

APPROPRIATION IN ART: THE FAIR USE DOCTRINE AND THE FUTURE OF CONTEMPORARY ART

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ABSTRACT

“What has been will be again, what has been done will be done again; there is nothing new under the sun.”¹

Many artists from the 20th and 21st centuries have engaged in the respectable and established art form of appropriation art. Because appropriation art utilizes previously created works as its subject matter, copyright law, which aims to facilitate access to original works, has had difficulty addressing this type of art. Practice of appropriation function by incorporating existing work of art into new art as a method of articulating new meaning. Social critique and commentary are common ways that this new meaning manifests itself. Appropriation art tends to fall under the category of infringement under copyright law since it is copied without the owner's consent. Over the years, there have been prominent infringement cases about whether a visual artist can use preexisting artwork from another artist for use in subsequent “appropriation art.” Different methods and conclusions about whether or not such appropriation can lead to fair use were represented in those rulings. However, the fair use defense's application is varied across copyright jurisprudence and does not reflect the evolving nature of contemporary art, particularly when it comes to transformative use. The problematic methods used by the courts when applying first factor of defense are examined in this study and concludes with a recommendation to reduce the extent of derivative rights and rebalance the fair use doctrine.

KEYWORDS: Appropriation Art, Copyright, Contemporary Art, Fair use, Transformative, Derivative works, Originality, Idea/Expression Dichotomy.

INTRODUCTION

Appropriation is an artistic technique in which artists copy elements from another work. In some cases the totality of another work is appropriated as in some of the works by *Richard*

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¹ Ecclesiastes 1:9

Prince, Barbara Kruger and Sherrie Levine. Needless to say, appropriation is not a twentieth century practice, copying is an age old technique, used in teaching others how to draw.² The most direct copy of Shakespeare's *Romeus and Juliet* was taken from *Arthur Brooke's* *The Tragical History of Romeus and Juliet*, written a few decades earlier (though *Brooke*, of course, copied from someone, and that person, and that person...going back at least to *Ovid's* story about *Pyramus and Thisbe*). *Shakespeare* appropriated the concepts, characters, storyline, and even passages: Romeo was told by the friar, "Are you a man? According to *Brooke*, "Art thou a man? Your form cries out thou art." The form says, "So you are." *Shakespeare* made the borrowed stories "uniquely *Shakespearean*" by adding a ton of ingenuity.³

The reclining naked is another example from the visual art world; the earliest one in Renaissance painting was *Giorgione's* *Sleeping Venus*. It shows that *Giorgione* based his work on a woodcut. However, things were not meant to stop there. One of *Giorgione's* pupils, *Titian*, made the decision to parody his instructor. Renaissance imitation, or the process of producing a unique work based on an existing model, is best exemplified by the *Venus of Urbino* that was created. An artist worked on an earlier piece to give it fresh meaning and expression. Furthermore, repurpose of old photos has been far from finished. Here is *Edouard Manet's Olympia*, which is regarded as a founding piece of artistic modernity yet clearly alludes to *Titian's* (and back step, to *Giorgione's*) *Venus*. As evidenced by *Giorgione*, *Titian* and *Manet* art is having prolonged emulations and copying history that has led to the continual progression of creative movements.⁴

Images taken from advertising, the media, popular culture, other artists, and other sources are used in appropriation art to create new pieces.⁵ Frequently, an artist's conceptual capacity to reframe images and alter their meaning is more significant than his technical proficiency. Appropriation art has commonly described "as getting the hand out of art and putting brain in"⁶ Some appropriation art does not implicate copyright law at all. For example, *Marcel Duchamp* exhibited ready-made objects such as a urinal, bicycle wheel, and snow shovel as works of art. In art, appropriation is the use of previously created items or images with minimal

² "Willajeanne F. McLean, *All 's Not Fair in Art and War : A Look at the Fair Use Defense After Rogers v. Koons*, 59 *Brook. L. Rev.* 373 (1993)

³ *Andy Warhol Foundation for Visual Art, Inc. v. Goldsmith* 598 US 26" (2023)

⁴ Priya Kavuru, 'Appropriation Makes the Art Grow Fonder: The Fair Use Doctrine and the Future of Contemporary Art' (2024) 76 *Rutgers UL Rev* 825

⁵ "E Kenly Ames, Note, *Beyond Rogers v Koons: A Fair Use Standard for Appropriation*, 93 *Column*". *L. Rev.* 1473 (1993); Lynne A Greenberg, *The Art of Appropriation: Puppies, Piracy and Post Modernism*, 11 *Cardozo Arts & Ent. L. J.* 1 (1992)

⁶ *Supra* n. 4

or no alteration. "The use of borrowed elements in creating novel work" is one definition of appropriation.

This study explores conflict which presently exists among copyright law and modern art, and concluding that the evolving field of postmodern art should be reflected in the way that "fair use elements" are analyzed by judges. Describe "fair use doctrine" moreover how it evolved within copyright law. How the court's adjudication of transformative use in case of *Blanch v. Koons*,⁷ *Cariou v. Prince*,⁸ and "*Andy Warhol Foundation for Visual Art v. Lynn Goldsmith*"⁹ is muddled by Second Circuit and the Supreme Court (SC) when applied to postmodern art. Rebalancing "fair use principles" application, restricting the derivative rights of copyright holders, and defending the rights of appropriation artists to promote modern art can all help to bridge the gap between copyright law and appropriation art.

APPROPRIATION IN ART

Appropriation has been denoted as "taking as one's own or to one's own use"¹⁰ In art, appropriation is the use of previously created items or images with minimal or no alteration. "The use of borrowed elements in novel work creation " is one definition of appropriation. In the visual arts, "to appropriate" means to properly adopt, borrow, recycle or sample aspects (or the entire form) of man-made visual culture. Other strategies include "re-vision, re-evaluation, variation, version, interpretation, imitation, parody or allusion". In essence, everything is borrowed to make the new piece is transformed or re-contextualized. Technical proficiency is frequently less significant than an artist's conceptual capacity to alter the meaning of images by placing them in various contexts.

