APPROPRIATION MAKES THE ART GROW FONDER: THE FAIR USE DOCTRINE AND THE FUTURE OF CONTEMPORARY ART

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"What has been will be again, what has been done will be done again; there is nothing new under the sun."[1]

ABSTRACT

The creation of art relies upon prior influences that work to inform new and emerging styles and movements. Yet, traditional notions of copyright law are at odds with postmodern art which thrives in the ubiquity of copying. The doctrine of fair use was codified in the Copyright Act of 1976 to facilitate a workable balance between protecting the rights of the creator and permitting others to borrow for the creation of new works. However, the adjudication of the fair use defense, specifically pertaining to transformative use, is not reflective of the changing landscape of contemporary art and is applied inconsistently throughout copyright jurisprudence. This Note examines the problematic approaches undertaken by the courts when applying the first factor of the defense and ultimately suggests a proposal in the form of rebalancing the fair use doctrine, narrowing the scope of derivative rights, and limiting vicarious and contributory liability on the part of the gallery or art museum displaying the work.

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1. *Ecclesiastes* 1:9.

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I. INTRODUCTION

Titian, the Italian painter, created the painting *Venus of Urbino* in 1534.[2] Titian's piece depicts Venus, the Roman goddess of love and fertility, reclining nude in a sumptuous palace. The figure in the work appears warm and delicate, conveying notions of sensuality, fidelity, and love.[3] In 1863, French modernist painter Édouard Manet composed *Olympia*, a painting bearing much resemblance to Titian's masterwork.[4] Although now illustrating a prostitute rather than a mythological goddess,[5] Manet posed the figure in the same position as Titian's Venus. The similarities are striking as both women are seen lounging with their right arms bent, left arms splayed across their bodies, and legs crossed at the ankles. Manet demystified the idealized Venus and reshaped her with a kind of real sexuality that broke conservative and conventional

2. Kamna Kirti, *The Stark Contrasts Between History's Two Famous Female Nude Paintings*, MEDIUM (Mar. 6, 2021), https://medium.com/the-collector/the-stark-contrasts-between-historys-two-famous-female-nude-paintings-289906abb31b.

3. Tom Gurney, *Venus of Urbino*, HIST. OF ART (Oct. 14, 2023) https://www.thehistoryofart.org/titian/venus-of-urbino/.

4. Tom Folland, *Édouard Manet, Olympia*, KHAN ACADEMY, https://www.khanacademy.org/humanities/becoming-modern/avant-garde-france/realism/a/manet-olympia (last visited Feb. 24, 2024).

5. Alicia du Plessis, *"Olympia" Manet – An Analysis of Édouard Manet's Olympia Painting*, ART IN CONTEXT (Oct. 9, 2023), https://artincontext.org/olympia-manet/.

rules existing in the art world. As evidenced by Titian and Manet, art has a long history of emulation and copying that has led to the continual progression of creative movements.

Copying is seen across the artistic realm, not just in paintings. Musicians have been sampling[6] since the early twentieth century, a practice that has deeply influenced the evolution of stylistic expression and revolutionized the way music is created.[7] Viewers also see copying in film,[8] photography, sculptures, and many other mediums. The pervasiveness of copying in a society steeped in images and content has inevitably led to litigation over ownership rights.

This Note addresses the current tension between copyright jurisprudence and contemporary art and concludes that judicial analysis of the fair use factors should reflect the changing landscape of postmodern art. Part II provides a look at key copyright principles and philosophical rationales, including the idea-expression dichotomy. It focuses particularly on how these concepts are at odds with the essence of contemporary art. Part III introduces the doctrine of fair use and its development throughout copyright law. Part IV presents case law central to the fair use inquiry in relation to contemporary art. This Part traces pivotal doctrinal development throughout the Second Circuit and the Supreme Court. Part V delves into how courts have determined transformative use through varied and ill-explained approaches. More specifically, this Part examines how the court's adjudication of transformative use is unfavorable when applied to postmodern art. Part

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6. Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Music Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 561–62 (2006) (explaining that sampling is the process of taking a sound bite from a pre-existing record and incorporating it into a new recording).

7. *A Brief History of Sampling*, THOMANN BLOG (July 1, 2018), https://www.thomann.de/blog/en/a-brief-history-of-sampling/; *see also To the Beat: Tracing the Origins of Sampling in Music*, KADENZE BLOG (Nov. 14, 2018), https://blog.kadenze.com/creative-technology/to-the-beat-tracing-the-origins-of-sampling-in-music/. In 1974, Gladys Knight & The Pips released "The Way We Were/Try to Remember." Mitchell Peters, *The "Ex-Factor": How Drake, Cardi B & More Sampled Lauryn Hill's "Miseducation" Single*, BILLBOARD (Apr. 7, 2018), https://www.billboard.com/music/rb-hip-hop/drake-nice-for-what-lauryn-hill-ex-factor-samples-kehlani-cardi-b-8297506/. Nineteen years later, in 1993, Wu-Tang Clan released "Can It Be All So Simple" on their iconic album *Enter the Wu-tang (36 Chambers)*. *Id.* A few years later, Lauryn Hill released "Ex-Factor" on *The Miseducation of Lauryn Hill*. *Id.* Each song features a sample of the previous track reworked into a new sound. *Id.*

8. Jack Goldstein created a two-minute film called *Metro-Goldwyn-Mayor* where he continuously loops the well-recognized MGM lion's roar. *Jack Goldstein,* Metro-Goldwyn-Mayer*, 1975*, WHITNEY MUSEUM AM. ART, https://whitney.org/collection/works/18656 (last visited Feb. 24, 2024). Goldstein's piece comments on the "endless recycling of Hollywood stories" and leaves its viewers suspended in anticipation for a movie that will never come. *Id.*

VI analyzes the Supreme Court's latest fair use decision, particularly the Court's focus on the use and purpose of the secondary work. Part VII examines the overlap between the copyright holder's derivative rights and the appropriation artist's goal of utilizing preexisting works to create new art. Part VIII proposes a three-pronged solution for copyright reform within the confines of contemporary art. The solution relates to the application of the fair use doctrine, derivative rights, and vicarious and contributory liability on the part of the gallery or art museum displaying the work.

II. COPYRIGHT AND CONTEMPORARY ART

Artists have always relied on copying, but the appropriation art space gained momentum in the mid-twentieth century due to technological advancements and heightened consumerism.[9] The practice of appropriation functions by incorporating existing works of art into new art as a method of articulating a new meaning.[10] This new meaning often takes the form of social commentary or criticism.[11] Appropriation artists, such as Andy Warhol, utilize images not limited to movie stars, soup cans, soda bottles, and cartoon characters as a vehicle to communicate their messages. Appropriation in contemporary art is further proliferated through mass media and innovation in digital technology.[12] Just as consumers are easily swept away in a sea of images and content, so are artists. With the ability to copy at the click of a button, copyright in contemporary art has taken on a new urgency. What was once a race to a paintbrush and canvas has become a sprint to see who can pick the right image in a culture of mass media and production.[13]

But where there is copying, there is copyright. Copyright's ultimate goal is to "promote the Progress of Science and useful Arts."[14] Copyright protection is granted to "original works of authorship fixed in any

9. *Appropriation*, MOMA, https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation/ (last visited Feb. 24, 2024).

10. Sarah L. Cronin & Joshua M. Keesan, *The Art of Appropriation*, LA LAW., Mar. 2014, at 23, 23.

11. *Id.*

12. Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 353 (2018) ("[W]hile art has always relied on copying, the technique has become more prevalent in contemporary culture. Because of shifts in both art and technology, copying itself has now become a central subject of art—as well as a basic tool of how people make it.").

13. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 572 (2016) ("We used to think of an artist as someone who sat in nature or in his garret, working alone to create something new from whole cloth. But now that we are bombarded by images, the most important artist may be the one who can sift through other people's art . . . .").

