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## Cover Page Footnote

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# THE NARROWEST AND MOST OBVIOUS LIMITS: APPLYING FAIR USE TO APPROPRIATION ART ECONOMICALLY USING A ROYALTY SYSTEM

*Brittani Everson*[+]

*"All artists steal; but the truly original artist repays a thousandfold."*[1]

The intersection of art and law has confounded courts for centuries.[2] In one of the most famous copyright cases of the twentieth century, Justice Holmes cautioned that judges, trained principally in law, should refrain from making judgments about the aesthetic value of art.[3] Scholars of law and art alike have written extensively on the ways in which art and law are distinct and should not mix.[4] However, there are many instances in which art and law must intersect, most notably when the law seeks to protect and promote the arts by granting exclusive copyrights and making allowances for fair use.[5]

In the United States, legal protection of art is rooted in the Constitution, which empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

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1. A sentiment traditionally attributed to the architect, Le Corbusier. *See* Henry Lydiate, *Appropriation Art and Fair Uses:* Cariou v. Prince, ART MONTHLY, May 2009, at 41.

2. *E.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903); *see* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 819–39 (2005); Anne Jamison, *Collaboration v. Imitation: Authorship and the Law*, 18 LAW & LIT. 199, 203 (2006).

3. *Bleistein*, 188 U.S. at 251. Justice Holmes remarked:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.

*Id.*

4. *See* Farley, *supra* note 2, at 811–13 (discussing the problematic nature of the rigid objectivity that judges must impart in their judgments about art, which is inherently subjective); William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2000) (noting that artists view copyright law as an impediment to their creativity).

5. *See* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM. J.L. & ARTS 103, 104 (1988).

respective Writings and Discoveries."[6] Pursuant to this power, Congress passed the Copyright Act of 1976, which gave holders of copyrights exclusive use of copyrighted material, including the rights of reproduction, adaptation, publication, performance, and display.[7] Additionally, as a tool to combat copyright infringement claims, the Copyright Act codified the judicial doctrine of fair use, which permits individuals other than the copyright holder to use copyrighted works in limited circumstances.[8] Copyright law aims to balance the private reward given to copyright holders with the benefit the public accrues from access to intellectual property.[9]

Judges must find equilibrium between judging the aesthetic value of art, an inquiry that is subjective and vulnerable to the influence of a judge's art knowledge, aesthetic preferences, and biases, and objectively ruling on the use of copyrighted works.[10] As art forms change, this has become progressively difficult.[11] Courts are increasingly asked to make rulings on art that they do not understand or consider as art.[12] This is particularly the case when courts deal

6. U.S. CONST., art. I, § 8, cl. 8.

7. 17 U.S.C. § 106 (2012); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1108 (1990) (stating that the text of the Constitution implies that exclusive intellectual property rights "exists only by virtue of statutory enactments"). This right is limited to protection of expressions and does not extend to protection of "idea, procedure, process, system, method of operation, concept, principle, or discovery." 17 U.S.C. § 102 (2012).

8. 17 U.S.C. § 107 (2012). Although fair use was codified in Section 107 in 1976, courts have long recognized and applied the doctrine. S. REP. NO. 94-473, at 61 (1975). *But see* WILLIAM F. PATRY, PATRY ON FAIR USE, § 2:1 (2013 ed.) (concluding that fair use was not codified but instead statutorily recognized because the Copyright Act does not give a finite definition of fair use and instead offers factors to be considered at the discretion of the court).

9. Carlin, *supra* note 5, at 104; *see* Jamison, *supra note* 2, at 202 (arguing that this analysis takes into account both financial and moral costs and benefits); *see also* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that Congressional intent of the Copyright Act was to strike the balance between society's interest "in the free flow of ideas" and the ability of creators to "control and [exploit] their creations"); Leval, *supra* note 7, at 1111 (finding that the sole goal of copyright law is to stimulate creativity for the greater benefit of the people).

10. *See* Leval, *supra* note 7, at 1107 (stating that fair use opinions are inconsistent and "result from intuitive reactions to individual fact patterns"); Sherri Irvin, *Appropriation and Authorship In Contemporary Art*, 45 BRIT. J. AESTHETICS 123, 134 (2005) (recognizing that defining art is more difficult when confronted with all of the developments made by contemporary artists).

11. *See infra* Part I.E (discussing the application of copyright protection to appropriation art).

12. *See, e.g.*, Cariou v. Prince, 784 F. Supp. 2d 337, 346 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013) *cert. denied*, 134 S. Ct. 618 (2013).

with "appropriation artists"[13] who skew the traditional art goal of originality[14] and seek to express ideas by borrowing and repurposing images from pop culture, advertisements, news media, and other artists.[15]

Appropriation artists incorporate borrowed images and found objects in varied ways: making unaltered carbon copies, incorporating the images in collages, and transforming the images through addition, distortion, and camouflage.[16] Courts have dealt with cases involving appropriation artists by prioritizing the first factor of the fair use inquiry and by allowing their visual experience of the art and understanding of the genre of appropriation art to inform their rulings.[17] Scholars have frequently noted the problems that accompany rulings based on

13. Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 33 (1992) (asserting that appropriation art "represents the most radical challenge to the copyright laws to date"). Within this Comment the term "appropriation artist" refers specifically to visual artists who work in the mediums of painting, drawing, sculpture, printing, and still photography. *See* 17 U.S.C. §101 defining "work of visual art" as "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author;" *see also* Leval, *supra* note 7, at 1128–29 (suggesting that it may be necessary to implement an entirely new form of copyright law to address the unique issues artists face).

14. *See* Irvin, *supra* note 10, at 136 (positing that "even innovation is not built in to the very idea of art" and explaining that appropriation art does not strive to be original); *see also* Greenberg, *supra* note 13, at 1 (arguing that contemporary artists constantly challenge the notion that copyright law uses to categorize art); Laura Gilbert, *No Longer Appropriate?*, ART NEWSPAPER (May 9, 2012), *available at* http://www.theartnewspaper.com/articles/No-longer-appropriate/26378 (reporting that appropriation artist, Sherri Levin, felt that the point of her art was to infringe and challenge notions of authorship).

15. Carlin, *supra* note 5, at 108–09; Barbara Pollack, *Copy Rights*, ARTNEWS, Mar. 2012, at 76 (concluding that "'[a]ppropriation' covers a broad array of practices—reworking, sampling, quoting, borrowing, remixing, transforming, adapting"); *see also* Jamison, *supra note* 2, at 202 (commenting on the troublesome place of appropriation art in copyright law, which distinguishes only between a true owner and one who is not a true owner).

16. *See, e.g.*, Carlin, *supra* note 5, at 136–37 (describing techniques used by appropriation artists, Levine and Bidlo). For example, artist Sherri Levine gained fame and legal trouble after displaying her "re-photographs,"photographic prints that were exact replicas of photographs previously taken and published by another artist, Edward Weston. *Id.* Similarly, Jeff Koons was sued for copyright infringement after creating sculptures based on a copyrighted photograph. Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006). Koons altered the original image by changing the medium of representation from photography to sculpture and adding several details and color choices not included in the original photograph. *Id.* at 248.

17. *See* Greenberg, *supra* note 13, at 1–2 (explaining that the process of legal copyright protection requires an aesthetic evaluation of the work and arguing that visual artist are unique and, therefore, deserve their own unique copyright analysis); Farley, *supra* note 2, at 805–18 (providing examples of judges making subjective aesthetic determinations in copyright cases); *see also* VILIS R. INDE, ART IN THE COURTROOM 20 (1998) (noting that the artists themselves believe that "the creative aspect of art goes far beyond the visual elements of art").

the aesthetic value of the alleged infringing works.[18] However, the judiciary has historically been reluctant to judge the aesthetic value of art.[19]

The Second Circuit confronted this issue in *Cariou v. Prince*.[20] For six years, the American photographer Paul Cariou photographed the religious practices, culture, and tropical landscapes that characterized the lives of Jamaican Rastafarians.[21] In 2000, his work was published in *Yes Rasta*, an almost two hundred page photographic essay.[22] In 2007, Richard Prince, a well-known appropriation artist,[23] exhibited and sold prints of a collection of paintings and collages that incorporated Cariou's photographs.[24] Cariou challenged Prince's use of the copyrighted photographs.[25] Through visual observation of the artworks, the court found that Prince had created a work of art that was visually different and that evoked a meaning completely separate from the photographs taken by Cariou.[26]

The trend towards prioritizing visual transformation in copyright law cases over all other considerations affects appropriation artwork because the appropriation artists use copyrighted material unconventionally.[27] This allows courts to resort to an aesthetic analysis that is based solely on the court's experience with and knowledge of art and the work in question, and that is subject to potential biases.[28] This approach has resulted in a modern day "I know it when I see it" approach for determining when copyright infringement occurs.[29] Furthermore, the judicial reliance on aesthetics and the artist-defendants' own

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18. *See, e.g.*, Farley, *supra* note 2, at 805–18 (identifying problems that accompany these judicial rulings); Greenberg, *supra* note 13, at 1 (same).

19. *See* Farley, *supra* note 2, at 807; Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 485, 518–28 (2010).

20. Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013). This case was recently settled. *See* Brian Boucher, *Art in America Landmark Copyright Lawsuit Cariou v. Prince is Settled*, ART IN AMERICA (Mar. 18, 2014), *available at* http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled/.

21. *Id.* at 698.

22. *Id.* at 699.

23. *Id.*

24. *Id.* For example, Prince took Cariou's black and white photograph of a young man standing next to shrubbery, spray painted the subject's eyes and inserted a photograph of a blue electric guitar so that the subject appeared to be playing the instrument. *Id.*

25. *Id.* at 698.

26. *Id.* at 706.

