Spring 2020

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AIPLA QUARTERLY JOURNAL

Volume 48, Number 2 Page 171 Spring 2020

VISUAL APPROPRIATION ART, TRANSFORMATIVENESS, AND FUNGIBILITY

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"Briefly stated, [fair] use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."[1]

I. INTRODUCTION

Art challenges. It can challenge boundaries, challenge preconceived notions in culture, and even challenge what is art.[2] Because art challenges, it can be difficult to imagine how the structural boundaries, inherent in copyright law, can effectively interact with art. And yet, copyright law must do so to fulfill its ultimate purpose—to encourage the production of creative works, including visual art, to benefit the general public.[3]

To achieve this goal, the current copyright regime assumes certain considerations. First, there must be an author, and that author's behavior can be influenced to produce additional, original works.[4] Second, authors can be

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1 Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

2 *See, e.g.*, Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 814 (2005); Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y U.S.A. 93, 101 (1994); Peter Margulies, *Doubting Doubleness, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought*, 51 U. MIAMI L. REV. 1155, 1194 (1997); Zahr K. Said, *Copyright's Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335, 335 (2016); Rikki Sapolich, *When Less Isn't More: Illustrating the Appeal of a Moral Rights Model of Copyright Through a Study of Minimalist Art*, 47 IDEA 453, 462 (2007); Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 451 (2017); Enzo Robert, *Can We Limit Art? Should We (and Is It Even Possible To) Limit Art?*, EPOCH MAG. (Jan. 30, 2018), https://epochmagonline.com/can-we-limit-art-46f50e8da2be [https://perma.cc/PG4M-PGMM].

3 *See* Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 814 (2001); Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 260–61 (1997).

4 *See* Lunney, *supra* note 3, at 888; *see also* Schaumann, *supra* note 3, at 260. Some note that copyright is structured to focus "solely on qualities of the work, not the identity or quality of the author." *See* Hamilton, *supra* note 2, at 103. While true with respect to determining what receives copyright protection, it does not speak to how the incentive structure functions. When contemplating an author outside of the employment setting, the incentive structure, whether functional or not, assumes that *someone* must be

incentivized to create more by having exclusive control over the most common ways to profit economically from creative works: reproduction, creating derivative works, publicly performing or displaying, and the like.[5] Third, the law is structured to not only incentivize creativity but to effectively deter infringement through appropriate punishment.[6] Fourth, Congress has recognized that the exclusive rights of a copyright owner, if stringently applied, could be used to undermine the purpose of copyright protection by actually suppressing creativity.[7] Therefore, the scope of exclusive control must be balanced, which has led to several safety valves, various measures intended to minimize such suppressions.[8] This final consideration requires careful attention to ensure that the "exception" does not swallow the "rule" and vice versa. These safety valves often utilize standards that guide behavior but allow flexibility to consider new expressions and ideas.[9] For example, the scope of the fair use factors has evolved

encouraged into creating new works. Further, the Ninth Circuit made clear that humans, not other animals, are the intended authors under our copyright law. *See* Naruto v. Slater, 888 F.3d 418, 425–26 (9th Cir. 2018) (finding no statutory standing under the Copyright Act for an animal to sue).

5 *See* Abraham Drassinower, *A Note on Incentives, Rights, and the Public Domain in Copyright Law*, 86 NOTRE DAME L. REV. 1869, 1869–70 (2011); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 7 (1987). Recent scholarship has questioned the efficacy of the incentive structure, but the value may be in providing economic support to free artists' time and resources to create more works. *See infra* note 46.

6 *See* WILLIAM PATRY, HOW TO FIX COPYRIGHT 164–65 (2012).

7 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (citing Stewart v. Abend, 495 U.S. 207, 236 (1990)) (noting that Congress intended § 107 to reflect the extant judicial doctrine, which inserts flexibility into the rigid copyright protection to avoid stifling creativity).

8 *See* Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 560–61 (1985) (stating "(1) the purpose and character of use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; [and] (4) the effect on the potential market for or value of the copyrighted work" as factors to be considered when determining if a use was fair).

9 *See, e.g.*, Meade v. United States, 27 Fed. Cl. 367, 372 (Fed. Cl. 1992) (citing PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE § 2.3.1.2 (1989)) (discussing how the line between copyright protected expression and unprotected ideas must be drawn carefully).

over the years to respond to challenges raised by new art forms, new technology, or new ways to utilize copyright protected works.[10]

However, these kinds of context-dependent, flexible inquiries come at a cost to certainty and clarity, and the fair use doctrine has long been the subject of criticism.[11] For example, Judge Pierre N. Leval, now a Circuit Judge of the U.S. Court of Appeals for the Second Circuit, wrote a highly influential source of criticism intended to redress confusion and inconsistency in fair use.[12] Among other things, Judge Level proposed that the first statutory fair use factor, the purpose and character of use, should turn on evaluating the "transformative" nature of the new work.[13] Shortly thereafter, the Supreme Court adopted Judge Leval's notion as at least one relevant consideration and described the transformative inquiry as determining "whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . ." [14] Contrary to Judge Leval's intent, however, transformativeness has created greater uncertainty.[15]

The transformative inquiry, conceptualized in the context of written or oral text, must be applied to visual art.[16] And in particular, it must be applied to one of the more recent forms—appropriation art. With its current incarnation beginning around the late 1960s and early 1970s,[17] appropriation art has been described as "borrow[ing] images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporat[ing] them into new works of

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10 *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).

11 *See, e.g.*, 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2020) [hereinafter NIMMER ON COPYRIGHT].

12 *See* Leval, *supra* note 1. Judge Leval noted that there was no consensus on the meaning of fair use, and decisions seemed more likely to reflect intuitive reactions to fact patterns rather than the application of consistent principles. *See id.* at 1106–07.

13 *See id.* at 1111.

14 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (internal citations omitted).

15 *See infra* Part II.

16 *See* 17 U.S.C. § 102(a)(5) (2012) (indicating that protection under the Copyright Act applies to "pictorial, graphic, and sculptural works").

17 *See* Darren Hudson Hick, *Appropriation and Transformation*, 23 INTELL. PROP. MEDIA & ENT. L.J. 1155, 1155–58 (2013).

art."[18] The very concept of appropriation art challenges the copyright regime in at least two ways: the concept of authorship and, more importantly for this Article, the extent of fair use.[19]

Fair use allows certain works to avoid copyright infringement claims.[20] The argument that some appropriation art pieces are fair use is rooted in fair use's rich history.[21] However, over time, appropriation art cases have utilized transformativeness to improperly expand the scope of fair use beyond prior, necessary boundaries; accordingly, fair use has been strained either in a manner that creates a new level of uncertainty as to its scope or that expands it to the point where the "exception" has now swallowed the "rule."[22] For example, "[t]o many photographers, [the Second Circuit's *Cariou v. Prince* decision finding the appropriation of many photographs to be fair use] was akin to slapping a 'Steal This' label on their work."[23] This expansion unbalances consideration of the competing interests captured by fair use: the copyright owners' interests in exclusive control with recognizing the secondary user's First Amendment right to free expression.[24] Further, the Second Circuit has continued to apply this distorted form of fair use to appropriation art cases, greatly favoring the appropriation artist.[25]

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[18] William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2000).

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

[20] *See* 17 U.S.C. § 107 (2012).

[21] *See, e.g.*, *infra* Part III.

[22] *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 698 (2d Cir. 2013); *cf.* Schaumann, *supra* note 3, at 250–51 (arguing that artists should generally be privileged to copy at will, which would allow appropriate tools for modern day, social commentary, as long as the secondary work was not a competitive threat to the original work).

[23] Patricia Cohen, *Photographers Band Together to Protect Work in 'Fair Use' Cases*, N.Y. TIMES (Feb. 21, 2014), https://www.nytimes.com/2014/02/22/arts/design/photographers-band-together-to-protect-work-in-fair-use-cases.html [https://perma.cc/T7X9-UQDJ].

[24] *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 550–52 (2004).

[25] *See infra* Part III.D.

In many ways, the evolution of these appropriation art cases are the canary in the coalmine—they warn of the potential for overly expansive fair use application across the creative arts spectrum that could undermine expected copyright rights. For example, the recent *Dr. Seuss Enterprises, L.P. v. ComicMix* decision, involving a mash-up of Star Trek and Dr. Seuss, reflects some problematic aspects of transformativeness,[26] perhaps demonstrating analytical creep from appropriation art cases to other creative works.[27] Addressing the distortions in the appropriation art cases equally raises awareness of these distortions in other fair use cases, particularly those involving purely visual arts.[28]

There are at least three significant problems with the current state of fair use. First, when assessing if a secondary user *transformed* the original work, courts cannot utilize transformativeness as a nearly dispositive determination of fair use.[29] As Judge Leval recognized, all factors should be weighed to balance all interests at play in fair use.[30] Likewise, the Supreme Court has noted in other contexts that presumptions in fair use must be rejected.[31] This does not mean that fair use should be precluded for all appropriation art (or any art based in critique) without appropriate licenses. Rather, this Article advocates for a more balanced approach that takes into account the interests of the original work's copyright owner, a secondary's artist's need to use a copyrighted work without obtaining a license, and the ultimate goal of benefiting the public as captured by the copyright incentive structure.

Second, courts assessing transformativeness have now begun to determine the expression, meaning, or message of both the original work and the appropriation art work—specifically, if the secondary work is sufficiently new,

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26 *See generally* Dr. Seuss Enters., L.P. v. ComicMix, 372 F. Supp. 3d 1101 (S.D. Cal. 2019).

27 Patrick Perkins, Senior Vice President & Chief Intellectual Prop. Counsel, Warner Bros. Entm't Inc., Keynote Address at the Brigham Young University Copyright and Trademark Symposium (Oct. 10, 2019).

28 *See, e.g.*, *infra* Part IV.B.

29 *See, e.g.*, *infra* Part IV.A.

30 Judge Leval suggested that it would be hard to find fair use without transformativeness but not the reverse. Leval, *supra* note 1, at 1111 ("The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner.").

31 *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994) (rejecting bright line rules rather than the careful weighing of factors).

innovative, or presenting a new or different message than the original work.[32] The ambiguity inherent in interpreting visual art opens the door for other, potentially less appropriate factors to influence the transformative assessment, such as the appropriation artist's reputation or known style.[33] Courts may also fall afoul of Justice Holmes' long-standing prohibition: "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . ."[34] In other words, it is not the court's role to determine what art is valuable and, therefore, what art should be encouraged under copyright law for the benefit of the public. Moreover, as with any communicative medium, allowing such determinations may result in suppressing unpopular points of view or messages.[35] Judging the value or worth of art, or even interpreting the message of art, should not be in the court's hands.

Third, the assessment of transformativeness is not only quite broad, but by focusing on the art's message, it actually discounts a different aspect of the artist's *purpose* and character of use.[36] Consider the exemplary uses identified in 15 U.S.C. § 107's introduction: criticism, comment, news reporting, teaching, scholarship, or research.[37] In each of these, as well as parody, the secondary user must reference the original work in order to achieve some purpose.[38] At some level, the assumption is that the original work added some unique value to the

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[32] Some courts have noted complexity in the interplay of derivative works with fair use and transformativeness. *See, e.g.*, Brief Amici Curiae of Professors Peter S. Menell, Shyamkrishna Balganesh & David Nimmer in Support of Petitioners at 11–12, Dr. Seuss Enters., L.P. v. ComicMix LLC, No. 19-55348 (9th Cir. Mar. 28, 2019). This Article will not significantly address the derivative works issue.

[33] *See, e.g.*, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019) (in arguing that the work is transformative, noting how the appropriation art is instantly recognizable as a Warhol by style).

[34] Bleistein v. Donaldson Lithographic Co., 188 U.S. 239, 251 (1903); *see, e.g.*, *Campbell*, 510 U.S. at 583 (referencing Justice Holmes' statement when to determine whether work is a parody).

[35] *See, e.g.*, Schaumann, *supra* note 3, at 261–62.

[36] *See infra* Part IV.A.

[37] *See* 17 U.S.C. § 107 (2012).

[38] *Infra* Part IV.A.

secondary work and was not, for example, fungible with other material.[39] In other words, the first factor should include assessing whether the secondary use is simply lazy appropriation,[40] taken to "avoid the drudgery in working up something fresh . . . ."[41]

At best, the current state of fair use in appropriation art is unclear, and at worst, it seems to disproportionately favor a finding of fair use.[42] This Article suggests a return to a more measured use of the transformative assessment in visual art fair use analysis as well as a fungibility assessment. Part II of this Article sets forth the relevant basic principles of the copyright regime, often developed in the written context. Part III describes the world of appropriation art and its interaction with copyright law to date. Part IV suggests how fair use can be rebalanced, including adding a fungibility assessment by reference to purpose of use and evaluating it as an objective assessment. By making these changes and under the current utilitarian approach, courts will better be able to balance protecting existing rights and allowing unlicensed fair use in order to encourage new art for the public benefit.

II. THE UNBALANCING OF FAIR USE

The Copyright Act is intended to "stimulate activity and progress in the arts for the intellectual enrichment of the public."[43] An author will receive copyright rights as soon as an original work, with a modicum of creativity and independent creation, is fixed in a tangible medium.[44] The Act thereby utilizes an

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39 *See, e.g.*, *Fungible*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fungible [https://perma.cc/7M5U-FJ4Q] (last visited Mar. 27, 2020).