14. U.S. CONST. art. I, § 8, cl. 8.

tangible medium of expression."[15] The grant of a copyright functions to give a "special reward" to those who engage in "creative activity" and, therefore, stimulate progress.[16] This reward takes the form of granting rights in a work to its creator.[17] Such rights include the right to reproduce the work, to prepare derivatives of the work, to distribute copies of the work, and to display or perform the work publicly.[18] Copyright thrives on the presumption that these benefits extended to the creator will incentivize them to continue on their creative pursuit. Authors would be less inclined to exert efforts to create new works and would often be unable to recognize the economic gain from their innovation if others were allowed to illegally copy and sell the author's work.[19] On the other side of the scale is the philosophical underpinning of copyright law: utilitarianism.[20] This rationale is designed to encourage the creation and distribution of works for the public good. Copyright seeks to find the optimal relationship between these special rights conferred to the creator and the use and dissemination of the work in favor of the public interest.[21]

However, rights granted by copyright protection are not absolute. The key doctrine limiting the copyrightability of a work is the idea-expression dichotomy. This doctrine, which is partially codified in 17 U.S.C. section 102(b),[22] states that an author may not obtain copyright protection for an idea.[23] The doctrine is grounded in the understanding that only an author's original *expression* may acquire protection.[24] An author is not permitted to monopolize an idea but rather may be

15. 17 U.S.C. § 102.
16. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).
17. 17 U.S.C. § 106.
18. *Id.*
19. Lori Petruzzelli, *Copyright Problems in Post-Modern Art*, 5 DEPAUL J. ART, TECH. & INTELL. PROP. L. 115, 117 (1995) ("Economic incentives guarantee a fair return for an author's effort in order to increase the amount of creative work available to the public.").
20. 2 PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 526 (2022).
21. *Id.* at 527.
22. 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").
23. MENELL ET AL., *supra* note 20, at 566.
24. Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653, 1673–74 (1995).

rewarded for the creativity and effort that is required to produce an original expression.[25]

Nevertheless, these laws and theories governing copyright clash with the foundations of appropriation in contemporary art. Fundamentally, copyright laws operate to grant the creator the exclusive right to the work while contemporary artists seek to utilize pre-existing images to create new works.[26] More simply, copyright law aims to protect against copiers, while contemporary artists do the copying. "The *sine qua non* of copyright is originality."[27] However, appropriation art directly undermines this prerequisite. To satisfy the originality requirement, the artist must show that the work "possesses at least some minimal degree of creativity."[28] Although the threshold to meet the originality bar is low, this creates an obvious issue for contemporary artists who incorporate others' works into their own.

Further, appropriation artists lift existing images to comment on or critique societal issues. The result is the creation of a work that is novel in *idea* but not in expression.[29] The expression may appear the same or similar as it includes images from a pre-existing work. However, the artist's contribution is original in idea as they are presenting a new message, despite the resemblance in aesthetic appearance. Contemporary art runs counter to the very essence of the idea-expression dichotomy, suggesting instead that "[a]rtistic expression . . . is now subservient to the artistic idea."[30]

For example, take conceptual artist Barbara Kruger. Kruger utilizes mass-produced images from magazines, television, video, and newspapers to ignite conversation about our complicity within society and other traditional institutions.[31] Her work may not be original in expression, as the images seen in her pieces are pre-existing, but her

25. *See* Baker v. Selden, 101 U.S. 99, 104 (1879) (illustrating the difference between copyrightable expression—the description of the book-keeping system—and the non-copyrightable idea—the exclusive claim to the book-keeping system itself).

26. Caroline L. McEneaney, *Transformative Use and Comment on the Original: Threats to Appropriation in Contemporary Visual Art*, 78 BROOK. L. REV. 1521, 1527 (2013).

27. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

28. *Id.* ("Original, as the term is used in copyright, means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low[.]" (citation omitted)).

29. Petruzzelli, *supra* note 19, at 118–19 ("The notion that art does not need to have any form at all so long as the artist has a mental conception is a total rejection of copyright's notion that a line can be drawn between idea and expression.").

30. *Id.* at 115.

31. Margarita Lizcano Hernandez, *Barbara Kruger*, MOMA (2022), https://www.moma.org/artists/3266.

work finds originality in idea as she assigns new meaning to the commonplace images she is appropriating.[32] Technically, Kruger's work would not meet the requirements of the idea-expression dichotomy and would therefore not be copyrightable. Kruger's work is one example of how contemporary art conflicts with well-established principles of copyright law, including the idea-expression dichotomy.

III. DOCTRINE OF FAIR USE

The doctrine of fair use was introduced to facilitate a workable balance between protecting the rights of the creator and permitting others to borrow for the creation of new works.[33] Fair use in copyright law serves as the central defense for appropriators against those with copyright infringement claims.[34] This defense was developed to permit artists to "appropriate elements of earlier works in the creation of new and valid artistic creations" while sidestepping liability for copyright infringement.[35] The doctrine of fair use, by promoting the creation of new works even by means of appropriation, advances the overarching goal of copyright law.[36]

The fair use defense has been developed across a long history of copyright jurisprudence. Justice Joseph Story played a seminal role in the expansion of the doctrine in *Folsom v. Marsh*.[37] *Folsom* involved the reproduction of letters written by George Washington in a biography about Washington himself.[38] In his opinion as Circuit Justice, Justice Story conceptualized the fair use doctrine by imparting the foundation for the defense.[39] When determining the question of piracy, Justice Story suggested looking to "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the

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32. *Id.*

33. Anthony R. Enriquez, *The Destructive Impulse of Fair Use After* Cariou v. Prince, 24 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 8–9 (2013) ("[The fair use doctrine] draws a line between unauthorized infringement of copyright—'stealing' another's work and passing it off as one's own—and legitimate use of another's work to facilitate new, useful creation—'borrowing' another's insights in the name of progress.").

34. Badin, *supra* note 24, at 1675.

35. Robert A. French, Note, *Copyright:* Rogers v. Koons*: Artistic Appropriation and the Fair Use Defense*, 46 OKLA. L. REV. 175, 175 (1993).

36. Brockenbrough A. Lamb, Comment, *Richard Prince, Author of* The Catcher in the Rye*: Transforming Fair Use Analysis*, 49 U. RICH. L. REV. 1293, 1304 (2015).

37. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

38. *Id.* at 345.

39. *Id.* (discussing when a "fair and [bona] fide abridgement of an original work" does not constitute "a piracy of the copyright of the [original] author").

objects, of the original work."[40] In addition to his influential role in shaping the doctrine through the common law, Justice Story's language in *Folsom* is discernable in the text of the Copyright Act of 1976 in which the doctrine was codified.

The fair use doctrine was codified in an attempt by Congress to bring clarity to the defense.[41] Section 107 of the Copyright Act introduces a list of fair uses, including: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[42] The Act then moves on to list four non-exhaustive factors that must be considered when determining whether a use is fair:

> (1) The purpose and character of the use, including whether such use is of 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.[43]

Since the codification of the doctrine in the Copyright Act, the modern fair use landscape has been continuously developed by judicial interpretation. In his seminal 1990 *Harvard Law Review* article, Judge Pierre Leval called out the statute for its lack of guidance[44] and proposed what became the conceptual footing of factor one—the purpose and character factor.[45] Under this factor, the inquiry has shifted to determining whether or not the secondary use was "transformative."[46] A transformative use is one that "adds value to the original" as opposed to a use that "merely repackages or republishes the original."[47] According

40. *Id.* at 348.
41. MENELL ET AL., *supra* note 20, at 797.
42. 17 U.S.C. § 107.
43. *Id.*
44. Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105–06 (1990) ("These formulations, however, furnish little guidance on how to recognize fair use.").
45. *Id.* at 1111.
46. *Id.* ("I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*."); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (explaining that "transformative works . . . lie at the heart of the fair use doctrine[]").
47. Leval, *supra* note 44, at 1111.

to Leval, value is added to the original by the secondary use "if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights[,] and understanding."[48] Leval's transformative use formulation was first introduced and further refined in *Campbell v. Acuff-Rose Music, Inc.* In this case, the Supreme Court formally adopted the transformative inquiry when assessing the first factor of the fair use defense.[49] The Court asked whether the new work "adds something new . . . altering the first with new expression, meaning, or message."[50] *Campbell* also established that the more transformative the secondary use, the less important the other fair use factors are; consequentially, a finding of transformative use under the first factor is oftentimes outcome determinative of the entire fair use analysis.[51] As a result of this decision, the transformative use doctrine became increasingly central to the modern fair use framework.[52] However, the Supreme Court's latest fair use ruling in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* ("*AWF*") may have muddled the role that transformative use plays in the defense.[53]

IV. FAIR USE JURISPRUDENCE

A. Blanch v. Koons

This case stars Jeff Koons, a renowned appropriation artist known for his work that comments on materiality and consumption culture[54] with readymade[55] objects. The subject of this copyright infringement

48. *Id.*

49. *Campbell*, 510 U.S. at 579.

50. *Id.*

51. *Id.* ("Although such transformative use is not absolutely necessary for a finding of fair use . . . [transformative] works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . ." (citations omitted)).

52. *See* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 173–74 (2019) (presenting an empirical study based on 260 fair use decisions that addressed transformative use). "This empirical study relies on all reported transformative use decisions in the U.S. copyright history by January 1, 2017." *Id.* at 173. The popularity of the fair use doctrine rapidly increased after the *Campbell* decision was published in 1994. *Id.* at 174. "The share of transformative use decisions in fair use decisions jumped from 8% to 41% one year later." *Id.* The percentage has continued to increase, but "appears to [have] stabilize[d] at 90% in recent years." *Id.*

53. 598 U.S. 508 (2023); *see infra* Part VI.

54. *Jeff Koons*, ART STORY, https://www.theartstory.org/artist/koons-jeff/ (last visited Feb. 24, 2024).