27. *See* Irvin, *supra* note 10, at 125–27 (positing that while traditionally artists were held "responsible for every aspect of their creation" but appropriation artists are not responsible for every aspect of their art because "they substitute the voices of others for their own"). *See* Jamison, *supra* note 2, at 202–03 (discussing the inability of copyright law to see past the idea of one author).

28. Farley, *supra* note 2, at 854 (concluding that the ability of judges to consider works of art is subject to "deeply subjective, highly personal, unanalyzed feelings that an object is or is not art").

29. This approach is akin to the one use in Justice Stewart's concurrence in *Jacobellis v. Ohio*. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (finding that illegal pornography could be identified by simply viewing it).

conception of their work has led to inconsistent rulings in which one court will see transformation in a piece of art while another court considering the same piece does not.[30] As the use of copyrighted works becomes more common in all genres and technological developments make appropriation of images easier, courts must wrestle with the copyright questions in unconventional mediums.[31]

This Comment explores the development of the fair use defense and its application to cases involving appropriation artists. Part I examines the history of fair use, including its beginning as a judicial doctrine, its codification in the Copyright Act, and the most recent Supreme Court cases interpreting the defense. Next, Part I outlines how courts employ a four-factor analysis in fair use cases, highlighting the initial application of those factors in cases involving visual appropriation artists. Part II analyzes the trend of prioritizing the aesthetic transformative value when dealing with visual artists through a discussion of the *Cariou* decision. This section argues that this focus on aesthetics is contrary to the history of court treatment of visual art and the overall goal of the Copyright Act. Part III offers a solution for solving copyright infringement cases involving appropriation artists based on the economic rationales for copyright law, concluding that the most effective way to judge cases involving appropriation artists is by applying an economic analysis. This economic analysis permits fair use when substantial commercial use has not been made of copyrighted material and institutes a royalty system when commercial use has been identified. This proposal allows courts to forgo aesthetic evaluation of appropriation artists.

## I. THE HISTORY OF COPYRIGHT LAW PROTECTION OF CREATORS AND THE FAIR USE DOCTRINE

### *A. The Complicated Purpose of Copyright Law*

Courts consider actions for infringement in light of the purpose of copyright law.[32] Judges have difficulty reaching consistent decisions because the underlying purpose of copyright is so controversial.[33] Simply stated, copyright

30. *See, e.g.*, Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

31. *See* Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES, Jan. 1, 2012, at AR1 (commenting that "art lawyers say that legal challenges are now coming at a faster pace, perhaps in part because the art market has become a much bigger business"); Pollack, *supra* note 15 (reporting that an appropriation artist stated that "technology has really opened up the techniques" and as a result artists have easy access to "computers, scanners and Google" the idea of a "digital culture"); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430–31 (1984) (pointing out the relationship between copyright law and technological development); Carlin, *supra* note 5, at 106 (finding that there is an increasing use of technology in "mainstream cultural expression" that incorporates borrowed text and images and "re-using original themes").

32. *See* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1120 (1983) (noting that the goal of copyright law underlies many judicial decisions).

33. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 250 (2d Cir. 2006).

law's purpose is "[t]o promote the Progress of Science and useful Arts,"[34] which is accomplished by giving creators limited monopolies through the grant of exclusive copyrights.[35] These monopolies stimulate creation by rewarding originators for their efforts.[36] Although the general public reaps benefits from the creativity resulting from these monopolies,[37] controversy arises when the monopolies are seen as an impediment to creativity.[38]

Scholars offer various justifications for granting exclusive copyrights that conflict when copyright law is applied.[39] The first justification elevates the rights of the public to access intellectual property and positions copyright law as a "necessary evil" that is permissible only because of the economic incentives it offers to creators and the benefit it provides to the public.[40] The second justification is that copyright law is simply an extension of an author's natural property rights and that the protection of authorship is the ultimate goal of copyright law.[41] The tension between these constructions is the central concern of fair use, a concept that can be distilled down to a choice between honoring an author's property rights and giving the public the benefit of access.[42]

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34. U.S. CONST., art. I, § 8, cl. 8.

35. 17 U.S.C. § 106 (2012).

36. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545–46 (1985) (stating that copyright owners should receive "a fair return for their labors"); *Sony*, 464 U.S. at 429 (deciding that copyright law must spur creation and provide "a special reward" for creators); *see also* MCA, Inc. v. Wilson, 677 F.2d 180, 182–83 (2d Cir. 1981) (stating that the purpose of copyright law is to reward creativity for the public's benefit).

37. *See* CR1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2000).

38. Leval, *supra* note 7, at 1109 (warning that copyright monopolies could "strangle the creative process"); *see also* Greenberg, *supra* note 13, at 32–33 (arguing that copyright law can discourage creation when new creators are unable to access the ideas of previous inventors).

39. Abrams, *supra* note 32, at 1120–21.

40. *Id.* at 1120–21 (concluding that the cost of exclusive copyrights is a burden on the public but is justifiable because of the benefits that creators and the public receive); NIMMER & NIMMER, *supra* note 37, at § 1.03[A] (arguing that without a benefit to the public, granting exclusive copyrights would be unwarranted). *But see* Frank J. Lukes, Comment, *The Public Good v. A Monetary Profit: The News Organizations' Utilization of the Fair Use Doctrine*, 11 J. MARSHALL REV. INTELL. PROP. L. 841, 844 (2012) (noting that "the primary purpose of copyright law is not to reward the author for his work" but is instead to promote the public good).

41. *See* Abrams, *supra* note 32, at 1122; *see also* NIMMER & NIMMER, *supra* note 37, at § 106[A] (hypothesizing that creative works could be considered private property and fit into the natural right concept underlying property law).

42. Blanch v. Koons, 467 F.3d 244, 250 (2d Cir. 2006). Fair use was developed to aid in implementing the purpose of copyright law. *See, e.g.*, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) (stating that fair use is necessary to obtain the goals of copyright); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006) (finding that fair use must conform with the goals of copyright law); Brownmark Films, LLC v. Comedy Partners, 800 F. Supp. 2d 991, 1000 (E.D. Wis. 2011) (finding that fair use advances the purpose of copyright law), *aff'd*, 682 F.3d 687 (7th Cir. 2012).

### *B. The Beginnings of Fair Use: A Judicially Created Doctrine*

The doctrine of fair use has been called "the most troublesome in the whole law of copyright."[43] As an exception to an exclusive copyright, fair use allows the use of copyrighted works in limited situations by entities other than the copyright holder.[44] Prior to the doctrine's codification in the Copyright Act of 1976, judges articulated varying criteria to identify fair uses, always considering the economic goal of copyright law.[45]

Building on English case law established under the Statute of Anne,[46] *Folsom v. Marsh* created the framework for fair use analysis in America.[47] In that case, the court had to decide whether a bibliography entitled, "Life of Washington" featuring the writings of President George Washington infringed on a previously published encyclopedia by using the same letters.[48] Focusing on the materials, the court inquired about the nature, extent, and value of the materials used by both parties and whether those materials had common sources.[49] The court next looked towards the purpose of each work and the authors' objectives in creating their work.[50] At minimum, the court sought to ensure that the subsequent work did not "supersede" the original, meaning that the secondary work did not

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43. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

44. Lukes, *supra* note 40, at 846–48.

45. *See* S. REP. No. 94-473, at 61 (1975) (stating that fair use as a defense in copyright actions "has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine applying it").

46. Act for the Encouragement of Learning, 1709 8 Ann., c. 19; *See* PATRY, *supra* note 8, at § 1:2 (tracing the roots of American copyright law to the English Statute of Anne, the sole purpose of which was to correct the damage done to the London book market by unauthorized copying); *see also* Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1373 (2011) (hypothesizing that early English case law and modern American copyright law have much in common). The Statute of Anne gave book printers and authors an exclusive monopoly over their works, in hopes to protect those artisans from financial ruin. *See* Leval, *supra* note 7, at 1108–09.

47. *See* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. mass. 1841) (No. 4901); Sag, *supra* note 46, at 1377.

48. *Folsom*, 9 F. Cas. at 344–45. In the oft quoted majority opinion, Justice Story remarked:

> [t]he question of piracy, often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.

*Id.* at 344.

49. *Id.* at 348. Other cases are instructive on this point. *See* Henry Holt & Co., to Use of Felderman v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (concluding that three sentences from a copyrighted book were a small percentage but represented the essential, valuable portions of the original work). However, some scholars have criticized *Folsom*'s expansion of copyright law to include tangible ideas like the value of each work. *See* Sag, *supra* note 46, at 1373.

50. *Folsom*, 9 F. Cas. at 348.

"prejudice the sale, or diminish the profits" of the original.[51] The court found that copying the essence of the original work produced the unfair use of the work.[52]

The principles identified by Justice Story in *Folsom* were a talisman repeated by many courts, effectively becoming the most prevalent fair use dogma.[53] Several courts expanded on the *Folsom* inquiry, each focusing on the use and economic protection of copyright holders.[54] These courts recognized the importance of allowing fair use for criticisms and parodies.[55] Additionally, courts focused on the economic damage an original work may suffer,[56] some courts concluding that actual damage need not be shown.[57] Overall, judges articulated principles that recognized justifiable uses of original material while at the same time preventing injury to original authors by recognizing the value and labor expended by original authors.[58]

### *C. Codification of Fair Use in the Copyright Act of 1976*

The first American Copyright Act was enacted in 1790 as a way to insure adherence to the Constitutional mandate of protection and promotion of innovation in the arts and sciences.[59] When the Copyright Act was amended in

51. *Id.* ("If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto."); *see also* Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 85 (6th Cir. 1943) (finding plaintiff's injury to be "infinitesimal" because plaintiff had hundreds of sketches and the suit only dealt with two of them).

52. *Folsom*, 9 F. Cas. at 348.

53. *See, e.g.*, *Mathews Conveyer*, 135 F.2d at 84-85; *Henry Holt*, 23 F. Supp. at 304; Reed v. Holliday, 19 F. 325, 326–27 (C.C.W.D. Pa. 1884); NIMMER & NIMMER, *supra* note 37, at § 13.05[B][1].

