Features Syndicate (which owns the copyright to Odie, and who had successfully sued Koons for infringement on it).[68] But Koons' new copyright savvy did not keep him out of legal hot water.

In 2000, Koons was commissioned to create a new series of seven paintings for the Deutsche Guggenheim Museum in Berlin.[69] Each work in the series dubbed "Easyfun-Ethereal" is essentially an oil-painted collage.[70] Koons collected images from advertisements, scanned them into a computer, and digitally cut-and-pasted selected, disembodied elements together over a landscape background.[71] The digital collages were then printed and used by Koons' assistants as templates for the final paintings.[72] One painting in the series, *Niagara*, consists of images of women's lower legs and feet—two in shoes, two barefoot—dangling above a tray of donuts and another of Danishes.[73] Behind the feet is an image of an enormous brownie topped with ice cream, and behind that sits a landscape dominated by the image of Niagara Falls.[74] According to Koons, the final painting was meant to "comment on the ways in which some of our most basic appetites—for food,

Longer Appropriate?, THE ART NEWSPAPER, May 9, 2012, *available at* http://www.theartnewspaper.com/articles/No-longer-appropriate/26378 (explaining that "'appropriating' other artists' work without consent is still common, but savvier practitioners know that permission is far less painful.").

68 *See* Gilbert, *supra* note 67 (explaining that "'hordes of people'" have granted Koons permission to use their copyrighted material, including United Feature Syndicate).

69 *See* Blanch v. Koons, 467 F.3d 244, 246–47 (2d Cir. 2006) (stating that Koon's Easyfun-Ethereal was commissioned in 2000 by Deutsche Bank and Guggenheim).

70 *See id.* at 247 (explaining that Koons gathered images from various sources to use as paint templates for all seven paintings); John Hudson, *Easyfun—Ethereal*, CULTURE WARS (2001), http://www.culturewars.org.uk/2001-08/koons.htm (last visited Jan. 29, 2013).

71 *See Blanch*, 467 F.3d at 247 (explaining that "Koons culled images from advertisements or his own photographs, scanned them into a computer, and digitally superimposed the scanned images against backgrounds of pastoral landscapes.").

72 *See id.* at 247 (describing that Koons "printed color images of the resulting collages for his assistants to use as templates for applying paint to billboard-sized . . . canvasses.").

73 *See id.* (explaining that Niagara "depicts four pairs of women's feet and lower legs dangling over . . . a tray of donuts, and a tray of apple Danish pastries").

74 *See id.* at 247.

play, and sex—are mediated by popular images."[75] One of the pairs of feet—the second pair from the left—was modeled on a photograph taken by Andrea Blanch, "Silk Sandals by Gucci."[76] Blanch's original photograph showed the woman's feet resting on a man's lap in an airplane cabin. For her work, Blanch wanted to "show some sort of erotic sense[;] . . . to get . . . more of a sexuality to the photographs."[77] For *Niagara*, Koons reproduced only the legs, feet, and shoes from Blanch's photograph, adding a heel to one of the shoes, altering their orientation, and slightly modifying the coloring.[78] Blanch discovered Koons' use and filed suit.[79]

Although again claiming fair use, Koons did not attempt in this case to claim that his work was a parody.[80] Rather, Koons argued that his work was *transformative*.[81] In his seminal 1990 article on fair use, Judge Pierre Leval attempted to outline a permanent framework upon which fair use cases might be adjudicated.[82] Central to this framework is the notion of transformative use.[83] Suggesting that transformation, which advances knowledge and the progress of the arts, can be distinguished from repackaged free riding, Leval argued:

> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative.* The use must be

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75 *Id*. (quoting Koons' Affidavit).

76 *See id.* at 248–49.

77 *Id*. (quoting Blanch's deposition).

78 *See id.*

79 *See id.*

80 *See* Brief for Defendant-Appellant at 8, Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (No. 05-6433-CV) ("Koons moved for summary judgment, or in the alternative partial summary judgment, on the following grounds: i) any claim based on the creation and sale of the painting was barred by the statute of limitations; ii) there was no infringement due to a lack of substantial similarity; iii) there was no infringement due to the fair use privilege; iv) Blanch's prayer for an award of punitive damages could not be maintained as a matter of law and/or under any known facts.").

81 *See id.* (arguing that the district court correctly determined that Koons' use was transformational).

82 *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990).

83 *See id.* at 1111 ("I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.").

> productive and must employ the quoted matter in a different manner or for a different purpose from the original. . . . If . . . the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. . . . If a quotation of copyrighted material reveals no transformative purpose, fair use should perhaps be rejected without further inquiry into the other factors. Factor One is the soul of fair use.[84]

Judge Leval's analysis served as the philosophical basis to the landmark Supreme Court decision in *Campbell v. Acuff-Rose*, four years later.[85] Here, drawing on Leval's framework and the legal origin for fair use, *Folsom v. Marsh*, Justice Souter wrote:

> The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like

[84] *Id.* at 1111, 1116. Here, Leval contrasts the first factor of fair use with the Supreme Court's earlier claim that the fourth factor was "the single most important element of fair use." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

[85] 510 U.S. 569, 579 (1994) (quoting Leval, *supra* note 82, at 1111.).

> commercialism, that may weigh against a finding of fair use.[86]

Campbell v. Acuff-Rose in many ways established the basis for parody claims under fair use, and as a result conceptually tied up issues of transformation with issues of parody.[87] In *Blanch v. Koons*, however, the court returned to the core of Leval's theory and separated the issues of parody and transformation, focusing solely on the latter.[88] The court noted, "[t]he sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals' confirms the transformative nature of the use."[89] Given the "distinct creative or communicative objectives"[90] of Koons and Blanch, respectively, the court decided Koons' use was transformative regardless of whether *Niagara* commented critically in any substantive way on Blanch's original photograph: "'Niagara' . . . may be better characterized for these purposes as satire—its message appears to target the genre of which 'Silk Sandals' is typical, rather than the individual photograph itself."[91] Although the work was not found to be parodic, the transformative nature of Koons' painting was found to weigh the first factor of fair use in its favor and trickled through the remaining factors in much the same way that they would in a parody case.[92] On this basis, the court of appeals affirmed an earlier district court decision that Koons' use was fair.[93]

The death knell of appropriation art had, it seemed, had been rung prematurely. Where the cases surrounding Koons' "Banality Show" had seemed to put the kibosh on unauthorized appropriation art, the finding in *Blanch v. Koons* gave new hope to appropriation

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86 *Id.* (internal citations omitted).

87 *See id.* (finding that "parody has an obvious claim to transformative value").

88 *See* Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006) (discussing transformative use).

89 *Id.* at 252. The court also draws on *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) in which reproduced images of Grateful Dead concert posters and tickets were found sufficiently transformative and ultimately fair when used in a biography of the rock band.

