

FAIR USE AND THE FUTURE OF ART

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I dedicate this Article to the memory of Dan Markel.

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ABSTRACT

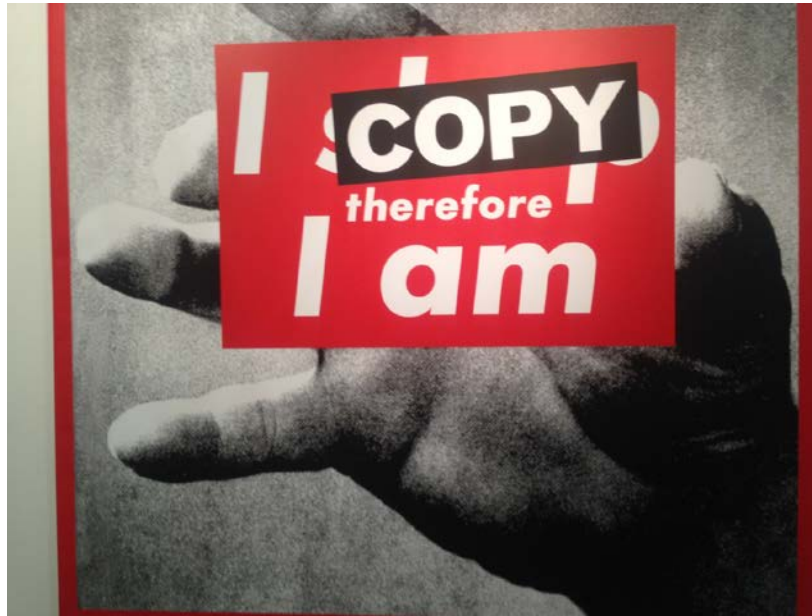
Twenty-five years ago, in a seminal article in the *Harvard Law Review*, Judge Leval changed the course of copyright jurisprudence by introducing the concept of “transformativeness” into fair use law. Soon thereafter, the Supreme Court embraced Judge Leval’s new creation, calling the transformative inquiry the “heart of the fair use” doctrine. As Judge Leval conceived it, the purpose of the transformative inquiry was to protect the free speech and creativity interests that fair use should promote by offering greater leeway for creators to build on preexisting works. In short, the transformative inquiry would ensure that copyright law did not “stifle the very creativity it was meant to foster.”

This Article shows that the transformative test has not only failed to accomplish this goal; the test itself has begun to “stifle the very creativity it was meant to foster.” In the realm of the arts, one of the very areas whose progress copyright law is designed to promote, the transformative test has become an obstacle to creativity. Artistic expression has emerged as a central fair use battleground in the courts. At the same time that art depends on copying, the transformative test has made the legality of copying in art more uncertain, leaving artists vulnerable to lawsuits under a doctrine that is incoherent and that fundamentally misunderstands the very creative work it governs. The transformative test has failed art. This Article shows why and what to do about it.

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INTRODUCTION



Superflex, *I Copy Therefore I Am* (2011)

Let me put my cards on the table. First card: when it comes to art, I believe in copying. Okay I'll be blunt. I even believe in stealing. Second card: in *Cariou v. Prince*,¹ the most urgent art law case of the last decade, a case that plunged the art world into a state of “panic,”² I am most unapologetically Team Richard Prince. I am so Team Prince that when I first read the district court's decision three years ago holding that the plaintiff could destroy Prince's series of thirty paintings because they were insufficiently “transformative” under the fair use doctrine of copyright law, I was stunned and furious. I am so Team Prince that when his actual legal team asked me to consult on his appeal, which ultimately overturned that ruling for most but not all of the paintings, I said yes in a heartbeat.³ Given my belief that copying has become the central mode of creativity in contemporary culture, of course I would give it up for Richard Prince. After all, he was one of the artists who first taught me to love copying. In fact, he practically invented it—except for the parts that he

¹ 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S.Ct. 618 (U.S. 2013) [hereinafter “Prince II”].

² Patricia Cohen, *Photographers Band Together to Protect Work in Fair Use Cases*, N.Y. TIMES, Feb. 21, 2014, at B1.

³ I am no longer involved in the case now that it has settled after remand. As stated above, the views expressed in this paper are my own and should in no way be attributed to Richard Prince or to his lawyers.

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stole.⁴

At first it seemed obvious to me that Prince should have won his case under the fair use doctrine. Fair use, a defense to a claim of copyright infringement, polices the boundary between free speech and copyright's control of creative expression.⁵ The defense succeeds when the new creator can show that his use of the copyrighted work in essence advances the goals of copyright itself: "[t]o promote the progress of science and useful arts."⁶ Since 1994, fair use, in all its complexity, has boiled down to a deceptively basic question: is the new work "transformative"?⁷ And to be transformative, the secondary work must alter the first with new "meaning or message."⁸

But as obvious as it seemed to me that Prince should have won under this test, the more I thought about it, the more I realized I was wrong to expect any coherent result in that case or indeed in the many cases that have arisen in recent years involving fair use and contemporary art. This is not only because contemporary art depends so deeply on copying in a way that makes it doomed to clash repeatedly with copyright law; the many recent cases involving some of the most famous artists of our time attest to that.⁹ And it is not only because the fair use doctrine is notoriously unpredictable.¹⁰ There is also a deeper problem with fair use that courts and scholars have overlooked. The transformative test poses a fundamental threat to art because the test evaluates art by the very criteria that contemporary art rejects.

In this paper, I use the Prince case as a backdrop to make a larger claim—the move to the transformative analysis, thought by many to be the solution to fair use woes, has actually made things worse for the visual arts. This is because the transformative inquiry asks precisely the wrong questions about contemporary art. It requires courts to search for "meaning" and "message" when the goal of current art is to throw the idea of stable meaning into play.¹¹ It requires courts to ask if that message is "new" when contemporary

⁴ Duchamp, Warhol, Rauschenberg, and others beat him to it. Nonetheless, Prince has famously been called "the inventor of appropriation art." DOUG EKLUND, *THE PICTURES GENERATION, 1974-1984* 153 (2009).