54. *See, e.g.*, *Mathews Conveyer*, 135 F.2d at 84–85 (adding a slight nuance to *Folsom*, the court recommended that accusations of piracy require the court to engage in a highly fact intensive inquiry); *Loew's*, 131 F. Supp. at 176 (expanding the fair use doctrine, by introducing the idea that the purpose of the use was most important).

55. *See, e.g.*, *Loew's*, 131 F. Supp. at 175–78 (finding that "[c]riticism is an important and proper exercise of fair use" and expanding the fair use doctrine by introducing the idea that the purpose of the use was most important).

56. NIMMER & NIMMER, *supra* note 37, at § 13.05[B][1].

57. *See, e.g.*, *Reed*, 19 F. at 326–27 (granting preliminary injunction "without proof of actual damage"); *Henry Holt*, 23 F. Supp. at 304 (concluding that actual damage is not required for the issuance of an injunction).

58. *See e.g. Mathews Conveyer*, 135 F.2d at 85 (finding that the purpose of fair use was to promote progress by allowing subsequent users to build on the knowledge of others to benefit the greater good); Lawrence v. Dana, 15 F. Cas. 26, 41 (C.C.D. Mass. 1869) (No. 8138) (opining that an infringer must not capitalize on the labors of another); Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (same).

59. U.S. CONST., art. I, § 8, cl. 8; Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (limiting copyright coverage to books, maps, and charts).

1976, Congress added fair use as an affirmative defense to an action for copyright infringement.[60]

The statute sets forth four factors that may be considered when a defendant raises a fair use defense, including:

> 1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.[61]

Congress made these four factors non-exclusive to provide fair use a flexible definition[62] and sought to codify the most prevalent factors expressed by judges.[63] Fair use has been defended as one of the most fundamental aspects of copyright law because it advances the stated purpose of the law by championing the public's interest in access to intellectual property and advances progress by allowing subsequent authors to build off the work of previous authors.[64]

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60. *See* 17 U.S.C. § 107 (2012). To prevail on a copyright infringement claim, plaintiff has the burden to prove that there is ownership of a valid copyright, and that the defendant copied component elements of the work that are original. *Id.*; *see* H. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677 (stating that the doctrine of fair use is "one of the most important and well-established limitations on the exclusive right of copyright owners"); *see also* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 552 (1985) ("The Copyright Act represents the culmination of a major legislative reexamination of copyright doctrine.").

61. 17 U.S.C. § 107.

62. H. REP. NO. 94-473, at 65 (stating that because circumstances in copyright cases can be so diverse, bright line rules are not as helpful as a case-by-case analysis); *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 476–77 (1984) (Blackmum, J., dissenting) (stating that no static rules for fair use have been established and so the factors are not exhaustive or to be strictly applied and the factors are not to be assigned "particular weight").

63. H. REP. NO. 94-1476, at 65 (stating that the factors are not exclusive, but are the closest approximation to the concepts created by judges); *see* Leval, *supra* note 7, at 1110–11 (advancing the idea that the four factors were never meant to be weighed equally but instead should be viewed as a way to reach the objectives of copyright protection; however, judges have treated the statutory factors as conclusive, leading to failures to contemplate additional relevant considerations); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 267, 280 (2003) (noting that the major issue with the four factors is that they are too flexible and can be manipulated to support both the conclusion that a use is fair and that the same use is not fair depending on the relative weight each judge assigns to the various factors); William C. Walker, Jr., *Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium*, 43 LA. L. REV. 735, 740 (1983) (concluding that this flexibility makes the outcome of copyright cases less predictable and decisions less consistent). *But see* H. REP. NO. 94-1478, at 65 (stating that because fair use is an equitable rule of reason, each case must be decided on an individual basis).

64. *See Sony*, 464 U.S. at 429 (stating that copyright law serves an "important public purpose" and encourages "free flow of ideas").

Furthermore, the fair use doctrine properly respects the rights of copyright holders by determining which uses are not fair.[65]

Once infringement has been found, courts may issue an injunction to stop further violations.[66] Upon a final order, courts may even order the offending works to be destroyed.[67] The Copyright Act also includes varying remedies, such as actual damages that incorporate any of the infringers' profits[68] or statutory damages ranging in amounts of $750 to $30,000 for "any one work" at the complete discretion of the courts.[69] These flexible remedies can result in significant or nominal amounts based on the court's perception of the infringer's actions.[70]

### *D. Supreme Court Decisions on Fair Use*

The Supreme Court has offered an in-depth fair use analysis.[71] Though the Court has never dealt specifically with appropriation visual artists, these opinions have shaped lower court rulings involving appropriation artists.[72] Over the course of deciding these cases, the Supreme Court significantly changed its stance on fair use when confronted with different facts. The Court moved from

65. NIMMER & NIMMER, *supra* note 37, at § 13.05[B][1].

66. 17 U.S.C. § 502. To prevail on a copyright infringement claim, plaintiff has the burden to prove that there is ownership for a valid copyright, and that the defendant copied component elements of the work that are original. 17 U.S.C. § 501(b).

67. 17 U.S.C. § 503(b); *see* Rogers v. Koons, 960 F.2d 301, 313 (2d Cir. 1992) (ordering the destruction of infringing documents); Cariou v. Prince, 784 F. Supp. 2d 337, 335–36 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013), *cert. denied* 134 S. Ct. 618 (2013) (ordering the destruction of infringing photographs).

68. 17 U.S.C. §504(b). The statute does not define the calculations needed to determine actual damage but instead offers that the damages must be "as a result of the infringement." *Id.* The amount of the infringer's profit is to be calculated by subtracting deductible expenses and profit not arising from use of the copyrighted material from the infringer's gross profits. *Id.*

69. 17 U.S.C. § 504(c)(1).

70. 17 U.S.C. § 504(c)(2). When an infringer has acted "willfully," the court may order fees in addition to the statutory damages not to exceed $150,000. *Id.*

71. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994) (holding that the presence of one element of fair use is not enough to make a fair use determiniation); Stewart v. Abend, 495 U.S. 207, 237–38 (1990) (stating fair use is more common in factual work than fictional work); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 551 (1985) ("Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433–34 (1984) (explaining fair use as a defense to infringement and remedies).

72. *See, e.g.*, Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176, 1181 (9th Cir. 2013) (holding that the *Campbell* Court's transformative use inquiry is paramount); Cariou v. Prince, 714 F.3d 694, 712 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013); Blanch v. Koons, 467 F.3d 244, 259 (2d Cir. 2006); *Rogers*, 960 F.2d at 306; Kienitz v. Sconnie Nation LLC, No. 12-CV-464, 2013 WL 4197454, at *10 (W.D. Wis. Aug. 15, 2013); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 384–85 (S.D.N.Y. 1993).

a fair use analysis that barred commercial use,[73] to one that focused on the economic considerations of the fourth factor,[74] and finally to a focus on transformative use.[75] The variety of outcomes encompassed in the Court's decisions continues to confuse lower courts' fair-use evaluations.[76]

*1. Commercial Use is Presumptively Unfair: The Betamax Case*

In *Sony Corporation of America v. Universal City Studios, Inc.*, the Court dealt with then-new technology, known as a Betamax, that allowed purchasers to video record programs aired on television.[77] Owners of copyrighted works aired on television challenged the ability of consumers to use the Betamax to create an exact copy of the works as a violation of the copyrights.[78] They also challenged Sony's ability to manufacture the product on a theory of vicarious copyright infringement and sought to enjoin production.[79]

After applying copyright factors one and four as outlined in the Copyright Act, the Court held that the neither the use nor the manufacture of the Betamax was copyright infringement.[80] The Court reasoned that consumers primarily used the Betamax to record television shows for later viewing—not for commercial purposes.[81] The Court found that the commerciality aspect of first factor the most salient.[82] The Court unequivocally stated that if the Betamax

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73. *See Sony*, 464 U.S. at 421.

74. *See Harper & Row Publishers*, 471 U.S. at 566–67.

75. *See Campbell*, 510 U.S. at 579.

76. *Compare Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986) (rejecting *Sony*'s conclusion on commercial use), *with* Balsley v. LFP, Inc., 691 F.3d 747, 760 (6th Cir. 2012) (applying *Sony*'s reasoning on commercial use), *cert. denied* 133 S. Ct. 944 (2013). *See also* Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 113 (2d Cir. 1998) (agreeing with *Campbell*'s abandonment of commercial use being presumptively unfair and instead adopting *Harper*'s idea that commercial use was simply a separate factor to be considered); *Cariou*, 714 F.3d at 705–06 (adopting *Campbell*'s transformative use analysis); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 921 (2d Cir. 1994) (noting that *Campbell*'s ruling disagreed with *Harper*'s elevation of the fourth factor); *Rogers*, 960 F.2d at 311–12 (agreeing with *Harper* that the fourth factor is most important).

77. *Sony*, 464 U.S. at 422.

78. *Id.* at 420.

79. *Id.*

80. *Id.* at 449–55. The court did not find it necessary to discuss any of the other factors identified by the Copyright Act, thereby underscoring the importance that economic factors should play in fair use analysis. *Id.*

81. *Id.* at 425, 449 (finding Betamax enabled "noncommercial, nonprofit activity"). Additionally, the Betamax has several other uses, including the ability to watch videos and record non-copyrighted programs, such as "sports, religious, educational, and other programming." *Id.* at 443–44. The Court found that the copyrighted programs were initially distributed to viewers by broadcast for free, and that the recording of the programs was a private activity, all of which weighed in favor of finding the use fair. *Id.* at 424, 449.