90 *Blanch*, 467 F.3d at 253.

91 *Id.* at 254.

92 *See id.* at 253 (concluding that the use in question was transformative).

93 *Id.* at 259.

artists.[94] And so, when Richard Prince was sued for copyright infringement only a couple of years later, he had reason to be optimistic.

Prince had become known for photographing others' photographs—particularly images used in commercial advertising—and presenting the results as his own work.[95] In 2005, one of Prince's "re-photographs" set an auction record, selling for over $1 million.[96] When Prince was sued, however, it was (as with Koon's *Niagara*) for a collage, and not for a straightforward re-photograph.[97] The case in question centered on Prince's work, *Canal Zone* (2007), a collage consisting of thirty-five photographs from *Yes, Rasta*, a book of photographs by Patrick Cariou depicting Jamaican Rastafarians. Prince had torn out the photographs and pasted them onto a wooden board.[98] Prince used some of Cariou's photographs in their entirety, cropped others, and painted ovoid splotches over some of the faces depicted.[99] The work was one of thirty created for the series "Canal Zone," all but one of which employ images from *Yes, Rasta*.[100] Motivated by a gallery's cancellation of a planned show of his work,[101] Cariou filed for summary judgment.[102] Prince attempted to argue—as Koons had successfully—that his

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94 *See id.* at, 264 (stating that where the court found "stronger considerations" existed [in] "pointing toward a finding of fair use.").

95 *See* GRANT B. ROMER, THE GETTY INSTITUTE, WHAT WAS PHOTOGRAPHY? 3 (2010) ("[H]e has explained his 'appropriation art', which has made him famous. In the early 1980's he began re-photographing advertisements featuring cowboys while working for Time-Life in the tear-sheet department.").

96 *See id*. at 2 ("On November 8th, 2005, Richard Prince's Untitled (Cowboy) 1989, set a world auction record, the first photograph to publicly sell for over a million dollars…The 're-photograph' of a magazine Marlboro cigarette advertisement, sold at Christie's Post-War/Contemporary Art auction for $1,248,000.").

97 *Cariou v. Prince*, 784 F.Supp.2d 337, 343 (S.D.N.Y 2011); *Cariou v. Prince*, No. 11-1197-cv (2d Cir. Apr. 25, 2013).

98 *Id*.

99 *See id*.

100 *See id*. at 344.

101 *See id*. (The show was "[c]ancelled by the gallery owner due to fears that she would seem to be capitalizing on Prince's success and notoriety, and worries about exhibiting work that had been 'done already'.").,

102 *See id*. at 337 ("Defendants invite this Court to find that use of copyrighted materials as raw materials in creating 'appropriation art' which does not comment on the copyrighted original is a fair use.").

appropriation art was transformative and, on this basis, fair use.[103] The district court, however, stated that it was "aware of no precedent holding that such use is fair absent transformative comment on the original."[104] Rather, it interpreted the finding of Koons' *Niagara* as transformative of Blanch's photograph because Koons "used it to comment on the role such advertisements play in our culture and on the attitudes the original and other advertisements like it promote."[105] Comparatively, the court found that Prince's appropriation was not in service of any commentary—either with regard to Cariou's works, or to the broader culture of which they are a part.[106] Where Koons and Blanch had clearly distinct artistic aims, the court in *Cariou v. Prince* found that Prince's purpose was essentially the same as Cariou's: "a desire to communicate to the viewer core truths about Rastafarians and their culture."[107] That is, while Prince intended that his work be something new, "his intent was not transformative within the meaning of Section 107."[108] And so the pendulum seemed to have swung back in the other direction for appropriation art.

The U.S. Court of Appeals reversed the district court's decision in part, finding that twenty-five of Prince's offending works were in fact fair. The remaining five works were remanded to the district court to reconsider on the basis that the court of appeals set out. Citing the reasoning in *Blanch*, the court of appeals argues that, to be transformative, it is not necessary that a use comment on the original—or, indeed, on anything else.[109] Dismissing Prince's own stated intentions regarding his works as essentially irrelevant, the court contends, "Prince's works could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so."[110] Instead, the court

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103 *See id*. at 348.

104 *Id*.

105 *Id*.

106 *See id.* at 349 ("Prince did not intend to comment on any aspects of the original works or on the broader culture.").

107 *Id*.

108 *Id*.

109 *Cariou v. Prince*, No. 11-1197-cv (2d Cir. Apr. 25, 2013).

110 *Id.*

suggests, the central question is whether the new work is transformative in the sense of adding "something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[111] And transformation in this sense, the court argues, hangs on "how the artworks may 'reasonably be perceived'."[112] The assumption here is that whether a work is a new expression, has a new message, or is invested with new meaning, is something that the work will wear on its face: "Here, looking at the artworks and the photographs side-by-side, we conclude that Prince's images . . . have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."[113]

And so the pendulum swings once again.

III. SOME STRATEGIES

A number of strategies have been suggested for how copyright law—and, in particular, fair use—might accommodate appropriation art. Perhaps the first such theorist, Patricia Krieg, suggested that appropriation art constitutes a special form of political discourse—acting as a "political symbol"[114]—and, "[b]ecause political discourse lies at the very core of First Amendment concerns, these images deserve the status of protected speech."[115] Krieg elaborates:

> Courts should extend First Amendment protection to visual works which use appropriated images to convey original expression, as this is consistent with First Amendment guarantees of free artistic expression. If the art work has significantly altered or transformed the copyrighted material so that the work as a whole adds meaning beyond that

111 *Id.*
112 *Id.*
113 *Id.*
114 Patricia Krieg, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1578 (1984).
115 *Id.*

> conveyed by the context of the copyrighted image alone, First Amendment protection is warranted.[116]

Krieg was writing several years before the finding of *Rogers v. Koons*, and indeed several years before Judge Leval's oft-quoted paper, but her focus on transformation clearly predicts Leval's framework.[117] Unfortunately, Krieg wraps up transformation in the issue of free speech. Only a year after Krieg's essay was published, the Supreme Court determined that the limits of copyright—including the confines of fair use—are consistent with First Amendment protections.[118] In other words, the First Amendment cannot serve as a viable defense against complaints of infringement.[119]

Also writing before the Koons cases, but at a time when appropriation art seemed to be circling closer and closer to the courts, John Carlin suggested modifying existing fair use standards to better allow for appropriation art.[120] Rejecting the standard four-factor model, Carlin focuses on the purpose of the copying

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[116] *Id.* at 1584.

[117] *Compare id.* ("If the art work has significantly altered or transformed the copyrighted material so that the work as a whole adds meaning beyond that conveyed by the context of the copyrighted image alone, First Amendment protection is warranted.") *with* Leval, *supra* note 82, at 1111 ("I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.").