⁵ See generally 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05[A] (release 50 1999) (discussing the fair use factors).

⁶ U.S. CONST. art. I, § 8, cl. 8.

⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). The Court noted that a finding of transformative use is not "absolutely necessary" to find fair use. *Id.* Nonetheless, the transformative inquiry has captured the test in most cases. Cf. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) (questioning the weight given to the transformative inquiry).

⁸ *Campbell*, 510 U.S. at 579.

⁹ *Infra* notes 43 and 44.

¹⁰ See *infra* notes 17 and 19 for scholarship setting forth this view and the new wave of scholarship contesting it.

¹¹ A note about the words "message" and "meaning": This piece argues that to the extent an artwork has any message or meaning at all, that message may be its defiance of a singular message or meaning—its uncertainty, its multiplicity. Yet throughout the piece I provisionally ascribe certain potential meanings to work. My use of the words "meaning" and "message" function in this Article as "essentially contested

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art depends on rejecting the idea of newness and questioning the possibility of originality by using copying and appropriation as the primary building blocks of creativity.

Worse, even if we assume that we could conclusively determine a work's "meaning," the pivotal question of how to ascertain meaning remains remarkably untheorized by courts, which have approached it in a hodgepodge, undisciplined fashion. Without any theory of interpretation, courts have actually taken three different approaches to determining meaning in fair use cases: some depend on the artist's statement of intent, some depend on aesthetics or formal comparison, and some depend on the viewpoint of the "reasonable observer."¹²

Not only is the mere choice of approach potentially outcome determinative in a way that courts and scholars have failed to recognize, the problem is also that each approach is rife with difficulties because each rests on premises that contemporary art rejects. While some courts search for the artist's intent, contemporary art revels in the erasure of the artist; while other courts look for meaning in aesthetics, contemporary art rejects the idea that art is even visual; while still other courts look for the viewpoint of "the reasonable observer,"¹³ contemporary art pictures the notion of a stable or reasonable viewer as a fiction.

This Article argues that courts should abandon the transformative test. And I make this argument at the precise time that several prominent scholars have begun to hail the transformative test as a triumph. In their view, it is bringing clarity to fair use, a doctrine that scholars had routinely lamented as so "impossible to predict"¹⁴ that it was "useless."¹⁵ As Larry Lessig put it succinctly in 2005, "fair use is the right to hire a lawyer."¹⁶ Indeed, one scholar had termed fair use "one of the most intractable and complex problems in all of law."¹⁷

concepts." W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 7 (1956) I use the terms as placeholders for contested (dare I say it) "meaning." Therefore, when I discuss the "meaning" of works, the term should be understood as provisional and fragile.

¹² *Prince II*, at 707.

¹³ *Id.*

¹⁴ Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 93 (2010). For a few examples of articles about the failures of fair use, see, e.g., Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092 (2007) (arguing that "ascertaining the scope of fair use ex ante is sufficiently uncertain that the doctrine is not effectively fulfilling its important function"); Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 433 (2008) (calling fair use "the great white whale of American copyright law"); Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 605-06 (2001) (arguing that the test causes "ample confusion among lawyers and laypersons alike, who often need to understand its nuances and live by its tenuous and fragile principles.").

¹⁵ Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1528 (2004).

¹⁶ LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 187 (2005).

¹⁷ Madison, *supra* note 15. For just a few other examples of the many lively discussions of fair use, see Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587 (2008) (arguing that the size of the fair use footprint has remained relatively constant over the past three decades, while the size and scope of copyright's exclusive rights have expanded markedly); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBLEMS 263, 287 (2003) (describing fair use as "naught but a fairy tale");

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But in a surprising twist, a new group of scholars has begun to embrace the “transformative” inquiry as a solution to fair use’s woes. For example, Peter Jaszi testified recently before Congress in praise of the transformative test; to him, it has solved the problems associated with the fair use doctrine, making it, at last, stable and easier to predict. “Fair use is working!” he declared.¹⁸ In another prominent example, Neil Netanel argued that the notion of “transformativeness,” a fairly recent injection into fair use doctrine, has begun to rescue it.¹⁹

Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem “Transformed”: Some Reflections on Fair Use*, 46J. COPYRIGHT SOC’Y 251, 268 (1999) (arguing for greater clarity in fair use rules); 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1 (3d ed. 2005) (“No copyright doctrine is less determinate than fair use.”); R. Anthony Reese, *Fair Use and the Derivative Work Right*, 21 COLUM. J.L. & ARTS 467 (2008) (exploring the tension between the use of the word transformed in the derivative work right and the use of the word in the fair use doctrine); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1773–74 (1988) (offering a seminal critique of fair use prior to the transformative test). The lamentation over fair use’s unworkability has a long history; in 1939, the Second Circuit called it “the most troublesome [doctrine] in the whole law of copyright.” *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

¹⁸ *Fair Use Now: Hearing Before the Subcomm. On Courts, Intellectual Property and the Internet on The Scope of Fair Use*, 113th Cong. (2014) (statement of Professor Peter Jaszi, Washington College of Law, American University).

¹⁹ Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011) (empirical study finding a correlation between the ascendancy of the transformative use paradigm and defendant win rates). For other scholarship suggesting that fair use is more predictable than has been thought, see Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012) (finding transformative use and partial copying to be strong indicators of fair use), Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (finding some predictability in fair use cases by sorting them into “policy-relevant clusters”); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008) (identifying which section 107 factors and sub-factors tend to drive judicial determinations of fair use).