40 Brammer v. Biolent Hues Prod., LLC, 922 F.3d 255, 262 (4th Cir. 2019) (citing Kienitz v. Sconnie Nation, LLC, 766 F.3d 756, 759 (7th Cir. 2014)).

41 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

42 Donn Zaretsky, *Déjà vu All Over Again*, THE ART LAW BLOG (Nov. 17, 2016, 4:41 PM), http://theartlawblog.blogspot.com/2016/11/deja-vu-all-over-again.html [https://perma.cc/5QKC-SG6W] ("Nobody has any idea what's fair use and what's not in the fine art context.").

43 Leval, *supra* note 1, at 1107.

44 *See* 17 U.S.C. § 102 (2012); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). There are many works that many may identify as art that do not receive federal copyright rights. For example, an ever-changing and ephemeral piece of art may not be sufficiently fixed, as required for copyright protection, unless and until captured in a photograph (or perhaps sketches). The lack of protection for unfixed works might be tied to the lack

incentive theory, which gives certain, exclusive rights to the author that then allow the artist to monetize any interest the public may have.[45] While recent scholarship has questioned the incentive theory,[46] its efficacy may be in allowing artists the

of long-term benefit to the public, the inability to circumscribe the exact nature of the art, evidentiary concerns, or other considerations. *See, e.g.*, Lydia Pallas Loren, *Fixation as Notice in Copyright Law*, 96 B.U. L. REV. 939, 959–60 (2016); Yoav Mazeh, *Modifying Fixation: Why Fixed Works Need to be Archived to Justify the Fixation Requirement*, 8 LOY. L. & TECH. ANN. 109, 118–22 (2009).

45 *See* 17 U.S.C. § 106.

46 *See, e.g.*, JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 27–28, 39, 53, 78–80 (2015) (questioning the incentive theory based on interviews of intellectual property stakeholders); Glynn S. Lunney, Jr., *Copyright's Excess Revisited*, TEX. A&M U.J. PROP. L. (forthcoming 2020), *available at* http://dx.doi.org/10.2139/ssrn.3468213 (discussing and building on his book's finding of no correlation between incentives and production of more/better music); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2000 (2011) (copyright's ability to promote creativity may be limited or even detrimental depending on if the copyright itself becomes the motivating goal); Eva E. Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935, 960 (2015) (collecting several arguments questioning the incentive story).

Professor Amy Adler specifically argues that, due to the nature of the fine art market, authenticity matters more than control over multiple copies or derivative works. Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 322–23, 327–28, 330–42 (2018) (limited to visual art as defined by VARA). There is a place for the incentive story, however, to the extent that appropriation artists are incorporating original works that benefit from having control, including photographs. *Id.* at 370–73. Further, while the premise has appeal, the weight of authenticity seems likely to unfairly benefit established artists to the detriment of the new or currently unpopular regardless of the various works' benefit to the public. Given that most fine art artists make their money via a work's first sale, establishing a reputation, one that will not be usurped by an established artists, seems important for the price of future works. *Id.* at 334. *But see id.* at 342–51 (arguing the art market addresses via authenticity).

In fact, the incentive story may have power if considered more as a reward system. *See, e.g.*, Mandel, *supra*, at 2007–08, 2011 (indicating that reward system "can increase intrinsic motivation and creativity" and noting that intrinsically motivated work is more likely to produce more creative

resources to spend more time on creating more art. Because it is the current, dominant theory, this Article assumes the incentive theory applies.

While the regime is intended to encourage creativity, the stringent use of copyright to preclude others from utilizing a work can actually chill the very creativity that should be encouraged.[47] In part, this issue is addressed by limiting the scope of copyright protection, such as limiting copyright protection to a particular expression of an idea rather than any expression of that idea.[48] Striking the balance between what is idea and what is expression is a difficult dance.[49] However, the dividing line should be tied to the underlying purpose of encouraging creativity.[50]

Likewise, the primary purpose of fair use is to allow flexibility to effectuate the very purpose of copyright protection, which is to encourage

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output). In other words, copyright rights probably do not inspire creativity, but the ability to monetize, via exclusive control, give artists the time and resources to pursue art in greater measure, creating more art than otherwise feasible if artists must have a full time "day job" for economic support. *See, e.g.*, SILBEY, *supra*, at 44, 48–49 (noting how artists often have to work outside of art for financial stability in jobs that allow the most time for creative pursuits).

It is hard to consider the counterfactual, modern world where there are no rights to provide economic support for artists. However, there is some indicia that economic support can bolster the creative output of those who are already in the creative realm. *See, e.g.*, Colleen Chien, *Beyond Eureka: What Creators Want (Freedom, Credit, and Audiences) and How Intellectual Property Can Better Give it to Them (By Supporting, Sharing, Licensing, and Attribution)*, 114 MICH. L. REV. 1081, 1087 (2016) (citing Michela Giorcelli & Petra Moser, Copyright and Creativity: Evidence from Italian Operas (May 24, 2015) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract-id=2505776 (describing how quantity and quality of operas increased after copyright protection was introduced in Italy).

47 *See* PATRY, *supra* note 6, at 164.

48 *See* 1 NIMMER ON COPYRIGHT, *supra* note 11, § 2.03[D][1]; *see also* Kaplan v. Stock Mkt. Photo Agency, Inc., 133 F. Supp. 2d 317, 323–26 (S.D.N.Y. 2001).

49 *See, e.g.*, Mannion v. Coors Brewing Co, 377 F. Supp. 2d 444, 456–61 (S.D.N.Y. 2005).

50 Meade v. United States, 27 Fed. Cl. 367, 372 (Fed. Cl. 1992) (citing GOLDSTEIN, *supra* note 9, § 2.3.1.2 (1989)).

creativity.[51] Thus, in situations where asserting copyright might stifle creativity rather than encourage it, the fair use doctrine is a primary mechanism to counter that problem.[52]

Fair use began as a judicially constructed argument. Judge Joseph Story's seminal 1841 decision in *Folsom v. Marsh*, considering 319 letters of President George Washington, provided the foundational principles that have evolved into the present day's fair use.[53] The 1976 Copyright Act codified these principles:

> [T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[54]

The purposes identified are not exclusive nor are the factors.[55] The fair use statutory factors are also undefined in the statute aside from a reference to

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

[52] *See* Leval, *supra* note 1, at 1109–10.

[53] *Compare* Folsom v. Marsh, 9 F. Cas. 342, 344–45, 347–48 (C.C.D. Mass. 1841), *with* 17 U.S.C. § 107 (2012). *See also* Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RES. L. REV. 135, 145–46 (2011).

[54] 17 U.S.C. § 107.

[55] *See Campbell*, 510 U.S. at 577–78.

commercial nature or nonprofit educational purposes.[56] Each factor is thus defined only by interpretive court decisions.[57]

Of these factors, the scope of the second and third are relatively settled.[58] The fourth factor is commonly called "undoubtedly the single most important element of fair use."[59] However, the evolution of the first factor in some recent cases has called this into question,[60] indicating that some courts consider the first factor to be nearly determinative.[61]

The first factor is the most multifaceted, most complicated, and most concerning—along with the manner in which courts weigh each of the factors. When considering the purpose and character of use, initially one may refer to the list in § 107's preamble: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . ." [62] This nonexclusive list of purposes, however, is not the end of the inquiry nor does it identify presumptively fair uses.[63] For example, the Supreme Court added parody to the previously recognized categories because it can provide "social benefit by shedding light on an earlier work and, in the process, creating a new one."[64] One

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56 *See* 17 U.S.C. § 107(1).

57 *See generally* Leval, *supra* note 1.

58 The second factor evaluates the infringed work to see where it likes on the factual-creativity spectrum. *See* Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 563–64 (1985). The second factor can also weigh against fair use if the infringed work is unpublished. *See id.* at 551–55, 564 (noting commercial value in protecting the author's right to control first publication and exploit prepublications rights). The third factor assesses both the quantity and quality of the work taken. *See id.* at 564–66.

59 *Id.* at 566; *see also* 1 NIMMER ON COPYRIGHT, *supra* note 11, § 13.05[A][4]. The fourth factor considers what would happen to the copyright owner's potential markets if the infringer's use were found to be fair use. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); *Harper & Row*, 471 U.S. at 568. It also calls for also assessing the benefit to the public if the use is permitted and striking a balance between the two stakeholders. *See* 1 NIMMER ON COPYRIGHT, *supra* note 11, § 13.05[A][4].

60 *See infra* Part III.B.

61 *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 705-06 (2d Cir. 2013).

62 17 U.S.C. § 107 (2012).

63 *See Harper & Row*, 471 U.S. at 561.

64 *Campbell*, 510 U.S. at 579–80.

could say that parody is a type of comment or criticism.[65] But as with comment and criticism,[66] all parodies should not automatically or presumptively receive fair use protection.[67] The statutory language provides guidance but not a bright-line.

Courts have developed several additional considerations in analyzing the first factor. For example, the Supreme Court noted in *Sony Corporation of America v. Universal City Studios, Inc.* that a commercial purpose is presumptively not fair use whereas noncommercial use is presumptively fair use.[68] The Court later clarified that utilizing commercial use as a bright-line test is incorrect—even a presumption is inappropriate—and reiterated that it is simply a consideration for the first fair use factor.[69] The commercial assessment should focus on "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[70] The Supreme Court has also identified the infringer's intent as relevant, specifically the infringer's bad faith intent to supplant the value of the copyrighted work.[71]

However, the recent rise of transformativeness as a key consideration for the first factor has deeply shifted the fair use landscape. Judge Leval proposed transformativeness in his seminal article on fair use.[72] He argued that the primary consideration should be "whether, and to what extent, the challenged use is transformative . . . [where] 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 . . . ."[73] Judge Leval then became one of the earliest to apply transformativeness—albeit in finding its opposite, reproductiveness.[74] In *American Geophysical Union v. Texaco*, Judge Leval

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65 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

66 *See, e.g.*, Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 540 (1985) (finding no fair use even though the reprinted portions of President Ford's memoirs included why Ford pardoned Nixon).

67 *Campbell*, 510 U.S. at 579–81.

68 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984).

69 *Campbell*, 510 U.S. at 583–84.

70 *See Harper & Row*, 471 U.S. at 562.

71 *See id.* at 562–63.

72 Leval, *supra* note 1, at 1111–16.

73 *Id.* at 1111.

74 Judge Leval's decision was the second case to apply transformativeness. The first, citing to Judge Leval's article, is *Basic Books v. Kinko's Graphics Corp.*, 758

found no fair use when the defendant reproduced copyright protected articles from scientific and technical journals in order to have easy access in the laboratory and for the purposes of developing a personal library rather than relying on the shared company's library.[75]

Shortly after Judge Leval's decision, the Supreme Court adopted transformativeness in *Campbell v. Acuff-Rose Music, Inc*.[76] In *Campbell*, the Court considered whether 2 Live Crew's new song, which paired some raunchy and shocking lyrics with some of the original Roy Orbison lyrics to "Oh, Pretty Woman," qualified for fair use.[77] The Court's decision not only cited Judge Leval's article and Judge Story's seminal decision, but also paralleled Judge Leval's reasoning.[78] Specifically, the critical inquiry is "whether the new work merely 'supersede[s] the objects' of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"[79] This transformation would indicate that the secondary work is more likely to further the goal of copyright law, which is to promote new creative works.[80] The Court noted that "[a]lthough such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright . . . is generally furthered by the creation of transformative works . . . . [T]he more transformative the new work, the less will be the significance of other [considerations in the first fair use factor], like commercialism . . . ."[81]

Although the *Campbell* decision adopted transformativeness, it is important to note that it was doing so in the factual context of a claimed parody.[82]

F. Supp. 1522, 1530–31 (S.D.N.Y. 1991) (involving book excerpts in course packs).

75 *See* Am. Geophysical Union v. Texaco, 802 F. Supp. 1, 4–5, 11–15 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994) (even in finding it inapplicable suggesting, in *dicta*, quite a lenient standard for transformativeness in a scientific environment).

76 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579–80 (1994).

77 *Id*. at 571–72 (explaining the suit between Campbell and Acuff-Rose Music).

78 *Id*. at 575–80.

79 *Id.* at 579.

80 *See id.* at 579 (explaining that the goal of copyright is furthered through transformation).

81 *Id*.

82 *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 571–74 (1994).

A parody must, by its nature, refer to and mimic the original work that it is mocking.[83] In contrast, a satirical piece, which uses the original author's work to comment on a societal issue, must find some justification because, presumably, the satirist could have made his or her point without reference to the copyright protected work.[84] Further, if the secondary work is a parody, its parodic nature affects the other factors' analyses.[85] Parodies mock creative works and need to reference enough of the original for the public to recognize what is being parodied; therefore, the Court narrowed the applicability and importance of the second and third factors.[86] As for the fourth factor, the Court rejected any argument that its prior *Sony* decision created a presumption of market harm when the appropriation was for commercial purposes.[87] Such an assumption *may* be appropriate when the use is merely reproductive; but a transformative use, such as parody, is less likely to act as a market substitution and, therefore, is less likely to affect the market for the original work.[88] Ultimately finding that parodies are transformative because they provide the social benefit of exploring the older work while creating a new one, the Court indicated that 2 Live Crew's parody of Roy Orbison's song has a strong argument for fair use.[89]

The Court noted two additional points about the parodic nature of this work and how it affected the transformation assessment.[90] First, the Court cautioned that transformativeness should take on a substantially smaller role (or perhaps none) in the first fair use factor analysis when the infringer is using the original work "merely . . . to get attention or to avoid the drudgery in working up something fresh . . . ."[91] Second, the Court cautioned that parodies (and presumably any transformative work) cannot be considered presumptively fair use.[92] Rather, these works must be evaluated by looking at *all* of the fair use

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83 *See id.* at 580–81 (explaining the different definitions of parody and how all definitions involve imitating or mimicking).