[118] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560, 582 (1985); *see also* Eldred v. Ashcroft 537 U.S. 186, 218–21 (2003) (discussing that the proximity in the time of the adoption of both the Copyright Clause and First Amendment indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles).

[119] *See Harper & Row*, 471 U.S. at 560. According to the Court's view, "the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." Thus, the Court adds "whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use." This explanation establishes that raising an additional defense in an inquiry involving fairness would not proceed and must be address under fair use.

[120] *See* Carlin, *supra* note 27, at 138 (explaining that in some situations flexibility of fair use should be modify to allow innovative artistic expression).

and the nature of the work copied.[121] Carlin suggests, first, that an appropriation artist's commercial interests should not determine a finding of fair use, but rather that the question hangs on "whether or not there is willful interference with another's commercial interests."[122] Second, Carlin looks to whether the image copied is a part of a shared cultural vocabulary—whether the particular image appropriated is recognizable to the average viewer.[123] Third, Carlin would require that, for an appropriation to be deemed fair, the artist behind the original work be no longer living, or at least no longer actively exhibiting his work.[124] Finally, Carlin suggests that singular works of appropriation be deemed presumptively fair, while works of appropriation in multiple copies be subject to further investigation.[125]

Carlin's approach, while extremely interesting, runs into some problems. In general, Carlin's suggested framework seems jerry-built to handle the particular cases of appropriation that he has in mind, leaving little room for other forms of art appropriation.[126] As E. Kenly Ames notes, Koons' *String of Puppies*, though not a willful interference with Rogers' commercial interests, would likely not have fared well under Carlin's system: first, the image probably would not have been immediately recognizable to an average viewer; second, Rogers was at the time of Koons' appropriation still a working artist; and third, Koons created four editions of his sculpture.[127] Koons' other works, as well as Prince's *Canal Zone*, would seem to encounter similar problems

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[121] *See id.* at 138–39 ("This is done to distinguish purely commercial appropriation from that having artistic legitimacy.").

[122] *Id.* at 139.

[123] *See id*.

[124] *See id.*

[125] *See id*. at 129–30, 135–36.

[126] *See* Ames, *supra* note 67, at 1514 ("Appropriation of an unknown work is no more likely to have a detrimental effect on the original artist's incentive to create than is appropriation of a well-known work. To draw this boundary as Carlin does is to chill expression in the same manner, although admittedly not to the same degree, as the current fair use doctrine does.").

[127] *See id*. at 1513. Ames further suggests that Carlin's system "arbitrarily privileges the work of established artists over that of fledgling artists." *Id*. This, however, seems questionable.

under Carlin's framework.[128] Granted, Carlin did not have the advantage of such legal hindsight, but with these cases in mind, it seems his system offers no greater advantage to appropriation artists, and is no less convoluted, than the existing system.[129]

Like Carlin, Ames seeks a specialized approach to fair use for cases of artistic appropriation.[130] Writing after *Rogers* but before *Blanch*, Ames seeks to distinguish appropriation art from parody, noting a particular disparity between what she sees as their respective functions, but establishing an approach which parallels the traditional approach to parody under fair use and in many ways predicting the outcome in *Blanch*.[131] First, looking to the purpose and character of use, Ames suggests that for a work of appropriation art to be presumptively fair, it should be a work of visual art, as defined under the Visual Artists' Rights Act of 1990.[132] Second, Ames suggests that, to be fair, "an artist's use of an appropriated image in a work of visual art should create a presumption that the work is created for the purpose of social criticism or commentary."[133] Regarding the nature of the work copied, Ames, unlike Carlin, does not limit the sources for appropriation to well-known images.[134] Rather, Ames allows for appropriation of "existing images that are representative of a particular type of genre of popular expression," where "the reasonable observer would recognize the image as being of a

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[128] Though *Wild Boy and Puppy* would have had the advantage of including a recognizable character of popular culture, and *Niagara* and *Canal Zone* exist in only single copies.

[129] *See* Ames, *supra* note 67, at 1513

[130] *See id.* at 1518.

[131] *See id.* ("Existing fair use doctrine was designed, and is adequate, to handle all but the most extreme subset of derivative uses. It was not, however, designed to handle the very limited number of uses for which partial copying of the original work is not a viable option and in which the relationship between appropriator and copyright holder is as likely to be adversarial as that between parodist and copyright holder.").

[132] *See id.* at 1518–19. This restriction is suggested by Ames for two reasons: 1) to "ensure that a copyright holder's image will not turn up on mass-produced and mass-marketed consumer goods, about whose critical purpose one would be quite skeptical; and 2) to avoid any need to decide whether it is "good art," or even "art" at all, or whether it is successful in getting its critical message across to the viewer." *Id.*

[133] *Id.* at 1519.

[134] *See id.* at 1514.

particular type or genre of images."[135] Noting that the secondary artist may need to appropriate an entire visual work in order to convey her critical message, Ames suggests no limit to the amount of the original copied, and further suggests that the secondary artist not be required to directly criticize the work copied: "The ability to criticize and comment on the values and practices of society on a sweeping scale is the special attribute of appropriation."[136] Finally, regarding the effect on the potential market for the original work, Ames suggests that such appropriation should be deemed fair so long as the secondary work cannot reasonably function as a market substitute for the original.[137]

Roxana Badin offers an approach that is largely in line with Ames', particularly as regards the issue of social commentary, which both take to be central to the project of appropriation art.[138] In general, Badin suggests that appropriation art performs a communicative function, leading to the public benefit of a "more direct relationship between the creative arts and popular culture, inevitably increasing the public's exposure to the arts."[139] Focusing on cases in which artists appropriate common, recognizable objects and imagery of popular culture ("soup cans, flags, cigarette packages, money, movie stars, comic strips and even shopping bags"[140]), Badin recommends a notion of "transformative use" expanded to recognize the "allegorical strategy" of appropriation art and so to allow for their fair use.[141] By "allegorical strategy," Badin is referring to the recontextualization of recognizable images by artists so as to invest those images with new meaning.[142] In the case of appropriation art, Badin suggests this new meaning takes the form of social

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135 *Id.* at 1521.

136 *Id.* at 1522.

137 *See id.* at 1524–25.

138 *See* Badin, *supra* note 53, at 1654–56 (1995) (explaining that the "creative significance of all forms of appropriation . . . derives from its ability to speak critically of the society in which both the public and the artist live.").

139 *See id.* at 1655.

140 *Id.* at 1656.

141 *See id.* at 1684.