French Dadaism is the origin of the American modern art movement known as "appropriation art."¹¹ Early in the 20th century, French artist Marcel Duchamp challenged the prevailing wisdom that emphasizes an artwork's uniqueness by introducing the notion that commonplace objects could be works of art.¹² By the mid-1900s, American artists began to integrate parts of

⁷ 467 F.3d 244 (2d Cir. 2006)

⁸ 714 F. 3d 694 (2d Cir. 2013)

⁹ *Andy Warhol* (n.2)

¹⁰ Alexandra E. Summa, 'Reproaching Appropriation: Analyzing Contemporary Appropriation Art Law in the United States and France' (2022) 97 Tul L Rev 102

¹¹ See *Appropriation, Tate*, <https://www.tate.org.uk/art/art-terms/a/appropriation> (last visited Dec 30, 2024). The Dada art movement, characterized by its humor and dissidence, emerged in Europe in response to the aftermath of World War I and soon become a revolutionary style of art with an enduring legacy. See *What is Dadaism, Dada Art, or a Dadaist?* Artland Magazine, What is dadaism, dada art, or a dadaist? | Artland Magazine (last visited Dec 30, 2024)

¹² See *Marcel Duchamp (1887-1968)*, Metro, Museum Art (Oct. 2004) Marcel Duchamp (1887–1968) | Essay | The Metropolitan Museum of Art | Heilbrunn Timeline of Art History (last visited Dec 30, 2024). Duchamp became a pioneering figure of the Dadaist movement, describing it as an "anti-art". Duchamp's "ready-mades"

preexisting images into iconic pop art pieces.¹³ Since the 1980s, artists have further adapted the philosophy of appropriation art by reproducing other artists' artworks, inspiring questions about the "originality, authenticity and authorship" of art.¹⁴ As technology accelerated media transmission, an increasing number of people began to reproduce and remix various forms. Increased access to digital images caused the prevalence of appropriation art to surge.¹⁵

COPYRIGHT AND CONTEMPORARY ART

Artists that practice appropriation have long used copying to convey a new message by fusing preexisting works of art into new creations. This new meaning often takes the form of social commentary or criticism. Appropriation in contemporary art is further proliferated through mass media and innovation in digital technology.¹⁶ 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 paint brush and canvas has become a sprint to see who can pick the right image in a culture of mass media and production.¹⁷

But where copying has been there, there is copyright. Copyright's ultimate objective is "promoting science alongside useful arts progress". "Original authorship task is secured in any tangible medium of expression from which it can be reproduced, conceived, and communicated" is protected under the copyright. By providing incentives for creative endeavors, copyright protection promotes advancement. The protection confers bundle of rights to owner of copyright work. The rights include capability of making derivative works, distribute work, exhibit or perform it in public, and reproduce the work. The reward given to the creator will encourage them to keep up their artistic endeavors and stop unauthorized duplication of their work. Conversely, it encourages public information distribution grounded in utilitarianism. This balancing rationale is designed to encourage creation and distribution of

famously include a piece titled "Fountain", consisting of a men's urinal atop a pedestal, signed "R-Mutt 1917". See, Niels Schaumann, 'Fair Use and Appropriation Art' (2015) 6 *Cybaris Intell Prop L Rev* 112

¹³ *Appropriation*, (n. 8)

¹⁴ *Ibid*

¹⁵ Richard H. Chused, 'The Legal Culture of Appropriation Art: The Future of Copying in the Remix Age,' (2014) 17 *Tul. J. Tech. & Intell. Prop.* 163

¹⁶ Amy Adler, 'Why Art Does Not Need Copyright' (2018) 86 *Geo Wash L Rev* 313. ("While 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 basic tool of how people make it")

¹⁷ Amy Adler, 'Fair Use and the Future of Art', (2016) 91 *N Y U L Rev* 559 ("*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 shift through other people's art....*")

work for the public good. Copyright aims to determine the best possible equilibrium among creators' unique rights alongside use and distribution of work in benefiting general public.¹⁸

“Copyright protection” doesn’t provide absolute rights. The idea-expression dichotomy is a key principle that restricts a work's copyrightability. Copyright protection is not extended to an idea is partially established in 17 USC Sec102(b).¹⁹ The doctrine is grounded in the understanding that only an author’s original expression may acquire protection. An author is not permitted to monopolize an idea but rather may be rewarded for creativity and effort that is required to produce an original expression.

Nevertheless, these laws and theories governing copyright clash with the foundations of appropriation in contemporary art. Fundamentally, copyright laws operate to grant the creator exclusive right to work while contemporary artist seek to utilizes preexisting images to create new works.²⁰ More simply, copyright law aims to protect against copiers, while contemporary artists do the copying. “The sine qua non of copyright is originality”.²¹ 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”.²² Although the threshold to meet the originality bar is low, this creates an obvious issue for contemporary artists who incorporates others works into their own.

Additionally, appropriation artists use pre-existing pictures to make social commentary or critique. As per outcome, task which has been innovative in concept however not in expression is produced.²³ The expression may appear the same or similar as it includes images from a preexisting 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, suggestion instead that artistic expression is now subservient to the artistic idea.²⁴

An illustration of *Andy Warhol's* art that uses advertising logos is the Campbell's Soup Can series as an example. To promote soup, Campbell's logo was created. *Warhol's* paintings do not serve the same function. Instead, the Soup Can series makes an artistic statement about consumerism by using *Campbell's* copyrighted work, which is varying from an objective of

¹⁸ 2 Peter S Menell Etal, ‘Intellectual Property in the New Technological Age 526 (2020)

¹⁹ TRIPS Agreement Art 9.2, 17 USC Sec 102 (b)

²⁰ Caroline L McEneaney, ‘Transformative Use and Comment on original: Threats to appropriation in Contemporary Visual Art’ (2013) 78 Brook L Rev 1521

²¹ Feist Publications Inc. v. Rural Telephone Service Co., 499 US 340 (1991)

²² *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.”)

²³ Lori Petruzzelli, ‘Copyright Problems in Post-Modern Art’, (1995) 5 DePaul J Art Tech & Intell Prop L 115

²⁴ *Id.* at 115

soup advertising. *Warhol* work might not be original in expression, as the image seen is preexisting, the work finds originality in idea as he assigns new meaning to the images he is appropriating. *Andy Warhol's* work is one example of how contemporary art conflicts with well-established “principles of copyright law”, including the idea-expression dichotomy.