55. *See id.* (presenting Koons's use of mass-produced objects such as vacuum cleaners and children's toys); *see generally Readymade*, MOMA, https://www.moma.org/collection/terms/readymade (last visited Feb. 24, 2024) (defining readymade as: "A term coined by Marcel Duchamp in 1916 to describe prefabricated, often mass-produced objects isolated

action is Koons's series entitled *Easyfun-Etheral*, specifically one painting in the series, *Niagara*.[56] These paintings were commissioned by Deutsche Bank in collaboration with Guggenheim.[57] *Niagara*, like the others in the series, was created by appropriating images and displaying them over a landscape background.[58] This work features four pairs of women's legs from the calf down, appearing above various desserts.[59] One pair of legs was lifted from a photograph taken by the plaintiff, Andrea Blanch.[60] Blanch, a fashion magazine photographer, published her photograph entitled *Silk Sandals by Gucci* in the August 2000 issue of Allure Magazine.[61] In her photograph, a woman's feet appear crossed at the ankle, resting on a man's leg in an airplane cabin.[62] On the woman's feet are a pair of Gucci sandals.[63] Koons's work was displayed at the Deutsche Guggenheim in Berlin, but Blanch did not see the work until it was exhibited at the Guggenheim in New York in 2002.[64]

Blanch commenced an action for copyright infringement, alleging that Koons's work infringed her copyright in *Silk Sandals by Gucci*.[65] The district court held that the work constituted fair use and granted Koons's motion for summary judgment.[66] In reaching its decision, the court applied the four-factor fair use test to determine infringement. When analyzing the first factor, the purpose and character of the use, the court deferred to Koons's stated intent recorded in his testimony.[67] Koons explained in his affidavit that he "transformed the meaning of [the] legs . . . into the overall message and meaning of [his] painting."[68] The district court found that the work was transformative according to Koons's

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from their intended use and elevated to the status of art by the artist choosing and designating them as such").

56. Blanch v. Koons, 467 F.3d 244, 247 (2d Cir. 2006).

57. *Id.*

58. *Id.*

59. *Jeff Koons,* Niagara, GUGGENHEIM, https://www.guggenheim.org/artwork/10734 (last visited Feb. 24, 2024); *Blanch*, 467 F.3d at 247 ("The painting depicts four pairs of women's feet and lower legs dangling prominently over images of confections—a large chocolate fudge brownie topped with ice cream, a tray of donuts, and a tray of apple danish pastries . . . .").

60. *Blanch*, 467 F.3d at 247.

61. *Id.* at 247–48.

62. *Id.* at 248.

63. *Id.* at 247–48.

64. *Id.* at 249.

65. *Id.*

66. Blanch v. Koons, 396 F. Supp. 2d 476, 482–83 (S.D.N.Y. 2005).

67. *Id.* at 480–81.

68. *Id.* at 481 (quoting another source) ("I thus suggest how commercial images like these intersect in our consumer culture and simultaneously promote appetites, like sex, and confine other desires, like playfulness.").

testimony and held that the rest of the fair use factors also favored Koons or were neutral between the parties.[69]

On appeal, the Court of Appeals for the Second Circuit similarly considered Koons's asserted purpose in using Blanch's photograph to determine the first factor of the fair use test.[70] The court of appeals held that Koons's use was transformative because he was "using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media."[71] The court deferred to Koons's own proposed description of his work to find that *Niagara* added new meaning to the original photograph and was therefore a fair use of Blanch's work.[72]

B. Cariou v. Prince

Key to the evolution of judicial interpretation of the doctrine of fair use is a 2013 decision involving appropriation artist Richard Prince and photographer Patrick Cariou. Richard Prince creates works by taking images found in pop culture and reworking the images into his art.[73] Referred to as the "father of Appropriation Art,"[74] Prince's works often re-contextualize familiar images to comment on the complicity of consumers.[75]

Throughout the mid-1990s, Patrick Cariou took a series of portrait and landscape photographs while spending time with Rastafarians in Jamaica.[76] A few years later, in 2000, Cariou published the photographs in a book entitled *Yes Rasta*.[77] Prince acquired a copy of *Yes Rasta* and created a collage out of thirty-five photographs that he tore out of the book.[78] The collage, entitled *Canal Zone*, altered Cariou's photographs

69. *Id.* at 480–82. The district court held that "[t]he third factor [was] neutral as between the parties." *Id.* at 482.

70. *Blanch*, 467 F.3d at 252.

71. *Id.* at 253 ("His stated objective is thus not to repackage Blanch's [*Silk Sandals*], but to employ it 'in the creation of new information, new aesthetics, new insights and understandings.'" (quoting Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998))).

72. *Id.* at 253.

73. *Richard Prince*, ARTNET, https://www.artnet.com/artists/richard-prince/biography (last visited Feb. 24, 2024).

74. *Id.*

75. *Id.*

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

77. *Id.*

78. *Id.*

"significantly."[79] Prince purchased three additional copies of *Yes Rasta* and continued to create thirty works in the *Canal Zone* series.[80]

In some of Prince's pieces from the series, Cariou's photographs are readily identifiable with minimal alterations, while in others, Cariou's work is hardly recognizable.[81] The portions of photographs used from *Yes Rasta* also fluctuate depending on the work.[82] *Canal Zone* was featured in a gallery exhibition at Gagosian Gallery,[83] a global gallery that showcases some of the biggest names in the art world.[84]

In 2008, Cariou sued Prince for copyright infringement and the Gagosian Gallery for vicarious and contributory infringement.[85] Prince defended on the ground of fair use, asserting that his works were transformative of Cariou's photographs.[86] The trial court heavily leaned on the requirement that Prince's new works comment on Cariou's original photographs.[87] To determine Prince's intended meaning or commentary, the court looked to Prince's testimony. Prince testified that he "did not intend to comment on any aspects of the original works or on the broader culture" and that he did not "really have a message" when creating art.[88] Relying greatly on Prince's testimony, the court found that the "transformative content of Prince's paintings [was] minimal at best."[89] The trial court further determined that the other three factors of the four-prong test also weighed against a finding of fair use, resulting in

79. *Id.* ("Prince altered those photographs significantly, by among other things painting 'lozenges' over their subjects' facial features and use only portions of some of the images.").

80. *Id.*

81. *Id.* at 699–700 ("In certain works, such as *James Brown Disco Ball*, Prince affixed headshots from *Yes Rasta* onto other appropriated images, all of which Prince placed on a canvas that he had painted. In these, Cariou's work is almost entirely obscured."); *id.* at 700–01 ("In other works, such as *Graduation*, Cariou's original work is readily apparent: Prince did little more than paint blue lozenges over the subject's eyes and mouth, and paste a picture of a guitar over the subject's body.").

82. *Id.* at 699–700.

83. *Id.* at 703.

84. Robin Pogrebin, *Without Heirs, Larry Gagosian Finally Plans for Succession*, N.Y. TIMES (Nov. 16, 2022), https://www.nytimes.com/2022/11/16/arts/design/larry-gagosian-gallery-art-succession.html (Larry Gagosian has "come to symbolize—and set the tone—for a sexy gallery scene of museum-quality shows, glamorous exhibition openings and high prices. . . . As one collector put it, there are two people in the art world who require only a first name: Larry and Andy (as in Warhol)").

85. *Cariou*, 714 F.3d at 704.

86. *Id.*

87. Cariou v. Prince, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011) ("Prince's Paintings are transformative only to the extent that they comment on the Photos; to the extent they merely recast, transform, or adapt the Photos, Prince's Paintings are instead infringing derivative works.").

88. *Id.*

89. *Id.* at 349–50.

the court rejecting Prince's fair use defense and granting summary judgment to Cariou.[90]

In addition to Prince's failed defense, the Gagosian was found liable for vicarious and contributory copyright infringement.[91] The court stated that the Gagosian defendants failed to exercise their ability to ensure that Prince obtained requisite licenses before the work was promoted and displayed.[92] The trial court seemingly pointed the finger at the Gagosian, as they were "well aware of (and capitalized on) Prince's reputation as an appropriation artist who rejects the constricts of copyright law."[93]

On appeal, the Second Circuit held that the trial court incorrectly required that a work comment on its original to be deemed transformative and therefore qualify for the fair use defense.[94] Rather, the Supreme Court established that to be eligible for the fair use defense, the new work "must alter the original with 'new expression, meaning, or message.'"[95] In determining that all but five of Prince's works were transformative, the Second Circuit found that twenty-five of the pieces "manifest an entirely different aesthetic from Cariou's photographs."[96] The court observed that Cariou's works depict carefully composed black and white photographs of Rastafarians, while Prince's collages disrupt the serenity through the inclusion of color and distorted human features.[97] However, instead of relying on Prince's intent, as the district court did, the court of appeals deemphasized the importance of his testimony and instead looked to the visual appearance of the work.[98] The court stated that "[w]hat is critical is how the work in question appears to the *reasonable observer*, not simply what an artist might say about a particular piece or body of work."[99]

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90. *Id.* at 353–55.
91. *Id.* at 354.
92. *Id.* at 354–55.
93. *Id.*
94. Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) ("The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those . . . identified in the preamble to the statute.").
95. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).
96. *Id.*
97. *Id.* ("Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.").
98. *Id.* at 707 ("Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so. Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may 'reasonably be perceived' in order to assess their transformative nature.").
99. *Id.* (emphasis added).