142 See *id.* at 1668.

commentary.[143] The image gains new meaning, Badin argues, by forcing the viewer to reevaluate her understanding of the image.[144] It is this reorientation of our evaluative practices, she suggests, that makes all art—and not merely appropriation art—valuable.[145] Badin further contends that "[p]ostmodern 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,"[146] treating images of popular culture as "parables of conspicuous consumption."[147]

Both Ames and Badin provide interesting analyses and offer interesting strategies, but both err in applying a universal philosophy to appropriation art, using this as the foundation upon which to accommodate appropriation art within copyright law.

IV. THE AIMS OF APPROPRIATION ART

Appropriation—the taking from artistic and other sources—for a new work is, as many will tell you, nearly as old as art itself.[148] Some artists have employed such takings to build on previous works, many to study those works, others to comment on them, and some simply to steal.[149] But Shakespeare, though he took many of his plots from other sources,[150] cannot reasonably be called an "appropriation artist" in the sense that Koons and Prince are so called. Nor does it seem reasonable to label Vincent van Gogh an appropriation artist in the relevant sense, though he copied and adapted nearly two dozen works by Jean-Francois

143 See *id.* at 1687.
144 *See id.* at 1660.
145 *See id.* at 1660.
146 *Id.* at 1661.
147 *Id.* at 1660.
148 See *id.* at 1657.
149 *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, 385 (1993).
150 See Badin, *supra* note 53, at 1654 n.5

Millet into paintings in his own inimitable style.[151] Pablo Picasso reinterpreted (and, in a sense, recreated) Velasquez' *Las Meninas* (1656) in a series of 58 paintings,[152] but it would be similarly difficult to call Picasso an appropriation artist. Although each of these artists has *appropriated* in one sense or another, if we are to talk about the contemporary art-historical category of appropriation art, we cannot simply reduce it to appropriation—taking—as an artistic method.

Neither, however, can we describe the contemporary category of appropriation art on the basis that it is essentially a form of social commentary. Ames contends that "[w]hile societal criticism is usually incidental to traditional parody, it is the avowed purpose of appropriationist visual art."[153] Badin's view is even narrower: "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."[154] Certainly, this seems true of much of Koons' work, but it does not describe Koons' appropriationist work in its entirety, and it certainly does not describe the contemporary category of appropriation art as a whole.[155] Probably the most celebrated of the appropriation artists is Sherrie Levine, who only very rarely appropriates from popular culture sources. Instead, Levine appropriates from other artists, such as Walker Evans, Alfred Stieglitz, and Kasimir Malevich.[156] Sturtevant, who set the contemporary movement in motion, appropriated from her artistic

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[151] *See* Michael J. Madison, *Beyond Creativity: Copyright As Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 837 (2010).

[152] *See* HANS BELTING, THE INVISIBLE MASTERPIECE 357 (Helen Atkins, trans., Reaktion Books 2001 (1998).

[153] Ames, *supra* note 67, at 1500.

[154] Badin, *supra* note 53, at 1660. Here, Badin cites Benjamin H.D. Buchloh, *Allegorical Procedures: Appropriation and Montage in Contemporary Art*, 21 ARTFORUM 43, 46 (1981), though it is worth noting that Buchloh does not actually give this as a definition.

[155] *See* Greenberg, *supra* note 64, at 31.

[156] *See Sherri Levine*, GUGGENHEIM, http://www.guggenheim.org/new-york/collections/collection-online/show-full/bio/?artist_name=Sherrie%20Levine (last visited Feb. 1, 2013) ("Levine extended her strategy of appropriation . . . when she rephotographed works by famous photographers including . . . Walker Evans.").

contemporaries.[157] Neither Levine nor Sturtevant seems centrally interested in popular culture, "conspicuous consumption," or the sort of societal criticism Ames discusses. And, in the case of *Canal Zone* at least, Prince "did not intend to comment on any aspects of the original works or on the broader culture."[158]

If we were to attempt to describe the contemporary movement of appropriation art in broad strokes, I would suggest that what links these artists is the employment of appropriation in pursuit of artistic projects focused on the art *object*—the nature of the *thing* (in both the original and secondary works)—and the nature of authorship. In many ways, appropriation art is *about* appropriation: the viewer is meant to know that the objects and images presented *are* appropriated, and this is meant to say something about the objects and the authorship of the original and new works. Lynne A. Greenberg suggests, "[t]hese artists likewise strive to erase all authorship from their work, replacing individual signature with the 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."[159] While this is true of, say, Levine,[160] Sturtevant considered her works "original Sturtevants" while openly acknowledging their sources.[161] Prince's general strategy is, if anything, the opposite of Levine's. Where Levine makes her sources explicit in the titles of her works, Prince treats his *sources* as authorless and himself as the author.[162] Speaking of his re-photographs of magazine advertisements, Prince says:

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157 *See* Irvin, *supra* note 20, at 123.

158 Cariou v. Prince, 784 F. Supp. 2d 337, 349 (SDNY 2011).

159 Greenberg, *supra* note 64, at 6; *see also* Carlin, *supra* note 24, at 129 n.106. ("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.").

160 *See* Irvin, *supra* note 20, at 123–24.

161 Elisa Schaar, *Spinoza in Vegas, Sturtevant Everywhere: A Case of Critical (Re-) Discoveries and Artistic Self-Reinventions*, 33 ART HISTORY 886, 890 (2010).

162 *See* Brian Appel, *Richard Prince*, ROVE TV (2007), *available at* http://www.rovetv.net/pr-interview.html.

> I like to think about making it again instead of making it new . . . Advertising images aren't really associated with an author—more with a product/company and for the most part put out or "art directed." They kind of end up having a life of their own. It's not like you're taking them from anyone. Pages in a magazine are more often thought of as "collage." When I re-photographed these pages they became "real" photographs.[163]

In another interview, Prince elaborates:

> They were like these authorless pictures, too good to be true, art-directed and over-determined and pretty-much like film stills, psychologically hyped-up and having nothing to do with the way art pictures were traditionally "put" together. I mean they were so off the map, so hard to look at, and rather than tear them out of the magazines and paste them up on a board, I thought why not re-photograph them with a camera and then put them in a real frame with a mat board around the picture just like a real photograph and call them mine.[164]

Prince revels in his authorship while denying it to the art from which he appropriates.[165]

It is at best difficult to attempt to draw lines to clearly distinguish one artistic movement from all others, and it would be equally difficult to fully and clearly explain any given artistic project or artist's body of work. Nevertheless, Sturtevant, Levine, Koons, and Prince—despite differences in their respective goals and views—are involved in substantially similar projects, projects unlike those of Shakespeare, Van Gogh, and Picasso.[166] However, the lines that separate appropriation art from other movements are

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163 *Id.*

164 Jeff Rian, *In the Picture: Jeff Rian in Conversation with Richard Prince*, *in* RICHARD PRINCE 6, 12 (2003).

165 *See id.*; Appel, *supra* note 162.