82. *Id.* at 451–52 (finding that non-commercial use required further analysis, the Court needed to decide whether the "particular use [was] harmful" and determine the effects of widespread use on the potential market for the copyrighted programs).

was used for commercial purposes, that use would have been presumptively unfair.[83] However, Justice Blackmun dissented and opined that outright copying of copyrighted material was not a productive use, and therefore fair use was not applicable.[84]

*2. Unpublished Memoirs Are Not Fair Use*

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court extended *Sony*'s focus on the importance of the commercial use distinction.[85] In *Harper*, the *Nation*, a news magazine, published unauthorized excerpts of an unpublished memoir of President Gerald Ford.[86] Harper purchased exclusive rights to the manuscript and then sold first rights to publish excerpts to *Time* Magazine.[87]

The Court held that the *Nation*'s use of excerpts was not fair, reasoning that *Nation* published the excerpts for commercial purposes, which affected the market for copyright holders based on Harper's ability to offer the first right to publish.[88] The Court elevated its commerciality analysis by treating it as a "separate factor," that when found should weigh heavily against a finding of fair use.[89] Most importantly, the Court identified the last factor, the effect of the use upon the potential market for or value of the copyrighted work, as "undoubtedly the single most important element of fair use."[90] To further the copyright law goal of protecting "the economic incentive to create and disseminate ideas," the Court sought to ensure that the new work did not "supplant" the original.[91]

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83. Other courts have also followed this approach. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) ("The fact that a publication was commercial as opposed to nonprofit . . . tends to weight against a finding of fair use."); Balsley v. LFP, Inc., 691 F.3d 747, 760 (6th Cir. 2012) (applying *Sony*'s presumption), *cert. denied*, 133 S. Ct. 944 (2013). *But see* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994) (warning against applying the "hard presumptive significance" as a "per se rule" in copyright cases presenting issues of commercial use); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 921 (2d Cir. 1994) (advocating a more sophisticated approach than *Sony*'s by making a distinction between "direct commercial use" and "indirect relation to commercial activity"); Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986) (holding that fair use would never be found when commercial use is designated as presumptively unfair).

84. *Sony*, 464 U.S. at 478 (Blackmun, J., dissenting) (defining productive use as a use that "result[s] in some added benefit to the public beyond that produced by the first author's work" and concluding that direct copying of television programs was not productive use).

85. *See Harper*, 471 U.S. at 562.

86. *Id.* at 542.

87. *Id.*

88. *Id.* at 568–69.

89. *Id.* at 562. Commerciality in the context of *Harper* was not solely concerned with the second user's motivation but instead with whether the second user "stands to profit from the exploitation of the copyrighted material." *Id.*

90. *Id.* at 566–67 (stating that a plaintiff in a copyright action only needs to establish that the use of the copyrighted work was connected with reasonable probability to the loss of revenue by the original author).

91. *Id.* at 558, 562.

*3. Turning Point: Converting Rock to Rap is Transformative Fair Use*

The Court's decision in *Campbell v. Acuff-Rose Music, Inc.* greatly departed from its earlier emphasis on the commerciality aspect of the first factor and the economic loss factor.[92] The case arose when the rap group, 2 Live Crew composed a parody song of Roy Orbison's rock song, "Oh, Pretty Woman" without obtaining permission.[93] The group used the musical score from the original song, but added additional beats and completely changed the lyrics.[94] The *Campbell* Court used the standard copyright analysis, stating that each case of copyright infringement required a fact-intensive case-by-case analysis, and that each factor must be "weighed together, in light of the purposes of copyright."[95] The Court held that the use was fair because the group successfully transformed the original song into a new expression.[96]

Building on the *Folsom* notion of superseding the original and *Harper's* mandate that the new work must not "supplant" the original, *Campbell* added a new dimension to the first factor analysis by requiring a finding of transformative use.[97] Now a fair use inquiry must determine whether the new work "instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"[98] In fact, the creation of transformative works furthers the purpose of copyright law.[99]

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92. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994).

93. *Id.*

94. *Id.* at 589.

95. *Id.* at 577–78 (stating that the purpose of copyright law is to uphold the Constitutional mandate to promote the arts and sciences).

96. *Id.* at 579.

97. *See id.* at 579; *see also Harper*, 471 U.S. at 562; Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

98. *Campbell*, 510 U.S. at 579. The idea of transformative use was first expounded in Judge Leval's journal article in which he suggested that the goal of first fair use factor was to determine whether the use conformed with the main objective of copyright protection. *See* Leval, *supra* note 7, at 1111–12. The main objective of copyright protection was to stimulate creativity for the greater benefit of the people. *Id.* Therefore, a justified use of copyrighted material is one that is productive and transforms the original purpose and manner of expression of the copyrighted material. *Id.* Leval has consistently been cited by courts for his opinion on the importance of transformative use for fair use inquiries. *See, e.g.*, Bouchat v. Baltimore Ravens Ltd. P'ship, 737 F.3d 932, 939 (4th Cir. 2013); Cariou v. Prince, 714 F.3d 694, 705–06 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013); Blanch v. Koons, 467 F.3d 244, 250–53 (2d Cir. 2006); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006); NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478 (2d Cir. 2004); Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc., 150 F.3d 132, 141–42 (2d Cir. 1998); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 112–13 (2d Cir. 1998); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 78–79 (2d Cir. 1997); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 923 (2d Cir. 1994).

99. *Campbell*, 510 U.S. at 579; Leval, *supra* note 7, at 1107, 1111–12 (arguing that transformative use is found when a use is productive and uses the original material for a different purpose and in a different manner, which allows the newly created work to benefit "the intellectual enrichment of the public").

Particularly salient to the *Campbell* analysis is whether the new work is a parody of the original.[100]

Notably, the *Campbell* Court did not view transformative use as the only means by which fair use could be found.[101] The finding of transformative use, however, could outweigh other factors such as commercial use.[102] Furthermore, *Campbell* directly contradicted the principle expressed in *Sony* when it stated that Congress could not have intended to make commercial use presumptively unfair.[103]

The influence of these three Supreme Court opinions cannot be overstated.[104] There has been great variety in how lower courts have applied the fair use principles outlined by the Court.[105] Most recently, courts, especially when dealing with visual artists, have prioritized the determination of transformative use as pronounced in *Campbell*.[106] This elevation of the first factor and the belief that the fourth factor is critical has reduced the importance of the second and

100. *See Campbell*, 510 U.S. at 579 (finding that the rap song was a parody and therefore could be a fair use). Other scholars and courts have found that the parody analysis is an important factor in a copyright infringement determination. *See* Marlin H. Smith, Note, *The Limits of Copyright: Property, Parody, and the Public Domain*, 42 DUKE L.J. 1233, 1247–48 (1993) (discussing the role of parody in fair use determinations); Blanch, 467 F.3d at 255 (finding that in order for appropriation art to qualify as a parody, the intent of the artist must be to comment on the copyrighted material);

101. *Campbell*, 510 U.S. at 579. Judge Leval was careful to qualify the importance of transformative use. *See* Leval, *supra* note 7, at 1111–12. Judge Leval concluded that an "extensive taking" could prohibit "creative incentives" and thereby exceed the bounds of productive use justification. *Id.* at 1112. When "the takings are excessive" and other factors weigh in favor of the copyright owner, transformative use should not override those findings. *Id.*

102. *Campbell*, 510 U.S. at 579. Other courts have agreed with the *Campbell* Court in that regard. *See, e.g.*, Seltzer v. Greenday, Inc., 725 F.3d 1170, 1178–79 (9th Cir. 2013) (concluding that transformative use outweighs a finding of parody); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 803 (9th Cir. 2003) (finding that transformative use and parody outweigh a finding of commercial use); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 110 (2d Cir.1998) (holding that a finding of parody outweighs a commercial use finding).

103. *See Campbell*, 510 U.S. at 584.

104. *See generally* Michael D. Murray, *What Is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law*, 11 CHI.-KENT J. INTELL. PROP. 260 (2012) (giving an overview of Supreme Court case law on copyright infringement and explaining the significance of each case).

105. *See supra* note 76 and accompanying text (documenting how lower courts look to the Supreme Court decisions on fair use and rule in a way that solves the case most efficiently).

106. *See, e.g.*, *Green Day, Inc.*, 725 F.3d at 1175–76 (finding that a transformative use inquiry can be highly contentious); Cariou v. Prince, 714 F.3d 694, 707–08 (2d Cir. 2013) *cert. denied*, 134 S. Ct. 618 (2013); Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 693 (7th Cir. 2012); Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006); Kienitz v. Sconnie Nation LLC, No. 12-CV-464, 2013 WL 4197454, at *4–5 (W.D. Wis. Aug. 15, 2013); *see also* Murray, *supra* note 102, at 262 (arguing that the question of transformative use has transformed copyright law).

third factors in cases presenting issues of transformation, parody, and general repurposing of copyrighted works.[107]

### *E. Moving Towards Transformative Use: Fair Use Applied to Appropriation Artists*

*Campbell*'s influence becomes most evident when juxtaposing the appropriation art cases decided prior to and following *Campbell*.[108] Three cases have dealt with appropriation artists extensively: *Rogers v. Koons*,[109] *Blanch v. Koons*,[110] and *Cariou v. Prince*.[111] These cases highlight the importance of *Campbell's* characterization of transformative use as the paramount consideration in the fair use analysis. This move to prioritizing transformative use has both helped and harmed artists. When courts judge the aesthetic value of the allegedly infringing works and see transformative use, appropriation artists have been able to claim legal victories.[112] However, when other judges fail to see transformation, appropriation artists have been barred from fair use.[113]

#### *1. The Pre-*Campbell *Appropriation Case:* Rogers v. Koons

The well-known appropriation artist, Jeff Koons, was held liable for copyright infringement after using a copyrighted photograph for the basis of his sculptural work.[114] His fair use defense, based on the characterization of his work as parody,[115] failed to sway the Second Circuit.[116] Koons created a sculpture of a man and woman sitting on a park bench.[117] Between the two figures was a "string of puppies" created to emulate an image of puppies Koons discovered on

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107. Darren Hudson Hick, *Appropriation and Transformation*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1155 (2013) (arguing that this assumption has led courts to consider the first fact and upon a finding of commercial use disregard the other factors culminating in the finding that use was not fair); *see also Green Day, Inc.*, 725 F.3d at 1179 (stating that factors one and four have always been the most important); Adrianne Barbour, Note, *Yes, Rasta 2.0:* Cariou v. Prince *and the Fair Use Test of Transformative Use in Appropriation Art Cases*, 14 TUL. J. TECH. & INTELL. PROP. 365, 370–71 (2011); Liz McKenzie, *Drawing Lines: Addressing Cognitive Bias in Art Appropriation Cases*, 20 UCLA ENT. L. REV. 83, 91 (2013).