84 *See id.* at 581 (citing to the dictionary's definition of satire).

85 *See id.* at 586–92.

86 *See id.* at 586–89.

87 *See id.* at 590–91 (noting that *Sony*'s reasoning does not match the purposes of copyright law).

88 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

89 *See id.* at 594 (remanding for further facts regarding rap markets).

90 *See id.* at 578–80.

91 *Id.* at 580.

92 *Id.* at 578.

factors,[93] presumably in light of the underlying purpose of whether the fair use would encourage or discourage creativity.

Transformativeness seems to require simply assessing if the raw material of the original work have been transformed into something new.[94] In considering seminal fair use cases and Judge Leval's seminal article, the development of transformativenss was entirely in the context of written or spoken text.[95] Judge Leval followed a long tradition as Judge Story created his set of fair use factors in the context of the written word,[96] and the prior essential fair use decisions that involve comparing and assessing content have continued that trend, particularly the few modern Supreme Court cases.[97] Judge Leval's article itself was prompted when the Second Circuit overturned two of his decisions involving written works and was infused with references to written or verbal works.[98]

This context was critical in how Judge Leval conceptualized transformativeness. Thus, for example, his initial description of

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93 *See id*.

94 *See, e.g.*, Leval, *supra* note 1, at 1111.

95 *See, e.g.*, *id.* at 1111-16.

96 *See* Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (explaining the considerations the court used in making its fair use decision).

97 *See, e.g.*, Stewart v. Abend, 495 U.S. 207, 207, 236–38 (1990) (evaluating the spoken/written works in a derivative work of a film from a novel); Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 542, 549–69 (1985) (considering a portion of President Ford's unpublished memoir); Tushnet, *supra* note 24, at 684–85, 710 (discussing the development of copyright issues with Google books). Some cases involve technological advances that change how consumers access a reproduction or remove and reproduce works aside from their original context. The first modern Supreme Court case analyzing the 1976 Act's fair use statutory provision, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), falls within this category. The Court found that home videotape recorders, which reproduce copyrighted television content, are fair use by allowing for time shifting. *See id.* at 442–56. Such cases do not require any interpretation of the first or second work and thus fall outside the transformativeness concern discussed in this Article.

98 *See* Salinger v. Random House, Inc., 650 F. Supp. 413, 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987) (involving an unauthorized biography of J.D. Salinger including some of his letters); New Era Publ'ns Int'l v. Henry Holt & Co., 695 F. Supp. 1493, 1497 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989) (involving an unauthorized biography of L. Ron Hubbard that included quotations from Hubbard letters and journals).

transformativeness was that the "use must be productive and must employ the *quoted matter* in a different manner or for a different purpose from the original. A *quotation of copyrighted material* that merely repackages or republishes the original is unlikely to pass the test."[99] His other case examples were all copyright cases involving text.[100] For example, he discussed the need historians and journalists have to use accurate quotes to not only convey information but also to support any conclusions they may draw about a particular person, his or her positions, or his or her behavior.[101] This discussion was solely in the context of scholarly presentations or criticism rather than in the context of a secondary user that created a competing product, and it also showed the power, and perhaps the clarity, provided by text.[102]

In the context of visual arts, this may be more difficult than the scenarios discussed by Judge Leval. For example, in evaluating passages taken from a copyright protected work that was then incorporated into a biography, Judge Leval criticized any approach where the second user's biography *as a whole* was assessed for transformativeness rather than assessing whether the individual passages appropriated were used in a transformative sense.[103]

> [A]lthough each biography overall served a useful, educational, and instructive purpose . . . , some quotations . . . were not justified by a strong transformative secondary objective. The biographers took dazzling passages of the original writing because they made good reading, not because such quotation was vital to demonstrate an objective of the biographers.[104]

In contrast to the suggested piecemeal assessment of text, consider whether it would be feasible to disaggregate a complex (or even relatively simple) piece of visual art. For example, in some works in the *Cariou v. Prince* dispute, Richard Prince used only part of Cariou's images or painted over Cariou's photographs

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99 Leval, *supra* note 1, at 1110 (emphasis added).

100 *See, e.g.*, *id.* at 1112–16 (citing to other cases such as biographies Stravinsky or Salinger).

101 *See, e.g.*, *id.* at 1115 (explaining that an author of a biography had to rewrite his book with quotes and then was subsequently was criticized with not accurately giving the correct information and changing the story).

102 *See, e.g.*, *id.* at 1111–16.

103 *See, e.g.*, *id.* at 1112–13.

104 *Id*. at 1112.

and included other images.[105] If one were to disassemble Prince's works, then Cariou's photographs may be returned to nearly their original condition–would that preclude a finding of transformativeness? Should one have to remove Cariou's photographs and see what remained of Prince's artwork to see if the message was transformative? Or should one only assess the aspects of the painting that gave context to the appropriated photographs, which of course leads to arguments regarding what created the context other than the whole piece?[106] No, the only way to assess the secondary work's message would be to look at the piece as a whole, which suggests that assessing visual art for transformativeness is quite difficult and different from assessing textual works.[107]

III. APPROPRIATION ART: ONE PERSON'S TREASURE IS ANOTHER PERSON'S TREASURE

Appropriation art has been defined as "a post-modern technique using images fundamental to a culture (and therefore not created by the artist . . .) to make a point about that culture."[108] Appropriation art uses common images with the intent of changing the viewer's perception of or perspective on those images.[109] In the art world, such appropriation is seen as "simply a technique or method of working . . . [that acts as] the vehicle for a variety of viewpoints about contemporary society, both celebratory and critical."[110]

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105 *See* Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013).

106 One may want to consider the appropriated work in the context of an entire show, if applicable.

107 *See, e.g.*, Christine Haight Farley, *No Comment: Will* Cariou v. Prince *Alter Copyright Judges' Taste in Art?*, 5 IP THEORY 19, 32 (2015) (explaining that when audiences view artwork they look at the entire artwork as a whole instead of individual pieces); Subotnik, *supra* note 46, at 970 (explaining that visual works have the same characteristics a textual works).

108 Schaumann, *supra* note 3, at 252.

109 Eric D. Gorman, *Appropriate Testing and Resolution: How to Determine Whether Appropriation Art is Transformative "Fair Use" or Merely an Unauthorized Derivative?*, 43. ST. MARY'S L.J. 289, 290 (2012).

110 *See, e.g.*, *Appropriation (Arts)*, LIBRARY OF CONGRESS, http://id.loc.gov/authorities/subjects/sh2013003220.html [https://perma.cc/AQU9-V2TL] ("Like collage, appropriation is simply a technique or a method of working. As such, it is the vehicle for a variety of viewpoints about contemporary society, both celebratory and critical.").

To a certain degree, the name appropriation art is ironic as courts often refer to the second step of copyright infringement as improper appropriation.[111] By its very nature, appropriation art challenges what it means to have originality and authorship in art and the mechanism by which the Copyright Act protects creative works.[112] Appropriation art is particularly difficult when an artist incorporates a copyright protected work of another artist "without permission or payment."[113] In recent cases, the real question is whether the appropriation artist can establish that her use falls within the fair use defense.[114] Over the years, courts have changed how it applies fair use to appropriation art—in a manner that first reflected and then exceeded the general loosening of fair use standards in copyright.[115] Although appropriation art is a unique form of copyrighted works, its fair use analysis may foreshadow an even greater loosening in fair use writ large.

A. EARLY APPROPRIATION ART CASE(S)

The earliest appropriation art case reflected a more limited view of fair use. It involved Jeff Koons, a successful American artist who worked primarily in the sculpture media.[116] In the context of complying with copyright laws, Koons made a telling statement: "I am really very interested in the exercising of freedom. The freedom of an artist to absolutely experience enlightenment and total consciousness. Absolute freedom."[117] Presumably, that included the freedom to appropriate others' art to utilize as raw materials for new works.

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111 *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 464 (2d Cir. 1946).

112 *See* Greenberg, *supra* note 19.

113 Hamilton, *supra* note 2, at 95.

114 *See infra* Part III.C.

115 *See infra* Parts III.A–C.

116 *See, e.g.*, Kelly Devine Thomas, *The Selling of Jeff Koons*, ARTNEWS (May 1, 2005, 12:00 AM), https://www.artnews.com/art-news/news/the-selling-of-jeff-koons-116 [https://perma.cc/EX9T-6LT3].

117 Ken Miller, *Q. & A.: Jeff Koons on His New Champagne-Filled Balloon Sculpture and the DNA of Art History*, N.Y. TIMES STYLE MAGAZINE (Sept. 18, 2013), https://tmagazine.blogs.nytimes.com/2013/09/18/q-a-jeff-koons-on-his-new-champagne-filled-balloon-sculpture-and-the-dna-of-art-history [https://perma.cc/9SRZ-C885].

In 1992, before the Supreme Court's decision in *Campbell*, Art Rogers sued Koons for creating an unlicensed, derivative work.[118] Rogers was commissioned to photograph eight new German Shepard puppies and made numerous creative judgments in its staging, including adding in the owners.[119] The photograph subsequently was licensed for reproduction as notecards and postcards, which was how Koons acquired his copy.[120] Koons created a sculpture based on the photograph for his exhibit entitled *Banality Show*.[121] While Koons wanted to keep the sculpture as identical as possible to the original poses, he then altered Rogers' expression in certain ways—for example, by adding flowers around the figures and enlarging the dogs' noses—likely to exacerbate the "banality" in the photograph.[122]

Under the standards of the time and reflecting what may have been common expectations about its limits,[123] Koons was unsuccessful in claiming fair use.[124] Applying the first factor, the Second Circuit was influenced by strong evidence of Koons' bad faith; he saw and removed a copyright notice on the photograph before sending the photograph for use in fabricating the statue.[125] The Second Circuit also focused on the commercial aspect of Koons' work as significant although the court did reinforce that the question was "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[126] Finally, the court rejected Koons' argument that his work was a

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118 *See* Rogers v. Koons, 960 F.2d 301, 301 (2d Cir. 1992).

119 *Id.* at 304.

120 *Id.* at 304–05.

121 *Id.*

122 *See id.* at 308.

123 For example, in the *Journal of the Copyright Society*, Professor Marci Hamilton published an article based on a paper presented at the 1994 Association of American Law Schools Annual Meeting. Hamilton, *supra* note 2. She argued that we should not allow for free appropriation of art any more than we provide "free canvas, paints[,] or brushes to make sure artists paint in the service of promoting the arts . . . ." *Id.* at 110 (recognizing that a small portion of appropriation art may fall within fair use, but only a limited amount). Noting that effectively setting the market value at zero is extreme, Professor Hamilton rejects fair use as an extreme solution. *See id.*

124 *See* Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992).

125 *See id.* at 309.

126 *See id.* (citing Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

parody.[127] The court stated that an artist can copy another's work under parody only when the general public can make that connection, either because the underlying work was well known or because the parodist acknowledged the original's existence in some way in the work.[128] Without having a parodic nature, there was no need to conjure up the original work.[129] In this case, the sculpture may have critiqued the banality of modern life (satire), but the court found that it was not pointedly critiquing the original photograph sufficiently for the first fair use factor.[130]

The Second Circuit assessed the other three statutory fair use factors and concluded that they did not fall in Koons' favor.[131] In particular, the court noted that the fourth factor, market effect, is widely deemed to be the most important.[132] However, as this decision occurred before the Supreme Court's ruling in *Campbell v. Acuff-Rose*, the court placed undue emphasis on the commercial nature of Koons' work, as assessed in the first factor.[133] The presumption against fair use, because of his commercial use, coupled with the impact on Rogers's potential market for derivative works from his photograph, led the court to find that this factor also weighed against fair use.[134] Interestingly, Rogers was not required to show that he previously had exploited the derivative works market for his photograph or intended to do so, nor that he had done so for other photographs in the past.[135] Koons was sued twice more for other appropriation art works that he produced for the same *Banality Show*; he lost on the same arguments in both cases.[136]

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127 *Id.* at 309–10.

128 *See id.* at 310.

129 *See id.*

130 *See* Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992).

131 *See id.* at 310–12.

132 *See id.* at 311 (citing Stewart v. Abend, 495 U.S. 207, 238 (1990)).

133 *See id.* at 312.

134 *See id.*

135 *See id.*

136 *See* Campbell v. Koons, No. 91 Civ. 6055 (RO), 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993) (containing a near-identical set of facts to *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992)); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993) (finding similar results to *Rogers v. Koons*, involving allegations that Koons infringed a copyright on Odie, the dog character in the Garfield comic strip).