166 *See* KENNETH GOLDSMITH, UNCREATIVE WRITING 109–18 (2011); MARJORIE PERLOFF, UNORIGINAL GENIUS: POETRY BY OTHER MEANS IN THE NEW CENTURY 146–50 (2010).

certainly blurry. Does Duchamp's *L.H.O.O.Q.* (1919)—a postcard of the *Mona Lisa* upon which Duchamp penciled a moustache and goatee—qualify as appropriation art? Roy Lichtenstein's enormous Pop-Art reproductions of comic-book panels certainly seem to come close. And what of Walter Benjamin's *The Arcades Project* (1940)—a 1,000-page literary collage—or Kenneth Goldsmith's *Day* (2003), a word-for-word retyping of the September 1, 2000 issue of the *New York Times*? Ames restricts her analysis—and, indeed, membership in the category of appropriation art—to the visual arts, but there seems to be a clear fraternity with these "conceptual writers," as they have been dubbed.[167] Like Koons and Prince, they trace their conceptual origins to Duchamp and Barthes, and focus on the art object and the nature of authorship. Their projects are very much *about* appropriation.

V. APPROPRIATION AND TRANSFORMATION

As noted above, the court in *Rogers v. Koons* states, "[i]f an infringer of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use—without insuring public awareness of the original work—there would be no practicable boundary to the fair use defense."[168] This is, on its face, a compelling slippery-slope argument: without any such boundary, what *wouldn't* be allowable as fair use? Impressed by this argument, the district court in *Cariou* sought a principled break to keep copyright from sliding into oblivion.[169]

The court states that Prince's "intent was not transformative within the meaning of Section 107."[170] This was an odd choice of words, however, given that transformation is not once mentioned in § 107 of the Copyright Act (the section devoted to the fair use doctrine).[171] Indeed, the notion of transformation is raised only

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167 *See* GOLDSMITH, *supra* note 166, at 109–18; PERLOFF, *supra* note 166, at 146–50.

168 Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992).

169 *See* Cariou v. Prince, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).

170 *Id.*

171 *See* 17 U.S.C. § 107 (2006).

once in the whole of the Act: in § 101, in the definition of "derivative work."[172] And so it is perhaps even odder still that the court drew this particular line in the sand: "Prince's Paintings are transformative only to the extent that they comment on [Cariou's] Photos; to the extent they merely recast, transform, or adapt the Photos, Prince's Paintings are instead infringing derivative works."[173] The court as such appears to be making a distinction between "mere transformation" (with regard to derivative works) and a special sort of transformation-as-commentary (in the domain of fair use).[174] Although this does draw a principled break on the slippery slope, the distinction employs a rather strange use of "transformative." While it is at the courts' discretion to introduce terms of law with specialized meanings in the legal domain, this is certainly not how "transformative" is used by Leval nor by the court in *Blanch v. Koons*, nor does it seem an intuitive use of the term.[175] Rather, it appears to be an *ad hoc* definition solely invented by the court in *Cariou* to stop the slide towards copyright anarchy.[176]

The appeals court, too, found this reasoning flawed, and introduced instead a stance on transformation disconnected from matters of intent. The court suggests, "[w]hat is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work."[177] However, the suggestion that transformativeness lies in "how the artworks may 'reasonably be perceived'"[178] is more complicated than it may at first appear. As the court notes, the audience for Prince's work is very different from that of

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172 *See* 17 U.S.C. § 101 (2006) ("A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work.'").

173 *Cariou*, 784 F. Supp. 2d at 349.

174 *See id.*

175 *Compare id.*, *with* Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992), *and* Leval, *supra* note 82.

176 *Cariou*, 784 F. Supp. 2d at 349.

177 *Cariou v. Prince*, No. 11-1197-cv (2d Cir. Apr. 25, 2013).

178 *Id.*

Cariou's.[179] And when the court reduces the question of transformation to how the work would appear to a "reasonable observer," it fails to ask whether this observer is a member of Prince's audience, or of Cariou's, both, or neither. Even where the original and the secondary work appear visually indistinguishable, the audience familiar with the aims and practices of appropriation art will treat them very differently, and in many cases, they are likely to find something new—a new meaning, a fundamentally different aesthetic. And much of this will turn *precisely* on what the artist says about his work.

In the end, the court leaves open what qualifies as a "new expression" or the employment of "new aesthetics," instead passing that burden on to an abstract "reasonable observer," and so, rather than providing a solution to the problem, only pushes the problem back a level.

Exactly what constitutes "transformation" in the law remains an open question. On the understanding that appearance alone cannot do the job, Ames and Badin attempt to ground transformation in context. Ames asserts, "What makes an image unique—what a reproduction cannot capture—is the context of the image. Meaning is dependent on context."[180] Badin elaborates:

> 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. 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.[181]

Change in context, on this view, brings about a change in meaning—a transformation in the work. Context alone, however, does not change a work, though a change in context might alter its

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179 *Id.* ("Prince's audience is very different from Cariou's")

180 Ames, *supra* note 67, at 1481.

181 Badin, *supra* note 53, at 1660.

significance to us. Taking a tribal African mask and placing it in an art gallery alongside primitivist works by Matisse and Picasso might alter how we *look at* or *think about* the mask, but it does not change *the work* (nor does it change those by Matisse and Picasso). Whatever was intrinsically true of the mask before its change in context remains true after, and whatever was false remains false.[182] We might be more aware of the work's subtle lines, or of the relation it bears to contemporary Western art, but if these are properties of the mask, they were properties of the mask before we discovered them. If it were true that context alone changed a work, then moving a sculpture from one room to another would result in a new or altered sculpture, and this surely isn't the case.

That being said, *something* happens when Duchamp selects a urinal and makes it art, when a collagist combines preexisting images together, or when Levine re-photographs an image created by Walker Evans and presents it as a new work. This is not simply a matter of context, however. Rather, the artist (Duchamp, the collagist, or Levine) employs the preexisting object as a means of expressing some new and distinct idea.

Copyright protects expressions, and not the ideas expressed.[183] However, expressions and ideas are not so neatly divisible as the law would sometimes like to pretend. If we take an idea to be, roughly, the content of a thought, feeling, emotion, desire, and/or other cognitive state or event, and an expression to be the manifestation or embodiment of such an idea or ideas in a perceptible form, then 'expression' will always be an ellipsis for "expression-of-an-idea" or "expression-of-ideas."[184] There are no bare expressions—expressions that do not express ideas; such a

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[182] Of course, its relational properties may be so altered. It is now true of the mask that it sits beside a Picasso sculpture, where this was false of it before.

[183] *See* 17 U.S.C. § 102(b) (2006) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work"). *See generally* Baker v. Selden, 101 U.S. 99 (1879) (originally giving rise to the idea/expression dichotomy, today encoded in the Copyright Act of 1976).