108. *Compare Cariou*, 714 F.3d at 698–99 *and* Rogers v. Koons, 960 F.2d 301, 303 (2d Cir. 1992), *with Blanch*, 467 F.3d at 259.

109. *Rogers*, 960 F.2d at 305.

110. *Blanch*, 467 F.3d at 259.

111. *Cariou*, 714 F.3d at 698–99.

112. *See, e.g.*, *Green Day, Inc.*, 725 F.3d at 1181; *Cariou*, 714 F.3d at 712; Kienitz v. Sconnie Nation LLC, No. 12-CV-464, 2013 WL 4197454, at *10 (W.D. Wis. Aug. 15, 2013).

113. *See* Cariou v. Prince, 784 F. Supp. 2d 337, 349–50 (S.D.N.Y. 2011) *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

114. *Rogers*, 960 F.2d at 306.

115. *See supra* note 102 and accompanying text (describing court rulings on parody and fair use).

116. *Rogers*, 960 F.2d at 309–10.

117. *Id.* at 303; *see also* Greenberg, *supra* note 13, at 25–26.

a postcard.[118] The photographer of the picture on the postcard sued Koons after reading a newspaper article advertising Koons's exhibition of the sculpture.[119]

The Second Circuit began by analyzing the first fair use factor.[120] The court examined whether the sculpture was used for commercial or non-profit purposes because under the *Sony* and *Harper* decisions, a finding of commercial use weighed against a finding of fair use.[121] The court found that Koons profited from the sale and exhibit of the work.[122] Furthermore, the court found that Koons acted in bad faith by removing the notice of copyright from the postcard, and therefore copied the content in an "intentionally exploitive" manner.[123]

Next, the court analyzed the first factor, turning to the issue of parody.[124] The Copyright Act provides that use of copyrighted work for parody or satire is fair use because parody operates as a form of criticism that requires viewers' ability to recognize the material being caricatured.[125] Koons argued that his sculpture was simply a parody of society in general and not of the copyrighted photograph.[126] Koons further argued that as an appropriation artist, media and mass-produced images "caused a deterioration in the quality of society."[127] By re-contextualizing these images in his artwork, Koons believed that he was commenting critically on the effect of these images on society.[128] While agreeing with Koons that his parody commented on society at large, the court held that parody as a fair use defense must comment on the original work itself, not merely offer a statement on society.[129]

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118. *Rogers*, 960 F.2d at 304. Koons removed the copyright accompanying the postcard, sent it to his sculpture artists with the directions that the "work must be just like photo." *Id.* at 305.

119. *Id.* In addition to advertising and exhibiting his work, Koons sold four copies of the statue. *Id.*

120. *Id.* at 308–09.

121. *Id.*; *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448–49 (1984).

122. *Rogers*, 960 F.2d at 309; *see also* Greenberg, *supra* note 13, at 30–31 (noting the paradoxical nature of Rogers's work being a "mass produced" and "commercially exploited" postcard compared with Koons'ss "limited-edition" work).

123. *Rogers*, 960 F.2d at 309.

124. *Id.* Traditionally, this is a question for the court. *See* Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 801 (9th Cir. 2003) (clarifying that whether a work is a parody is a question of law requiring a determination by a court).

125. *See* 17 U.S.C. § 107 (2012). Parody is one of the express allowances mentioned in the Copyright Act. *Id.* In *Rogers*, the court defined parody as: "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original." *Rogers*, 960 F.2d at 309–10.

126. *Rogers*, 960 F.2d at 309.

127. *Id.*

128. *Id.* This is a common belief among appropriation artists. *See* Marvin Heiferman & Richard Prince, *When Jokes Become Second Nature*, BOMB, Summer 1988, at 35, 36.

129. *Rogers*, 960 F.2d at 310.

The court devoted very little discussion to the second and third factors.[130] On the second factor, the court found that the puppies photograph was an original work of art and that its photographer made a living from his photography.[131] Therefore, the nature of the copyrighted work weighed against a finding of fair use.[132] Similarly, the third factor also weighed against a finding of fair use because the photograph was copied in toto.[133]

In judging the fourth factor, the court looked again at the commercial nature of Koons's artwork.[134] The copyright owner, Rogers, only needed to prove that widespread dissemination of Koons's sculpture—the sculpture itself or photographs of the sculpture—would prejudice the potential market for Rogers's work or subsequent derivative works from the photograph.[135] The court hypothesized that if another artist wanted to purchase the rights to Rogers's work, the existence of Koons's work could negatively affect that transaction.[136] The possibility of harm alone weighed against a finding of fair use.[137]

### *2. The Post-*Campbell *Appropriation Case:* Blanch v. Koons

More than a decade after *Rogers*, Koons was again sued by a photographer for copyright infringement, but this time he was able to use the intervening *Campbell* decision to his advantage.[138] Koons contended that his painting collages were transformative enough to qualify as fair use.[139] In a series of paintings commissioned by Deutsche Bank, Koons incorporated images from fashion magazines.[140] These borrowed images included a photograph of women's legs taken by the fashion photographer Andrea Blanch.[141]

The court considered the first factor "the heart" of the fair use inquiry, and devoted the majority of its analysis to this transformative use inquiry.[142] Koons argued that his purposes for using the fashion photograph were different from

130. *Id.* at 310–11.

131. *Id.* at 310.

132. *Id.*

133. *Id.* at 311.

134. *Id.* at 311–12.

135. *Id.* at 312.

136. *Id.*; *see* INDE, *supra* note 17, at 4–17 (1998) (summarizing the background of the case and describing the origin of each of the pieces of "art" at issue in *Rogers*).

137. *Rogers*, 960 F.2d at 312 (noting that the court presumes harm "where the use is intended for commercial gain").

138. *See* Blanch v. Koons, 467 F.3d 244, 250–59 (2d Cir. 2006); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

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

140. *Id.* at 247.

141. *Id.* Koons was paid two million dollars for this series, while Blanch, who owned the copyright for the photograph, was paid $750 by the fashion magazine, Allure. *Id.* at 248–49.

142. *Id.* at 251–53.

those motivating Blanch's creation of the photograph.[143] Agreeing with Koons, the court found that the difference in both artists' descriptions of their work justified a finding of transformative use.[144]

Although disputed by the court, the finding of transformative use practically made the inquiry into the other factors less relevant.[145] The court found that even though Koons's use of the photograph was commercial, the finding of transformative use made this finding less significant.[146] Similarly, the second factor was found to have "limited weight" because Koons's use reached the appropriate level of transformation.[147]

The court analyzed the third factor by looking at the elements included in the original photograph and the elements that appeared in Koons'ss collage.[148] The court distilled the original photograph down to its basic elements, finding that Koons only used three out of five of the identified elements of the original photograph.[149] Moreover, Koons'ss use was also reasonable because the court deemed his work a parody of Blanch's work.[150] Therefore, out of necessity, Koons made use of the original photograph to evoke the idea of mass media advertisements.[151]

Finally, the court turned to the last factor, which also weighed in Koons'ss favor.[152] The court emphasized that Blanch had not sought to publish or license the photograph, that there was no evidence of Koons'ss use harming the market for Blanch's work, and that Koons'ss actions did not decrease the value of the original photograph.[153]

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143. *Id.* at 248, 252–53. Koons'ss goal here, as in *Rogers*, was to comment on society and to remind viewers of his or her relationship to advertisement and how mass media affects lives. *Compare id.* (explaining how Koons claimed he wanted viewers to experience his work relative to their own personal experiences), *with* Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992) (explaining that here Koons argued his work was a societal parody). Conversely, Blanch's stated purpose was to evoke a sense of sexuality. *Blanch*, 467 F.3d at 248.

144. *Id.* at 253, 259.

145. *Id.* at 254. Other courts have also followed this approach. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (stating that in the context of a challenge to an allegedly infringing rap song the commercial use of a work should be ignored after the finding of transformative use); NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478 (2d Cir. 2004) (finding that transformative use makes the commercial use inquiry less significant).

146. *Blanch*, 467 F.3d at 254.

147. *Id.* at 257.

148. *Id.* at 257–58.

149. *Id.* The basic elements of Blanch's photograph included a model's legs, feet, and sandals, the placement of the model's feet on the lap of a male model, and the background elements that pointed to the photography having been shot in an airplane. *Id.* The Koons collage used only the legs, feet, and sandals found in Blanch's photograph. *Id.* at 258.

150. *Id.* at 255.

151. *Id. But see* Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) (holding that a parody must specifically comment on the copyrighted work).

152. Blanch, 467 F.3d at 259.

153. *Id.* at 249, 258.