The court of appeals ultimately turned to a side-by-side comparison of the works to conclude that Prince's art gave Cariou's previous photographs new expression.[100] The court found that twenty-five of the works constituted fair use, and the remaining five would be remanded so that the district court could reassess using the correct standard.[101] With regard to the Gagosian, the gallery was not liable for vicarious or contributory infringement for the twenty-five works that were found to be transformative.[102] However, the court noted that if, on remand, the district court found that Prince was liable as to the remaining five works, the court should reconsider the gallery's liability as a result of its role in the exhibition.[103]

Central to this opinion is the vehicle that the court chose to arrive at its decision. The court of appeals adjudicated its determination from the vantage point of the reasonable observer and inserted an aesthetic determination into the fair use defense.[104] This stands in contrast to the district court's approach, which considered the artist's stated purpose and intent in the creation of the work by examining the artist's testimony.[105] What is problematic about *Cariou* is the messy and ambiguous standards the district court and the court of appeals applied to determine what works constituted fair use.[106] Not to mention that *Cariou* and *Blanch* illustrate the varying standards by which fair use is litigated within the same circuit. The U.S. Court of Appeals for the Second Circuit in *Blanch v. Koons* deferred almost entirely to the artist's proposed description of their works, while the very same court in *Cariou v. Prince* created a new standard of the reasonable observer's aesthetic determinations.[107]

C. Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith

A dispute between the Andy Warhol Foundation and photographer Lynn Goldsmith provides the Supreme Court's most recent interpretation of the fair use doctrine. At the forefront of the emerging Pop art movement in America, Warhol mass-produced art that captured

100. *Id.* at 707–08.
101. *Id.* at 710–11.
102. *Id.* at 712.
103. *Id.*
104. *Id.* at 707–08.
105. *Id.* at 706–07.
106. *See* Adler, *supra* note 12, at 359.
107. *See* Blanch v. Koons, 467 F.3d 244, 257–58 (2d Cir. 2006); *Cariou*, 714 F.3d at 707–08.

the supposed vapidity of consumer culture.[108] Goldsmith, although less well known, photographed major rockstars such as Bob Dylan and Mick Jagger and had her work displayed in *Time* and *Rolling Stone Magazine*.[109] In 1981, Goldsmith photographed pop icon Prince, methodically styling him to capture his femininity.[110] A few years later, in 1984, *Vanity Fair* licensed one of Goldsmith's photographs of Prince "for use as an artist's reference."[111]

Unbeknownst to Goldsmith, *Vanity Fair* commissioned Warhol to create an illustration to accompany an article about Prince.[112] Based on Goldsmith's Prince photograph, Warhol created fifteen works entitled the *Prince Series*, in addition to Vanity Fair's commissioned illustration.[113] When Warhol died, the Andy Warhol Foundation ("the Foundation") asserted copyright ownership in the series.[114]

When Prince died in 2016, Condé Nast (the parent company of *Vanity Fair*) licensed one of Warhol's *Prince Series* works to display on the cover of a commemorative issue of the magazine.[115] Goldsmith obtained neither a fee nor a source credit.[116] Further, Goldsmith was only made aware of the *Prince Series* when she saw the 2016 Condé Nast magazine cover.[117] The photographer reached out to the Foundation to inform them of her belief that her copyright was infringed.[118] The Foundation sued Goldsmith for a declaratory judgment of noninfringement and Goldsmith countersued for infringement.[119]

The District Court for the Southern District of New York found that the *Prince Series* works were protected by fair use. The court held that Warhol's *Prince Series* works were transformative because they "have a different character, give [Goldsmith's] photograph[] a new expression, and employ new aesthetics with creative and communicative results distinct from [Goldsmith's]."[120] The court considered Goldsmith's intent

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108. *See Andy Warhol*, ANDY WARHOL MUSEUM, https://www.warhol.org/andy-warhols-life/ (last visited Feb. 24, 2024).
109. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 515 (2023).
110. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 318 (S.D.N.Y. 2019).
111. *Id.*
112. *Id.*
113. *Id.* at 319.
114. *Id.* at 320.
115. *Id.* at 321.
116. *Id.*
117. *See id.*
118. *Id.*
119. *Id.* at 322.
120. *Id.* at 326 (alteration in original).

to illustrate Prince as a "vulnerable human being" in her photograph.[121] However, Warhol's *Prince Series* ultimately resulted in an entirely different aesthetic because it "can reasonably be perceived to have transformed Prince . . . to an iconic, larger-than-life figure."[122]

The Court of Appeals for the Second Circuit reversed and remanded, finding all four fair use factors favored Goldsmith.[123] In assessing the transformative nature of the *Prince Series*, the court notably stated that it does not follow that "any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative."[124] The court noted that such a liberal construal of transformative works would undoubtedly overshadow derivative rights held by copyright owners.[125] The Second Circuit concluded that Warhol's *Prince Series* was not transformative and turned instead to the "'purpose and character' of the primary and secondary works."[126] The court asked whether the secondary work's "use of its source material is in service of a 'fundamentally different and new' artistic purpose and character, such that the secondary work stands apart from the 'raw material' used to create it."[127] The Second Circuit held it did not.[128]

The U.S. Supreme Court granted certiorari and affirmed the holding of the Second Circuit. The Supreme Court relied largely on the first factor of the fair use analysis. While previous courts have exclusively looked to the new meaning or message employed by the secondary work, the Supreme Court sidestepped fair use jurisprudence and found that this inquiry "does not suffice under the first factor."[129] Instead, the Supreme Court stated that the first fair use factor "focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree" to be weighed against considerations such as commercialism.[130] The Court found that the purpose of the Foundation's image of Prince—to license an image to Condé Nast to appear on the cover of a commemorative magazine edition—was substantially the same as the purpose of Goldsmith's photograph.[131] Therefore, the Foundation's

121. *Id.*
122. *Id.*
123. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 32 (2d Cir. 2021).
124. *Id.* at 38–39.
125. *Id.* at 40.
126. *Id.* (quoting Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1204 (2021)).
127. *Id.* at 42 (quoting Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013)).
128. *Id.*
129. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 547 (2023).
130. *Id.* at 525.
131. *Id.* at 526.

image superseded Goldsmith's work, rather than serve a distinct use, and as a result, did not constitute a fair use.

The Second Circuit and the Supreme Court both denounced the practice of judges playing the role of art critics in the courtroom—a stark departure from the opinion of the court in *Cariou v. Prince*.[132] The Supreme Court instead replaced any subjective determinations about transformative use with "an objective inquiry into . . . what the user does with the original work."[133] In reaching its decision, the Court deviated from the transformative inquiry grounded in *Campbell*[134] and hung its hat on the fact that both Warhol and Goldsmith licensed their works to a magazine. According to the dissent, "[b]ecause the artist had such a commercial purpose, all the creativity in the world could not save him."[135]

V. WHAT DOES IT MEAN TO BE TRANSFORMATIVE?

The transformative nature of a work is an essential part of the fair use inquiry. A work is transformative if it adds to the original "new expression, meaning, or message."[136] However, as seen in fair use jurisprudence, the method of determining new meaning has been employed quite arbitrarily and inconsistently.

First, as demonstrated in *Cariou v. Prince*, the court of appeals turned to the manifested aesthetic of the works to determine that twenty-five of Prince's collages were transformative.[137] The court employed a side-by-side comparison from the eye of a reasonable observer.[138] Additionally, the district court in *AWF* turned to the reasonably perceived aesthetic alterations of Warhol's work, such as the use of "loud, unnatural colors, in stark contrast with [Goldsmith's] black-and-white original photograph."[139] Although aesthetic determinations seem like the logical gauge of assessing new meaning in artworks, they run contrary to the core of contemporary art.