[184] *See* Darren Hudson Hick, *Making Sense of the Copyrightability of Plots: A Case Study in the Ontology of Art*, 67 J. AESTHETICS & ART CRITICISM 399, 402 (2009). Under "ideas," here, I would include ideas about facts.

thing simply is not an expression, whatever it may be. And so, any expression will be indexical to its idea, though a given idea might be expressed in multiple ways.[185] Likewise, the same image, textual string, or series of notes may be used to express entirely disparate ideas.[186] As such, if two expressions, however indistinguishable, express two distinct ideas, they are (perhaps all appearances to the contrary) two distinct expressions, strictly speaking. And, just as I might imbue an ordinary urinal with an idea by transforming it into art (through perhaps little more than intending it to be treated as art),[187] so too can I use another's image, textual string, or series of notes to express some new idea of mine, thereby shedding or adding to the ideas expressed in the image, text, or notes by the original author. Strictly speaking, these will be distinct expressions, even if visually, textually, or sonically indistinguishable.[188]

Of course, if the original image, text, or musical work is copyrighted, and I use that image, text, or other work without

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185 *See* Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 553 (1990).

186 This, allowing for possible exceptions where an idea is expressible in only one way. In the parlance of copyright law, this idea and its expression will have "merged." *See Baker*, 101 U.S. at 106 (holding that if an idea can only be expressed in one or a small number of ways, copyright law will not protect the expression because it has "merged" with the idea); Morrissey v. Procter & Gamble Co., 379 F.2d 675, 679 (1st Cir. 1967) (establishing the principle that where a work is so simple and so straightforward as to leave available only a limited number of forms of expression of the substance of the subject matter, the expression would be uncopyrightable); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930) (as long as a defendant only takes the uncopyrightable elements of a plaintiff's work, the two works will not be substantially similar enough to constitute copyright infringement).

187 *See generally* Jerrold Levinson, *Defining Art Historically*, 19 BRIT. J. OF AESTHETICS 232 (1979) (arguing that a thing is art in virtue of its creator's intention that it be treated or regarded as past works were treated or regarded); GEORGE DICKIE, THE ART CIRCLE: A THEORY OF ART (1984) (suggesting that an item becomes art in virtue of its role in a wider institution of art).

188 As the law recognizes that two authors might independently and coincidentally string together the same words in the same order, and so treats these as two distinct and copyrightable expressions under the law—each being "original" to its author—my theory here is less strange than it may initially appear. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951) ("The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his.").

permission, the result will be a case of *prima facie* copyright infringement.[189] That is, although my creation will be a distinct expression from that work from which I have appropriated—even if it is visually, textually, or sonically indistinguishable from it—this alone will not shield me from a claim of infringement, nor will it guarantee that my creation is copyrightable.[190] In the relatively simple case in which I have, for instance, photographed someone else's photograph (as Levine and Prince have done on numerous occasions), then everything in my resulting work owes its origin to the original photographer. Since nothing in the expression is original to me, the work will not pass the minimum bar of originality required for copyrightability.[191] As far as the law is concerned, my photograph will simply be an instance of the original work.[192] Nevertheless, if I am employing the image in service of expressing some distinct idea, it will be, strictly speaking, a distinct expression. Without formally altering the original, I will nevertheless have *transformed* it. Of course, I might also express some new idea by borrowing from a preexisting work and formally modifying it in the process.[193] Where my creation would constitute a new work, insofar as it involves a recasting, transformation, or adaptation of an existing copyrighted work, it will also be a derivative work and so (if created without permission of the original copyright holder) a *prima facie* violation of the derivative works right.[194] To recall:

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189 *See* 17 U.S.C. § 1309 (2006) (establishing originality as an element of the *prima facie* case for copyright infringement).

190 *See id.* § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

191 *See* Burrow-Giles Lithographic Co. v. Sarony, 111 US 53, 58 (1884) (stating that the Constitution covers works as long as they are representations of "original intellectual conceptions of the author"); *see also* Darren Hudson Hick, *Toward an Ontology of Authored Works*, 51 BRIT. J. OF AESTHETICS 185, 195 (2011).

192 *See* Hick, *supra* note 191, at 194.

193 *See id.* at 192.

194 *See* 17 U.S.C. § 106 (2006) (among the six exclusive rights recognized in the copyright owner is the right "to prepare derivative works based upon the copyrighted work").

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be *recast, transformed, or adapted*. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work."[195]

This returns us, then, to the central clash between transformative derivative works and transformation as the basis of fair use claims. It is certainly odd that one aspect of copyright law (the derivative works right) takes transformation to be sufficient for a finding of infringement, while another aspect of the law (the fair use doctrine) takes transformation as a core ingredient in nullifying such a charge.[196] What does transformation mean in the context of derivative works? Not surprisingly, there is disagreement here as well.

The court of appeals in *Cariou* states, "A secondary work may modify the original without being transformative. For instance, a derivative work that merely presents the same material but in a new form, such as a book of synopses of [television] shows, is not transformative."[197] On this view, the issue seems to be whether the work is transformative *enough*, or *in the right way*—that *merely* derivative works do not have a "new expression" or "employ new aesthetics." Whether this is meant to be a difference merely in degree, or a difference in kind, is not clear. Either way, however, it seems very odd to suggest that the difference between a work and a written summary of that work does not so qualify. Although all too many students will happily read synopses, say, of Shakespeare's plays, rather than the originals, I think we can all agree that *Hamlet* and the CliffsNotes summary of the same differ

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195 *See id*. § 101 (emphasis added).

196 *See id.* § 107.

197 *Cariou v. Prince*, No. 11-1197-cv (2d Cir. Apr. 25, 2013).

wildly in their aesthetic character. And although *Seinfeld* might not rise to the level of Shakespeare, the same principle would seem to hold here.

The court in *Castle Rock v. Carol Publishing* stated that "derivative works that are subject to the author's copyright transform an original work into a new mode of presentation."[198] The court in *Warner Bros. v. RDR Books* states, "[t]he statutory language seeks to protect works that are 'recast, transformed, or adapted' into another medium, mode, language, or revised version, while still representing the 'original work of authorship.'"[199] These are still fairly high-order analyses, however, which would require substantial unpacking of their own. What is a "mode of presentation"? What constitutes a "revised version"? Paul Goldstein argues that a derivative work is created through transformation whenever it creates a "new work for a different market."[200] But what constitutes this creation of a "new work"? In the case of *Mirage v. Albuquerque A.R.T. Co.*, the court of appeals found that affixing copyrighted photographs, cut from a book, to ceramic tiles creates a violating derivative work:

> By removing the individual images from the book and placing them on the tiles, perhaps the appellant has not accomplished reproduction. We conclude, though, that appellant has certainly recast or transformed the individual images by incorporating them into its tile-preparing process.[201]

However, less than a decade later, in a case nearly identical in substance, the court in *Lee v. A.R.T. Co.* argued that simply mounting a note card on a tile backing does *not* result in a derivative work:

> [T]he copyrighted note cards and lithographs were not "transformed" in the slightest. The art was

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198 Castle Rock Entm't, Inc. v. Carol Publ'g Grp., 150 F.3d 132, 143 n.9 (2d Cir. 1998).