DOCTRINE OF FAIR USE

For striking equilibrium among defending artists' rights and allowing others in utilizing older work as inspiration for new works, “the fair use” concept was established.²⁵ According to copyright law, appropriators can utilize “fair use as a defense” against anyone who allege copyright infringement.²⁶ This defense was developed to allow artist to appropriate elements of earlier works in creation of new and valid artistic creations while escaping from the liability of copyright infringement.²⁷ By encouraging new work development through appropriation, “the fair use” doctrine advances the goals of copyright law.²⁸

“The fair use” has been developed by *Justice Joseph Story* in *Folsom v Marsh*.²⁹ *Folsom* involved the reproduction of the letters written by *George Washington* in a biography about *Washington* himself.³⁰ As Circuit Justice, *Justice Story* provided the basis for the defense, so conceptualizing the notion of “fair use”. When assessing whether the task has been pirated, *Justice Story* advised considering “*the nature and object of the selection made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work.*”³¹ *Justice Story's* language is discernible in the text of Copyright Act 1976, in which “doctrine of fair use” was codified. “Fair use doctrine” was codified by Congress for bringing clarity to defense. “Sec.107 of Copyright Act” introduces a list of fair uses, including: “*Criticism, comment, news, reporting, teaching, scholarship or research.*”³² *The Act then moves on to list four non-exhaustive factors that need to be classified on defining if the use has been fair:*

²⁵ Anthony R Enriquez, ‘The Destructive Impulse of Fair Use After *Cariou v. Prince*’, (2013) 24 DePaul J Art Tech & Intell Prop L 1

²⁶ Roxana Badin, ‘Comment, An Appropriated Place in Transformative Value: Appropriation Art’s Exclusion from *Campbell v. Acuff-Rose Music, Inc.*’, (1995) 60 Brook L Rev 1653

²⁷ Robert A French, ‘Note, Copyright: *Rogers v. Koons*: Artistic Appropriation and the Fair Use Defense’, (2015) 46 Okla L Rev 175

²⁸ Brockenbrough A Lamb, ‘Comment, Richard Prince, Author of *The Catcher in the Rye*: Transforming Fair Use Analysis’, (2015) 49 U Rich L Rev 175

²⁹ *Folsom*, 9 F. Cas. 342 (C.C.D Mass. 1841) (No. 4901)

³⁰ *Id.* at 345

³¹ *Id.* at 348

³² 17USC Se 107

- (1) *The nature and intent of use, like if it has been for non-profit educational reasons or for commercial ones*
- (2) *the nature of work protected by copyright;*
- (3) *Significance alongside utilized component's quantity in regard of complete copyrighted work; and*
- (4) *the impact of use over copyrighted work's value or prospective market.*

Since the codification of doctrine in Copyright Act, the modern fair use landscape was continuously developed by judicial interpretation. In his landmark 1990 paper in the *Harvard Law Review*, Judge Pierre Leval criticized the Act for lacking direction and suggested the conceptual foundation for the first criterion, the purpose and character factor.³³ Under this factor, the inquiry was shifted to determining *whether or not secondary use was "transformative"*.³⁴ A usage that "adds value to the original" is considered transformative, in contrast to one which "*merely repackages/republishes the original.*"³⁵ Leval claims that "*if the quoted content has been utilized like raw material and transformed into novel knowledge, novel aesthetics, new insights, and new understanding, the secondary usage adds value to the original.*"³⁶

Leval's transformative use was first introduced and further refined in *Campbell v. Acuff-Rose Music Inc.* When evaluating first factor of "the fair use defense" in this instance, SC explicitly accepted the transformative inquiry.³⁷ The court inquired if new piece "*adds something new...modifying first with novel phrase, interpretation, or message.*"³⁸ A determination of transformative use under first factor is frequently outcome determinant of the entire fair use framework. *Campbell* also demonstrated that the more transformative secondary use, the less significant the other fair use factors are.³⁹ This ruling made the transformative test a key component of the contemporary fair use framework. But the recent fair use decision in "*Andy Warhol Foundation for Visual Arts Inc. v. Goldsmith*" by the SC might have confused the defense's use of transformative usage.⁴⁰

³³ Pierre N Leval, 'Commentary, Toward a Fair Use Standard', (1990) 103 Harv L Rev 1105

³⁴ *Ibid*; See also, *Campbell* (n.25)

³⁵ Leval (n.34)

³⁶ *Ibid*

³⁷ *Campbell* (n.25)

³⁸ *Ibid*

³⁹ *Ibid*

⁴⁰ *Andy Warhol* (n.2)

FAIR USE JURISPRUDENCE

ROGERS V. KOONS⁴¹

The earliest appropriation art case 2nd Circuit heard, *Rogers v. Koons*, held that artist *Jeff Koons*'s sculpture of a photograph by *Art Rogers*, "*String of Puppies*," was infringing because it replicated the unique way *Rogers* expressed a particular concept.⁴² *Koons*'s sculpture, a polychromed wooden three-dimensional rendering of *Rogers*'s black and white image of a couple holding eight puppies, depicted the photo in colour and added cartoon-like features to the puppies.⁴³ *Koons* shifted the medium of original task, incorporated new colors and forms, and provided proof that his stated intention in creating this piece was to comment on modern society.⁴⁴ Despite *Koons*'s states one lacking art education are inaccurate in their assessments of copying, this court concluded that the "ordinary observer test," which asks whether a layperson can identify infringement when comparing the similarities between two works, was a suitable criterion to decide appropriation art.⁴⁵ Regardless of stark contrasts between the original and secondary works, such alterations aren't enough to render *Koons*'s art transformative.⁴⁶

BLANCH V. KOONS⁴⁷

Renowned appropriation artist "*Jeff Koons*" is well-known for using readymade products to comment over materialism and consumerism.⁴⁸ This copyright infringement action subject is *Koons*'s series entitled *Easyfun-Etheral*, specifically one painting in series, *Niagara*.⁴⁹ This work features four pairs of women's legs from the calf down, appearing above various desserts.⁵⁰ One pair of legs was lifted from a photograph taken by the plaintiff, *Andrea Blanch*.⁵¹ *Blanch*, a fashion magazine photographer, published her photograph entitled *Silk Sandals by Gucci* in the August 2000 issue of *Allure Magazine*.⁵² In her photograph, a woman's feet appear crossed at the ankle resting on a man's leg in an airplane cabin.⁵³ On the woman's

⁴¹ *Rogers*, 960 F.2d 301 (2d Cir. 1992)

⁴² *Id.* at 308

⁴³ Jeff Koons, 'String of Puppies' (1988), <http://www.jeffkoons.com/artwork/banality/string-puppies> (last visited 14-01-2025)

⁴⁴ *Rogers*, (n. 42)

⁴⁵ *Id.* at 307-308

⁴⁶ *Id.* at 308

⁴⁷ *Koons*, 467 F.3d 244 (2d Cir.2006)

⁴⁸ Jeff Koons, 'Art Story', <https://www.theartstory.org/artist/koons-jeff/> (last visited January 5, 2025)