As previously discussed, a core doctrine in copyright law is the idea-expression dichotomy, which permits the protection of an original *expression*, not an original *idea*. However, the key to contemporary art is

132. *Id.* at 544 (agreeing with the court of appeals, the Supreme Court stated that "[a] court should not attempt to evaluate the artistic significance of a particular work").
133. *Id.* at 545.
134. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
135. *Andy Warhol Found.*, 598 U.S. at 560 (Kagan, J., dissenting).
136. *Campbell*, 510 U.S. at 579.
137. Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).
138. *Id.* at 706–07.
139. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019).

that the artist seeks to convey an *idea*, rather than a visual expression of the work alone.[140] Appropriation artists inherently struggle with the idea-expression dichotomy because their works are not original in expression as they often use appropriated images.[141] Central to the tension between the idea-expression dichotomy and contemporary artists is the notion that contemporary art is not necessarily about aesthetics in the first place.[142] Contemporary artists are no longer focused on the physical expression that their work takes on, but rather on the idea, which is fundamentally conceptual and less visual.[143] Therefore, if courts use aesthetic judgments to determine whether a work is transformative, it calls into question the validity of the decision as it judges the work on criteria that are no longer consistent with contemporary art.

The movement away from the visual and towards the conceptual has been demonstrated by various artists and artistic movements. The most notable is Dada. Dada is a movement that emerged against the backdrop of World War I.[144] These artists used their works to criticize society and challenge the conventional belief that art must be visually beautiful.[145] For Dadaists, "the aesthetic of their work was considered secondary to the ideas it conveyed."[146] The movement was not about producing aesthetically pleasing artwork, but questioning the norms of society, "the role of the artist, and the purpose of art."[147] The cornerstone of Dada art

140. Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After* Rogers v. Koons, 59 BROOK. L. REV. 373, 383–84 (1993) ("Postmodernist art is going to be about art itself in a new kind of way; even more it means that one of its essential messages will involve the necessary failure of art and the aesthetic, the failure of the new, the imprisonment in the past.").

141. Badin, *supra* note 24, at 1674 ("Since the allegorical process entails appropriating the entirety of a copyrighted image's expression, copyright law presently limits the intellectual [marketplace] by stifling significant ideas that contemporary art seeks to communicate.").

142. Arjun Gupta, *"I'll Be Your Mirror" – Contemporary Art and the Role of Style in Copyright Infringement Analysis*, 31 DAYTON L. REV. 45, 55–56 (2015) ("In other words, contemporary art represents a mode of production that is beyond style. Stated differently, it is art that functions beyond representation, and whose meaning is no longer derived from what its style or appearance may represent historically.").

143. *Id.*

144. *Dada*, MOMA, https://www.moma.org/learn/moma_learning/themes/dada/ (last visited Feb. 24, 2024).

145. *Id.*

146. *Id.*

147. *Dada*, ART STORY, https://www.theartstory.org/movement/dada/ (last visited Feb. 24, 2023).

is the use of readymade goods.[148] The use of everyday objects forced society to face the question of what truly constituted art.[149]

A central player in the contemporary art space who makes use of readymade objects to create works is Marcel Duchamp. In 1917 Duchamp created a sculpture titled *Fountain*.[150] Dispense of any images that might have materialized in your head of a serene garden or courtyard fountain, because this sculpture was a porcelain urinal flipped upside down.[151] This blatant rejection of traditional artistic principles illustrates the movement away from aesthetics and towards the conceptual. Duchamp shows that anything can be art, not just beautifully crafted paintings by highly skilled artists.[152] In addition to the porcelain urinal, Duchamp unveiled *Bicycle Wheel*, another work utilizing readymades, consisting of an inverted bicycle fork installed on a wooden stool.[153] With the creation of this piece, Duchamp again showed his talent for taking mass-produced objects and redesignating them as art.[154] The shift into Postmodernism and the development of contemporary art styles renounced aesthetic principles in favor of the conceptual and nontraditional. Aesthetic judgments by courts in fair use cases show the application of out-of-touch and irrelevant methods of determining the transformative nature of the work.

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148. *Id.*

149. *Id.* ("Dada artists are known for their use of readymades—everyday objects that could be bought and presented as art with little manipulation by the artist. The use of the readymade forced questions about artistic creativity and the very definition of art and its purpose in society.").

150. *Marcel Duchamp,* Fountain, TATE, https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573 (last visited Feb. 24, 2024).

151. *Id.*

152. Isabella Meyer, *Postmodern Art – An In-Depth Exploration of the Postmodernism Period*, ART IN CONTEXT (Jan. 12, 2024), https://artincontext.org/postmodern-art/ ("Duchamp's artwork ridiculed the entire groundwork on which the establishment of art has been constructed, which gave way for artists to begin experimenting with the concept of what informed art."). To further emphasize the idea that art is built on copying, Duchamp's *Fountain* was appropriated by Sherrie Levine, another conceptual artist. Levine took a urinal in 1991 and recast it in bronze, calling the work *Fountain (After Marcel Duchamp)*. Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 223 (2007); *Sherrie Levine,* Fountain (After Marcel Duchamp)*, 1991, and* Fountain (Buddha)*, 1996, from Sherrie Levine: Mayhem*, WHITNEY MUSEUM AM. ART (Nov. 9, 2011), https://whitney.org/media/760.

153. *Marcel Duchamp,* Bicycle Wheel, MOMA, https://www.moma.org/learn/moma_learning/marcel-duchamp-bicycle-wheel-new-york-1951-third-version-after-lost-original-of-1913/ (last visited Feb. 24, 2024).

154. *Id.* Another of Duchamp's readymades was a reprinting of Leonardo da Vinci's *Mona Lisa*, onto which he drew a mustache and a goatee and titled it *L.H.O.O.Q. or La Jaconde*. L.H.O.O.Q. or La Joconde, NORTON SIMON MUSEUM, https://www.nortonsimon.org/art/detail/P.1969.094 (last visited Feb. 24, 2024).

The Supreme Court and Second Circuit in *AWF* denounced the use of aesthetic considerations in fair use inquiries. The Foundation argued that Warhol transformed Goldsmith's depiction of Prince as a "vulnerable, uncomfortable person to an iconic, larger-than-life figure."[155] The Court rejected this argument and noted that "a court should not attempt to evaluate the artistic significance of a particular work."[156] The Court leaned into the belief that judges are ill-suited to play the role of art critics.

Even if aesthetic judgments are the correct method by which a finding of transformative use should be reached, the courts have provided no standard or coherent guidance. The court in *Cariou v. Prince* stated that Prince's new works "manifest an entirely different aesthetic from Cariou's photographs."[157] How the court came to this decision is unclear. After noting the size differences between the new and old work, the court found that Prince's "composition, presentation, scale, color palette, and media are fundamentally different and new" compared to Cariou's photographs.[158] This assessment of transformative use was based on the perceived artistic qualities of the work by a judge trained in the field of law. As Justice Holmes expounded, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work]."[159] The court left its decision to a side-by-side comparison of the works with no uniform explanation of how Prince's art employs new character and expression.[160]

What also lies in the ambiguous wake of the *Cariou* decision is the "reasonable observer" standard.[161] When making aesthetic judgments to determine transformative use, the court stated that "[w]hat is critical is how the work in question appears to the reasonable observer."[162] The district court in *AWF* adopted a version of this standard by asking how the *Prince Series* "may 'reasonably be perceived' in order to assess their transformative nature."[163] But who is this unidentified reasonable observer? Someone with vast knowledge of the art space such as a critic?

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155. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 523 (2023) (quoting Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019)).

156. *Id.* at 544; *id.* at 554 (Gorsuch, J., concurring) ("Nothing in the law requires judges to try their hand at art criticism and assess the aesthetic character of the resulting work.").

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

158. *Id.*

159. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

160. *Cariou*, 714 F.3d at 707–08.

161. *Id.* at 707.

162. *Id.*

163. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019) (quoting *Cariou*, 714 F.3d at 707).

Or someone who was plucked at random to make artistic judgments? Additionally, considering the shift from visual to conceptual in postmodern art, would the reasonable observer be able to identify the transformative nature of a work?[164]

From a broader lens, it seems as though the reasonable observer is ill-suited to assess the transformative nature of an art form that exists to reject traditional artistic constructs. As the reasonable observer attempts to identify transformative use in contemporary art, the art scene will find fluidity and freedom in continuous evolution. Many of these developing artistic movements may obtain value in being located outside the orbit of any reasonableness perspective.

Cariou left many questions unanswered and fashioned into precedent an ill-defined method for determining the transformative nature of a work. If the reasonable observer has knowledge of the art world and, as a result, can more obviously identify transformative works, appropriation artists finish first.[165] On the contrary, if the reasonable observer has no prior artistic knowledge, such as judges, "some works of genius would be sure to miss appreciation."[166]

However, some argue that the reasonable observer standard would create a more predictable and democratic outcome.[167] Under this line of thinking, a reasonable person would provide an objective lens to look at transformative use.[168] As a result, the fair use inquiry would capture the "culture's wider perception of whether an added new meaning qualifies as 'transformative.'"[169] Nevertheless, this narrative fails to consider an ordinary viewer's lack of artistic knowledge and the impact that will precipitate on the contemporary art space. This artistic movement is built on copying; therefore, the reasonable observer without an understanding of art—most likely someone unable to spot obvious differences between works—will find that the work was not transformative and inevitably stifle creativity. Appropriation artists will be unable to prevail in court, leading to a bleak future for contemporary art.