Perhaps the following can begin to explain the stark discrepancy between my claim and Netanel’s confident assertion that fair use has become workable. Netanel allows in his conclusion that pockets of uncertainty remain in fair use law. One area he describes is an almost perfect description of what is happening in art cases. He writes: “Fair use law also leaves uncertain when and whether a defendant’s highly creative incorporation of portions of copyrighted works for the same general expressive purpose can qualify as fair use. Mash-ups, remixes, fan fiction, collages and digital sampling of sound recordings often serve the same broad purpose as the original: art or entertainment [and] should be able to qualify as fair use.... But courts have yet to determine, when, if ever, highly creative alterations of expressive content” such as these would qualify as fair use. Netanel, *supra*, at 771. All of the major art cases seem to fit into this unresolved category that Netanel identifies. Indeed, many commentators focus on transformative “purpose” rather than “meaning,” some concluding that the key to fair use is when courts find new “purpose”. Netanel, *supra* at 747; R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 21 COLUM. J.L. & ARTS 467, 485 (2008). The purpose inquiry has proved particularly helpful for finding fair use in digital cases. See *infra* note 68 (collecting cases). But art cases frequently involve two works that serve the same purpose. In these cases, meaning comes to the forefront of the analysis. Furthermore, even if “purpose” is the proper inquiry, it will often raise the same questions I discuss here: by what interpretive criteria should courts discern purpose?

Finally, Rebecca Tushnet’s important work on the disparate treatment of text and image in copyright law might provide further insight into why special problems plague art cases. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 755 (2012) (discussing why visual

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This strikes me as clearly wrong when viewed from the perspective of the visual arts. A cursory reading of recent case law under the transformative doctrine shows that several of the biggest art stars of our day have recently been caught in its web (sometimes repeatedly) with differing and capricious outcomes. In addition to Richard Prince, major cases over the past few years have ensnared Jeff Koons, Shepard Fairey, Banksy, and Sarah Morris.²⁰ (As I write this, a new claim has just been brought against Richard Prince, arising from his most recent show in Fall 2014.)²¹ The disparate results of these cases,²² not to mention the high costs of litigating against a backdrop of uncertainty, help explain why a climate of “self-censorship” has taken hold in the art world.²³ The *New York Times* recently reported what has been obvious for some time: “Technological advances, shifting artistic values and dizzying spikes in art prices have turned the world of visual arts into a boxing ring for intellectual-property rights disputes.”²⁴ At the same time that art depends on copying, the transformative test has made the legality of copying in art more uncertain, leaving artists vulnerable to lawsuits under a doctrine that is incoherent and that misunderstands the very creative work it governs. The transformative test has failed them. This paper seeks to show why.

Part I of this Article shows how developments in both contemporary art and copyright

nature of materials may lead to results in visual fair use cases that are “unpredictable”).

²⁰ See Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES, Dec. 28, 2011, at AR1 (discussing the pervasiveness of copying in contemporary art). For two recent lawsuits against prominent artists in Europe, see Dorreen Carvajal, *Belgian Artist’s Painting Infringes Upon Photographer’s Work*, N.Y. TIMES, Jan. 21, 2015, <http://artsbeat.blogs.nytimes.com/2015/01/21/belgian-artists-painting-infringes-upon-photographers-work-court-rules/> (describing French lawsuit against artist Luc Tuymans’s painting based on a photograph); Coline Milliard, *Swiss Artist Valentin Carrol Accused of Plagiarism*, ARTNET NEWS, Nov. 8, 2014, <http://news.artnet.com/art-world/swiss-artist-valentin-carron-accused-of-plagiarism-159859> (describing accusations against Swiss artist Valentin Carron for copying another artist’s work).

²¹ Hrag Vartanian, *Photographer Sends Cease and Desist Letters to Richard Prince and Gagosian*, HYPERALLERGIC, Feb. 15, 2015, <http://hyperallergic.com/183036/photographer-sends-cease-and-desist-letters-to-richard-prince-and-gagosian/>.

²² See *infra* Part I.B.1 (discussing cases).

²³ COLLEGE ART ASSOCIATION, COPYRIGHT, PERMISSIONS AND FAIR USE AMONG VISUAL ARTIST AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 8 (2014) (describing self-censorship by artists based on apprehension about fair use law); see also James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (explaining how uncertainty of doctrine creates risk aversion among creators).

For an example of the chilling effect on museums, note that the 2011 Whitney exhibition of Sherrie Levine’s work did not include some of her major works, reportedly because of fear that she or the museum would be sued for copyright violation. Laura Gilbert, *No Longer Appropriate?*, THE ART NEWSPAPER, (May 2012) (describing how Levine “changed her practice to avoid ‘copyright snags’”). In addition, although Levine is usually described as an appropriation artist, the word “appropriation” did not appear in the text for the exhibition. *Id.* But see William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 17 (2000) (arguing that the artistic community’s concern that copyright threatens appropriation art is “greatly exaggerated”).

²⁴ Ben Mauk, *Who Owns this Image?*, NEW YORKER (Feb. 14, 2014), <http://www.newyorker.com/online/blogs/currency/2014/02/who-owns-this-image.html>.

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law have turned the realm of artistic expression into the ultimate fair use battleground. First I claim that copying has become essential to contemporary art; I then set forth the transformative test in fair use law, tracing its erratic application in several high-profile art cases. Part II argues that although scholars have not recognized it, courts have actually taken three widely divergent and outcome determinative approaches to determining transformativeness. Here I document and analyze these three different interpretive approaches courts have used—the artist’s intent, the aesthetics of the work, and the viewpoint of the reasonable observer—to show why each poses a threat to contemporary art. In Part III, I briefly sketch what copyright law might look like if we abandoned, as I think we should, the transformative test that has reigned supreme in fair use law for over twenty years. I suggest that a possible way to protect the vital creative and free speech interests in copying—the very interests that the transformative test was designed to protect—may be to stop evaluating art for its expressive value, its meaning or message, and to turn instead to thinking about art as a market commodity.