*3.* Cariou v. Prince*: Illustrating that Transformation is Not Easily Identified*

Patrick Cariou is a professional photographer who documented the lives of Jamaican Rastafarians by creating landscape and portrait photographs.[154] In 2000, his photographs were compiled in a photographic essay entitled *Yes, Rasta*.[155] After purchasing the pictorial book, Richard Prince created a series of paintings and collages incorporating Cariou's photographs.[156] Prince's series was exhibited in Saint Barthelemy and in the Gagosian Gallery in New York.[157] Prince is a well-known appropriation artist who had gained a reputation as being an art rebel for his liberal use of copyrighted images.[158] By contrast, Cariou is a small-time photographer who specialized in classical black and white photography.[159]

Prince's collage paintings incorporated Cariou's photographs in various ways.[160] Some works used small portions of Cariou's photographs, distorting the images to the point that they were unrecognizable, thereby completely obscuring Cariou's work.[161] Other collages used entire photographs to which Prince added colorful "lozenges" to the eyes of Cariou's subjects and made other figures look as though they were playing musical instruments.[162] Cariou learned of Prince's use of his work after a gallery owner declined to exhibit Cariou's photographs because of the owner's belief that the photographs had already been exhibited in collaboration with Prince.[163]

On April 25, 2013, the Second Circuit held that Prince's paintings and collages were transformative as a matter of law, and therefore, did not violate Cariou's copyright.[164] The court built upon the rulings in *Campbell* and *Blanch* when it again found that transformative use outweighs all of the other fair use factors.[165] This ruling effectively overturned the district court, which had found that there was minimal, if any, transformation.[166]

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154. Cariou v. Prince, 714 F.3d 694, 698 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

155. *Id.* at 698–99 (noting that the book was not meant to be "pop art").

156. *Id.* at 698.

157. *Id.*

158. Paul Taylor, *Richard Prince, Art's Bad Boy, Becomes (Partly) Respectable*, N.Y. TIMES, May 17, 1992, at H31; Gilbert, *supra* note 14.

159. *See* Cariou, 714 F.3d at 699 (discussing the limited commercial success of Cariou's black and white photographic book).

160. *Id.* at 706.

161. *Id.*

162. *Id.* at 699.

163. *Id.* at 704.

164. *Id.* at 695, 707, 712.

165. *Id.* at 708–10.

166. *Id.* at 712.

*a. District Court Found Minimal Transformation*

Focusing almost entirely on the transformative use element of the first factor, the district court ruled that Prince's work was not consistently transformative.[167] The court looked first to the intent of the artist, finding that Prince's intent was not to comment on Cariou's photographs but instead mirrored Cariou's intent, and therefore the works were not transformative.[168] This analysis added a new dimension to transformative use by requiring that a subsequent work comment on the original.[169] Next, the court turned to the aesthetic aspects of transformative use.[170] By comparing the aesthetic attributes of each painting, the court reached the conclusion that the majority of Prince's paintings were heavily copied and in some cases incorporated unaltered photographs.[171] Even though several paintings did not borrow heavily from Cariou, the district court looked at Prince's work in the aggregate, holding that the overall transformation was "minimal at best," precluding a finding of fair use.[172]

*b. The Second Circuit Easily Identifies Transformation*

The Second Circuit also focused on the first fair use factor in determining whether Prince's collages were transformative.[173] Focusing on the art's appearance, the court found that Prince's work was larger in scale, incorporated color, featured distorted human body parts, and, in essence, had a completely different meaning and feeling than Cariou's photographs.[174] The court interpreted Prince's work as being "crude and jarring," exuding a "hectic and provocative" feeling.[175] In contrast, Cariou's photographs were characterized as being "serene and deliberate."[176] Confusingly, the court held that this analysis only applied to twenty-five of the thirty paintings created by Prince.[177] The remaining five works were eventually remanded to the district court for its fact-finding on the transformative use question.[178] The court then moved to the second inquiry within the first factor of the fair use inquiry, simultaneously

167. Cariou v. Prince, 784 F. Supp. 2d 337, 347–50 (S.D.N.Y. 2011), *rev'd in part*, *vacated in part*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

168. *Id.* at 349 (reasoning that the intent of both artists was to "communicate to the viewer core truths about Rastafarians").

169. *See Cariou*, 714 F.3d at 698 (criticizing the district court for adding another element to the transformative use inquiry).

170. *Cariou*, 784 F. Supp. 2d at 349. The Ninth Circuit took a similar approach. *See* Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013) (conducting a transformative use inquiry by looking at the physical changes made to an original work).

171. *Cariou*, 784 F. Supp. 2d at 349–50.

172. *Id.* at 350.

173. *Cariou*, 714 F.3d at 705–06.

174. *Id.* at 706.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 711.

assessing "the purpose and character of the use" and "whether the allegedly infringing work has a commercial or nonprofit educational purpose."[179] Finding that Prince's use was clearly commercial, the court disregarded this finding as relatively unimportant because the new works were so transformative.[180]

The court next discussed the fourth factor: the effect of Prince's paintings on the potential market for Cariou's pictorial book and photographs.[181] In considering this factor, the court focused on whether Prince's works would usurp Cariou's market for works derivative of his photographs.[182] Focusing on the aesthetic differences of the two works, the court believed that there was no evidence that Cariou would license his photography for other artists like Prince.[183] Furthermore, the court viewed the inability of Cariou to exhibit his artwork as a simple misunderstanding that was not a result of Prince's use of the copyrighted material.[184] The court also considered Cariou's earnings from the sale of his book, which totaled $8,000, and his reluctance to sell prints of his work to anyone other than four close acquaintances.[185] Unlike Cariou, Prince's art openings attracted "wealthy and famous" entertainers, musicians, actors, professional athletes, and business moguls.[186] Based on these facts and the aesthetic differences, the court determined that the audiences for Cariou's work and Prince's work were completely different.[187] As such, Prince's work could not then usurp the market for Cariou's work.[188]

Briefly discussing the remaining factors, the court easily dismissed the worthiness of protecting Cariou's photographs.[189] Cariou's photographs were creative works that the Copyright Act was meant to protect.[190] However, the finding of transformation outweighed this concern.[191] The court could not come to a consensus on the third factor regarding the amount and substantiality of the use.[192] The court stated that the twenty-five transformative paintings used a

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179. *Id.* at 708.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 709.

184. *Id.* The court believed that the gallery owner did not understand the nature of Prince's use of Cariou's photos and mistakenly believed Cariou and Prince were working together. *Id.* This mistaken belief led the gallery owner to decline to show Cariou's work, not the fact that Prince had used Cariou's copyrighted works. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*; *see also* Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) (explaining that when transformative use is identified, it is likely that the market for the original will be usurped)).

189. *Cariou*, 714 F.3d at 710.

190. *See id.*

191. *Id.*

192. *Id.*

reasonable amount of Cariou's photographs.[193] The decision regarding the five paintings that the court could not deem sufficiently transformative to reach a fair use determination was remanded for the district court's determination on the amount of the copyrighted work used.[194] The remanded case settled out of court.[195]

## II. LOOKING FOR TRANSFORMATIVE USE SHIFTS THE COURTS' FOCUS TO THE AESTHETIC VALUE OF ART RESULTING IN THE ABANDONMENT OF THE TRADITIONAL VALUES UNDERLYING COPYRIGHT PROTECTION

### *A. Prioritizing Transformative Value Leads to Inconsistent Rulings*

As the foregoing discussion demonstrates, courts are now turning to a presumption of fair use after finding that a work has successfully transformed the meaning and purpose of the copyrighted work.[196] But in the absence of objective, uniform criteria, the question becomes: how do courts determine which works are transformative and which are not? Courts continue to employ different methods to answer this question, leading to increasingly subjective determinations and disparate results.[197] These determinations are based on: judges' visual perceptions of the art, beliefs about the genre of appropriation art and its artists, and the notion that a reasonable observer (in most cases, the judges themselves)[198] can know transformation when they see it.[199]

#### *1. Transformative Use as Viewed Through the Artist's Meaning and Genre*

Courts determine the purpose and meaning of a copyrighted work by looking to the artists' own statements about their goals in using the works and comparing those statements to the copyright holders' testimony about the intent of their works.[200] Both the district court and appeals court in *Blanch* and the district court in *Cariou v. Prince* looked directly to the artists' statements about the meaning

193. *Id.* at 706.

194. *Id.* at 711.

195. Randy Kennedy, *Richard Prince Settles Suit Over Photos*, N.Y. TIMES, Mar. 20, 2014, at C3.

196. *See supra* Part I.E.

197. *See infra* Part II.A.3.

198. *See infra* Part II.B. The vast majority of fair use cases are decided through motions for summary judgment. *See also Cariou*, 714 F.3d 694; Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

199. *See generally* Farley, supra note 2, at 857 (arguing that judges need to employ peer-reviewed aesthetic theory to narrow the gap between artistic discourse and legal determination regarding the same).

200. *See Blanch*, 467 F.3d at 252.

of their work.[201] In *Blanch*, the artist, Koons, claimed to have a completely different intent, one of social commentary, than the one exhibited by the copyrighted work of the fashion photographer, Blanch, whose stated intent was to create a sexualized advertisement.[202] Relying heavily on artists' expressed construction of their work is highly problematic because it could lead to defendants unreliably claiming transformative intent when there was none.[203] Paradoxically, in the case of artists like Prince, who routinely claim that their work has no artistic meaning, the court has found that lack of expressed intent is evidence of a lack of transformative use.[204] Neither approach results in accuracy because both depend on the ability of the artist to lucidly and truthfully express the meaning of his artwork without regard to the actual meanings of the work, which can vary with context and according to the experience of the observers.[205]

*2. Appropriation Art on Trial*

The status of the artist is complicated further when courts harbor biases about who the artist is and their membership in the appropriation art genre. The term "appropriation artist" itself has been called "unfortunate[] in a legal context."[206] Appropriation is defined as "[t]he exercise of control over property; a taking of possession."[207] Infringement is similarly defined as "[a]n act that interferes with one of the exclusive rights of a patent, copyright, or trademark owner."[208] The art community has proposed other equally problematic imagery, such as comparing appropriation artists to thieves.[209]

Courts have shown bias against appropriation artists by characterizing them as thieves and pirates who sail under "the flag of piracy."[210] As a result, the artists are sometimes viewed as illegitimate artists and their works are not respected as art.[211] Cases involving appropriation art routinely result in

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201. *Blanch*, 467 F.3d at 252–53, 257; Cariou v. Prince, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

202. *Blanch*, 467 F.3d at 252–53.