B. TRANSFORMATIVENESS BEGINS TO CHANGE THE FAIR USE ANALYSIS FOR APPROPRIATION ART

The second significant Koons case led to a decidedly different result.[137] In 2006 and after the Supreme Court's *Campbell* decision, Andrea Blanch, a photographer, sued Koons based on his collage, titled *Niagara*, for his *Easyfun-Ethereal* collection.[138] Koons had cut out photographs of women's legs, repositioned them to point downward, and placed them over a grassy field, Niagara Falls, and various confections so that the legs hung approximately two-thirds of the way down the overall piece.[139] Koons' stated intent was to recontextualize and "comment on the ways in which some of our most basic appetites–for food, play, and sex–are mediated by popular images."[140] Koons obtained one of the leg images from a highly stylized Andrea Blanch photograph for a fashion magazine; Koons stated that he chose Blanch's photograph because it was so representative of a certain type of woman in advertisements.[141]

Unlike *Rogers*, this use by Koons was deemed fair use.[142] Reiterating the Supreme Court's mandate to avoid bright-line rules, the Second Circuit began its analysis of the purpose and character of the use with transformativeness, identifying it as the heart of the fair use breathing space.[143] To determine transformativeness, the court looked to both artists' stated intentions for their respective pieces.[144] Further, the court found the image was transformed because Koons used a fashion magazine photograph to comment on the social ills of mass media and concluded that his adaptation in coloration, background, medium, size,

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137 *See generally* Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

138 *See id.* at 247.

139 *See id.*

140 *Id.*

141 *See id.* at 248.

142 *See id.* at 259; *see also* Farley, *supra* note 107, at 267–68 (attributing the ruling in *Blanch* to Koons engaging in a more in depth discussion of art and his artistic intent rather than the court's application of the Supreme Court's *Campbell* decision).

143 *See* Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006) (citing Davis v. Gap, Inc. 246 F.3d 152, 174 (2d Cir. 2001)).

144 *See id.* at 252 (comparing Koons's interest in engaging the viewer to think about the objects, products, and images and how they affect lives and Blanch's intent to convey an erotic sense).

and details as well as purpose and meaning "almost perfectly" fit the test for transformativeness.[145]

Unlike later courts, the court here separately considered the parody/satire question.[146] The court found that the work was satire, a generalized social critique rather than parody, one expressly pointed at the specific original work.[147] Addressing the fact that the *Campbell* court appeared to apply a preference for parody, the court here found satire sufficient because there was no way to engage in the overall social critique of mass media without utilizing images from the mass media.[148] Further, the court leaned on Justice Holmes' prohibition against judging the value or worth of art; thus, the court did not assess whether Koons had "a genuine creative rationale for borrowing Blanch's image, rather than using it 'to get attention or to avoid the drudgery in working up something fresh.'"[149] Because judges should not judge art, the court deferred to the artist's stated intentions in deciding if the work was transformative.[150]

The court, however, did not ignore other considerations within the first fair use factor; it also examined commercial use and bad faith.[151] However, the court's finding of transformativeness led the court to severely discount the commercial use consideration even though Koons made a large profit.[152] Although not present here, the court also questioned whether bad faith should still be a consideration in the first factor.[153] Therefore, the first fair use factor analysis became almost exclusively about the transformative test, irrespective of parody or satire status, and utilizing the artists' intentions as the key determination of whether the original work was transformed.[154]

The court assessed the other three fair use factors, and they led the court to find fair use.[155] However, the decision also demonstrated analytical creep from

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145 *See id.* at 253.

146 *See id.* at 251–55; *infra* Parts III.C–D.

147 *See Blanch*, 467 F.3d at 255.

148 *See id.*

149 Blanch v. Koons, 467 F.3d 244, 255 (2d Cir. 2006).

150 *See id.*

151 *See id.* at 253–54, 256.

152 *See id.* at 253–54.

153 *See id.* at 255–56.

154 *See id.* at 251–53, 254–55.

155 *See* Blanch v. Koons, 467 F.3d 244, 256–58 (2d Cir. 2006).

Campbell's parody context to all transformative uses, despite its earlier analytical separation.[156] Thus, as indicated in the Supreme Court's *Campbell* decision in the context of parodies, the second factor, nature of the copyrighted work, was considered of limited use.[157] For the third factor, amount and substantiality of use, the court assessed whether Koons copied excessively beyond what was "reasonable in relation to the purpose of the copying."[158] The court found that only using the woman's legs from a larger photograph was an appropriate and necessary amount in light of his social commentary purpose.[159] Finally, although the fourth factor had previously been called the most important factor,[160] this decision gave it short shrift.[161] Instead of assessing the potential licensing market, the court evaluated whether the original artist had taken advantage of the licensing market in the past and whether Koons' use caused any direct harm to her.[162] In so doing, the court shifted the burden from the party claiming fair use to the copyright owner to prove what potential markets she had previously exploited.[163] This was an unusual shift from the norm where the party claiming fair use should be the party with the burden of proof.[164] Moreover, it strongly favored protecting currently successful exploiters of their works rather than protecting all artists' rights in future exploitations. Thus, began the fall down the slippery slope to expand the scope of fair use in light of transformativeness.

C. THE ASCENT OF TRANSFORMATIVENESS: *CARIOU V. PRINCE*

Seven years later, the Second Circuit decided *Cariou v. Prince*.[165] Patrick Cariou, a professional photographer, spent years living among Rastafarians in

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156 *Compare Blanch*, 467 F.3d at 253–59 (finding that "the broad principles of *Campbell* are not limited to cases involving parody"), *with* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994).

157 *See Blanch*, 467 F.3d at 257 (citing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006)).

158 *See id*. at 257–58.

159 *See id.* at 258.

160 *See supra* note 59 and accompanying text.

161 *See* Blanch v. Koons, 467 F.3d 244, 58 (2d Cir. 2006).

162 *See id*.

163 *See id.*

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

165 Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

Jamaica and created a book of portraits and landscapes.[166] Cariou had previously published a compilation of surfer photographs and was contacted by a gallery owner to see if he would be interested in creating an exhibit based on those surfer photographs.[167] The discussion subsequently included his Romani photographs and the Rastafarian portraits; the ultimate decision to not have an exhibit, however, was heavily influenced by the appropriation art that led to the lawsuit.[168]

Richard Prince, another highly successful appropriation artist, first received recognition for appropriation art with his series of Cowboy works, which entailed re-photographing images from of the Marlboro Man advertisements and simply eliminating the tobacco product and advertising information.[169] Some in the art world suggested that his work was a critique of the advertising world's exploitation or repurposing of our American mythology and a critique of photography as capturing "truth"—even while recognizing purchasers may not understand the pieces in the same way.[170] Others were less enamored.[171]

For a new project, Prince purchased several copies of Cariou's book of Rastafarian portraits, tore many out, and altered them in a variety of ways.[172] For example, he often enlarged photographs, sometimes mixed Cariou's photographs with other artists' appropriated work, often painted "lozenges" over part of the portrait's facial features, and sometimes mixed in "dissonant" images like an electric guitar.[173] In his collage *Canal Zone*, Prince used 35 of Cariou's photographs or portions thereof.[174] Prince produced 28 or 29 paintings, also reproduced in a

166 *See id.* at 698.

167 *See id.* at 703.

168 *See id.* at 703–04 (noting that the gallery owner believed that Cariou was doing something with Richard Prince).

169 *See id.* at 699, *Collection: Richard Prince – Untitled (Cowboys)*, THE MUSEUM OF CONTEMP. ART, L.A. (Mar. 16, 2014), https://www.moca.org/collection/work/untitled-cowboys [https://perma.cc/Y9MU-U8EW].

170 Brian Appel, *For Your Eyes Only: Eighteen Experts Talk with Brian Appel on the $1,248,000 Richard Prince Photograph That Has Set a New World Auction Record for Photography*, ARTCRITICAL.COM (Dec. 2005), http://www.artcritical.com/appel/BAPrinceRecord.htm [https://perma.cc/7UCR-BELX].

171 *See, e.g.*, *id.* (comments by Alex Novak).

172 *See* Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013).

173 *See id.* at 700–04.

174 *See* Cariou v. Prince, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011).

catalogue, with images from Cariou's works, and some of Prince's works were entirely composed of Cariou's images with some alterations.[175] Despite what Prince claimed to be transformative changes to Cariou's work, the gallery owner that had previously contacted Cariou seemed to think otherwise.[176] She indicated that the Rastafarian portraits had been "done already" to the point where she was not interested in putting together an exhibit with those images, thought that perhaps Cariou was working with Prince, and did not "want to seem to be capitalizing on Prince's success and notoriety."[177]

Cariou sued and mostly lost in the Second Circuit.[178] The court held, on summary judgment, that at least twenty five of the appropriation art works constituted fair use.[179] At least five key points emerged, expanding the scope of fair use. All resulted in heavily unbalancing fair use—both in the individual factor analysis and in the overall weight apportioned to each factor.

First, with respect to transformativeness's scope, the *Cariou* court explicitly rejected any requirement that the appropriation art substantively related to the original work.[180] *Blanch* involved an appropriation artist who was commenting upon or critiquing the original work.[181] While the court noted that parody was not required if satire existed, that was done in a context where one could argue that Koons was doing both.[182] He was using one representation of mass media in order to criticize mass media.[183] Thus, it was a broader critique that equally applied to the original work. In contrast, the *Cariou* court entirely rejected any need to argue that the secondary work commented, critiqued, or otherwise was connected to the meaning of the original work even in cases when the secondary work constituted a potentially competing, and commercially successful, product.[184]

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175 *See id.* at 344; *see also Cariou*, 714 F.3d at 699.

176 *See Cariou*, 784 F. Supp. 2d at 344; *see also Cariou*, 714 F.3d at 703–04.

177 *Cariou*, 784 F. Supp. 2d, at 344; *see also Cariou*, 714 F.3d at 703–04.

178 *See* Cariou v. Prince, 714 F.3d 694, 712 (2d Cir. 2013).

179 *See id.* at 698–99.

180 *See id.* at 706.

181 *See supra* notes 145–50, 158 and accompanying text.

182 *See* Blanch v. Koons, 467 F.3d 244, 254–55 (2d Cir. 2006).

183 *See id.* at 253.

184 *See* Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

Second, under the guise of using the reasonable observer standard, the *Cariou* court seemed to use its own aesthetic to determine that twenty-five of Prince's pieces were transformative.[185] Unlike prior decisions, the court did not refer to the artists' stated intentions or any gathered expert opinions nor did it shy away from making an aesthetic judgment.[186] Perhaps this was a function of Prince's inconsistent statements. In one portion of Prince's deposition testimony, he stated that, regardless of the original artist's intent, his intent was to make something completely different and also a contemporary take on the music scene.[187] At the same time, Prince testified that he "doesn't really have a message" to convey with his art.[188] To the contrary, the district court decision noted that Prince's stated intent was to "pay homage or tribute to other painters, including Picasso, Cezanne, Warhol, and de Kooning and to create beautiful artworks which relate to musical themes and to a post-apocalyptic screenplay he was writing which featured a reggae band."[189] Accordingly, Prince did not really argue or explain how or why his pieces would be transformative (other than his right to use others' works as raw materials)[190] despite the fact that this was an affirmative defense.[191] As William Patry noted, "[under this kind of] argument, one artist is free to plunder the works of others, devoid of any justification other than one's claimed status as an artist."[192]

Regardless, the court made the transformative determination for Prince, ostensibly by utilizing a reasonable observer standard.[193] Thus, the court shifted the focus in determining transformativeness from the artist's stated intent to (presumably) the audience's reaction.[194] But, in truth, this failed to shift to the audience's reaction for two reasons. First, the court assessed the works side-by-

185 *See id.* at 710–11 (For five of Prince's works, the court remanded for further facts while indicating that the alterations may have been too limited to be transformative on summary judgment.).

186 *See id.* at 706–08.

187 *See id.* at 706–07.

188 *Id.* at 707.

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

190 *See id.* at 348; Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013).

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

192 WILLIAM F. PATRY, PATRY ON FAIR USE § 3:27 (2019).

193 *See Cariou*, 714 F.3d at 707.

194 *See id.*

side even though it is not clear an audience would do so or have that experience.[195] Second, the court took its perspective to be that of the reasonable observer.[196] Not only did this cross into judging art, but it also assumed that the court would be able to capture the reaction of the reasonable observer without defining who the reasonable observer is—the general public, art aficionados or experts, or even simply those who could afford to purchase Prince's high priced art. Even assuming that the reasonable observer is a reasonable person from the general public (as the scope of copyright protection purportedly benefits the general public), the court failed to identify what efforts one should take to capture a true sense of the general public.[197] Furthering the domination of transformativeness, the *Cariou* court discounted the importance of commercialization in light of the works' transformative nature. [198] The court discussed no other first factor considerations.[199]

Third, consistent with the *Blanch* decision, the Second Circuit greatly discounted the second and third fair use factors. The second factor lacked import because the secondary work was transformative.[200] And as to the third factor, the Second Circuit continued to apply the *Campbell* court's parody discussions to transformative, non-parodic secondary works.[201] Thus, the Second Circuit stated that "[t]he secondary use 'must be [permitted] to 'conjure up' *at least* enough of the original' to fulfill its transformative purpose."[202] The Supreme Court's statement was placed specifically within the context of a parody, which *must* reference the original in order to mock it.[203] The Second Circuit provided no explanation why a transformative work must be able to conjure up the original when it already stated

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195 *See id*. Although this is the comparison method used in every art history class, it is not clear that the reasonable observer would be so educated. *See* Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 600–01 (2016).