I. THE BATTLEGROUND: CONTEMPORARY ART AND FAIR USE LAW

This Part offers an account of developments in both art and law that have led to the current clash between them in this arena. I begin by sketching the central place of copying in artistic expression. Next I turn to fair use law and theory.

A. Contemporary Art and Copying as Creativity

Fair use law in its uncertainty and incoherence threatens to thwart the culture of copying that is central to creativity in contemporary art. In my view, a rule that inhibits an artist’s ability to copy threatens artistic creation for two reasons, one age old and one new.

First, any rule that makes the legality of copying uncertain threatens the longstanding tradition of artists looking at, borrowing from, and emulating one another’s works. This tradition is the history of art: a history of innovation built on emulation.²⁵ Thus, for example, Manet’s *Olympia* riffed on Titian’s *Venus of Urbino*, which itself had riffed on Giorgioni’s *Sleeping Venus*; the allusion to each previous painting enriched its successor, joining them in a play of meaning.

²⁵ As Kathy Halbreich, the Associate Director at the Museum of Modern Art, explained in her affidavit in a fair use case, “[T]he interpretation of existing imagery is essential to all artistic practice.... Even to cite examples feels absurd because, once again, virtually every work of art is based upon or inspired by some other work of art.” Affidavit of Kathy Halbreich, *Rogers v. Koons*, 89 Civ. 6707 (CSH) (1990). Although my account focuses on visual art, other art forms evince the same tradition. As T.S. Eliot wrote of poetry: “Immature poets imitate; mature poets steal;” T.S. ELIOT, *Philip Massinger*, in *THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM* 82, 83 (Dodo Press 2009) (1920).

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Second, while art has always relied on copying, the technique has taken on a new

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urgency in contemporary culture. Because of shifts in both art and technology, copying has now become a central subject of art as well as a basic tool of how people make it.²⁶ Fittingly, Richard Prince played a pivotal role in this shift.²⁷ His influence has been strong enough that while his work once seemed transgressive, it might now seem everyday.²⁸ Of course, Prince drew on (okay, copied from) others, particularly Pop artists like Warhol, whose work reproduced images and objects from pop culture.²⁹ Instead of striving to be original or authentic as artists were expected to do, Warhol celebrated “the second-generation image,”³⁰ and the promise of endless repetition. “I like things to be exactly the same over and over again,” he said.³¹

Prince went further. He made abject copying the subject of his art. In his rephotography work from the early 80s, such as his famous *Cowboys* pictures, one of which is reproduced below, Prince simply rephotographed Marlboro ads.³² It may be hard for us, from our remix-addled vantage point, to see what made this work so shocking and influential.³³ In my view, these early pieces anticipated the digital culture we live in. By rephotographing, Prince was downloading before there was an internet.³⁴ He anticipated and exposed the radical possibilities of copying that we now take for granted.

²⁶ See generally MARTHA BUSKIRK, *THE CONTINGENT OBJECT IN CONTEMPORARY ART* (2005) (exploring dominance and range of copying in contemporary art); SETH PRICE, *DISPERSION 6* (2002) (noting shift in emphasis in art from creating new content to a system that “depends on reproduction and distribution ... that encourages contamination, borrowing, stealing”); SARA KRAJEWSKI, *IMAGE TRANSFER: PICTURES IN A REMIX CULTURE* (2010) (catalogue of art exhibit picturing copying as intuitive, pervasive practice and highlighting role of technology in this shift).

²⁷ MARVIN HEIFERMAN, LISA PHILLIPS AND JOHN G. HANHARDT, *IMAGE WORLD: ART AND MEDIA CULTURE* (1989).

²⁸ See, e.g., Carol Vogel, *Painting, Rebooted*, N.Y. TIMES, Sept. 27 2012 at AR1 (quoting critic Hal Foster on the enormous influence of Prince’s generation on younger artists).

²⁹ Pop artists in turn drew on a rich history of copying, predominant in collage and cubism, BRANDON TAYLOR, *COLLAGE: THE MAKING OF MODERN ART* (2004), and also in the use of the readymade. RUDOLF E. KUENZLI AND FRANCIS M. NAUMANN, *MARCEL DUCHAMP: ARTIST OF THE CENTURY* 76 (1989).

³⁰ DAVID DALTON AND TONY SCHERMAN, *POP: THE GENIUS OF ANDY WARHOL* 17 (2010)

³¹ ANDY WARHOL AND PAT HACKETT, *POPISM: THE WARHOL 60S* 50 (1980).

³² Abigail Solomon-Godeau, *Photography After Art Photography*, in *ART AFTER MODERNISM: RETHINKING REPRESENTATION* 80 (Brian Wallis, ed., 1984); *IMAGE WORLD: ART AND MEDIA CULTURE* (Whitney Museum of American Art 1989).

³³ See LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2009) (offering authoritative account of remix culture).

³⁴ GREG ALLEN, *CANAL ZONE: RICHARD PRINCE, YES RASTA* 17 (2011) (quoting Richard Prince on rephotography as downloading).

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Richard Prince, *Untitled (Cowboys)* 1980-84, Ektacolor print, Museum of Contemporary Art, LA

And indeed, artists do now take copying for granted. As technology has unleashed both a torrent of images and the capacity to copy them with a click, copying has become a basic tool for making art, as basic as paintbrushes once were.³⁵ If you ask art students about their work, they don't talk about *whether* to copy, but *what* to copy, how to choose the right source.³⁶ This is not only because technology has produced a new technique for creating work, but also because it has changed our landscape. Artists have always tried to depict our world; now our world looks like Google Images. The digital screen and its endless play of disconnected images is our new daily landscape, as Giverny once was for Monet.