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164. Adler, *supra* note 13, at 610–611 ("If a work that resists its own status as art, one that looks like . . . a toilet, now rules as the most influential work of art, one can see the problem posed by asking lay observers to make judgments about meaning in the current art world.").

165. *Id.* at 612.

166. *Id.*

167. Ritika Gopal, *A New Theory of Fair Use, Re-Conceptualized and Updated for Today's Information Society*, 2 TEX. J. L. & TECH. 1, 45 (2018–2019).

168. *Id.*

169. *Id.* (quoting another source).

Additionally, in *Cariou v. Prince*, the court of appeals valued the appearance of the work to the reasonable observer above the artist's stated intent about the work.[170] In Richard Prince's deposition, he stated that he was not "trying to create anything with a new meaning or a new message"; nonetheless, the court held that this testimony was not dispositive.[171] In *Cariou*, the court replaced artistic intent with the reasonable observer standard to assess transformative use.[172] Similarly, the Supreme Court in *AWF* attacked the consideration of artist intent when determining whether a secondary work is transformative. The Court stated that neither the aesthetic evaluation nor "the subjective intent of the user . . . determine[s] the purpose of the use."[173] Despite the subjectivity that attaches to the reasonable observer standard, artistic intent is no way to judge the transformative nature of a work.

Artistic intent is ultimately irrelevant to determining if a work is transformative. An artist's intent, if there even is one, has no impact on the interpretation or the meaning of the artwork. The idea that fair use can be determined through artistic intent is mistaken, as oftentimes in contemporary art there is no artist and there is no intended meaning. Contemporary art is anti-authoritarian and disruptive in nature. Many contemporary artists attempt to escape the confines of what is traditionally considered art. In doing so, artists will avoid their "duty to impart an identifiable message to a waiting audience."[174]

The notion of erasure of an artist's stated purpose was developed by French philosopher Roland Barthes. Barthes greatly influenced the Post-structuralist movement through his study of semiotics and existentialism.[175] In 1967, Barthes's essay, *The Death of the Author*, ushered in a new era of thinking that rejected the author as a reliable source of meaning.[176] By killing the author, Barthes freed the work from the confines of individual agency and leaves room for interpretation by the viewer.[177] Barthes stated that:

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

171. *Id.*

172. *Id.* ("What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.").

173. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 544 (2023).

174. Enriquez, *supra* note 33, at 22.

175. *Roland Barthes*, ART STORY, https://www.theartstory.org/influencer/barthes-roland/ (last visited Feb. 24, 2024).

176. Carys J. Craig, *Symposium: Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207, 216–17 (2007).

177. Gupta, *supra* note 142, at 57.

> In the multiplicity of writing, everything is to be *disentangled*, nothing *deciphered*; the structure can be followed, "run" (like the thread of a stocking) at every point and at every level, but there is nothing beneath: the space of writing is to be ranged over, not pierced; writing ceaselessly posits meaning ceaselessly to evaporate it, carrying out a systematic exemption of meaning. In precisely this way literature (it would be better from now on to say *writing*), by refusing to assign a "secret", an ultimate meaning, to the text (and to the world as text), liberates what may be called an anti-theological activity, an activity that is truly revolutionary since to refuse to fix meaning is, in the end, to refuse God and his hypostases—reason, science, law.[178]

From this vein of reasoning, artists are no longer the ultimate dictators of assigning meaning to a piece of work.[179] Rather, meaning is assigned through continuous viewership of art by the audience. The "death of the author" rhetoric has crept into the philosophical underpinning of contemporary art. Duchamp's readymade works epitomize this notion of allowing the viewers to bring to the piece their thoughts and interpretations.

Moreover, the very action of appropriating someone else's work blurs the identity of the artist. The appropriation of someone else's work calls into question who the true creator is and therefore who can impart a meaning to the awaiting audience. Contemporary artists obscure the individuality of the author by copying pre-existing works, illustrating the adoption of this concept by many postmodern artists.[180]

The courts in *AWF* and *Cariou* correctly dispensed with the romantic conception of the author. Examining works independent of the artist adheres to trends that view the individual creator as disappearing into the work. Considering the artist's intent conflicts with contemporary art

178. ROLAND BARTHES, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142, 147 (Stephen Heath trans.) (1978).

179. *Roland Barthes*, NEW WORLD ENCYC., https://www.newworldencyclopedia.org/entry/Roland_Barthes (last visited Feb. 24, 2024) ("Barthes points out that the great proliferation of meaning in language and the unknowable state of the author's mind makes any such ultimate realization impossible. As such, the whole notion of the 'knowable text' acts as little more than another delusion of Western bourgeois culture.").

180. Elton Fukumoto, *The Author Effect After the "Death of the Author": Copyright in a Postmodern Age*, 72 WASH. L. REV. 903, 904 (1997) ("Postmodern artists, to some extent influenced by the post-structuralists, have accepted the death of the author as a basic tenet; when they act upon that belief, through the technique of appropriating the work of others, they run afoul of copyright law.").

where "the lack of a unitary message imparted by a godlike author may be the entire point."[181]

VI. DID THE COURT IN *AWF* GET IT RIGHT?

The Supreme Court decided *AWF* in 2023, adding new problems to copyright jurisprudence's already troubling history of applying the fair use defense. In *AWF*, the Court did not consider the transformative nature of the secondary work (which has historically dominated the fair use analysis)[182] and looked instead to the purpose and use of Warhol's *Prince Series*. The Court held that a secondary work that has the same purpose as the original work is not a fair use.[183] However, exclusively analyzing the use and purpose of an allegedly infringing work is especially flawed pertaining to works of art. In a hyper-capitalistic society, artists often create to realize monetary gain and market advantages.[184] The resulting commodification of art has inevitably led to the creation of artworks for identical purposes or uses. Under the new *AWF* regime, secondary artworks will struggle to obtain a finding of fair use. The evolution of art is certain to be stifled as a consequence.

The idea of art as a commodity can be understood through the lens of critical economic theory. Commodities "are depositories of value" that can be exchanged for money or other equally valuable commodities.[185] Capitalism creates commodities, each with an abstract value.[186] As a result, "[a]ll art made within this system is a commodity to be bought and sold."[187] The commodification of the art industry through capitalism, and thus the homogenized purpose of creating art, is best stated by writer and journalist Ernst Fischer:

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181. Enriquez, *supra* note 33, at 22.

182. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006); Cariou v. Prince, 714 F.3d 694, 705–06 (2d Cir. 2013).

183. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 531–32 (2023).

184. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 298 (2009) ("Artworks have become de rigueur trophies for newly minted billionaires. Several of the most highly acclaimed contemporary artists make work that simultaneously critiques and caters to this new market reality.").

185. John A. Walker, *Artworks as Commodity*, CIRCA ART MAG., Feb. 1987, at 28, 28.

186. Jeanne Willette, *Marxism, Art and the Artist*, ART HISTORY UNSTUFFED (June 11, 2010), https://arthistoryunstuffed.com/marxism-art-artist/.

187. *Id.*; *see also* Walker, *supra* note 185, at 26 ("Most of the artworks produced by professional artists within the context of the Western economic system become commodities once they leave the artist's studio and are sold to collectors and museums . . . .").

> The artist in the capitalist age found himself in a highly peculiar situation. King Midas had turned everything he touched into gold: capitalism turned everything into a commodity. With a hitherto unimaginable increase in production and productivity, extending the new order dynamically to all parts of the globe and all areas of human experience, capitalism dissolved the old world into a cloud of whirling molecules, destroyed all direct relationships between producer and consumer, and flung all products on to an anonymous market to be bought or sold.[188]

Who best exemplifies this concept other than Andy Warhol? Warhol utilized the technique of screen-printing, which essentially allowed him to run his art production like a factory and mechanized the artistic process.[189] This technique permitted Warhol to mass produce his works of art.[190] As a result, the artist behind the work fades away and the art turns into a piece of merchandise created to be bought and sold.[191] Warhol said that "[b]eing good in business is the most fascinating kind of art . . . making money is art."[192] The artist even entered into a period of production he referred to as "Business Art," where he mirrored his artistic practices to match corporate ones.[193] Warhol's brand, down to his artistic techniques, embodied the conception of art as a commodity.

The staggering monetary value at which art is sold is further proof of its commodification. On May 9, 2022, Andy Warhol's *Shot Sage Blue Marilyn* (1964) sold at Christie's Auction House in New York for $195 million.[194] Just six months later, on November 9, 2022, Georges Seurat's

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188. ERNST FISCHER, THE NECESSITY OF ART: A MARXIST APPROACH 49 (Anna Bostock trans., Penguin Books 1963) (1959).

189. Vivien Greene, *Andy Warhol: A Factory*, GUGGENHEIM, https://www.guggenheim.org/exhibition/andy-warhol-a-factory (last visited Feb. 24, 2024).