196 Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013).

197 *See* PATRY, *supra* note 192, § 3:27 (noting that, without any evidence of how a reasonable perceiver would see the works, "the majority was merely speculating").

198 *See Cariou*, 714 F.3d at 708.

199 *See generally id*. at 694–714.

200 *See id*. at 710.

201 *See id.*

202 Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013).

203 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994).

that a transformative work *does not* have to comment upon the original. Regardless, for at least twenty-five works, the court weighed this factor heavily in Prince's favor because of their transformative natures.[204] In so doing, the second and third factors were essentially mooted once a secondary work was deemed transformative.

Fourth, the *Cariou* court took the *Campbell* language regarding the fourth factor, market effects, entirely out of context in order to deny Cariou any benefit from this factor. *Campbell* involved a parody that also transformed a song into a rap.[205] In the context of evaluating the parody component, the Supreme Court noted that a successful parody, or other critical work, may actually destroy the market for the original work because it made the original work seem old fashioned, outdated, and the like.[206] In other words, a parody may have harmed the market for the original, but only in a way that served the purpose of criticism inherent in parody.[207] The *Cariou* court made clear that transformative works need not even criticize or comment upon the original,[208] which should mean that the Supreme Court's limitations as to critical works should be inapplicable *unless* there is a finding that the transformative work was also critical of the original work in some way. This is not what the *Cariou* court did.[209] Instead, the *Cariou* court stated that the more transformative the use, the less likely it served as a substitute for the original.[210]

Further, the *Campbell* decision included evaluating potential markets that the creator of the original works would develop or license, which could extend beyond the markets already exploited. [211] The Supreme Court directed consideration of the *type* of markets that the original work's *type* of artist may explore for the *type* of work; it did so in the context of noting that parodies/critical works are generally not markets exploited by artists.[212] The *Cariou* court distorted this fourth factor by limiting potential markets to situations where "the infringer's

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204 *See Cariou*, 714 F.3d at 711.

205 *See Campbell*, 510 U.S. at 572.

206 *See id.* at 592.

207 *See id*. at 592–93 (stating that if the secondary work has complexity beyond criticism, like rap, then that must separately be assessed).

208 *See* Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013).

209 *See id.* at 709.

210 *See id.*

211 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994).

212 *See id.* at 590.

target audience and the nature of the infringing content is the same as the original."[213] Thus, even though both were art pieces and potentially displayed in galleries, the *Cariou* court segmented the market further by examining if the pieces appealed to the same segment of the art purchasing market, limiting its analysis of the original work to markets already exploited.[214] Ultimately, the *Cariou* court found that Prince's audience was different from Cariou's, no evidence indicated that Prince's work was the kind that *Cariou* would license, and there was no evidence that Prince's work impacted *Cariou's* marketing of the photographs; therefore, this factor weighed in Prince's favor. [215] This was particularly problematic when the court's decision, in this case that Prince's work was mostly fair use, could eliminate a portion of the usual photography licensing market.[216] Moreover, it demonstrated that a finding of transformativeness, the only factor that focuses on the interests of the secondary work's author, was so powerful as to significantly diminish the chances of the original work's artist defeating a fair use defense.

Fifth, an additional troubling aspect of the court's fourth factor analysis was the tremendous burden it placed on the copyright owner to defeat a fair use claim by a "transformative" work's author. The court sought evidence from Cariou regarding whether he ever would/could develop or license secondary uses of his work in art like Prince's work.[217] By asking Cariou to establish his business model and any harms, rather than the defendant, the court burdened the plaintiff and seemed to diminish Cariou's copyright rights simply because he had not aggressively marketed his work and had earned little money thus far from his Rastafarian photograph book.[218] For example, Prince sold eight pieces for $10.4 million at an event opening his Canal Zone exhibit, whereas Cariou had earned

213 *Cariou*, 714 F.3d at 709.

214 *See* Cariou v. Prince, 714 F.3d 694, 709–10 (2d Cir. 2013).

215 *See id*.

216 *Cf.* Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 308 (3d Cir. 2011) (citing *Campbell*, 510 U.S. at 590, 591) (acknowledging that uncompensated reproductions of professional photography would "surely" undermine a photographer's capacity to license his works).

217 *See Cariou*, 714 F.3d at 709.

218 *See id*.

just over $8,000 in royalties from his book.[219] The court seemed to punish Cariou for being a less successful artist and businessperson than Prince.

And finally, also interesting was a deposition excerpt noted only by the district court. Prince testified that he appropriated other artist's work because "doing so helps him 'get as much fact into [his] work and reduce[d] the amount of speculation.'" [220] Prince used Cariou's work because they were an accurate representation of Rastafarians.[221] Being so comfortable with taking other artist's photographs suggested an implicit assumption that photographs, particularly portraits, reflect reality and, therefore, appropriately constituted raw materials just as any other component of reality would.[222] However, it also suggested that Prince really had no need to take Cariou's work because Cariou's creative contribution was not required. Instead, *any* accurate photographs of Rastafarians would have been sufficient, including ones taken by Prince himself or in the public domain. Perhaps Prince was simply avoiding "the drudgery" [223] of getting his own raw materials.

As argued below, this run contrary to the spirit of fair use, specifically that it is most appropriate when the original work adds some unique value to the secondary work.[224] Moreover, it is highly ironic that Prince's appropriation of Carious' photographs was justified as constituting accurate representations, capturing the truth of reality, when the art world justified his rephotography as denying "one of the main tenets of the medium of photography—its inherent ability to record 'truth.'"[225]

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219 Larry Neumeister, *NY Court: Artist Richard Prince Fairly Used Photos*, THE SAN DIEGO UNION-TRIB. (Apr. 25, 2013), http://bigstory.ap.org/article/ny-court-artist-richard-prince-fairly-used-photos [https://perma.cc/Y9KK-Z4NP].

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

221 *See id.*

222 *See generally* Tushnet, *supra* note 24, at 724–33, 757 (discussing courts' use of representativeness/realism as a proxy for ideas and the remaining as expression, as inaccurate as that may be, and very little may be protected depending on artistic style as opposed to the content of the specific work).

223 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

224 *See infra* Part IV.C.

225 Appel, *supra* note 170.

D. (APPROPRIATION) ART FAIR USE CLAIMS AFTER *CARIOU*

Richard Prince continues to challenge the boundaries of art and fair use. Perhaps it is not surprising, therefore, that two of the more recent appropriation art cases, still pending final resolution, are suits against him.[226] The most informative to date is *Graham v. Prince*, based upon Donald Graham's well recognized work, a black and white photograph called *Rastafarian Smoking a Joint*, which aptly describes the content.[227] Prince found an Instagram posting reproducing the work, added a comment, and then took a screenshot of the Instagram photograph with his comment along with other Instagram markers.[228] The photograph itself was nearly untouched, merely cropped a little bit.[229] The screenshot was reproduced onto a canvas and included in the Gagosian Gallery's *New Portraits* exhibition and catalog, along with 36 other Instagram screenshot works.[230] Prince also posted his work on a Manhattan billboard for several months and on Twitter.[231]

To date, the *Graham* court has only decided a motion to dismiss on the fair use argument.[232] Because the fair use inquiry is so fact dependent, the court noted its general caution in granting dismissal based on fair use; and so, it is not surprising that this court did not grant Prince's motion to dismiss.[233] Importantly,

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226 Two other suits were filed in California, but they both had stipulated dismissals with the expectation of refiling in New York. *See* Stipulation of Voluntary Dismissal of Entire Action Without Prejudice, Salazar v. Prince, No. 16-cv-04282 (C.D. Cal. Aug. 12, 2016); Stipulation of Voluntary Dismissal of Entire Action Without Prejudice, Dennis Morris, LLC v. Prince, No. 2:16-cv-03924-RGK-PJW (C.D. Cal. Aug. 12, 2016). No further docket information is available. In 2015, Jeff Koons was also sued based on another appropriation art piece, but the case was voluntarily dismissed in 2016. *See* Stipulation of Dismissal, Gray v. Koons, No. 1:15-cv-09727-SHS (S.D.N.Y. Apr. 18, 2016).

227 *See* Graham v. Prince, 265 F. Supp. 3d 366, 370–72 (S.D.N.Y. 2017).

228 *See id*. at 372–73.

229 *See id*. at 372.

230 *See id*. at 373.

231 *See id*. at 374–75.

232 *See id.* at 371.

233 *See* Graham v. Prince, 265 F. Supp. 3d 366, 371 (S.D.N.Y. 2017).

the court made its decision even while noting that transformativeness is the "heart of the fair use inquiry."[234]

Also importantly, the *Graham* court heavily reiterated each of the Second Circuit's confused and problematic *Cariou* standards, including the use of a side-by-side comparison and the "reasonable observer" standard to determine transformativeness.[235] Specifically, the *Graham* court suggested that the reader of the opinion may be a "reasonable observer" while still not clarifying who or what that is.[236] The aesthetic determinations again relied upon the court's assessment of the works without reference to anyone else's expertise, experience, or knowledge.[237] However, because Prince used Graham's entire photograph, the court suggested that Prince would need substantial evidentiary support for transformativeness, such as from art criticism or even evidence of the artist's intent, noting that the latter may be helpful but is not dispositive.[238] In so doing, the court implied either that the reasonable observer standard is only applicable to works that are significantly altered or that the determination can and should be influenced by evidence of the artist's intent.[239]

Despite reiterating the Second Circuit's *Cariou* decision, there is one place where the *Graham* court deviated from the *Cariou* decision in ways that inch towards rebalancing the fair use inquiry.[240] The court assessed the second fair use factor and found that it weighed in favor of Graham.[241] Regardless, the court deemed discovery necessary to evaluate the first and fourth fair use factors."[242]

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234 *See id*. at 377–78.

235 *See id*. at 380.

236 *See id*. at 381.

237 *See id.* at 380–81. These aesthetic determinations include whether there is a different aesthetic in the moods and expressions, the primacy of the original image, and the amount of alteration to the original image.

238 *See id*. at 382.

239 *See* Graham v. Prince, 265 F. Supp. 3d 366, 382 (S.D.N.Y. 2017).

240 This rebalancing may be a function of the fact that the court could not find transformativeness as a matter of law.

241 *See Graham,* 265 F. Supp. 3d at 383. The fourth factor was also more contentious because of the pending transformativeness determination and because Graham's work may be engaged in a similar market. *See id.* at 384–85.

242 *See id*. at 386 (citing Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 808 F. Supp. 2d 634, 641 (S.D.N.Y. 2011)).

The second pending Prince suit has no reported decisions yet. Once again, it is a copyright infringement suit brought by a photographer against Prince for use of a black and white portrait, this time of musician Kim Gordon, in a different *New Portraits* show.[243] Prince allegedly uploaded the photograph, with a caption, to Instagram himself and then reproduced it as he did in *Graham*.[244] Although the cases are not joined, it appears that this court will follow any determination made by the court in *Graham*.[245] Further, within days of each other, Prince made the same summary judgment argument in both cases, using art experts.[246] Given that Prince reproduced the entire original works, skeptics argue that even if it is art, it should not be fair use.[247]

The final, and most recent, "appropriation art" case involves a titan, Andy Warhol. The Andy Warhol Foundation for the Visual Arts filed a declaratory judgment against Lynn Goldsmith regarding a photograph of the musician Prince.[248] Vanity Fair licensed Goldsmith's photograph to use as an artist's reference and commissioned Warhol to create an illustration of Prince.[249] Although

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243 *See* Complaint at 1–2, McNatt v. Prince, No. 1:16-cv-08896-PGG (S.D.N.Y. Nov. 16, 2016). Perhaps raising a further concern of gender issues similar to the racial and gender issues in his show incorporating Cariou's work, many of this show's works "tended to be lascivious, even skeevy, photos of young, attractive women . . . . Many of his *New Portraits* were based on pictures posted by the Suicide Girls, young women from the well-known alt-porn pinup collective." Adler, *supra* note 46, at 315–16.

244 Complaint, *McNatt*, *supra* note 243, at 2.

245 *See* Order at 1, McNatt v. Prince, No. 1:16-cv-08896-SHS (S.D.N.Y. July 18, 2017) (citing Graham v. Prince, 265 F. Supp. 3d 366 (S.D.N.Y. 2017)) (asking the parties to address the impact of the *Graham* decision.).

246 *See* Laura Gilbert, *Richard Prince Defends Reuse of Others' Photographs*, ART NEWSPAPER (Oct. 10, 2018, 5:38 PM), https://www.theartnewspaper.com/news/richard-prince-defends-re-use-of-others-photographs [https://perma.cc/N64H-2DYY].

247 *See, e.g.*, David Newhoff, *Graham v. Prince or Art v. Fair Use*, ILLUSION OF MORE (Oct. 17, 2018), https://illusionofmore.com/graham-v-prince-or-art-v-fair-use [https://perma.cc/3W6S-J7FU] (arguing that the real transformation was simply the Richard Prince branding); *see also* Adler, *supra* note 46, at 316–18 (discussing the divided art world and near unanimous criticism from online public reaction).