We used to think of an artist as someone who sat in nature or in his garret, working alone to create something new from whole cloth. But now that we are bombarded by images, the most important artist may be the one who can sort through other people's art (or trash), the one who functions like a curator, an editor, or even a thief. In a world with a surfeit of images, perhaps the greatest artist is not the one who *makes* the image but the one who knows which image to *take*: to sort through the sea of images in which we are now drowning and choose the one that will float. Warhol as usual saw this first; as a critic explained, Warhol realized that most crucial piece of making art had become "choosing the

³⁵ Cf. Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 580 (1964) (calling the readymade "a contribution to artists' materials, as oil paint was")

³⁶ LEE EMERY, *TEACHING ART IN A POSTMODERN WORLD* 41 (2002).

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right source image.”³⁷

Copying is now so ubiquitous in art that some have complained it has become “hegemonic.”³⁸ It is both the topic of contemporary art and its technique. Enter copyright law.³⁹

B. The Legal Landscape

1. Fair Use Law and Theory

The defense of fair use in copyright law permits certain uses of copyrighted material without obtaining permission from the copyright holder. It marks a critical “First Amendment safeguard” against the monopoly rights that copyright law grants creators of original works.⁴⁰ As Judge Leval explained a wildly influential 1990 article, the fair use defense tempers the risk that “excessively broad [copyright] protection would stifle, rather than advance” the underlying objectives of copyright by preventing references to earlier

³⁷ DAVID DALTON AND TONY SCHERMAN, POP: THE GENIUS OF ANDY WARHOL 113 (2009).

³⁸ Simon Critchley, *Absolutely-Too-Much*, THE BROOKLYN RAIL, Aug. 1, 2012, <http://www.brooklynrail.org/2012/08/art/absolutely-too-much>.

³⁹ This leaves unanswered an important question: should copyright law facilitate this kind of art? As I argue, freeing copying, which is central to contemporary art, would produce more art and more artists, at least for the moment. Shutting down copying in art would be shutting down a central way people create art in digital culture. I believe copying represents the future of art. *See, e.g.*, Hotseat: Cory Doctorow, Willamette Week, (Feb. 6, 2013, 1:20 p.m.), http://www.wweek.com/portland/blog-29742-hotseat_cory_doctorow.html (quoting Boing Boing co-editor Doctorow) (“If you’re not making art with the intention of having it copied, you’re not really making art for the twenty-first century.”)

But of course, this answer leaves numerous unanswered questions in its wake, not only about how copyright law can best incentivize the creation of more art and more artists, but also about whether and why it should. What is the purpose of copyright when it comes to art? Barton Beebe points to the problem in copyright of how to conceptualize “aesthetic progress.” Barton Beebe, *Bleistein; or, Copyright Law, and the Problem of Aesthetic Progress* (Oct. 15, 2012) (unpublished manuscript). He explores and rejects, *inter alia*, the “accumulationist” model, which sees *more* art as progress, and a model that imagines that progress would mean we get *better* art over time. I agree with Beebe that it is folly to assume art would become objectively “better” over time. Take a look in the basements of museums, laden with art that earlier generations deemed essential and that current curators deem unworthy, to see that our estimation of what makes art good varies over time in a way that would make this calculus impossible. *See* William J. Baumol, *Unnatural Value: Or Art Investment as Floating Crap Game*, 76 AMER. ECON. REV. 10, 11 (May 1986) (stating that “the history of art connoisseurship ... tells us that the main lesson imparted by the test of time is the fickleness of taste”) Nonetheless, I think that in the fair use context (which is animated by First Amendment principles) we should take the accumulationist view seriously because of its concordance with a basic free speech value: the First Amendment tenet that “more speech” is better. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). And liberating copying, which democratizes the tools of creativity, would also lead to more popular aesthetic participation, making it likely to facilitate the pragmatist view Beebe endorses.

⁴⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (discussing fair use and the idea/expression dichotomy as the two realms where First Amendment values exert themselves in copyright law).

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works in the development of new ones.⁴¹ The fair use defense is “necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”⁴² After all, copyright law is meant to be “an engine of free expression” rather than an impediment to it.⁴³ Without a fair use defense, there is a risk that copyright law would “strangle the creative process.”⁴⁴

The fair use defense to a claim of copyright infringement has a long history.⁴⁵ Famously distilled by Justice Story in the mid-19th century,⁴⁶ it is now codified in the Copyright Act of 1976, which provides an equitable four-factor test to determine whether a particular use is fair: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”⁴⁷

But the application of the test, though not its wording, changed dramatically in 1994. In *Campbell v. Acuff-Rose Music* (1994), the Supreme Court retreated from its market-focused approach to the test which had emphasized the fourth factor’s inquiry into market effects.⁴⁸ Instead, the Court elevated the first factor of the test and effectively distilled the fair use inquiry into a single question: whether the work is “transformative.”⁴⁹ Specifically, a court must ask whether the secondary work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁵⁰ If the answer is yes, the use is “transformative” and the other factors recede in importance.⁵¹ The transformative approach built on the analysis of Judge Leval, who

⁴¹ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990). *See also* Stewart v. Abend, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted).

⁴² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (quoting U.S. CONST. art. I, § 8, cl. 8).

⁴³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

⁴⁴ Leval, *supra* note 30, at 1109. *See generally* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012) (discussing how the foundation of copyright and patent is granting incentives to create).

⁴⁵ *See generally* WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995) (discussing origins of fair use).

⁴⁶ *Folsom v. March*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁴⁷ 17 U.S.C.A. § 107 (2000).

⁴⁸ Prior to *Campbell*’s elevation of the first factor, the Court had called the fourth factor “undoubtedly the single most important element of fair use.” *Harper & Row*, 471 U.S. at 566-67.

⁴⁹ As the Court explained in its detailed description of the importance of the transformative inquiry to the analysis of the other factors, “the more transformative the new work, the less will be the significance of other factors.” *Campbell*, 510 U.S. at 579. *But see* *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) (questioning the prominence of the transformativeness inquiry and calling for a focus on the fourth factor). For an account of the extraordinary dominance of the transformative inquiry on fair use, see PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHTS* § 12.2.2 at 12:33 (3d ed. 2012 Supp.).