199 Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008).

200 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 5.3.1 (2nd ed., 1996).

201 Mirage v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1344 (9th Cir. 1988).

> bonded to a slab of ceramic, but it was not changed in the process. It still depicts exactly what it depicted when it left Lee's studio. If mounting works is a "transformation," then changing a painting's frame or a photograph's mat equally produces a derivative work.[202]

That is, since we do not want to say that the mere reframing of a work constitutes the creation of a new, derivative work, transformation cannot consist in this.[203] But, to dig a little further into the issue, let us consider another series of works by Jeff Koons.

For his 1985 "Equilibrium" exhibition, Koons purchased Nike posters from the manufacturer—two of each—framed them, and presented them as his own works.[204] The original posters created by brothers Tock and John Costacos depict 1980s sports icons in quasi-mythic poses.[205] The Costacos Brothers' poster of basketball legend Moses Malone, for instance, shows the player holding a staff and parting a sea of basketballs over a legend reading "MOSES."[206] Koons' work, *Moses*, consists of a copy of the original poster in a simple wooden frame.[207] The frame was not incidental to the work, however. Koons notes: "The framing was very important. I spent a lot of time choosing the material and the color."[208] The frame is a *part* of Koons' work, and not merely a

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[202] Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997).

[203] *See Albuquerque A.R.T. Co.*, 856 F.2d at 1343 (holding that by borrowing and mounting preexisting, copyrighted individual art images without the consent of the copyright proprietors, appellant had prepared a derivative work and infringed the proprietors' copyrights).

[204] *See* Tamara Warren, *New Exhibit: The Costacos Brothers For the Kids*, FORBES (Jan. 18, 2012), http://www.forbes.com/sites/tamarawarren/2012/01/18/new-exhibit-the-costacos-brothers-for-the-kids/ ("For "Equilibrium" Koons appropriated images from Nike poster advertisements . . . .").

[205] *See id.* ("The Nike posters [depict images] in which the sports stars are shown to have supernatural abilities.").

[206] *See Jeffrey Koons' Basketball Poster Switch-Up*, Bread City Basketball, http://breadcity.org/tag/costacos-brothers/ (depicting the original Costacos Brothers' poster of Moses Malone).

[207] *See Jeff Koons-Moses*, CHRISTIE'S, http://www.christies.com/lotfinder/lot/jeff-koons-moses-1789213-details.aspx?intObjectID=1789213 (last visited Feb. 1, 2013) (showing Koon's work that sold at auction).

[208] JEFF KOONS, JEFF KOONS: PICTURES 1980–2002 19 (Thomas Kellein, ed., 2002)

means of displaying the Costacos Brothers' poster—it was selected and arranged with the poster as essential *to* the work.[209]

Certainly, there is *something* interesting going on here. At the very least, Koons thinks he has created a new work. Offering an interpretation of *Moses*, he says:

> Equilibrium is unattainable, it can be sustained only for a moment. And here are these people in the role of saying, "Come on! I've done it! I'm a star! I'm Moses!" It's about artists using art for social mobility. Moses [Malone] is a symbol of the middle-class artist of our time who does the same act of deception, a front man: "I've done it! I'm a star!"[210]

"People were shocked," Koons reports, "that I was asking 1000 dollars for a framed Nike poster."[211] But Koons was not merely selling a copy of the Costacos Brothers' poster; he was selling an edition of his work, *Moses*. And Koons isn't the only one who sees it this way. The original Nike poster of Moses Malone occasionally shows up for sale on eBay for about forty dollars. One of the two editions of Koons' *Moses* sold at auction in 2004 for $78,000.[212] To buy a copy of the original poster is certainly not to purchase an edition of Koons' work.[213] *Moses* is in part *composed* of the original poster, but Koons' work is something distinct from it, in the same way that Duchamp's *Fountain* is

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[209] *See* Darren Hudson Hick, *Finding a Foundation: Copyright and the Creative Act*, 17 TEX. INTELL. PROP. L.J. 363, 376 (2009).

[210] Klaus Ottman, *Jeff Koons*, 1 J. CONTEMPORARY ART 18 (1988), *available at* http://www.jca-online.com/koons.html.; *see also* Katy Siegel, *Jeff Koons Talks to Katy Siegel*, 41 ARTFORUM 252, 253 (2003).

[211] KOONS, *supra* note 208, at 19.

[212] Stephen Perloff, *Lambert Sale a Smashing Success as Records Fall for Contemp Work*, 82 E-PHOTO NEWSLETTER, December 10, 2004, *available at* http://www.iphotocentral.com/news/article_view.php/88/82/441.

[213] Although I am centrally restricting my discussion in this article to the issue of transformation, this matter also bears on the fourth factor of fair use: the effect of the secondary use on the market value of the original. On the interpretation that uses which suppress sales of the original are allowable while those that usurp the sales of the original are not, no reasonable person simply seeking to obtain a copy of the Nike poster would purchase a copy of Koons' work at several thousand times the original poster's price.

distinct from the porcelain urinal of which it is composed.[214] Put simply, while the Nike poster is about Moses Malone, Koons' work is about (among other things) the Nike poster itself (and, importantly, this could be true even if Koons had not selected a frame, but had simply appropriated the poster itself). Insofar as what the work is *about* is, at least in part, determined by the idea expressed in that work, Koons' work expresses an idea distinct from that of the original, and so, as an expression is indexical to its idea, Koons' expression is, strictly speaking, distinct from that of the Costacos Brothers. And so, in this sense, Koons has *transformed* the original work.

VI. A PROPOSAL

Whether some work is independently copyrightable depends centrally upon whether it constitutes an original work of authorship, and this is established within the law on formal and causal grounds.[215] That is, a work constitutes an original work of authorship if it is formally distinct from all preexisting works, or includes material not copied from any preexisting work, assuming that what sets the new work apart from others meets a fairly minimal bar of originality.[216] If an item is formally indistinguishable from, and is entirely copied from, some work, then that item simply counts as an instance of that preexisting work.[217] As such, although I argue that two works will constitute different expressions, strictly speaking, so long as they are employed as expressions of distinct ideas (even if the resulting expressions are visually, textually, or sonically indistinguishable), where one is entirely and completely copied from the other, the newer of the works would not qualify as "original" within the law,

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214 *See* Arthur Danto, *The Artworld*, 61 J. OF PHILOSOPHY 571 (1964).