248 *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 332 (S.D.N.Y. 2019).

249 *See id*. at 318.

it is disputed as to whether Warhol used Goldsmith's photograph, Warhol subsequently created 16 works depicting Prince's face and a bit of his neck.[250]

Relying heavily on the *Cariou* decision, the court found Warhol's works to be "plainly" fair use.[251] As with *Cariou*, the court made several key findings with respect to transformativeness: the secondary work had a different aesthetic based on Goldsmith's articulated intent, the court identified differences in composition and aesthetic, and the court noted that the secondary work was "immediately recognizable as a 'Warhol' rather than a photograph of Prince . . . ."[252] Like *Graham*, the court actually assessed the second factor, but influenced by *Cariou*, the court deemed the second factor neutral as the court found Warhol's work to be transformative and as the original work was published.[253] Transformativeness also heavily influenced the court's third factor analysis, amount and substantiality of use. The court undertook a fuller analysis, but ultimately its findings depended on the fact that Warhol eliminated several of Goldsmith's original elements, transforming the look.[254] Likewise, the court found the fourth factor favored Warhol because of the works' transformative nature.[255]

Aside from involving appropriation art, many appropriation cases have one important thing in common: favoring famous artists over lesser known artists. A famous artist, now Andy Warhol, appropriates the work of a lesser known artist, in this case Lynn Goldsmith, and his recognizable branding becomes important in finding transformativeness.[256] One must query whether appropriation art fair use simply favors the famous over the majority of artists.[257] And it certainly distorts the economic incentive structure inherent in the copyright regime, particularly because transformativeness addresses the secondary user's interests, but the other

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250 *See id*. at 319.

251 *See id*. at 324, 325–31.

252 *Id*. at 326.

253 *See id.* at 327.

254 *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 329–30 (S.D.N.Y. 2019).

255 *See id.* at 330–31.

256 *See id*. at 317, 321–22.

257 Professor Andrew Gilden has also noted a gender and race component to the transformative cases, noting how women and minorities often are treated as raw materials in the transformative analysis and consequences. *See* Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 379–80 (2016).

three factors address the interests of the original work's artist.[258] Adding insult to injury, the lesser known artist may be subject to tremendous expenses defending a declaratory judgment action brought by the appropriating artist.[259]

Although these specific cases involve what has been termed appropriation art, the term is less important than the behavior. Many pieces of recent visual art involve some form of appropriation.[260] Further, one may wonder if other circuits, like the Ninth Circuit, have more carefully considered fair use in visual art.[261] Two 2013 Central District of California decisions may hearten photographers because fair use arguments were rejected regarding altered photographs of various Sex Pistol band members.[262]

However, only a few months later and after the Second Circuit's *Cariou* decision, the Ninth Circuit leaned closer to the Second Circuit jurisprudence on appropriation art, this time, for an artist who has no reputation as an appropriation artist.[263] In *Seltzer v. Green Day, Inc.*, Seltzer created the Scream Icon, a closely cropped, screaming, contorted face, which was then reproduced and plastered on walls as street art.[264] A filmmaker photographed a weathered copy from a Los Angeles brick wall, cropped and enlarged it, changed the coloring, added black

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258 *See* Leval, *supra* note 1, at 1116.

259 *See* Stephen Carlisle, Warhol v. Goldsmith: *A Terrible Decision, Correctly Decided*, NOVA SOUTHEASTERN U. (July 11, 2019), http://copyright.nova.edu/warhol-v-goldsmith [https://perma.cc/AUC7-EM29] (noting that Goldstein started a GoFundMe page to help with her legal fees, $400,000 through this motion).

260 *See, e.g.*, Adler, *supra* note 195, at 571.

261 The Ninth Circuit has long been considered a significant circuit for copyright decisions. *See, e.g.*, Michael C. Albin, *Beyond Fair Use: Putting Satire in its Proper Place*, 33 UCLA L. REV. 518, 538 (1985); Allison M. Scott, *Oh Bother: Milne, Steinbeck, and an Emerging Circuit Split over the Alienability of Copyright Termination Rights*, 17 J. INTELL. PROP. L. 357, 359–60 (2007).

262 *See* Morris v. Guetta, No. LA CV12-00684 JAK, 2013 WL 440127, at *1, *3 (C.D. Cal. Feb. 4, 2013) (finding that, with no justification provided, an appropriation artist's modifications of Morris' photograph is irrelevant and applied all fair use factors to find no fair use); Morris v. Young, 925 F. Supp. 2d 1078, 1084–89 (C.D. Cal. 2013) (Although not called an appropriation artist, Young's fair use argument was rejected in summary judgment for two of three works when he took images from the internet and created works by, for example, slightly cropping and tinting a photograph red.).

263 Seltzer v. Green Day, Inc., 725 F.3d 1170, 1173–74 (9th Cir. 2013).

264 *Id.*

streaks, and painted a large red cross across it.[265] For Green Day's tour, the filmmaker centrally placed the altered Scream Icon in a larger and changing set of images to serve as the backdrop for a specific, religiously-oriented song; although other parts of the stage would change with new art and alterations to three images of Jesus Christ, the altered Scream Icon never moved or changed.[266] In finding that this was fair use, much of the Ninth Circuit analysis paralleled the Second Circuit's *Cariou* decision with just a few changes.

First, when assessing transformativeness, the court seemed to place weight on the fact that the Scream Icon was used as raw materials, only a component of a larger work.[267] Second, the court was not clear whose interpretation of the original Scream Icon mattered; it offered its own reaction as well as the artist's intent; regardless, it found that the original was clearly not religious while the backdrop and song were.[268] Third, the Ninth Circuit did give weight to the second and third factors.[269] However, when considering the quantity taken, the court found that the original work was not meaningfully divisible, ultimately neutralizing this factor.[270] The court did not specify why this was so, when visual art would be meaningfully divisible, or by what standard this should be determined.[271]

Seltzer provided few facts about market harm, which may have significantly affected the ultimate conclusion.[272] Regardless, this case indicates both that there may be some analytical creep from the Second Circuit to other circuits and that works need not be labeled appropriation art to trigger a similar fair use analysis.

IV. REBALANCING THE PURPOSE AND CHARACTER OF FAIR USE

Despite Judge Leval's admirable attempt to provide grounding to the fair use inquiry, courts have distorted the balance in appropriation art cases. The arc of these cases demonstrate that problems still exist and perhaps are exacerbated in visual art disputes. Many courts seem to use transformativeness as a conclusory

265 *Id.* at 1174.

266 *Id.*

267 *See id.* at 1176–77.

268 *See id.* at 1177.

269 Seltzer v. Green Day, Inc., 725 F.3d 1170, 1178–79 (9th Cir. 2013).

270 *See id.*

271 *See id.*

272 *See id.* at 1179.

label denoting that the court feels the use is "fair," rather than as a deeply evaluated consideration in the first fair use factor. [273] Further, despite claiming that there is a reasonable observer standard, that determination is most often based upon the judge's perception of transformation, analogous to Justice Stewart's pornography standard: the court knows it when it sees it.[274]

Over time and in the context of appropriation art, courts have made it easier to deem a work transformative, which conversely makes it more difficult for copyright artists to assert their rights.[275] If there is any validity to the economic incentive story as the justification for U.S. copyright laws, then allowing a lax fair use standard will discourage some artists or decrease artists' output because they will not be able to capture the expected, full economic benefits.[276] Certainly one could question the incentive story, but some artists themselves have expressed the importance of their copyright rights and want to reinvigorate that economic incentive.[277] The concern is that others will be able to use the artists' original work simply because they want to, because it is easier, or because it is cheaper. On the other hand, if fair use becomes too high a hurdle, it creates boundaries that chill some creativity that could benefit the general public, the ultimate purpose of the copyright law.[278] Striking the right balance is not easy but is necessary to avoid vitiating the copyright incentive structure in the U.S.[279] Three steps can help: (1)

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273 *See* 1 NIMMER ON COPYRIGHT, *supra* note 11, § 13.05[A][1][b].

274 *See* Carlisle, *supra* note 259.

275 *See supra* Part III.

276 *See* Schaumann, *supra* note 3, at 263–64 (recognizing that part of the analysis must depend on whether "any particular unauthorized use is dangerous because it impairs the economic incentive to create[,]" despite arguing for significant copying ability to allow for appropriation art). Further, if nothing else, the output may be decreased because, failing to capture economic benefits from their art, artists will be forced to spend more time in other paid employment rather than in creating more art.

277 *See* Cohen, *supra* note 23.

278 *See* Lunney, *supra* note 3, at 814; Schaumann, *supra* note 3, at 260–61.

279 Some commentators raise concerns about a copyright regime that attempts to shape behavior rather than merely reflect agreed upon social norms. *See, e.g.*, PATRY, *supra* note 6, at 165–71, 173–76. However, others suggest that artists in particular are hungering for a clearer articulation of their rights and opportunities. *See* PATRICIA AUFDERHEIDE ET AL., COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 5 (2014), http://www.collegeart.org/pdf/FairUseIssuesReport.pdf

reinvigorate the multifactor test; (2) use an objective standard to assess artist's intent for transformativeness; and (3) add a consideration of fungibility to the first factor.

A. MULTIFACTOR TESTS REQUIRE MULTIFACTOR ASSESSMENT

The fair use analysis is intended to weigh the copyright rights of the original artist against the needs of other artists to utilize the original artist's work, in other words, the need to loosen copyright's monopolistic nature to encourage new creativity.[280] The first fair use factor focuses on the interests and needs of the accused infringer, but the other three factors direct focus on the original artist's interests.[281]

Consideration of both sides' interests is critical.[282] Accordingly, perhaps the most obvious problem with some courts' fair use assessments are the quick dismissals of any factor other than transformativeness in the ultimate decision.[283] The fair use factors, which are not even an exclusive list, are intended to present the different ways one could slice and dice the respective interests at play in copyright and fair use.[284] The *Cariou* court, based upon the Supreme Court's *Campbell* decision involving a parody, has led courts astray with respect to transformativeness in two ways. First, it drew too much of an analogy between

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[https://perma.cc/ZKJ5-TMKN] (noting that many artists are actually censoring their work, as opposed to the appropriation artists highlighted in this Article, because they are unaware of how fair use may protect their projects). Providing greater clarity as to the scope of fair use in advance can provide better guidance for artists and may avoid costly litigation to resolve disputes.

280 *See* Leval, *supra* note 1, at 1116.

281 *See id.*

282 *See id.* at 1111 ("[I]t is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.").

283 The Seventh Circuit made a similar critique of the Second Circuit's approach in *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

284 *See* Leval, *supra* note 1, at 1110.

parodic works and all types of transformative works.[285] Second, it gave short shrift to all of the other factors, and particularly the fourth factor.[286]

As to the first point, a good, valuable, or funny parody really must do two things simultaneously: it must relate to or reflect the original work for purposes of ridicule while also making it clear that it is not the original work.[287] Original works subject to parody are likely to be more creative.[288] Therefore, in order to allow breathing room for parodies, which is the kind of criticism for which an original work's artist is unlikely to grant a license, the second fair use factor on the nature of the copyrighted work becomes nearly a nullity.[289]

Likewise, the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, is less valuable in assessing fair use for a parody.[290] A sufficient amount of the work (quantitatively and/or qualitatively) must be taken to make the parody effective both as a criticism and to make the subject of criticism recognizable for the audience.[291] Again, following the *Campbell* decision regarding the unique nature of parody as a pointed criticism imbued with humor, the third factor now becomes an assessment of whether the amount taken "conjures up" the original or is more than necessary in light of its parodic justification.[292] Interestingly, the *Cariou* court rejected the notion that the taking must be no greater than necessary, thus further diminishing the importance of the third factor for a work that is transformative, even if not parodic.[293]

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285 *See* Cariou v. Prince, 714 F.3d 694, 707–08 (2d Cir. 2013).

286 *See id.* at 708–10.

287 *See, e.g.*, Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741, 745, 747 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (*per curiam*).

288 *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

289 *See, e.g.*, Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962, 979 (C.D. Cal. 2012); Henley v. Devore, No. SACV 09-481 JVS (RNBx), 2010 U.S. Dist. LEXIS 67987, at *38 (C.D. Cal. June 10, 2010); Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 464 F. Supp. 2d 495, 507 (E.D. Va. 2006).

290 *See Campbell*, 510 U.S. at 588.

291 *See id.* at 569–88 (finding that 2 Live Crew did not take too much by using the same opening riff and first line when added other sounds and departed markedly from the original work's lyrics; the court did remand as to the music).

292 *See, e.g.*, *Henley*, 2010 US Dist. LEXIS 67987, at *39–40; *Louis Vuitton*, 464 F. Supp. 2d at 507.

293 *See* Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013).