⁵⁰ *Campbell*, 510 U.S. at 579.

⁵¹ *Id.*

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explained why transformativeness “lies at the heart” of fair use.⁵² If “the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings— this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”⁵³

2. *Cariou v. Prince* and its Precedents

Cariou v. Prince, the most recent in a series of fair use cases ensnaring major contemporary artists, sent the art world into a “panic.”⁵⁴ It was the perfect test case: a face-off between the uncertain legal rules governing copying, the artist who has been called “the inventor of appropriation”⁵⁵ and the most powerful gallery in the world. The stakes for the art world were high: twenty-nine museums signed an amicus brief submitted by the Warhol Foundation arguing for the importance of appropriation in art.⁵⁶

In the follow two subsections, I begin with the basic story of the case. I then turn to a discussion of prominent precedents to the Prince case. Ultimately I use these cases to show that courts have employed three different ways of discerning meaning in fair use art cases: intent, aesthetics, and the perception of the viewer. I will argue that all three are flawed.

a. *Cariou v. Prince*

Question [deposition]: “Were you trying to create anything with a new meaning or a new message?”

*Answer [Richard Prince]: “No.”*⁵⁷

In 2000, Patrick Cariou published *Yes Rasta*, a book of portrait-style photographs of Rastafarians that Cariou took while living in Jamaica. Richard Prince incorporated altered versions of Cariou’s photographs as well as other source material into a project called *Canal Zone*, a series of thirty large-scale paintings and collages. In 2008, Prince exhibited *Canal Zone* at Gagosian Gallery, the art world powerhouse.⁵⁸ In some of Prince’s works in

⁵² Leval, *supra* note 30, at 1111.

⁵³ *Id.* at 1111.

⁵⁴ Cohen, *supra* note 2.

⁵⁵ EKLUND, *supra* note 4.

⁵⁶ Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc. in Support of Defendants-Appellants and Urging Reversal, *Cariou v. Prince*, 714 F.3d 694 (2d. Cir., 2013) (No. 11-1197-cv).

⁵⁷ Mauk, *supra* note 25.

⁵⁸ See Carol Vogel, *Artist’s Exit Sets Back Gagosian Gallery*, N.Y. TIMES, Dec. 14, 2012, at C12 (describing Gagosian as “unquestionably the most powerful art dealer”). Unsurprisingly, given that this was Richard Prince and that Gagosian is the most powerful gallery in the world, the show generated millions of

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this series, Cariou's images are barely detectable; in others, Cariou's images appear more prominently with fewer apparent physical alterations by Prince.⁵⁹

The two sets of illustrations below give some sense of the range of uses Prince made of Cariou's work. In both pairings, Prince's work appears on the right and the Cariou image that he incorporated on the left:



dollars in sales even though it was not considered one of Prince's best. Kyle Chayka, *Will Richard Prince have to Destroy Rasta Photos?*, HYPERALLERGIC, Mar. 24, 2011, <http://hyperallergic.com/21446/richard-prince-rasta-photos/>.

⁵⁹ Formal changes were still significant, involving dramatic differences in scale (which is not captured by this side-by-side comparison of the images) and color. See RICHARD PRINCE: CANAL ZONE CATALOGUE (2008) (reproducing images of Prince's series).

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When Cariou sued both Prince and the Gagosian Gallery for copyright infringement, Prince mounted a fair use defense.⁶⁰ The trial court, relying heavily on Prince’s testimony, ruled in favor of Cariou and found that because the “transformative content of Prince’s paintings is minimal at best,” the transformative use inquiry cut against a finding of fair use.⁶¹ The court dwelled on Prince’s testimony, writing that because Prince testified that he didn’t “really have a message,” he had failed to satisfy the “requirement that the new work in some way comment on ... or critically refer back to the original works.”⁶² The district court also found that Prince had failed the remaining three prongs of the fair use test.⁶³ Not only was Prince liable for the infringement, but the Gagosian Gallery was contributorily liable for not stopping him; Prince was, after all, a known “habitual user” of appropriated images as the district court put it, making him sound vaguely like a drug addict.⁶⁴ The Judge ordered Prince to turn over the paintings to Cariou for

⁶⁰ *Cariou v. Prince*, 784 F. Supp. 2d 337, 348 (S.D.N.Y. 2011) *rev’d in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013) [hereinafter “Prince I”].

⁶¹ *Id.* at 350.

⁶² *Id.* at 348.

⁶³ *Id.* at 352-53.

⁶⁴ *Id.* at 351.

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destruction.⁶⁵ (At oral argument for the appeal, Judge Parker remarked that this order brought to mind the “Huns or the Taliban.”)⁶⁶

On appeal, the Second Circuit reversed and found that twenty-five of the thirty paintings were transformative as a matter of law.⁶⁷ In reaching this result under the first factor of the fair use test, the Second Circuit emphasized three things. First, it explicitly rejected the lower court’s requirement that the second work somehow comment on the first.⁶⁸ Second, the court deemphasized the artist’s professed intent and instead stressed the aesthetic qualities of the work, noting that “Prince’s artworks manifest an entirely different aesthetic from Cariou’s photographs.”⁶⁹ Third, it held that when making this “side-by-side” aesthetic comparison, a court must ask how the works may “reasonably be perceived,” for “what is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”⁷⁰ Using these criteria, the court found that almost all of Prince’s images were transformative under the first factor.⁷¹

Yet the court still remanded five of the works to the district court.⁷² With no guidance, it noted only that these five particular works “do not sufficiently differ from the photographs of Cariou’s that they incorporate for us confidently to make a determination about their transformative nature as a matter of law.”⁷³ Judge Wallace wrote separately, questioning the majority’s ability to draw a principled distinction between the remanded

⁶⁵ *Id.* at 355.