⁴⁹ *Koons* (n.42)

⁵⁰ *Ibid*

⁵¹ *Id.* at 247

⁵² *Id.* at 247-48

⁵³ *Id.* at 248

feet are a pair of *Gucci* sandals.⁵⁴ *Koon*'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 2002.⁵⁵

Alleging that *Koons*'s work violated her copyright in *Silk Sandals by Gucci*, *Blanch* filed a lawsuit for copyright infringement.⁵⁶ For *Koons*' move the DC granted summary judgment, that determined if task qualified as fair use.⁵⁷ In reaching its decision, court utilised the four factor test to determine infringement. When analyzing 1st factor, purpose and character of use, the court deferred to *Koons*'s stated intent recorded in his testimony.⁵⁸ *Koons* explained in his affidavit that he “transformed the meaning of the legs ...into the overall message and meaning of his painting.”⁵⁹ The District court noted if work had been transformative according to *Koons*'s testimony and stated rest “fair use factors” also favoured *Koons* or were neutral between the parties.⁶⁰

On appeal, court of Appeal for Second Circuit similarly considered *Koons*'s asserted purpose in using *Blanch*'s photograph to determine first factor of fair use test.⁶¹ Court of appeal's held that *Koons*'s use has been transformative since he was “using *Blanch*'s image as a fodder for his commentary on the social and aesthetic consequence of mass media.”⁶² The court deferred to *Koons*'s own proposed description of his work to find that *Niagara* added new meaning to original photograph and was therefore fair use of *Blanch*'s work.⁶³

CARIOU V. PRINCE⁶⁴

Key of evaluating judicial interpretation of “doctrine of fair use” has been 2013 decision involving appropriation artist *Richard Prince* and photographer *Patrick Cariou*. Using pictures from popular culture, *Richard Prince* transforming them into his own artwork.⁶⁵ Known as the

⁵⁴ *Id* at 247-248

⁵⁵ *Id* at 249

⁵⁶ *Ibid*

⁵⁷ *Blanch v Koons*, 396 F.Supp. 2d 476 (S.D.N.Y. 2005)

⁵⁸ *Id* at 480-81

⁵⁹ *Id* at 481

⁶⁰ *Id* at 480-482. The DC held that “the third factor was neutral as between the parties”

⁶¹ *Koons*, 467 F. 3d at 252

⁶² *Id* at 253 (“His stated objective is thus not to repackage *Blanch*'s *Silk Sandals* but to employ it ‘in the creation new information, new aesthetics, new insights and understandings’”)

⁶³ *Id* at 253

⁶⁴ *Cariou v Prince* 714 F. 3d 694 (2d Cir. 2013)

⁶⁵ *Richard Prince*, ‘Artnet’, <https://www.artnet.com/artists/richard-prince/biography> (last visited January 5, 2025)

“father of Appropriation Art”,⁶⁶ Prince’s works often re-contextualize familiar images to comment on complicity of consumers.⁶⁷

Throughout the mid-1990s, *Patrick Cariou* took series of portrait and landscape photographs while spending time with *Rastafarians* in *Jamaica*.⁶⁸ A few year later, in 2000, *Cariou* published the photographs in book entitled *Yes Rasta*.⁶⁹ Prince acquired copy of *Yes Rasta* and created a collage out of thirty five photographs that he tore out of the book.⁷⁰ The collage, entitled *Canal Zone*, altered *Cariou*’s photographs “significantly”.⁷¹ Prince purchased three additional copies of *Yes Rasta* and continued to create thirty works in the *Canal Zone Series*.⁷² In some of Prince’s pieces from the series. *Cariou*’s photographs are readily identifiable with minimal alterations. While in others, *Cariou*’s work has hardly been recognizable.⁷³ The portions of photographs used from *Yes Rasta* also fluctuate rooted over work.⁷⁴ *Canal Zone* was featured in a gallery exhibition at Gagosian Gallery,⁷⁵ a global gallery that showcases some of biggest names in art world.⁷⁶

Cariou filed a copyright infringement lawsuit against *Prince* in 2008. Prince said that his creations were a transformation of *Cariou*’s images, using fair use as justification.⁷⁷ The trial court heavily leaned on the requirement that *Prince*’s new works comment on *Cariou*’s original photographs.⁷⁸ To determine *Prince*’s intended meaning or commentary, court looked to *Prince*’s testimony. When Prince created art, he “did not intend of commenting over any original work aspect or the broader culture,” according to his testimony, and he didn’t “really have a message”.⁷⁹ Relying greatly on Prince’s testimony, court found that “transformative

⁶⁶ *Ibid*

⁶⁷ *Ibid*

⁶⁸ *Cariou* (n. 59)

⁶⁹ *Ibid*

⁷⁰ *Ibid*

⁷¹ *Id* (“Prince altered those photographs significantly by among other things painting ‘lozenges’ over their subject facial features and use only portions of some of the images”)

⁷² *Ibid*

⁷³ *Id* at 699-700 (“In specific works, such as *James Brown Disco Ball*, Prince attached headshots from *Yes Rasta* onto other appropriated pictures, all of which he positioned on a canvas he had created. *Cariou*’s work is mostly concealed in these”); *Id* at 700-701 (“In some artworks, including *Graduation*, *Cariou*’s original creation is clearly discernible: Prince merely applied blue lozenges over the subject’s eyes and lips and affixed an image of a guitar onto the subject’s body”)

⁷⁴ *Id* at 699-700

⁷⁵ *Id* at 703

⁷⁶ Robin Pogrebin, ‘Without Heirs, Larry Gagosian finally Plans for Succession N.Y. Times (Nov 16, 2022)’, <http://www.nytimes.com/2022/11/16/arts/design/larry-gagosian-gallery-art-succession.html> (last visited on January 6, 2025)

⁷⁷ *Cariou* 714 F.3d at 704

⁷⁸ *Cariou v Prince*, 784 F. Supp 2d337 (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 adopt the Photos, Prince’s Painting are instead infringing derivative works”)

⁷⁹ *Ibid*

content of *Prince's* painting was minimal at best.”⁸⁰ Trial court stated further that other three factors of the four-prong test also weighed against a finding a fair use, resulting in the court rejecting *Prince's* fair use defense and granting summary judgment to *Cariou*.⁸¹