190. *Silkscreen Printing*, ANDY WARHOL MUSEUM, https://www.warhol.org/lessons/silkscreen-printing/underpainting-and-photographic-silkscreen-printing/ (last visited Feb. 24, 2024).

191. Warhol often had his assistants producing the work, contributing to the factory-like production scheme of his art. *Id.*

192. Walker, *supra* note 185, at 28 (alteration in original).

193. *Pop Art: Aesthetics of Consumption*, CARDI GALLERY, https://cardigallery.com/magazine/pop-art/ (last visited Feb. 24, 2024). If this is not enough proof that art is a commodity, Warhol created a piece called *200 One Dollar Bills*, literally reproducing images of money to make money. Roger Kamholz, *Andy Warhol and "200 One Dollar Bills"*, SOTHEBY'S (Nov. 3, 2013), https://www.sothebys.com/en/articles/andy-warhol-and-200-one-dollar-bills.

194. Andy Warhol, *Shot Sage Blue Marilyn*, CHRISTIE'S, https://www.christies.com/lot/lot-6369449 (last visited Feb. 24, 2024).

Les Poseuses, Ensemble (Petite version) (1888) sold for $149.2 million.[195] In 2022, the global art market was valued at $67.8 billion.[196]

Because art is a commodity within a capitalistic system and commodities exist to be exchanged, art will continuously be created for the perceived purpose of realizing its exchange value. Therefore, if both the original and secondary work share the same purpose—as they most likely will in the art world—secondary works will fail to pass the muster of a fair use test focused on use and purpose. This essentially extinguishes the relevance of any other factor that could lean in favor of the secondary use.

Equally problematic is the Supreme Court's conflation of the first and fourth fair use factors. The fourth fair use factor assesses the "effect of the use upon the potential market" of the copyrighted work.[197] By finding under factor one that Warhol's *Prince Series* shared the same purpose as Goldsmith's photograph and was therefore "more likely to provide 'the public with a substantial substitute,'" the Court folded the fourth factor into the first.[198] In doing so, both the first and fourth factors are dominated by the economic impact of the secondary work on the copyright holder's market. As a result, the original creators are inherently favored in the fair use analysis. The commercialization of the first factor corrupts any balance struck between the fair use factors and asks whether the secondary artwork is merely a fungible product.

Moreover, the majority injects anti-elitism sentiments into the decision which further harm the future of artistic progress. The Court tells the story of a lesser-known photographer defending herself against an artistic powerhouse whose well-known style is imposed on her photograph.[199] But in an attempt to protect the little guy, the Court ironically harms smaller artists down the line. The Court in *AWF* pushes this notion that secondary artists should just obtain a license to use the original work.[200] However, this misapprehends the practical realities of licensing artwork. The copyright holder can charge an exorbitant amount for a license which may be unattainable to artists who do not have Andy

195. Georges Seurat, *Les Poseuses, Ensemble (Petite version)*, CHRISTIE'S, https://www.christies.com/en/lot/lot-6397099 (last visited Feb. 24, 2024).

196. Brian Boucher, *The Global Art Market Grew to $67.8 Billion in 2022, Exceeding Pre-Pandemic Levels*, ART BASEL, https://www.artbasel.com/stories/key-findings-art-market-report-2023?lang=en (last visited Feb. 24, 2024).

197. 17 U.S.C. § 107(4).

198. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 496 (2023) (quoting Authors Guild v. Google, Inc., 804 F.3d 202, 207 (2d Cir. 2015)).

199. *Id.* at 543–44. The Second Circuit and the Supreme Court acknowledge the secondary work must, "comprise something more than the imposition of another artist's style on the primary work." *Id.*

200. *Id.* at 534–35.

Warhol-level status. These artists will now have to grapple with a future of negotiating licenses that they may not be able to afford, stopping the flow of creativity that originates from copying.

The Supreme Court in *AWF* scrambled the fair use analysis further and took a misguided approach as it relates to contemporary art. Rather than asking whether the secondary work was altered with new expression, meaning, or message as the sole measure of transformative use, the Court found that this inquiry is not "dispositive of the first factor" without more.[201] Instead, the Court looked directly to the specific purpose or character of the allegedly infringing use. The Court made it clear that assessing the commerciality of the secondary work is key, notwithstanding how transformative the work is. This issue is especially prudent in contemporary art, where copying has taken on greater urgency.

VII. COPYRIGHT HOLDER'S RIGHT TO DERIVATIVE WORKS

The Copyright Act confers the exclusive right to the copyright owner "to prepare derivative works based upon the copyrighted work."[202] A derivative work springs from one or more preexisting works.[203] For example, an author with a copyright in a book may go on to produce a movie based on the book. The movie is the derivative work as it is based upon an already existing copyrighted book. Therefore, "any work that incorporates a portion of a copyrighted work in some form presumably falls within the statutory definition of a 'derivative work.'"[204] Derivative works are protected for various reasons, including to incentivize copyright holders to create new works and to help them realize the full economic reward from investments in their work.[205] These monetary

201. *Id.* at 526.

202. 17 U.S.C. § 106(2).

203. MENELL ET AL., *supra* note 20, at 564; 17 U.S.C. § 101 (codifying that a derivative work is "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted").

204. Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1218 (1997).

205. MENELL ET AL., *supra* note 20, at 565; Gupta, *supra* note 142, at 53 ("The right to derivative works is a result of the economic rationale behind copyright law. . . . '[D]erivative rights affect the level of investment in copyrighted works by enabling the copyright owner to proportion its investment to the level of expected returns from *all* markets . . . .'" (emphasis added)).

returns come from markets beyond the ones in which the work is first exhibited.[206]

This right held by copyright owners is in tension with appropriation artists' goal of utilizing preexisting works and incorporating them into new art. The statutory definition of derivative rights seems to grant the copyright holder the right to use parts of the work to create a new work, which is essentially what appropriation artists seek to do. The right to derivative works discourages appropriation artists because of the possibility that artists will be liable for copyright infringement.[207] The continued expansion of derivative rights throughout copyright history has contributed to the suppression of contemporary artists.[208] Derivative rights monopolize the space where appropriate artists thrive. The fair use doctrine was created to quell this issue, but as demonstrated, the courts have continued to be inconsistent in their application and interpretation of the four statutory factors.

Copyright holders' derivative rights are yet another hurdle that appropriation artists face when under scrutiny for their work. Artists invoking the fair use doctrine fight to prove that their works are transformative when copyright holders claim the right to transformative works through derivative rights.[209] Not only does this tension result in ambiguity and, in turn, increased litigation, but it also affects artistic expression.[210] Artists in fear of costly litigation fees will cease to create appropriation art, ultimately changing the trajectory of the contemporary art landscape.

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206. Voegtli, *supra* note 204, at 1241.

207. *See id.* at 1244–45 ("Consequently, the cost of derivative rights, measured in terms of suppression of the production of new works based on appropriation, has increased significantly.").

208. *See id.* at 1237 ("In the 1976 Act, Congress gave a copyright owner not only the exclusive right to reproduce one's work in copies, but also the exclusive right to 'prepare derivative works based upon the copyrighted work,' and broadly defined a 'derivative work.'").

209. Jacqueline D. Lipton & John Tehranian, *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation*, 109 NW. L. REV. 383, 387 (2015) ("Unfortunately, the contradiction between the broad scope of the derivative rights doctrine, which seems to interdict all unauthorized transformative uses, and the first factor of the fair use defense, which strongly favors immunizing unauthorized but transformative uses from infringement liability, creates a state of affairs wrought with ambiguity.").

210. *See id.* at 388 ("A broad reading of the exclusive right of copyright holders to prepare derivative works threatens to enervate our creative marketplace.").

VIII. A PROPOSED SOLUTION

A. Rebalancing Fair Use

As shown, courts have employed problematic approaches to discern whether works are transformative in fair use cases. Nevertheless, the transformative inquiry holds the most weight among the four fair use factors.[211] One suggested remedy to this issue would be to rebalance the defense. Under this model, the transformative use inquiry would not control the analysis and each factor would be considered equally by the court. Reshaping the fair use doctrine is necessary to evolve with the changing trends in contemporary art and to provide protection to appropriation artists. The ubiquity of copying in art brings renewed considerations to how courts should be interpreting copyright law.

By limiting the weight that the first factor holds, judicial misinterpretation of transformative use by methods that run afoul of contemporary art is mitigated. The remaining three factors of the fair use inquiry are vital to the fair use assessment. A rebalanced approach will prevent the transformative use assessment from swallowing the defense. By allowing the court to proceed under the impression that the more transformative the use the less important the other factors are, the court is ignoring potential considerations that may be key to the overall inquiry.