⁶⁶ Brian Boucher, *Injunction in Prince v. Cariou Compared to Taliban in Appeal*, ART IN AMERICA, May 21, 2012, <http://www.artinamericamagazine.com/news-features/news/price-cariou-oral-arguments/>.

⁶⁷ Notably, the court offered a fascinating reading of the fourth factor, which tests for market usurpation. It contrasted Cariou, who had not sold his work “for significant sums,” to Prince, an art world celebrity. *Prince II*, at 709. The court dwelled on the “wealthy and famous” on the guest list at Gagosian’s opening dinner for Prince; it included “Jay-Z and Beyoncé Knowles, artists Damien Hirst and Jeff Koons ... Anna Wintour... Angelina Jolie, and Brad Pitt.” Prince’s work, the court concluded, “appeals to an entirely different sort of collector than Cariou’s.” *Id.*

⁶⁸ The court held that the “law imposes no requirement that a work comment on the original or its author in order to be considered transformative.” *Id.* at 706. Several other cases support this view. Many of these also reveal that fair use can encompass uses which involve few or no physical changes. *See, e.g.,* Seltzer v. Green Day, 725 F.3d 1170, 1177 (9th Cir. 2013) (finding transformative use even where the “allegedly infringing work makes few physical changes to the original or fails to comment on the original”); Authors Guild, Inc. v. Google Inc., 954 F.Supp.2d 282 (S.D.N.Y. 2013) (finding scanning of books for search engine served transformative purpose); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 608–09 (2d Cir. 2006) (finding use of concert posters in a book was transformative because they were used as ‘historical artifacts’); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–20 (9th Cir. 2003) (finding thumbnail images in search engine were transformative because they were used for different purpose than originals); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007); (finding automated display and processing of thumbnails of copyrighted photos as part of a visual search engine to be fair use).

⁶⁹ *Prince II*, at 706.

⁷⁰ *Id.* at 707.

⁷¹ *Id.* at 707–08.

⁷² *Id.* at 699.

⁷³ *Id.* at 710–11.

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works and the other works deemed transformative.⁷⁴ The parties ultimately settled.⁷⁵

b. The Road to Prince: Jeff Koons and the “Easyfun”⁷⁶ Allure of Intent

Before Richard Prince, Jeff Koons had been the poster child for the fair use woes that plague art stars. His copyright battles in two cases that preceded *Prince* help set forth a fuller picture of the interpretive possibilities courts have considered when assigning meaning to art in the fair use context. These cases also shed light on why the *Prince* court did what it did.

Jeff Koons (in my view) is both a great artist and a great gift to art law; he has a dazzling knack for being sued.⁷⁷ In the early 90s he lost, rather spectacularly, a copyright case involving his sculpture *String of Puppies*, based on an image of puppies he had appropriated from a schlocky greeting card.⁷⁸ In *Rogers v. Koons*, the Second Circuit was so scathing in its refusal to see Koons’s work as fair use that he quickly settled two other pending litigations after losing at the summary judgment stage.⁷⁹ Yet when Koons was sued yet again in the Second Circuit for copyright violation fourteen years later, he won resoundingly.⁸⁰

What happened to turn Jeff Koons from a fair use loser to a fair use winner? Four points can explain it. First, the law changed. In the years between *Rogers v. Koons*, which Koons lost, and *Blanch v. Koons*, which he won, the Supreme Court had decided *Campbell v. Acuff Rose*, which introduced the notion of transformative use as the central new question.⁸¹ *Campbell* also rejected the presumption that any commercial use by the secondary artist was unfair.⁸² This presumption of unfairness for commercial uses had

⁷⁴ *Id.* at 713-14 (Wallace, J., concurring in part and dissenting in part).

⁷⁵ Randy Kennedy, *Richard Prince Settles Suit over Photos*, N.Y. TIMES, Mar. 20, 2014, at C3.

⁷⁶ “Easyfun-Ethereal” was the title of Koons’s series of paintings that led to his 2006 litigation in *Blanch v. Koons*, 467 F.3d 244 (2d. Cir. 2006).

⁷⁷ For a glimpse of Koons’s stature and reputation, see, e.g., Peter Schjeldahl, *Selling Points*, NEW YORKER, Jul. 7, 2014 (calling Koons “the most original, controversial, and expensive American artist of the past three and a half decades.”)

⁷⁸ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) *cert. denied*, 506 U.S. 934 (1992). To hear my comments about the case on the audio guide for the recent Whitney retrospective of Koons’s work, see Whitney Museum of American Art, Jeff Koons: A Retrospective, Audio Guide for Jeff Koons, *String of Puppies*, (2014), available at http://whitney.org/WatchAndListen/AudioGuides?play_id=1060 and http://whitney.org/WatchAndListen/AudioGuides?play_id=1061.

⁷⁹ *Campbell v. Koons*, No. 91 Civ. 6055, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Mar. 30, 1993); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

⁸⁰ *Blanch*, 467 F.3d at 244.

⁸¹ *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

⁸² The Court stated that lower courts had mistakenly interpreted its previous decision in *Sony* as standing for the proposition that commercial use was presumptively unfair. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

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been fatal to Koons in *Rogers*, where the court, in a remarkably prescient and accurate reading of Koons, understood his art through the lens of money, picturing him as an elite, rich guy who ripped off sweet, legitimate puppy photographers like Rogers. (The court was prescient because in the current overheated art market, Koons is king. His *Balloon Dog (Orange)* sold for \$58.4 million in 2013, making it the highest-priced work by a living artist ever sold at auction.)⁸³

Second, and relatedly, I think Koons won in *Blanch* and lost in *Rogers* because in the intervening years, Koons had become an art star, and his work was now seen as benefiting the public at large.⁸⁴ Koons was no longer a sleazy “pirate,” as the Second Circuit had called him in *Rogers*;⁸⁵ now he was a master artist whose work was a gift to us all.⁸⁶ Third, burned by his fair use losses, Koons changed his art. The painting at issue in the 2006 case, *Blanch v. Koons*, still involved an image appropriated directly from pop culture. But now instead of making that image the central one in his work, as had been the case in *String of Puppies*,⁸⁷ Koons had begun to collage. A curator told me (off the record) that Koons did so as a direct response to his legal losses of the ‘90s, under the belief that this working method would offer him some legal cover. Appropriation receded from the central place it had occupied in his work; fair use law had affected his artistic choices, just as it has for so many other artists.⁸⁸