The Supreme Court's decision to give such short shrift to the second and third factors for parodies is inextricably intertwined with the unique nature of a parody.[294] The short shrift given to these factors in *Campbell* is neither an indictment of the usefulness of the factors nor is it truly ignoring the factors. It is merely an assessment that, in light of what a parody does, these factors will always be of little help in weighing whether these critical, humorous works should be fair use.[295] One can assume that many artists are, after all, unlikely to open themselves up to a parody via license. The real inquiry is whether what was taken was necessary to be effective and the effectiveness of the parody.[296]

However, the wholesale adoption of this standard for all transformative works is wholly inappropriate. Transformativeness should be assessed in its broadest sense to determine whether there is "new expression, meaning, or message."[297] If that is true, then the specific type of transformativeness alleged should dictate how the second and third factors are assessed and greater weight may be appropriate where the relationship between the original and secondary work does not involve comment, criticism, or the like. And yet, the Second Circuit essentially applied the same weight to these factors as one would in a parody.[298] To do so vitiates these factors for nearly any derivative work.[299]

The consequence of improperly, presumptively diminishing these factors is hard to quantify because no factor should be dispositive. Generally, however, the secondary user raising fair use should have a harder time to prove fair use if the work is creative and if the user took a significant portion of the work.[300]

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294 *See supra* notes 287–93 and accompanying text.

295 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586, 587 (1994).

296 *See supra* notes 287–93 and accompanying text.

297 *Cariou*, 714 F.3d at 706.

298 *See* Cariou v. Prince, 714 F.3d 694, 710 (2d Cir. 2013).

299 The Second Circuit suggested that there are derivative works that would not be transformative, such as "a book of synopses of televisions [sic] shows." *Id*. at 708. Given a broad enough definition, however, one could argue that the selection of facts and arrangement of information is transformative. Additionally, it is notable that the Supreme Court held that a use does not need to be transformative to be fair. *See Campbell*, 510 U.S. at 579.

300 *See, e.g.*, Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 563–65 (1985) (holding that fair use is less likely to be found where a large quantity and/or quality of an original work is used).

Thus, for example, Koons' criticism of mass media using Blanch's photograph[301] would be taking creative work out of necessity to comment on its meaning, and the amount taken actually was limited to be sufficient for his commentary. These factors may weigh in favor of fair use for Koons. And if Koons' work was a parody, then taking more may have been appropriate. But Prince indicated that he was not looking to comment on the creative choices or contexts of Cariou's work, but rather simply sought the factual depiction of Rastafarian portraits.[302] Thus, whether he took a creative work seems a valuable inquiry. Likewise, the amount taken seems relevant. Reinstating these requirements in accordance with the kind of transformative work may do much to rebalance the manner in which fair use has been distorted.

Second, the Supreme Court has repeatedly noted that the fourth factor, effect of the use upon the potential market or value for the copyright work, is the most important element.[303] Even when the Supreme Court recognized the limited value of the second and third factors for a parodic work, it still reaffirmed the importance of the fourth factor.[304] Of all the factors, this one most directly assesses the economic impact of fair use on the original work's artist.[305]

Ironically, Judge Leval seemed to be concerned that courts would treat the fourth factor as nearly dispositive even with negligible economic loss to the original work's artist.[306] Unfortunately, courts have taken his recommendation simply to change where their dispositive determination lies; now, courts focus on transformativeness.[307]

Moreover, in line with the parody cases, the *Cariou* court expressed significant skepticism with respect to derivative markets to the point where any market other than those already exploited by Cariou seemed discounted or irrelevant.[308] Doing so dramatically undermines the economic incentive structure, particularly for industries where derivative/licensing markets can be significant,

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301 *See* Blanch v. Koons, 467 F.3d 244, 247–48 (2d Cir. 2006).

302 *See supra* notes 220–22 and accompanying text.

303 *See, e.g.*, *Harper & Row*, 471 U.S. at 566.

304 *See* Campbell v. Acuff-Rose, 510 U.S. at 586–94.

305 *See* Leval, *supra* note 1, at 1124.

306 *See id.*

307 *See supra* Parts III.B–D.

308 *See* Cariou v. Prince, 714 F.3d 694, 708–09 (2d Cir. 2013).

like photography.[309] Further, to consider only existing market exploitation by the original owner unfairly benefits artists that are already successful, undermining creativity incentivization for those who have yet to be recognized by the marketplace or are simply not as good businesspeople.[310] Failing to take into account potential markets based on the industry could undermine existing markets for the original work as well as chill similar types of works by other artists.[311]

Fair use is intended to weigh the interests of all the stakeholders in creativity.[312] Recognizing that fair use should be used to respond to the already established infringement of the copyright owner's rights, Judge Leval noted that the "transformative justification must overcome factors favoring the copyright owner,"[313] which means taking a serious, independent evaluation of all the fair use factors. The second user can always find a way to assert that his or her use is transformative, but such use may not be justified if the secondary user's taking is excessive or not in line with the purpose alleged by the secondary user.[314] Furthermore, the fourth factor must be given full consideration to avoid stripping the original work's owner of his or her derivative works right in toto. That full consideration will not happen if the fourth factor is denuded such that it only weighs against fair use if the two works are pure market substitutes for the markets in which the original work has already been exploited. Transformativeness does not take this consideration into account,[315] and so the fourth factor must be properly assessed in future cases.

Finally, if courts return to a fair assessment of all factors, they must also return to a balanced assessment. Most of these factors are (or should be) assessed on a spectrum. Therefore, courts should resist simply counting the factors and

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309 *See, e.g.*, *About Overview*, DIG. MEDIA LICENSING ASS'N, http://www.digitalmedialicensing.org/about.shtml [https://perma.cc/PW7Q-MH9K] (last visited Mar. 27, 2020) (introducing the Digital Media Licensing Association, which started in 1951 and is currently involved in digital licensing for more than 100 companies in addition to promoting and protecting the interests of the medial licensing community).

310 *See supra* notes 217–19, 256–59 and accompanying text.

311 *See, e.g.*, Cohen, *supra* note 23.

312 *See supra* notes 280–81 and accompanying text.

313 Leval, *supra* note 1, at 1111.

314 *See id*. at 1112.

315 *See supra* Part II.

ruling for the party with the greatest number.[316] Instead, to fully rebalance fair use, courts must weigh the strength of each factor carefully in making their final fair use determinations.

B. WHOSE MEANING MATTERS FOR TRANSFORMATIVENESS – TRANSFORMING TO GUIDANCE

Even if the fair use factors are rebalanced, the transformative assessment is still a problem. The foundational, exemplar transformativeness cases involve written or spoken words.[317] This is not to say that the interpretation of words in verbal or written form is perfectly clear; witness the numerous contract interpretation disputes, including over methodology.[318] Words at least give a starting place utilizing various common understandings to try and divine meaning.[319] With less guidance, courts currently must compare the meaning or message of visual art pieces (perhaps including perceptions of aesthetics) to assess transformativeness.[320] Purportedly using the reasonable observer standard, the recent appropriation art cases demonstrate the difficulty in defining the meaning attributable to visual art and seem rife with inconsistencies and unpredictability.[321]

The difficulties in defining transformativeness seem tied to resolving a fundamental question, namely, whose perception or meaning matters. On a simplistic level, there are two general choices: the audience or the artist.[322]

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316 *See* Leval, *supra* note 1, at 1110–11.

317 *See supra* Part II.

318 *See, e.g.*, Joshua M. Silverstein, *Contract Interpretation Enforcement Costs: An Empirical Study of Textualism Versus Contextualism Conducted Via the West Key Number System*, 47 HOFSTRA L. REV. 1011 (2019); Tushnet, *supra* note 24, at 702.

319 *See, e.g.*, Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1695–96 (2014) (considering the rise of visual images in legal advocacy and potential problems, including the lack of tools for interpreting visual persuasion as compared to the traditions and debates in interpreting ambiguous text).

320 *See supra* Parts III.C–D.

321 *See supra* notes 185–207, 236–39 and accompanying text.

322 Professor Alfred Yen suggests that aestheticians have three approaches used in interpreting art: (1) formalism (there is one objective meaning); (2) intentionalism (the artist's intent governs); and (3) reader-oriented theories (meaning exists in the mind of the audience). *See* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 261–66 (1998). Focusing

Presuming that the audience means the general public, one may argue that this approach best supports the goal of copyright law, to encourage more creative works for the public's benefit.[323] If the general public perceives a new message (really that the secondary work adds to the repository of art), then the public receives the intended benefit.[324] Relying on the general public's perception, however, is flawed. Although not in the copyright context, the *Claudio v. United States* decision aptly demonstrates the problem with using a general audience standard.[325] Claudio created a painting and applied for a license to display it in a federal building's main entrance.[326] Inexplicably, he was granted the license without providing information regarding the content of the painting or even a title.[327] Claudio chose to display a painting entitled *Sex, Laws & Coathangers*:[328]

> The work bears a painting of a nude female and, attached to the canvas, a three-dimensional representation of a human fetus and a metal wire coathanger. The curved end of the coathanger is partially straightened, and the coathanger appears to be dripping blood. The work measures approximately ten feet long by seven feet high.[329]

Some additional elements: the woman is wearing a gold crucifix around her neck, part of an American flag covers part of her face, one end of the coathanger points to the word "laws," and the fetus and area around it is tinged

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on the latter two, this Article suggests that the recognized flaws in each theory and the specific purpose of fair use demonstrate that a fixed interpretation is not required or appropriate to guide artists to create more art for the benefit of the general public.

323 *See generally* Tushnet, *supra* note 24, at 751 (noting the important interests of the audience).

324 *See supra* note 3.

325 *See* Claudio v. United States (*Claudio I*), 836 F. Supp. 1219 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994).

326 *See id.* at 1220.

327 *See id.* at 1221.

328 *See id.* at 1222.

329 *Id.*

or streaked with red.[330] Additionally, the canvas itself is in the form of a cross.[331] Although the work must concern abortion, both parties conceded that they could not identify whether the painting's viewpoint was pro-choice or pro-life.[332] The court itself deemed the painting ambiguous.[333]

Consider the *Claudio I* court's experience in the context of fair use transformativeness. Under modern art theory and for contemporary visual art, "meanings can be contradictory, multiple[,] and are certainly open-ended and unstable."[334] In teaching contemporary visual art interpretation, a Tate Paper suggests that the process of interpretation be rigorous even though the result may lead to a multitude of meanings, potentially even contradictory ones.[335] This reflects the postmodern notion that "the world is given meaning through local, personal narratives rather than one grand, master narrative . . . ."[336] As a consequence, "[g]reat art has many layers and a multiplicity of possible meanings."[337]

Particularly when it comes to contemporary art, therefore, it is fallacy to attempt to impose one meaning or one message upon the art.[338] Perhaps one could

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330 *See id.* at 1232–33 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994).

331 *See* Claudio v. United States (*Claudio II*), 836 F. Supp. 1230, 33 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994).

332 *See id.* at 1230.

333 *See id.* at 1236.

334 Helen Charman & Michaela Ross, *Contemporary Art and the Role of Interpretation*, TATE (2004), https://www.tate.org.uk/research/publications/tate-papers/02/contemporary-art-and-the-role-of-interpretation [https://perma.cc/3SMW-CY4B] (noting the challenges posed by the process of interpretation in contemporary visual art).

335 *See id.*; *see also* Terry Barrett, *Principles for Interpreting Art*, 47 ART EDUC. 8, 9–10 (1994) ("No single interpretation is exhaustive of the meaning of an artwork and there can be different, competing, and contradictory interpretations of the same work.").

336 *See* Charman & Ross, *supra* note 334; Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 446–47 (2008) (discussing Roland's Barthes' view that text is interpreted contextually by the readers, otherwise called the reader-response theory).

337 *See* Tom Anderson, *Interpreting Works of Art as Social Metaphors*, 15 VISUAL ARTS RES. 42, 46 (1989).

338 *See, e.g.*, Barrett, *supra* note 335, at 9; Yen, *supra* note 322, at 264.

survey the relevant audience to narrow down the options, but in the trademark context, the untrustworthiness of survey data is often raised.[339] One can assume that similar concerns about study design to test the meaning of visual art, especially in light of the post-modern take on art interpretation, may make it difficult to determine the meaning by any audience greater than one. Therefore, using the general public to ascertain one particular meaning for the original and secondary works respectively seems a futile exercise, certainly one that is rife with lack of clarity, unpredictability, and even contradictions.[340] Further, the artist is more likely to be steeped in artistic history and more likely to be able to consider and be able to articulate the specifics to which the work is responding.[341]

There are two alternate, potential measures of audience perception: the court or experts. As demonstrated by the modern appropriation decisions, relying upon the court's perception is entirely unpredictable and appears subjective.[342] It also runs counter to Justice Holmes cogent articulation as to why attorneys and judges should never be in the position to assess what art is worthy.[343] As to art experts, this could open the door for a battle of the experts over questions analogous to what is art. While courts are well versed in handling such battles, reliance on experts also falls into the trap of looking for an "authoritative voice"

339 *See, e.g.*, Louis Vuitton Malletier v. Dooney & Bourke, Inc., 525 F. Supp. 2d 558 (S.D.N.Y. 2007); Trouble v. Wet Seal, 179 F. Supp. 2d 291, 307–08 (S.D.N.Y. 2001).

340 *Cf.* Heymann, *supra* note 336, at 448–49 (advocating to use the reader's interpretation in the context of text). However, Professor Laura Heymann also notes that, when the artist is famous, the artist's stated intent may impact the reader's reaction as compared to a lesser artist. *See id.* at 449–50. Although she recognizes the danger, such bias fundamentally undermines the use of a reader-centered approach to determining transformativeness because readers will be influenced by who the artist is rather than what the artist produced; the focus will not be on advancing more creative works, but supporting already famous artists, exacerbating an already existing problem. *See, e.g.*, Gilden, *supra* note 257, at 375.