The Second Circuit ruled on appeal that the trial court had erroneously demanded that a work's commentary on its original be considered transformative for it to be eligible for “the fair use” defense.⁸² Instead, SC ruled that novel work “must alter original with novel meaning, expression, or message” for qualifying to “fair use defense”.⁸³ Court while determining held that however 5 of *Prince's* works were transformative, Second Circuit found that 25 of pieces “manifest an entirely different aesthetic from *Cariou's* photographs.”⁸⁴ 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 colour and distorted human features.⁸⁵ However, instead of relying on *Prince's* intent, as the district court did, the court of appeals de-emphasized the importance of the testimony and instead looked to the visual appearance of the work.⁸⁶ The court ruled that “what is important is not just what an artist might say about given body/piece of work, but how work in issue seems to reasonable observer.”⁸⁷ Court of appeals ultimately turned to a side-by-side work comparison for concluding that *Prince's* art gave *Cariou's* previous photograph new expression.⁸⁸ Court found that twenty-five of works constituted fair use, moreover the remaining five would be remanded so that district court could reassess using the correct standard.⁸⁹

Court of appeals adjudicated its determination from the vantage point of reasonable observer and inserted an aesthetic determination into fair use defense.⁹⁰ This stands in contrast to the district court's approach, which considered the artist's stated purpose and intent in creation of work by examining the artist's testimony.⁹¹ What is problematic about *Cariou* is the messy and

⁸⁰ *Id* at 349-50

⁸¹ *Id* at 353-55

⁸² *Cariou v Prince*, 714 F.3d 694, 706 (2d Cir. 2013). (“The law imposes no requirement that a work comment on original/its author for considering transformative and a secondary work may constitute a fair use even if it serves some other than those ...identified in the preamble to the statute”)

⁸³ *Id.* (quoting *Campbell v Acuff-Rose music Inc.*, 510 US 569(1994))

⁸⁴ *Ibid*

⁸⁵ *Id.* (*Prince's* presentation, composition, scale, colour palette alongside media have been fundamentally varying moreover novel in comparison to photographs like expressive nature of *Prince's* work.)

⁸⁶ *Id.* at 707 (*Prince's* Work can be transformational independently of any commentary on *Cariou's* oeuvre or culture, and irrespective of *Prince's* articulated aim to address these themes. Instead of limiting our investigation to *Prince's* interpretation of his artworks, we analyse how the artworks can be reasonably viewed to evaluate their transformational essence.)

⁸⁷ *Ibid*

⁸⁸ *Id.* at 707-708

⁸⁹ *Id.* at 710-711

⁹⁰ *Id.* at 707-708

⁹¹ *Id.* at 706-707

ambiguous standards in district court and court of appeal applied to determine what works constituted fair use.⁹² Not to mention that *Cariou* and *Blanch* illustrate the varying standards by which “the fair use” is litigated within the same circuit. “The US Court of Appeals” for 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 standards of the reasonable observer’s aesthetic determinations.⁹³

ANDY WARHOL FOUNDATION FOR VISUAL ARTS, INC., v. GOLDSMITH⁹⁴

The most current interpretation of the fair use concept by SC comes from a disagreement between *Andy Warhol Foundation* and photographer *Lynn Goldsmith*. At forefront of emerging Pop art movement in America, *Warhol* mass-produced art that captured the supposed vapidness of consumer culture.⁹⁵ *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*.⁹⁶ In 1981, *Goldsmith* photographed pop icon *Prince*, methodically styling him to capture his femininity.⁹⁷ One of *Goldsmith*’s images of *Prince* was leased by *Vanity Fair* a few years later, in 1984, “for use as an artist reference.”⁹⁸

Goldsmith was unaware that *Warhol* had been hired by *Vanity Fair* to draw an artwork for a piece about *Prince*.⁹⁹ In addition to the commissioned artwork for *Vanity Fair*, *Warhol* produced fifteen pieces titled the *Prince Series* based on *Goldsmith*’s *Prince* shot.¹⁰⁰ When *Warhol* died, *Andy Warhol Foundation* asserted copyright ownership in the series.¹⁰¹

Conde Nast, the parent company of *Vanity Fair*, licensed one of *Warhol*’s *Prince Series* pieces to be featured on cover of commemorative issue of the magazine following *Prince*’s death in 2016.¹⁰² *Goldsmith* did not receive source credit or a remuneration.¹⁰³ Further, *Goldsmith* was only made aware of the *Price Series* when she saw the 2016 *Conde Nast* magazine cover.¹⁰⁴ The photographer believed her copyright was being violated, so she contacted the Foundation

⁹² Adler (n.15)

⁹³ See *Blanch v Koons* 467 F.3d 244, 257—58 (2d Cir. 2006); *Cariou*, 714 F.3d at 707-08

⁹⁴ *Andy Warhol* (n. 2)

⁹⁵ See *Andy Warhol*, ANDY WARHOL MUSEUM, <http://www.warhol.org/andy-warhols-life> (last visited Jan. 17, 2025)

⁹⁶ *Andy Warhol* (n. 2)

⁹⁷ *Andy Warhol Foundation for Visual Art, Inc. v. Goldsmith*, 382 F.Supp.3d 312, 318 (S.D.N.Y. 2019)

⁹⁸ *Ibid*

⁹⁹ *Ibid*

¹⁰⁰ *Id.* at 319

¹⁰¹ *Id.* at 320

¹⁰² *Ibid*

¹⁰³ *Ibid*

¹⁰⁴ *Ibid*

to let them know. *Goldsmith* filed a counter suit alleging infringement in response to the *Foundation's* request for declaratory judgment of non-infringement.¹⁰⁵

Prince Series works have been determined to be protected under fair use by “District Court for Southern District of New York”. Because *Warhol's Prince Series* pieces “have distinct character, give *Goldsmith's* photograph new expression, as well as employ new aesthetics with creative as well as communicative results different from *Goldsmith's*,” the court determined that they were transformative.¹⁰⁶ Court considered *Goldsmith's* intent to illustrate *Prince* as “vulnerable human being” in her photograph. However, because it “can plausibly be seen as having turned Prince into a legendary figure,” *Warhol's Prince Series* ultimately produced a completely distinct aesthetic.¹⁰⁷

Goldsmith benefited from all four fair use requirements, according to the Court of Appeals for Second Circuit, which reversed as well as remanded the decision. When evaluating *Prince Series'* transformative potential, the court noted that “any subsequent work that adds new aesthetic or new expression to its original material is necessarily transformative.”¹⁰⁸ Court observed that such a liberal construction of transformative works would undoubtedly overshadow derivative rights held by copyright owners.¹⁰⁹ Second Circuit concluded that *Warhol's Prince series* wasn't transformative and turned instead to the “‘purpose and character’ of the primary and secondary works.”¹¹⁰ To determine whether secondary work “stands apart from the ‘raw material’ used to create it, such that its utilization of its original material is ‘fundamentally different and new’ artistic purpose and character,” the court asked this inquiry.¹¹¹ Second Circuit held it didn't.¹¹²