For example, the impact on the market—the fourth factor in the fair use inquiry—is probative of whether the new work "usurps the market of the original work."[212] This statutory factor is essential for determining the effect on the market for the original and the monetary harm felt by the copyright holder. If the secondary work truly fills the demand for the original work, then a presumption against fair use will result. Nevertheless, the market's reaction will give appropriation artists a chance to show that their work has a target market of its own, rather than simply displacing the original work.

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211. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[Transformative] works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." (citation omitted)).

212. Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013) (quoting Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006)) ("We have made clear that 'our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.'" (quoting *Blanch*, 467 F.3d at 258)).

Additionally, the second factor—the nature of the copyrighted work—plays a key role in granting leeway to secondary uses that are not inherently expressive or creative.[213] Although this factor is not necessarily conducive to the goals of an appropriation artist, it reinforces the established principles of copyright law. Redistributing equal weight to this factor will nevertheless "call[] for recognition that some works are closer to the core of intended copyright protection than others."[214]

Finally, uniform consideration of the third factor—the substantiality of the portion used in relation to the copyrighted work—is especially vital in reworking the fair use defense. The court in *Cariou v. Prince* stated that copying an entire work "does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image."[215] This factor can lean in favor of secondary users even if their work utilizes the entirety of the original.[216] As a result, equal consideration of this factor gives secondary users a chance to demonstrate the reasonableness of the portion appropriated from the original work, notwithstanding the degree of transformation.

This proposal does not call for a complete overhaul of the defense but instead suggests a balanced approach to alleviate uncertainties stemming from the transformative use inquiry. Appropriation artists are inherently at odds with copyright holders because they are utilizing what the rights holder already has a legal claim to. The goal is to prevent the analysis from hinging on one factor in a copyright system that is already stacked against appropriation and postmodern artists.

B. Narrowing the Scope of Derivative Rights

The wide breadth of rights afforded to owners of copyrights leaves minimal space for appropriation artists to create without the pressure of infringement litigation. Derivative rights monopolize the use of preexisting copyrighted works, chilling the appropriation artists' expression.

Having a claim to both the market for the copyrighted work and the derivative market gives copyright holders wide latitude to dominate the space. The Court in *Campbell v. Acuff-Rose Music, Inc.* stated that the market for derivatives includes uses that the original creator *would*

213. *Id.* at 709–10.
214. *Campbell*, 510 U.S. at 586.
215. *Cariou*, 714 F.3d at 710 (quoting Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2006)).
216. *Id.*

develop or license to others.[217] This allows original artists to argue that the appropriation artist's work is something that they *would* have created and therefore infringes their derivative market. But why should the original creator's scope of protection include works that they hypothetically would have created? This leaves an appropriation artist guessing as to what a copyright holder would possibly create in order to evade liability. The scope of derivative rights should be appropriately narrowed to prevent copyright holders from alleging infringement of any work they would have potentially created or developed.

The Court in *Campbell* underwent an analysis to determine if defendant 2 Live Crew's parodic rap song had an effect on the derivative market for a rap version of the copyrighted song "Oh, Pretty Woman."[218] The derivative market was reserved for the copyright holder, meaning that the original artist had the right to works stemming from their preexisting art. Both parties submitted affidavits on the market effects of 2 Live Crew's song, but the Court found no evidence that the potential derivative rap market was harmed by the secondary work.[219] The original artist in this case, Roy Orbison, should not be able to claim rights to a space of *potential* creation. Leaving open this possibility silences artistic innovation as appropriation artists will cease creating works that could possibly infringe upon an artist's derivative rights.

Limiting the scope of copyright owners' derivative rights leaves their original market for copyrighted works protected. Such rights still impart copyright holders with sufficient protection to incentivize their creation. For the preservation of future contemporary art, derivative rights should be appropriately tailored to make space for unencumbered artistic expression.

Furthermore, derivative rights, in conjunction with the fourth factor of the fair use inquiry, push the analysis in favor of the copyright holder. The fourth factor considers the secondary work's impact, not only on the original market but also the impact on the derivative market.[220] An appropriation artist would clearly have a higher risk of impacting the derivative market and therefore fail the fourth factor's fair use inquiry. Surrendering the overbroad scope of derivative rights allows the appropriation artist more bandwidth to create as opposed to worrying

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217. *Campbell*, 510 U.S. at 592 ("The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.").

218. *Id.* at 593.

219. *Id.*

220. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) ("[The fair use] inquiry must take account not only of harm to the original but also of harm to the market for derivative works.").

about usurping the market of the derivative work—a work that may not have been created yet.

C. Limiting Gallery and Institutional Vicarious Liability

The fair use doctrine implicates parties beyond the copyright holder and secondary user. Running parallel to the defense are potential vicarious liabilities on behalf of art galleries and institutions that house the allegedly infringing work. In *Cariou v. Prince*, the Gagosian Gallery, along with Richard Prince, was entangled in the suit. The Gagosian is the gallery that displayed Prince's series, *Canal Zone*. Cariou sued the gallery alleging liability for vicarious and contributory infringement.[221]

Cariou mainly argued that the gallery acted in bad faith. According to Cariou, the gallery knew that Prince was an appropriation artist who used others' copyrighted works and, accordingly, failed to investigate if Prince obtained permission to use Cariou's photographs.[222] Several prominent contemporary art museums and foundations jointly submitted an amicus brief in support of Prince and the Gagosian. Institutions including The Metropolitan Museum of Art, The Museum of Modern Art, The Solomon R. Guggenheim Foundation, The Whitney Museum of American Art, and several others, wrote to voice their disagreement with the district court's ruling on museum liability.[223]

The Second Circuit opinion in *Cariou* dedicated three sentences to the approval of liability on behalf of museums, but their impact is of great consequence.[224] Implicating institutions in lawsuits not only places an unfair burden on museums, but also impacts the individual artist. As stated by the district court in *Cariou*, the Gagosian should have more thoroughly vetted the artist and his work to mitigate the risk of liability.[225] However, this kind of responsibility on the part of the museum, especially smaller museums, is a heavy lift and may directly impact the kind of art that is displayed.

As a result, smaller galleries with fewer resources, such as money for litigation, may err on the side of caution when selecting works to feature. Rather than displaying less-established avant-garde artists, museums

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221. Cariou v. Prince, 784 F. Supp. 2d 337, 354 (S.D.N.Y. 2011).

222. *Id.* at 351.

223. Brief for the Association of Art Museum Directors et al. as Amici Curiae Supporting Appellants, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (No. 11-1197-cv), 2011 WL 5517864, at *16–17 ("If affirmed, this rule of law would impose an onerous and unwarranted burden on art museums. This new burden would interfere with the educational mission of non-profit museums in presenting art based on an evaluation of artistic merit . . . .").

224. *Cariou*, 714 F.3d at 712.

225. *Cariou*, 784 F. Supp. 2d at 354.

will favor more conservative pieces that shield them from exposure to potential liability. Such pieces perhaps allay litigation anxiety but may fail to push the bounds of artistic creativity. As galleries maneuver to mitigate risk, they will unilaterally impact the art and artists that are exhibited.

The chilling effect from gallery liability spans beyond individual artists and touches the public interest. If art museums and galleries are not displaying art because they could potentially be liable, the general public is deprived of critical cultural perspectives. The Second Circuit, in *Blanch v. Koons*, acknowledged this sentiment, stating that "the public exhibition of art is . . . considered to 'have value that benefits the broader public interest.'"[226] Works of art, especially controversial pieces such as those created by appropriation artists, must be displayed to stimulate a public discourse. By implicating art galleries, the fear of potential liability will cause these institutions to recoil at the chance to promote social progress. Limiting the scope of institutional liability preserves gallery resources and creative discretion, ultimately protecting the future of art.

IX. CONCLUSION

Contemporary art has a long history entangled with the practice of copying. The advent of technology and mass media consumption has only made copying easier. Appropriation artists, by creating works using preexisting content, thrive in an image-saturated world. The ubiquity of copying in postmodern art forces courts to adjudicate ownership rights through copyright law when portions of preexisting works are utilized to create new pieces.

However, courts have struggled to adapt to the evolution of appropriation art. Copyright law stands firm in preserving copyright holders' rights and leaves minimal space for appropriation artists to create. The application of the fair use doctrine has done little to provide relief. Part of the reason for this inconsistency is the courts' lack of understanding of the essence of contemporary art. The disconnect between copyright law and appropriation art can be quelled by rebalancing the application of the fair use factors, limiting copyright holders' derivative rights, and narrowing the scope of liability on behalf of the art museums and galleries that exhibit the works.

Protecting the rights of appropriation artists is fundamental to the future landscape of postmodern art. Copying often lies at the heart of

226. Blanch v. Koons, 467 F.3d 244, 254 (2d Cir. 2006) (quoting Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994)).

artistic progress and is key to the creation of new works. Creating a balance between the scope of copyright holders' rights and the rights of appropriation artists is essential to protect the process of creation.

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