341 *See generally* Adler, *supra* note 195, at 610, 612–13 (discussing contemporary art as an insider's game and arguing for an art world insider as the appropriate viewer).

342 *See also* Yen, *supra* note 322, at 300–01; *cf.* Heymann, *supra* note 336, at 457.

343 *See supra* note 34 and accompanying text.

to deem one meaning as the superior or only meaning and may simply support art world superstars to the detriment of the lesser known.[344]

More importantly, if one must wait until there is an audience for the secondary work to determine if the original work's meaning is transformed, then the fair use doctrine is less capable or completely incapable of guiding artists when creating new art.[345] The uncertainty is likely to chill expression for artists less self-assured and with less wealth than the Koonses and Princes of the art world. In fact, the ambiguity now present is already chilling the production of art.[346]

One may argue that seeking the artist's intent is equally problematic. As with art experts, one may characterize it as simply seeking one authoritative voice as to the artwork's meaning.[347] In fact, because the artist will have only one interpretation (if that), it falls into the same problem of asserting one meaning over all others, in contradiction to the post-modern approach.[348]

Moreover, perhaps what transformativeness should be assessing is not the imposition of an actual meaning on the works. Rather, fair use writ large should help guide artists in determining whether they can make additional works with

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344 *See* Charman & Ross, *supra* note 334; Adler, *supra* note 195, at 616; *see also* Anderson, *supra* note 337, at 45–46 (1989) ("The discursive meanings of paintings, sculptures, even photographs may not be self-evident, however, precisely because of all the possibilities for meaning intrinsic to the intellectualization of art . . . . In a pluralistic culture that spawns a pluralistic art subculture, one cannot hope to have integrated all the necessary premises for complete understanding of all images.").

345 Professor Heymann notes that, when a text is released, discursive communities are created around those texts that engage with and begin to offer interpretive views. *See* Heymann, *supra* note 336, at 455. Over time, the reaction of these discursive communities may change. *See id.* at 455–56. This weighs against using the reader response as the response may be entirely different depending on when the copyright suit is brought, which again will fail to guide artists planning new works. *See also* Subotnik, *supra* note 46, at 974 (noting some work may not have a community prior to litigation).

346 *See* AUFDERHEIDE ET AL., *supra* note 279 (noting that many artists are censoring their work, as opposed to the appropriation artists highlighted in this Article, because they are unaware of how fair use may protect their projects).

347 *See* Charman & Ross, *supra* note 334.

348 *See* Barrett, *supra* note 335, at 11; *see also* Subotnik, *supra* note 46, at 940, 971 (noting that "putting weight on user intent risks barring uses by those unable to express–or to afford competent legal counsel to help them express–legally compliant goals").

the materials on hand.[349] Transformativeness, specifically, can be used to assess whether the artist's intention in utilizing the original work, realized or not, was simply lazy appropriation or was intended to create new art for the public's benefit—in other words, whether allowing the appropriation art without requiring the customary remuneration to the original work's artist serves the public benefit.[350] This approach comports with the copyright regime's approach writ large: the focus is on affecting the artist in order to garner the greatest benefit to the public.[351] As long as such reaction is not treated as an *interpretation* but solely as evidence of *intention*, then it seems to avoid the problems of multi-verse interpretations expected for modern works while providing guideposts for artists generating more works.

Even so, this Article does not suggest that the court should peer into the artist's mind to ascertain a subjective artistic intent. Among other problems, relying upon an artist's stated intent raises the concern of a post-hoc rationalization to accommodate a stronger fair use argument and/or requires an artist to articulate his or her intent, which may be difficult.[352] This concern about post-dispute changes is one reason that contract formation is no longer dependent upon the parties' subjective intent.[353]

There is another option, however. Fair use must function as a channeling doctrine–to channel artistic behavior in ways that strike the right balance between incentivization and avoiding chilling creativity. [354] Accordingly, transformativeness should be circumscribed in a way that provides guidance to artists contemplating or creating future works.[355] As with contract formation, an

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349 *See* Adler, *supra* note 195, at 582 (citing a curator, Professor Adler argues that Jeff Koons altered his artistic style in direct response to losing his *Banality Show* fair use cases. Also noting that fair use has affected other artists).

350 While the goal is to provide guidance to artists, this Article advocates for using intent as an intention to communicate new expression rather than an intent to comply with the statutory fair use factors or to be a good citizen. *See* Subotnik, *supra* note 46, at 947–49.

351 *See supra* note 3.

352 *See, e.g.*, Adler, *supra* note 195, at 584–89; Subotnik, *supra* note 46, at 971.

353 *See, e.g.*, Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 354 (2007).

354 *See supra* notes 47, 51–52 and accompanying text.

355 This may be most relevant to lesser known or lesser resourced artists who may need to protect or defend their work against those who use the

objective assessment of the artist's intent at the time of creation may allow for such guidance.[356] Artists would be forewarned that self-serving statements alone will not be sufficient–although their stated intentions, especially if they are contemporaneous with creation, may be considered. Even if the appropriation artist has a stated intention, however, the objective manifestation of the artist's intent may not be coextensive and should be the key assessment. The court should place the burden on the secondary user to produce evidence from the time of creation, including full details of related art pieces and the creation process. By utilizing evidence from the time of creation, as with contracts, this may encourage artists to create more contemporaneous records, give guidance as to what kind of information will assist a claim of fair use, and may even foster pre-appropriation communication between the original work artist and the appropriation artist.

For example, the name given to the art piece or the show for which a particular piece was created may give guidance as to the artist's intention. The name of Koons' show in the *Rogers* case, *Banality Show,* is helpful in ascertaining Koons' intention in creating his art pieces.[357] There may have been other contemporaneous evidence of artistic intent, such as the theme and cohesiveness of the planned show, information on how the artist developed the show's theme, what the artist's search strategy for raw materials was, how the artist found the original work, and the like. Art experts may be useful at this point as well as long as their opinions are not used to ascribe meaning to the artwork. Such evidence allows the court to assess whether the intended purpose was transformative without forcing or relying upon the appropriation artist's stated intent.

Additionally, courts must also be more cautious in considering transformativeness as a spectrum, like creativity, rather than a dichotomous choice between transformation and reproduction. Rather than deeming a work to be transformative, courts should consider *how* transformative the work is and use that degree of transformativeness to weigh whether and how much the first factor weighs in favor or against fair use.[358]

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copyright regime more regularly. *See generally* Subotnik, *supra* note 46, at 962–63.

356 *See e.g.*, Ray v. William G. Eurice & Bros., Inc., 93 A.2d 272, 279 (Md. 1952) (using the objective intent to be bound for contract formation).

357 *See* Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992).

358 *See* Heymann, *supra* note 336, at 449 (observing this in the context of using the reader response rather than the artist's intent).

Because the fair use analysis is intended to be flexible, all uncertainty cannot be eliminated.[359] The trier of fact must make its decision on a case-by-case basis regarding whether the evidence is sufficient such that the transformative consideration should weigh in favor of the secondary user.[360] But considering objective evidence of artistic intent (and subjective statements contemporaneous to creation to the extent they are otherwise supported) may provide better guidance to artists as they consider new works and therefore, makes it less likely that artists will chill creative expression out of fear of the unknown or of failing to achieve what an audience would perceived as new expression.[361]

C. FUNGIBILITY BALANCES THE TRANSFORMATIVE CONSIDERATION

There is one final consideration to add to the first factor of fair use: fungibility.[362] At its heart, transformativeness approaches the question of the public benefit, namely, whether the exclusive rights of the copyright regime must be relaxed to foster new creative works.[363] Even putting aside the interests reflected in the other fair use factors, something is still missing. None of it answers the question of whether the secondary user *needed* to use the copyright protected work to create the secondary work. Logically, courts may want to stay away from this type of evaluation because it seems to invade the creative process too much. At the same time, the Supreme Court has warned against secondary uses that are simply to obtain attention or avoid drudgery.[364] Transformativeness does not really address the drudgery question, but a fungibility assessment may do so.

Questions surrounding the first fair use factor are often posed as assessing when it is appropriate for an artist to use another artist's copyrighted work as raw

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359 *See supra* notes 11–12 and accompanying text.

360 *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

361 *See, e.g.*, Subotnik, *supra* note 46, at 973–74.

362 Often used in the context of contracts, fungible is defined as "[c]ommercially interchangeable with other property of the same kind." *Fungible*, BLACK'S LAW DICTIONARY (11th ed. 2019). In the context of this Article, fungibility refers to interchangeability, specifically when different works are interchangeable to achieve the same goals.

363 *See supra* notes 3, 7–10 and accompanying text.

364 *See also* Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 759 (7th Cir. 2014) (noting that fair use is not to protect lazy appropriation but rather to facilitate uses that would not always be possible if licenses were required).

materials or as the foundation of a new work.[365] In fact, this "raw-material paradigm" ignores the fundamental, appropriate reason for using preexisting images, namely, when the underlying copyrighted works are "so deeply infused with meaning that they can provide opportunities for personal development or broader cultural dialogue."[366]

In even broader terms, the original work should have unique characteristics that are useful to the creation of the secondary work. The more the characteristics of the original work are fungible for the purposes of the secondary user, the less likely the secondary user should have a claim to fair use. While this assessment should tack back to the objective evidence of artistic intent, the focus is not on the finished product but on the reasons why the original work was needed to produce the finished product. Notably, however, fungibility would not be dispositive or even presumptively determinative. As with transformativeness, fungibility would be assessed on a spectrum rather than a simple yes or no determination. And as with transformativeness, it would simply be a consideration to guide the court in evaluating the ultimate question—should this use be considered fair in order to further the goals of copyright law?[367]

Consider the *Cariou* case. At one point, Prince noted that he was looking for very factual representations of Rastafarians,[368] suggesting that any factual depiction of Rastafarians would suffice. Factual pictures of Rastafarians would have been interchangeable for his purposes. If he chose Cariou's photographs simply to avoid costs, such as the costs of taking his own photographs, paying Cariou or another photographer for a license, or identifying works in the public domain, then this fungibility inquiry indicates a high degree of fungibility and more heavily weighs against fair use. The copyright owner's rights do not need to be diminished to allow for the creative endeavor of the second user.

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365 United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 379 (S.D.N.Y. 1993). It cannot be solely because the art world has recognized appropriation art as a form of art. "The fact that the infringing copy can be classified as 'art' or as being part of an 'artistic tradition' cannot be used as a shield to salvage an otherwise defective fair use defense." *Id.*

366 Gilden, *supra* note 257, at 357.

367 *See Kienitz*, 766 F.3d at 759–60 (noting that there was no need for the secondary artist to take the original photograph, as opposed to other photographs of the same politician; the Seventh Circuit still found fair use appropriate, determining that "by the time the defendants were done, almost none of the copyrighted work remained," perhaps largely influenced by the third factor analysis).

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

Without a fungibility check, appropriation artists may be simply avoiding the "drudgery"[369] of finding non-infringing raw materials or creating their own raw materials. One consequence may be that further enabling wealthy artists to simply take the work of other, lesser known artists without paying for a license.[370]

As with transformativeness, the assessment should be inextricably tied to objective manifestations of artistic intent. At the same time, fungibility would not be a redundant inquiry. Instead, fungibility should act to refocus the court on the overall copyright scheme. If the exclusive rights do not have the fair use safety valve, then important expression is chilled.[371] But if the safety valve is too loose, then the exclusive rights have little chance to incentivize creativity. Fungibility reminds the court to consider whether the appropriation artist really had any reasonable, non-infringing alternatives. It serves to make sure that the safety value is neither too tight nor too loose.

V. CONCLUSION

It is true that "every new artistic work borrows from, or stands on the shoulders of, the art work that came before it."[372] Simply because appropriation art is recognized as an art form, however, does not mean that it must *a fortiori* be protected by the fair use doctrine. To avoid copyright infringement, the focus must be on whether fair use is a necessary release value to avoid chilling creative works or whether allowing fair use would discourage other artists from making their creative works.

Unfortunately, the current transformativeness test, when used in the context of visual art, fails to strike the right balance. As adopted by courts, transformativeness has been given too powerful a role and has no clear mechanism for determining meaning. Additionally, the spectrum between reproduction and transformativeness has been subsumed into a simple dichotomous evaluation as to whether the work is transformative or not. Most importantly, when the original work used as "raw materials" is easily interchangeable with other work or obtainable by the second artist without using anyone else's copyright protected

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369 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

370 *See, e.g.*, David Newhoff, *Graham v. Prince or Art v. Fair Use*, ILLUSION OF MORE (Oct. 17, 2018), https://illusionofmore.com/graham-v-prince-or-art-v-fair-use [https://perma.cc/HB4D-BPXR] (arguing that the real transformation was simply the Richard Prince branding).

371 *See supra* notes 47, 51–52 and accompanying text.

372 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (citing Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)).

material, it is not clear why the copyright rights of the first artist should be diminished. Instead, a rebalanced fair use analysis, with an appropriate transformativeness and fungibility assessment, should help protect all artists' rights—even though nothing could solve all the ambiguity or uncertainty inherent in fair use.