203. Kennedy, *supra* note 31 (claiming that the question of transformative use "turns on artistic intent, often a much grayer area in the visual arts than in other arts").

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

205. *See* Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992) ("If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use . . . there would be no practicable boundary to the fair use defense.").

206. *Blanch*, 467 F.3d at 246.

207. BLACK'S LAW DICTIONARY 117 (9th ed. 2009).

208. BLACK'S LAW DICTIONARY 851 (9th ed. 2009).

209. Grace-Yvett Gemmell, *Appropriation Art (Or How to Steal Like an Artist)*, ARTSPACE (Nov. 28, 2012), *available at* http://www.artspace.com/magazine/art_101/art_101_appropriation_art.

210. *Rogers*, 960 F.2d at 311; *see also* Farley, *supra note* 2, at 834 (suggesting that the court implied that appropriation art is more akin to theft than true art).

211. *See* PATRY, *supra* note 8, at § 1:2 (arguing that defining fair use as a limitation of copyright goes along with the belief that "copyright owners are good" and infringers are "bad").

injunctions and orders for the destruction of the offending artwork.[212] At least one scholar has argued that no judge would order the destruction of an artist's work that was viewed as legitimate.[213] Generally, appropriation artists intend to take the work of others and some even describe their creative process as stealing.[214] This leads many courts to negatively view appropriation artists on the whole.[215] To combat these issues some scholars argue that judges should consider aspects of art history and the context in which the art was created.[216] However, those considerations are not a good indicator of transformative use because appropriation artists always use copyrighted materials with the intent to re-contextualize the images.[217]

### *3. Does the Reasonable Observer Truly Know What Transformation Looks Like When They See It?*

The *Campbell* Court decided its parody case based partly on the differences that could "reasonably be perceived" when listening to and viewing the lyrics of the new rap song and the original rock song.[218] This idea was further extended by the Second Circuit in *Rogers v. Koons*, in which the court references the "average lay observer as a measure of whether the work is a parody."[219] Applying this reasonable perception test to cases involving appropriation visual artists is problematic because of the subjective nature of visual arts.[220] Evidencing this difficulty, the Second Circuit and the district court in *Cariou* viewed the same work by Prince and developed two different theories on whether there was transformation use.[221]

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212. *See, e.g.*, Cariou v. Prince, 784 F. Supp. 2d 337, 355–56 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013); *Rogers*, 960 F.2d at 313.

213. Farley, *supra note* 2, at 834.

214. *See* Gemmell, *supra* note 209.

215. *See, e.g.*, *Rogers*, 960 F.2d at 310–12 (preventing the defendant appropriation artist from asserting a fair use defense and finding that the copying was done in bad faith and motivated by profit).

216. *See* Elizabeth Winkowski, Comment, *A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art*, 12 J. MARSHALL REV. INTELL. PROP. L. 746, 763–64 (2013); Farley, *supra note* 2, at 839.

217. *See Rogers*, 960 F.2d at 310 (finding that the boundaries of fair use require that courts not simply allow all uses by appropriation artists based on the artists' intentions); 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, 1660 (1995) (distinguishing appropriation from plagarism).

218. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582–83 (1994).

219. *Rogers*, 960 F.2d at 308.

220. *See* Farley, *supra note* 2, at 811–19; Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 450, 453–66 (2008).

221. *See supra* Part I.E.3; *see also* Randy Kennedy, *Court Rules in Artist's Favor*, N.Y. TIMES, Apr. 26, 2013, at C25, C32 (indicating that copyright lawyers saw the appeals court decision in *Cariou* as one that "further mudd[ied] an already confusing terrain for determining fair use").

The court of appeals in *Cariou* used the reasonable observer approach by performing a side-by-side comparison of the works in question.[222] From this comparison, the court determined that Cariou's aesthetic was traditional, calm, and serene while Prince's images were provocative, rough, and rudimentary.[223] In contrast, the district court found that there were minimal, if any, transformative elements in the majority of Prince's collages.[224] In fact, the district court chose to view the amount of copying, and looked to see the amount of Cariou's work that was visible to the viewer.[225] The court of appeals in *Cariou* considered the elements of Prince's work that differed from Cariou's photographs, including Prince's addition of color, his use of larger scaled images, and the change of medium from black and white photography to color painting collages.[226]

These differences in the perception of visual art lead to the conclusion that the reasonable observer test is not an objective test at all. Indeed, the majority of fair use cases are decided on motions for summary judgment, which gives judges open season on an intensely fact-bound, subjective inquiry open to many interpretations.[227] Consequentially, judges, as opposed to juries, have become the sole authority of what can be reasonably perceived in each work.[228] What is described as an objective test is then transformed into a subjective test based on the visual experience of a single individual.[229]

### *B. Deemphasizing Aesthetics Brings Fair Use Analysis in Line with the Goals of Copyright Law*

Limiting discussions of copyright infringement solely to aesthetics is problematic because it leads to inconsistent rulings based on each judge's subjective experience with the art in question.[230] Even art philosophers disagree

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222. Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013), *cert. denied* 134 S. Ct. 618 (2013).

223. *Id.* at 706.

224. Cariou v. Prince, 784 F. Supp. 2d 337, 350 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013); Jennifer Gilbert-Eggleston, *Cariou v. Prince: Painter or Prince of Thieves?*, 2011 DEN. U. SPORTS & ENT. L.J. 117, 124–25 (2011).

225. *Cariou*, 784 F. Supp. 2d at 349–50.

226. *Cariou*, 714 F.3d at 706; *see* Greenberg, *supra* note 13, at 15 (discerning that courts consistently mistake changes in size as being transformative); Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 231 (2007) (arguing that judges have very little art knowledge, which further complicates their ability to judge copyright cases involving art).

227. *See* Snow, *supra note* 19 at 485–87 (2010).

228. *Id.* at 485.

229. Arjun Gupta, *"I'll Be Your Mirror"-Contemporary Art and the Role of Style in Infringement Analysis*, 31 U. DAYTON L. REV. 45, 61, 67 (2005) (noting judges' preference for the subjective elements of art in infringement determinations).

230. *See supra* Part II.A; *see also* Farley, *supra note* 2, at 857 (stating that courts "adopt aesthetic theory intuitively").

about how to determine meaning in art.[231] When judges prioritize transformation, they are making aesthetic judgments.[232] Courts are deciding how the art looks to the reasonable observer, taking into account changes in medium, color, and size, and reaching different opinions on the same art.[233] Moreover, courts have historically been reticent to judge the aesthetic value of art.[234]

Enforcing the purpose of copyright law to both grant exclusive rights to copyright holders and preserve the public's access to intellectual property is frustrated by courts' inability to uniformly decide cases involving visual artists.[235] Focusing too heavily on the aesthetic aspects of the works clouds the importance of the economic factors of fair use, including commerciality and the effect on the market. These economic considerations were once the "heart" of fair use analysis[236] and are particularly useful given the subjective nature of visual art.[237]

## III. FOCUSING SOLELY ON ECONOMIC FACTORS WILL LEAD TO MORE CONSISTENT RULINGS

### *A. Economic Analysis Offers Coherent Fair Use Guidance*

Unlike aesthetic reasoning, economic analysis of fair use offers a more objective approach, and guarantees more uniform results.[238] Economic inquiry can incorporate aspects of the current fair use analysis and expand that analysis

231. Farley, *supra note* 2, at 841–46 (noting the several schools of thought concerning the proper way to interpret art). Formalists believe that the expression of art is found in the "line, shape, color and other formal properties." *Id.* at 842. As their name suggests, Intentionalists view the artist intentions as holding the key to art interpretation, while relativists believe that art is undefinable. *Id.* at 842–43; *see also* Carlin, *supra* note 5, at 120 (observing that "a basic tenet of twentieth century art and philosophy is that virtually all concrete expression is in fact a copy of a copy").

232. *See* Farley, *supra* note 2, at 849 (asserting that "judges rely almost exclusively on their intuition to guide their analysis on aesthetic questions"). However, Farley argues that a judge's aesthetic analysis can be a welcome aspect of art legal opinions as long as courts are explicit about resorting to aesthetic reasoning and fully explain how they reach decisions. *Id.* at 849–50.

233. *Supra* Part II.A.3.

234. *Supra* notes 1–4 and accompanying text.

235. *See* Leval, *supra* note 7, at 1107 (characterizing fair use analysis employed by judges as "mysterious" and "disorderly"). Leval argues that fair use decisions are constantly overturned because judges have failed to find a consistent definition of fair use. This tendency creates confusion for legal scholars, lawyers, writers and copyright holders because each judges' opinion are so unpredictable. *Id.* Furthermore, because fair use is an equitable principle it should always be employed rationally to fulfill the purpose of copyright law. *Id.*

236. *See supra* Part I.B.

237. *See supra* note 221 and accompanying text.

238. *See* Landes, *supra note* 4, at 17. *But see* Farley, *supra note* 2, at 857–58 (arguing that it is better for judges to be honest about using aesthetic analysis than to ignore the issue completely or hide the true motivations for their rulings).

for greater effect.[239] Economic analysis can be used to determine the optimal degree of copyright protection.[240]

*1. Economic Considerations Spurred Copyright Protection*

The origins of copyright law can be traced to the economic principles that recognized that the cost of creating unique works was high, and that the profits from such innovation should be protected.[241] Similarly, when individuals seek to copy another's work, the infringer's cost of copying is generally lower than the cost incurred by the innovator.[242] This finding spurred the need for legal protection from infringement to incentivize the creation of original works.[243] At the same time, copyright law allows entities other than the copyright holder to reasonably use copyrighted work for similar economic reasons.[244] These reasonable or fair use allowances are linked to the theory that no innovation is made in a vacuum.[245] Subsequent inventors always build on the collective knowledge of previous originators; allowing fair or reasonable uses results in lower costs to subsequent inventors and therefore encourages higher rates of

239. *See* Wendy J. Gordon, *Fair Use As Market Failure: A Structural And Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982); William M. Landes, *Copyright Protection of Letters, Diaries, and Other Unpublished Works: An Economic Approach*, 21 J. OF LEGAL STUD. 79, 81 (1992). *But see* Greenberg, *supra* note 13, at 24 (concluding that fair use is "a necessary safe harbor for the appropriation" and that exclusive property rights stifle creativity).