The US SC granted *certiorari* and affirmed the holding of Second Circuit. The SC mostly depended on fair use analysis's first component. The SC deviated from fair use jurisprudence by ruling that this investigation “doesn't suffice under first factor,” when earlier courts have only considered the secondary work's additional meaning or message.¹¹³ The SC mostly depended on the fair use analysis's first component. The SC deviated from fair use jurisprudence by ruling that this investigation “doesn't suffice under the first factor,” when

¹⁰⁵ *Id.* at 322

¹⁰⁶ *Id.* at 326

¹⁰⁷ *Ibid*

¹⁰⁸ *Id.* at 38-39

¹⁰⁹ *Id.* at 40

¹¹⁰ *Id.* (quoting *Google LLC v. Oracle Am. Inc.*, 141 S. Ct. 1183, 1204 (2021)).

¹¹¹ *Id.* at 42 (quoting *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013))

¹¹² *Ibid*

¹¹³ Andy Warhol (n. 2)

earlier courts have only considered the secondary work's additional meaning or message.¹¹⁴ Court determined that *Goldsmith's* shot served a similar purpose as the *Foundation's* Prince image, which was to license image to *Conde Nast* for use on cover of commemorative magazine edition.¹¹⁵ As a result, *Goldsmith's* work wasn't considered to be fair use since the *Foundation's* image took precedence over it rather than serving a specific purpose.

Second Circuit and the SC both denounced the practice of judges playing role of art critics in the courtroom - a stark departure from opinion of court in *Cariou v Prince*.¹¹⁶ Instead, the SC substituted "*an objective inquiry into ...what user does with original work*" for any subjective assessment of transformative usage.¹¹⁷ Court departed from the transformative inquiry based on *Campbell*¹¹⁸ and based its judgment on fact that *Goldsmith and Warhol* had granted magazine license for their works. The dissent claims that "*all creativity in world couldn't save him due to artist had such commercial purpose.*"¹¹⁹

NATURE AND SCOPE OF TEST OF TRANSFORMATIVE

A crucial component of fair use investigation is a work's transformative quality. If a artwork contributes to original "new meaning, message, or expression," it is transformative.¹²⁰ But as evidenced by fair use jurisprudence, the process of figuring out new meaning has been applied quite haphazardly and unevenly.

First, as demonstrated in *Cariou v Prince*, court of appeals turned to the manifested aesthetic of works to determine that twenty five of Prince's collages were transformative.¹²¹ The court employed a side-by-side comparison from the eye of a reasonable observer.¹²² Additionally the District Court in AWF, turned to the reasonably perceived aesthetic alteration of *Warhol's* work, like use of "loud, unnatural colours, in stark contrast with *Goldsmith's* black-and-white original photograph."¹²³ Although aesthetic determinations seems like the logical gauge of assessing new meaning in artworks, they run contrary to the core of contemporary art.

As previously stated, a key tenet of copyright law is the idea-expression distinction, which allows for the protection of an original expression as opposed to an original notion. But the

¹¹⁴ *Id.* at 525

¹¹⁵ *Id.* at 526

¹¹⁶ *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")

¹¹⁷ *Id.* at 545

¹¹⁸ *Campbell* (n.25)

¹¹⁹ *Andy Warhol* (n. 2). at 560 (Kagan J., dissenting)

¹²⁰ *Campbell* (n.25)

¹²¹ *Cariou* (n. 83). at 706

¹²² *Id.*, at 706-707

¹²³ *Andy Warhol* (n. 97)

important thing about contemporary art is that artist aims to communicate a concept rather than just a visual representation of the piece.¹²⁴ Appropriation artists inherently struggle with the idea-expression dichotomy because their works aren't original in expression as they often use appropriated images.¹²⁵ One of the main sources of conflict between contemporary artists and the idea-expression dichotomy is the belief that aesthetics is not always the primary focus of modern art.¹²⁶ 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.¹²⁷ Therefore, if courts use aesthetic judgments to find whether work is transformative, it calls into question that 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.¹²⁸ These artists used their works to criticize society and challenge the conventional belief that art must be visually beautiful.¹²⁹ For *Dadaists*, “aesthetic of their work was considered secondary to the ideas it conveyed.”¹³⁰ 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.”¹³¹ The corner stone of *Dada* art is use of ready made goods. Use of everyday objects forced society to face the question of what truly constituted art.¹³²

A central player in the contemporary art space who make use of ready made objects to create works is *Marcel Duchamp*. In 1917 *Duchamp* created a sculpture titled *Fountain*.¹³³ Get rid of any mental pictures of a tranquil garden or courtyard fountain since this sculpture was actually

¹²⁴ Willajeanne F McLean, ALI'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)

¹²⁵ Roxana Badin, Comment, An Appropriated Place in Transformative Value: Appropriation Art's Exclusion from *Campbell v Acuff Rose Music, Inc.*, 60 Brook L. Rev. 1653, 1674 (1995). (“*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*”)

¹²⁶ 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 function beyond representation and whose meaning is no longer derived from what its style or appearance may represent historically*”)

¹²⁷ *Ibid*

¹²⁸ *Supra* n. 8

¹²⁹ *Ibid*

¹³⁰ *Dada*, Art Story, <https://www.theartstory.org/movement/dada> (Last Visited Jan. 20, 2025)

¹³¹ *Ibid*

¹³² *Id.* (“*Dada artists are known for their use of readymades-everyday objects that could be bought and presentedv as art with little manipulations by the artist. The use of the readymade forced questions about artistic creativity and the very definition of art and its purpose in society.*”)

¹³³ *Supra* n.8

an upside-down porcelain urinal.¹³⁴ 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.¹³⁵ In addition to the porcelain urinal, Duchamp unveiled *Bicycle Wheel*, another work utilizing ready made, consisting -of an inverted bicycle fork installed on the wooden stool.¹³⁶ This sculpture is another example of *Duchamp's* ability to turn mass-produced objects into artistic creations.¹³⁷ The shift into postmodernism and development of contemporary art styles renounced aesthetic principles in favour of the conceptual and non traditional. Aesthetic judgments by the courts in fair use cases show application of out-of -touch and irrelevant methods of determining transformative nature of work.