215 *See* 17 U.S.C. § 102 (a) (2006) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.").

216 *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991) ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

217 For a more detailed analysis see Hick, *supra* note 191.

and so would not be independently copyrightable.[218] However, to whatever degree the new work appropriates from the preexisting work, where the new work is used to express some distinct idea, I would suggest that such a use be recognized as transformative and so presumptively fair.

As a finding of fair use does not in itself recognize a copyright in the new expression, the appropriation artist who entirely and accurately copies her work from some preexisting work will obtain no right to make further copies of the work, nor to license further derivative works based upon it.[219] Rather, she will gain *only* a finding of fair use in her copy.[220] Where the new expression is not *entirely* copied from preexisting works, the appropriation artist would gain copyright ownership in what was not copied,[221] where this new material itself meets the law's minimum bar of originality (there is, after all, a back-side to *String of Puppies*), with all of the associated rights thereof.[222] However, as with cases of complete appropriation, the use here should be found to be fair where it is employed in the expression of an idea distinct from that of the original.

On this understanding, there is no essential difference between the notion of transformation employed in the definition of "derivative work" and that employed in fair use evaluation. Where a new work is based on a transformation of some preexisting work, it will constitute a derivative work (on the condition that it constitutes a new work at all under the law). But where this transformation is in service of expressing some distinct idea, this use will be presumptively fair.

Now, what of the slippery slope worry raised in *Rogers v. Koons*—that, if a use could be judged fair solely on the basis that

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218 *See* Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

219 *See* A.V. *ex rel.* Vanderhye v. iParadigms, LLC., 562 F.3d 630 (4th Cir. 2009).

220 *See id.*

221 *See* 17 U.S.C. § 103(b) (2006) ("The copyright in a . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.").

222 This would do little for Prince in the case of *Canal Zone*, however, as nearly every *part* of the work is copied from *some* work of Cariou's, leaving him little to further copy or license.

the secondary user claims a higher or different artistic purpose, there would be no practicable boundary to the fair use defense?[223] Where this purpose constitutes the expression of a new idea, however, isn't the promotion of this the avowed *purpose* of copyright law? The Constitutional foundation to copyright states, "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."[224] As standardly interpreted, the right of copyright exists to promote the progress of mankind's body of knowledge, or, as Donald Diefenbach puts it, "to expand the marketplace of ideas."[225] Isn't this precisely what Koons and the other appropriation artists are attempting to do? While copyrightability rests centrally on an author's expression, and not on her ideas expressed, I would suggest that, given the intended function of copyright law in general and the fair use doctrine in particular, it is worth considering a secondary author's ideas in determining whether her use is fair. And while it would perhaps be ideal on this understanding to require for a finding of fair use that the secondary work express some *new* idea, such a requirement would undoubtedly place an enormous burden on the law.[226] Instead, I suggest only for such a use to be presumptively fair that the secondary use be in service of expressing some idea *distinct* from that of the original. However, my proposal still requires a fairly high degree of sensitivity on the part of the courts.

In the case of *Cariou v. Prince*, the district court found that Prince's purpose in creating *Canal Zone* was the same as that of Cariou's in the original photographs: to "communicate to the viewer core truths about Rastafarians and their culture."[227] What the court failed to consider important was whether Cariou and Prince sought to communicate the *same* core truths, and this seems a critical matter. Both purposes and ideas can be described in

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223 *See* Rogers v. Koons, 960 F.2d 301, 310.

224 U.S. CONST. art. I, § 8, cl. 8.

225 Donald L. Diefenbach, *The Constitutional and Moral Justifications for Copyright*, 8 PUB. AFFAIRS. Q. 225, 226 (1994).

226 I advanced an even more stringent proposal in Hick, *supra* note 47, at 415–20.

227 Cariou v. Prince, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).

varying degrees of specificity, and at an abstract enough level all authored works perform the same function: expression. However, it is very often the more detailed, nuanced levels that interest us, that expand the marketplace of ideas. Are the ideas expressed in *Canal Zone* importantly distinct from those expressed in *Yes, Rasta*? Here, the court notes:

> In creating the Paintings, Prince did not intend to comment on any aspects of the original works or on the broader culture. Prince's intent in creating the Canal Zone paintings was to pay homage or tribute to other painters, including Picasso, Cezanne, Warhol, and de Kooning, and to create beautiful artworks which related to musical themes and to a post-apocalyptic screenplay he was writing which featured a reggae band. Prince intended to emphasize themes of equality of the sexes; highlight "the three relationships in the world, which are men and women, men and men, and women and women"; and portray a contemporary take on the music scene.[228]

How the court could reduce this to a purpose to "communicate to the viewer core truths about Rastafarians and their culture" boggles the mind, and clearly for my proposal to operate, works would have to be considered at a reasonable enough degree of specificity to distinguish the ideas genuinely expressed in the works in question. In taking up the *Cariou* case, the appeals court makes note of substantial differences between Prince's works and Cariou's:

> These twenty-five of Prince's artworks manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative. Cariou's black-and-

[228] *Id.* (internal citations omitted).

> white photographs were printed in a 9 1/2" x 12" book. Prince has created collages on canvas that incorporates color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.[229]

Notably, all of these differences are, or arise from, differences that the court *sees* in the *form* of the respective works. Judge Wallace, in his partial dissent to the court's opinion, notes that, according to the majority, "all the Court needs to do here to determine transformativeness is view the original work and the secondary work and, apparently, employ its own artistic judgment."[230] Wallace is rightly incredulous of this position: transformation need not be apparent on a work's surface. The courts, I take it, would very much like it if cases could be decided simply by looking at the works before them. Unfortunately for the courts, neither art nor copyright works that way, and nor should they. So, certainly, there is work to be done.

One of the great assets of the present Copyright Act is that it was designed to accommodate future forms of art and technology not predicted by its authors at the time of its framing. Although Sturtevant was active when the Act was written, she was far from well known—and it seems safe to assume that none of the Act's authors were familiar with the fictional Hank Herron. However, appropriation art has since grown to become one of the most fascinating—and most influential—movements in contemporary art. As such, given the instrumental purpose of copyright law as encoded in the Constitution, it seems incumbent upon the law to seek to find a way of accommodating appropriation art within its boundaries. What I suggest here is a conceptual framework for understanding how the law might do just this by recognizing how the appropriation artist *transforms* what she takes. Herron's

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229 *Cariou v. Prince*, No. 11-1197-cv (2d Cir. Apr. 25, 2013).

230 *Id.*

imagined art, appropriated from Frank Stella, transformed Stella's work. A painting by Herron expressed an idea distinct from that of a visually-indiscernible Stella, even if Herron's idea was simply a denial of his own originality.