240. *See* Carlin, *supra* note 5, at 104; William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. OF LEGAL STUD. 325, 325–26 (1989) (giving an overview of an economic analysis for copyright law).

241. *See* Carlin, *supra* note 5, at 104, 123 (noting that "economic incentives of intellectual property law" are the mode by which the Constitutional mandate to promote the arts is manifested); David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1806 (2013) (stating that the objective of copyright monopolies is to protect the potential for profits, which can be damaged by unauthorized secondary uses); Greenberg, *supra* note 13, at 1 ("[E]conomic incentives are at the heart of copyright law."). *But see* Badin, *supra* note 217, at 1670 (arguing that copyright law is not a reward but simply the means by which artists protect their work).

242. Landes & Posner, *supra note* 240, at 326.

243. *See* Timothy J. Brennan, Harper & Row v. The Nation, Inc.*: Copyrightability and Fair Use*, J. COPYRIGHT SOC'Y U.S.A., Oct.–July 1986, at 368, 375–76; Greenberg, *supra* note 13, at 16 (stating that the Copyright Act has an "incentive structure" meant to promote the creation of "unique and original" art).

244. *See* Greenberg, *supra* note 13, at 30. Greenberg asserts that the economic justification for denying fair use for unpublished works is that the author has not yet reaped the benefits of their work. *Id.* However, once an author has commercially exploited their work there is no longer justification for maintaining exclusive copyrights. *Id.* at 30–31; *see also* Gordon, *supra* note 239, at 1610.

245. Landes and Posner, *supra note* 240, at 325.

invention.[246] Further, the public benefits from the uncompensated access to intellectual property.[247]

### *B. Proposing a Solution: Royalty System*

Economists argue that copyright law must consider the benefit of incentivizing artists to create works minus the cost of limiting access to a work.[248] This cost-benefit analysis can be applied to appropriation artists in a simple two-step economic analysis after a determination has been made that a copyrighted work has been substantially used.[249] This analysis would be applied only to appropriation art because of the distinctive way appropriation artists use copyrighted material.[250]

The first step is to consider whether the alleged infringing artist used the copyrighted material for commercial purposes.[251] Courts would consider only whether the artist profited from the sale, exhibition, or promotion of the work incorporating the copyrighted material.[252] Only upon a finding that the use was commercial and therefore, profitable, would the court consider the second step in the analysis.[253] By defining commercial use as profitability, this step considers the costs of limiting the artist's access to intellectual property. When

246. *Id.*

247. *See* Fagundes, *supra* note 241, at 1811 (listing the benefits of efficient copyright infringement, which include a "richer cultural environment" and "inspiration" for new works); Gordon, *supra* note 239, at 1615 (noting the necessity of fair use when markets fail).

248. Landes and Posner, *supra note* 240, at 326; *see also* Carlin, *supra* note 5, at 133 (arguing that both pecuniary and moral considerations are at play when dealing with appropriation artists).

249. For purposes of determining substantial use courts could employ a *de minimis* analysis. *See, e.g.*, Sandoval v. New Line Cinema Corp., 147 F.3d 215, 217 (2d Cir. 1998) (explaining that in order to determine fair use, the *de minimis* threshold must be decided as a matter of law and if a finding of *de minimis* copying is made the fair use analysis is unnecessary); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 77 (2d Cir. 1997) (finding that *de minimis* determination is a threshold matter to determinations of fair use); Mathews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 84–85 (6th Cir. 1943) (reasoning that the legal maxim, *de minimis non curat lex*, is a necessary part of any copyright infringement case because it must be shown that a substantial part of a work was used); *see also* PATRY, *supra* note 8, at § 2:6 (describing the pros and cons of using *de minimis* in conjunction with fair use).

250. *See supra* note 13 and accompanying text (explaining the uniqueness of appropriation art and visual art generally).

251. Carlin, *supra* note 5, at 124. Carlin argues that that "limited use of a copyrighted image in a work of art should not affect the value of that image." *Id.* However this is issue is more complicated when numerous editions and "commercial merchandising" of the art occur. *Id.* Carlin also proposes that a distinction be made between an artist's single use of a copyrighted image versus the multiple use of copyrighted images because the latter deserves higher scrutiny of the possible economic impact. *Id.* at 136.

252. *See* Meyers, *supra* note 226, at 237–38; *see also* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1563 (2004) (suggesting that when copying is done in large amounts there will always be some type of economic injury to the copyright holder).

253. *See supra* note 102 and accompanying text (citing Judge Leval's de-emphasis of transformative use when excessive taking occurs).

artists do not profit from the work, the ability to borrow images would be unlimited. This preserves the ability of small-time artists, recreational artists, and general users to access copyrighted material.[254] However, artists seeking pecuniary gain from the use of copyrighted images would be subject to the protections that copyright offers.[255]

The next consideration is the incentive that copyright holders should receive for their work.[256] This analysis must consider the total amount of profits earned by the artists. The copyright holder would then receive royalties in an amount based on the percentage of total profits.[257] Royalties can offer a better solution for artists that are unable to identify the copyright holder or are prevented from purchasing licensing rights.[258]

Some scholars argue that rigid application of exclusive copyrights stifles the very creativity the Copyright Act was meant to promote.[259] However, creating a balance between granting fair use and upholding exclusive copyrights is necessary to ensure that creation continues.[260] Applying economic analysis to

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254. Carlin, *supra* note 5, at 132 (declaring that difficulty arises when an artist's rights are in direct conflict with another artist's rights because an appropriation artist seeks to protect their work and be free to use copyrighted materials without providing compensation).

255. Meyers, *supra* note 226, at 238 (arguing that that artists should be free to express themselves by using images of their choosing but at the same time those artists must remember that "all artists require compensation").

256. *See id.* at 237–38 ("Copyright should be concerned with compensation, not control.").

257. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (stating that contemplation of the commercial use factor is meant to determine whether a secondary user is profiting from an original work in efforts to avoid paying "the customary price"); *see also* Gilbert, *supra* note 14 (reporting that several appropriation artists, including Koons and Prince have modified their behavior and now seek licensing agreements when they wish to incorporate copyrighted material into their artwork).

258. Unlike the variability of the damages awarded in the current scheme, the amount of royalties available under this proposal would always be the same percentage no matter the amount of copying. This royalty scheme is similar to a compulsory license; however, compulsory licenses can prevent small time artists from accessing material. *See* Deveny A. Deck, *Fine Tuning Fair Use Music Parody: A Proposal for Reform in* Acuff-Ross Music, Inc. v. Campbell, 71 U. DET. MERCY L. REV. 59, 84 (1993). Royalties that are capped at a relatively low percentage would preserve the majority of the appropriation artists profits and the ability of artists to access material when they would be otherwise unable to pay licensing fees. *See* Fagundes, *supra* note 241, at 1823 (noting the high transaction costs that can accompany licensing fees). However, the cost of a lawsuit that eventually leads to royalties could be similarly high in transaction costs, which is why it is important for courts to simplify and make fair use inquires consistent, discouraging potential litigants, facilitating even-playing-field settlement, and lessening the likelihood of appeal. *See* Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 66 (2012).

259. *See* Greenberg, *supra* note 13, at 33 (arguing that appropriation artists suffer when exclusive copyrights are strictly enforced because appropriation regularly experiment with the traditional copyright conceptions of originality and creativity); Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013) (arguing that copyright law should not be construed strictly because doing so would stifle creativity).

260. See *supra* part I.A.

fair use does not completely bar artists from accessing copyrighted material without compensating the rights holders.[261]

This proposed fair use analysis for appropriation artists would prevent courts from deciding the aesthetic value of artwork. By looking only at objective facts, the use of copyrighted work for profit, and the amount of those profits, judges can make decisions that are based on the facts of each case. These decisions would result in consistent rulings that are not based on subjective criteria such as the visual aspects of each work as it appears to a specific judge.[262]

## IV. CONCLUSION

As lawsuits involving visual artists become more prevalent and complicated, relying solely on the visual experience of a judge is increasingly problematic. Establishing a fair use analysis that allows for appropriated use absent substantial commercial use and profitability properly compensates and incentivizes creators to make original works. Appropriation artists benefit from an analysis that is based solely on objective factors. Judges would no longer need to rely on their experience with the artwork or form opinions based on their unrecognized biases. Furthermore, a royalty system can offer artists the ability to use works that are otherwise unavailable. Instead of risking the destruction of their art, artists can simply pay licensing fees or be subject to the royalty system, which merely takes into account a percentage of the profits made by the secondary user. Fair use is an equitable principle that must be applied in a manner most consistent with the purpose of copyright law. Finding a fair use solution that directly addresses the use of copyright material by visual appropriation artists, while at the same time allowing artistic innovation and freedom is necessary. Instituting a royalty system is a fair use solution that best accomplishes this goal because it is most consistent with the economic principles underlying copyright protection.

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261. The most efficient way to gain access to copyrighted works is by seeking permission. INDE, *supra* note 17, at 4. Permission, however, may be hard to secure when the artists seek to use the copyrighted material to further a political message as many appropriation artists have done. *Id.*

262. *See supra* notes 231–238 and accompanying text (describing judges' instinctual resort to aesthetic reasoning in cases involving art).