Recently, artist *Maurezio Cattelan* garnered world wide attention with *Comedian*, *Cattelan's* first sculpture created for an art fair in over fifteen years. The sculpture was a store-bought banana duct taped to the convention center wall. *Mr.Cattelan's* banana was offered in a limited edition of three with one artist's proof at a cost of \$120,000 a piece.¹³⁸ The sale inevitably reignited age- old discussion about what constitutes art and less importance is given to aesthetic expression in the contemporary art. The sale also inspired continued commentary on the growing status of art as a Veblen good.¹³⁹

The SC and Second Circuit in *AWF* denounced use of aesthetic considerations in fair use inquiries. In accordance to *Foundation*, *Warhol* turned *Goldsmith's* portrayal of *Prince* as "vulnerable, uncomfortable person" into a famous, larger-than-life figure.¹⁴⁰ "A court shouldn't attempt to evaluate artistic importance of particular work," the court said, rejecting this claim.¹⁴¹ The Court leaned into the belief that judges are ill-suited to play the function of art critics.

¹³⁴ *Ibid*

¹³⁵ Isabella Meyer, Postmodern Art-An Indepth 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 emphasis the idea that art is built on copying, 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, 233 (2007)

¹³⁶ Marcel Duchamp, *Bicycle Wheel*, MOMA. http://www.moma.org/learn/moma_learning/marcel-duchamp-bicycle-wheel-new-york-1951-third-version-after-lost-original-of-1913/ (last visited on Jan 20, 2025)

¹³⁷ *Ibid*

¹³⁸ Elise Taylor, *The \$120,000 Banana, Explained*, *Vogue* (Dec. 10, 2019), <http://www.vogue.com/article/the-120000-art-basel-banana-explained-maurizio-cattelan> (last visited on Jan 20, 2025)

¹³⁹ Paris Sanders, *Art is Big Business: Fine Art, Fair Use and Factor Four after Goldsmith*, 29 *UCLA Ent. L. Rev.* 59 (2021-2022)

¹⁴⁰ *Andy Warhol* (n.2)

¹⁴¹ *Id.* at 544 (Gorsuch J., concurring) ("Nothing in the law requires the judges to try their hand at art criticism and assess the aesthetic character of the resulting work".)

Even while aesthetic judgments are the right method to reach a conclusion of transformative usage, the courts do not provide any consistent or rational guidance. The court in *Cariou v Prince* stated that *Prince*'s new works "manifest an entirely different aesthetic from *Cariou*'s photographs."¹⁴² How the court came to this decision is unclear. After noting the size differences between the new and the old work, court found that *Prince*'s "composition, presentation, scale, colour palette and media are fundamentally different and new" in comparison to *Cariou*'s photograph.¹⁴³ This assessment of transformative use was based on perceived artistic qualities of work by a judge trained in the field of law. "*Even while aesthetic judgments are the right method to reach a conclusion of transformative usage, the courts do not provide any consistent or rational guidance,*" Justice Holmes explained.¹⁴⁴ The court left its decision to a side-by-side comparison of the work with no uniform explanation of how *Prince*'s art employs new character and expression.¹⁴⁵

What also lies in the ambiguous wake of the *Cariou* decision is the "reasonable observer" standard.¹⁴⁶ According to court, "How the work in question appears to a reasonable observer is crucial" when determining transformative use through aesthetic judgments.¹⁴⁷ A variation of this approach was applied by the DC (District court) in the AWF case, which inquired as to how *Prince* Series "may reasonably be perceived to evaluate their transformative nature."¹⁴⁸ But who is the unidentified reasonable observer? Someone with vast knowledge of art space like a critic? Or someone who was plucked at random to make artistic judgments? Would a reasonable viewer also be able to recognize transformative aspect of the piece given the postmodern art movement's transition from visual to conceptual?¹⁴⁹

It appears that the rational observer is not well-suited to evaluate the transformative nature of art that exists to challenge conventional artistic conceptions when viewed from a wider perspective. Additionally, in *Cariou v Prince*, the court of appeals valued the appearance of work to reasonable observer above the artist's stated intent about the work.¹⁵⁰ *Prince* claimed in his deposition that he wasn't "trying to create anything with new meaning or a new message," but the court considered this testimony to be inconclusive.¹⁵¹ In *Cariou*, the court

¹⁴² *Cariou* (n. 83)

¹⁴³ *Ibid*

¹⁴⁴ *Bleistein v Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)

¹⁴⁵ *Cariou* (n. 83) at 707-708

¹⁴⁶ *Id.* at 707

¹⁴⁷ *Ibid*

¹⁴⁸ Andy Warhol (n.99). (quoting *Cariou* 714 F.3d at 707)

¹⁴⁹ Adler (n. 16)

¹⁵⁰ *Cariou* (n. 83) at 707

¹⁵¹ *Ibid*

replaced artistic intent with the reasonable observer standard to assess transformative use.¹⁵² Similarly, SC in AWF attacked the consideration of artist intent when finding whether secondary work is transformative. The court stated that neither the aesthetic evaluation nor “*the subjective intent of user... determines purpose of use.*”¹⁵³

AWF AND CONTEMPORARY ART

Court in AWF focused on the intent and application of *Warhol's* Prince Series rather than the transformative quality of secondary piece. In accordance to court, a secondary work that serves the same function as the original is not considered fair use.¹⁵⁴ But when it comes to art, it is particularly problematic to focus just on examining the use and intent of a purportedly infringing piece. In a capitalistic society, artists often create to realize monetary gain and market advantages.¹⁵⁵ 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 finding of fair use. Evolution of art is certain to be stifled as a consequence.

Because art is a commodity within a capitalistic system and commodities exists 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.

Equally problematic is SC conflation of the 1st and 4th fair use factors. The 4th fair use factor assesses the “effect of use upon potential market” of copyrighted work.¹⁵⁶ 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 4th factor into the first.¹⁵⁷ In doing so, the economic impact of secondary work on the market of copyright holder dominates both the 1st and 4th variables. As a result, the original creators are inherently favoured in fair use analysis. The commercialization of the 1st factor

¹⁵² *Ibid.* (“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.”)

¹⁵³ Andy Warhol (n.3)

¹⁵⁴ *Id.* at 531-32

¹⁵⁵ Amy M. Adler, *Against Moral Rights*, 97 Calif. L. Rev. 263, 298 (2009) (“*Artworks have become 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.*”)

¹⁵⁶ 17 USC Sec107 (4)

¹⁵⁷ Andy Warhol (n.3) (Quoting *Authors Guild v Google, Inc.*, 804 F.3d202, 207 (2d Cir. 2015))

corrupts any balance struck between fair use factors and asks whether 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.

¹⁵⁸ But to protect the little guy, the Court ironically harms smaller artist down the line. The Court in AWF pushes this notion that secondary artists should just obtain a license to use the original work.¹⁵⁹ However, this misapprehends the practical realities of licensing art work. The Copyright holder can charge an exorbitant amount for a license which may be unattainable to artist who do not have *Andy Warhol* level status. The creative flow that comes from copying will suddenly be halted as these artists must deal with a future of negotiating licensing that they might not be able to afford.

In the AWF case, the SC further jumbled the fair use analysis and adopted a faulty stance with reference to modern art. Court find that this question isn't "dispositive of the first factor" without more information, rather than focusing on whether secondary work was changed with new meaning, expression, message as the only measures of transformative use.¹⁶⁰ Instead, Court looked directly to specific purpose or character of the allegedly infringing use. The Court made it clear that assessing the commercial 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.

COPYRIGHT HOLDERS RIGHT TO DERIVATIVE WORKS

Copyright owner is granted the sole authority "to create derivative works based on material protected under the Copyright Act."¹⁶¹ Derivative work is based on the works that already exist.¹⁶² Therefore, "any work that incorporates a portion of copyrighted work in some form" is the statutory definition of "derivative work."¹⁶³ Protecting derivative works serves several purposes, such as encouraging copyright holders to produce new works and assisting them in receiving the full financial return on investments made in their creations.¹⁶⁴

¹⁵⁸ *Id.* at 543-544 (*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."*)

¹⁵⁹ *Id.* at 534-35

¹⁶⁰ *Id.* at 526

¹⁶¹ 17 U.S.C. Sec 106 (2)

¹⁶² *Supra* n. 126, at 564

¹⁶³ Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 Brook L. Rev. 1213, 1218 (1997).

¹⁶⁴ *Supra* n. 127, at 53

The intention of appropriation artists to use previously created works as well as incorporate them in new works of art is at odds with rights of copyright holders. Right to use portions of work to produce new work appears to be granted by statutory meaning of derivative rights, which is basically what appropriation artists want to accomplish. Right to derivative works discourages appropriation artists because of possibility that artists will be liable for copyright infringement.¹⁶⁵ The continued expansion of derivative rights through out copyright history has contributed to the suppression of contemporary artists.¹⁶⁶ Derivative rights monopolize the space where appropriation artists thrive. Fair use doctrine was created to quell this issue, but as demonstrated, courts have continued to be inconsistent in their application and interpretation of the statutory factors.

Copyright holders' derivative rights are yet another hurdle that appropriation artist face when under scrutiny for their work. When copyright holders assert that their works are transformative through derivative rights, artists using the fair use doctrine battle to demonstrate that their creations are transformative.¹⁶⁷ This tension hinders artistic expression in addition to creating ambiguity, which leads to more lawsuits.¹⁶⁸ Artist in fear of costly litigation fees will cease to create appropriation art, ultimately changing the trajectory of the contemporary art landscape.

APPROPRIATION IN ART AND INDIAN COPYRIGHT ACT

India and the US have differing laws on the fair utilization of copyrighted material. A comprehensive list of actions that do not constitute copyright infringement is provided in Section 52 of Indian Copyright Act, 1957. This is unlike Section 107 of the US Copyright Act, 1976 that provides only an illustrative list of purposes, the use for which could be considered fair use and enumerates four factors that are to be supposed for determining whether an act amounts to fair use or not. Thus, under the Indian law, an appropriation artwork would not amount to copyright infringement only if its covered by any of acts exempted under section 52. In case of *Civic Chandran v. Ammini Amma*,¹⁶⁹ the Kerala HC held that defendant's counter-drama (that substantially reproduced the plaintiff's drama that it has been based upon) fell within the purview of 'criticism' under Section 52 (1)(a) as its main purpose was to criticize the drama and thus didn't constitute copyright infringement. However, appropriation artworks

¹⁶⁵ Supra n. 164, 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")

¹⁶⁶ *Id.* at 1237

¹⁶⁷ 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)

¹⁶⁸ *Id.* at 388

¹⁶⁹ *Civic Chandran v. Ammini Amma*, 1996 PTR 142 (ker)

which reproduce the underlying copyrighted works almost in entirety, merely for making new artworks for commercial purposes, are unlikely to fall within ambit of any such exempted acts. Notwithstanding the fact that the appropriated artworks are meant to comment on a societal practice, they will not be protected by Section 52 (1)(a), which exempts fair dealing with work for purpose of criticism or review of that work or of any other work.

CONCLUSION

Contemporary art survives with the practice of copying and with the advent of technology and mass media consumption has only made copying easier. Appropriation artists develops the work based on the preexisting work and if the work is a copyrighted it amounts to infringement. The ubiquity of copyright is originality of expression but in the appropriation art it is originality of idea. The artist use the copyright work without any alteration or with the slight modification but it give a new message or a meaning.

However, courts have struggled to adapt to the evolution of appropriation art as a fair use. Application of fair use doctrine has done little to provide relief. Part of reason for this inconsistency is the courts lack of understanding of the essence of contemporary art. Narrowing the derivative rights of copyright holders and rebalancing the use of fair use elements can help to bridge the gap between copyright law and appropriation art.

One suggested remedy to issue would be to rebalance the application of the fair use defence. The transformative use inquiry would not control the analysis and each factor would be considered equally by the court. Reformulating the doctrine of fair use is necessary to evolve with the changing trends in contemporary art and to provide protection to appropriation artists. The remaining three factors of fair use inquiry are vital to 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 more transformative the use the less important other factors are, the court is ignoring potential considerations that may be the base to the overall inquiry.

Limit the scope of copyright holder's derivative right and thereby prevent copyright owner from alleging infringement of any work that they would have potentially created or developed. Having a claim to both market for copyrighted work and derivative market gives copyright holders wide latitude to dominate the space. Court in *Campbell v Acuff-Ross Music, Inc.*, stated that original creator would develop and license to others. This gives original artists the opportunity to claim that their derivative market is violated because the appropriation artist's work is something they would have produced. To stop copyright holders from claiming

infringement of any work they could have designed or produced, scope of derivative rights should be suitably limited.

Protecting the rights of appropriation artists is fundamental to the future landscape of postmodern art. Copying often lies at the heart of artistic progress and is key to creation of new works. Creating a balance among scope of copyright holders right and the rights of appropriation artists is essential to protect the process of creation.