Fourth, and most importantly, in the years between *Rogers v. Koons* and *Blanch v. Koons*, Koons had learned how to testify in a way that pleased the court. Gone were the affidavits by art experts using art-speak. (Koons’s work had been “phantasmagoric” and “poststructuralist”.)⁸⁹ Now Koons himself gave the court exactly what it wanted. In the years leading up to *Blanch*, the Second Circuit had said that question of transformative use boiled down to this: did the secondary work use the first to impart “**new insights** and

⁸³ Carol Vogel, *At \$142.4 Million, Triptych Is the Most Expensive Artwork Ever Sold at an Auction*, N.Y. TIMES, Nov. 13, 2013, at A27. The court’s reading was accurate because money has always been a theme in Koons’s work. However I view this as part of what makes his work interesting, not a reason for condemnation, as the *Rogers* court seemed to suggest. See SCOTT ROTHKOPF, *No Limits*, in JEFF KOONS: A RETROSPECTIVE 15 (2014) (describing commerce as prevailing theme in Koons’s work).

⁸⁴ *Blanch*, 467 F.3d at 254 (discussing “public benefits” of Koons’s work).

⁸⁵ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) *cert. denied*, 506 U.S. 934 (1992).

⁸⁶ *Blanch*, 467 F.3d at 244. I often wonder if courts get worried about being on the wrong side of cultural matters; there’s the specter of being called out as a philistine. Long ago, Justice Warren described judges in obscenity cases as haunted by “mistakes of the past”—the history of having condemned great works of literature such as *Ulysses*. *Roth v. United States*, 354 U.S. 476 (1957) (Warren, J., concurring).

⁸⁷ I should note that I think there were significant physical as well as conceptual changes in *Rogers*, even if Judge Katzmman in his concurrence in *Blanch* still distinguished *Rogers*; he saw the earlier Koons sculpture as nothing more than a “slavish copy.” *Blanch*, 467 F.3d at 262 (Katzmann, J., concurring). I think *Rogers* should have come out differently. See *supra* note 78 (Whitney audio guide in which I explain my view.)

⁸⁸ See College Art Association, *supra* note 23 (describing self-censorship by artists based on apprehension about fair use law).

⁸⁹ Affidavit of John Caldwell at 4, *Rogers v. Koons*, 89 Civ. 6707 (CSH) (1990). Caldwell was curator of painting and sculpture at San Francisco Museum of Modern Art.

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understandings?”⁹⁰ And lo and behold, look at what Koons said about his purpose and meaning during his deposition: “I want the viewer to think about ... these images and... gain **new insight**” into them.⁹¹ Sure enough his use was found to be transformative. The artist said the magic words.

Thus, in *Blanch*, an artist’s statement of intent seemed to capture the transformative test (and because of the force of a finding of transformativeness, to capture the whole fair use test.) Several other fair use cases follow this same deference to a creator’s statements of intent.⁹² Indeed, so powerful was intent as a key to finding transformative fair use that I would have advised any artist worried about appropriation in the years between *Blanch* and *Prince* to record clear, contemporaneous statements of transformative intent; even though fair use is unpredictable and there can be no assurances, this could have offered possible protection. (I still give this advice even post-*Prince*, although the safest choice given the uncertainty of the law is always not to copy).

Nonetheless, in spite of its celebration of artists’ statements of intent, the *Blanch* court offered an important caveat. The court warned in a footnote that such statements should not be a requirement to finding fair use. As the court explained, “Koons’s clear conception of his reasons ... and his ability to articulate those reasons, ease our analysis in this case. We do not mean to suggest, however, that either is sine qua non for a finding of fair use.”⁹³

Richard Prince, the next art superstar to be caught in the net of fair use law, tested that very problem. As we have seen, Prince failed to testify about his transformative intent in a way that was palatable to the courts. Thus the *Prince* court had to struggle directly with this question left open by *Blanch*: how to evaluate whether there is transformative meaning in cases where an artist didn’t spoon feed the court a statement of transformative purpose? Artists’ statements of intent had made it easy. Prince’s testimony (or at least the court’s interpretation of it) made his case hard.⁹⁴

⁹⁰ *Blanch*, 467 F.3d at 253 (emphasis added).

⁹¹ *Id.* at 252 (emphasis added).

⁹² For examples of other cases in which courts have given prominent consideration to an artist’s or defendant’s subjective statements of intent, see *Calkins v. Playboy*, 561 F. Supp. 2d 1136 (E.D. Cal.) (relying on defendant’s testimony about motive for using a photograph “to inform and entertain Playboy readers” to find a use transformative purpose); *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (in preliminary injunction phase, finding that defendant author would be unlikely to make out a fair use defense because of his previous statements about the purpose of his book which indicated he did not intend to critique the original.); *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 507-08 (S.D.N.Y. 2009) (finding transformative meaning could be reasonably perceived based in part on defendant’s testimony from a show’s creator and producer that “one of the song’s intentions was to make a point” about the underlying work). *Cf.* *Morris v. Guetta*, 2013 WL 440127 (2008) (noting that a finding of justification for using copyrighted material “could also be based on a clear articulation of how using the material served the artist’s objective beyond merely saving the artist time or effort” but rejecting the artist’s statement as a mere “post-hoc rationalization.”).

⁹³ *Blanch*, 467 F.3d at 255, n. 5.

⁹⁴ Note, however, that the district court overlooked statements by Prince that could have been interpreted

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Thus the Second Circuit dispensed with intent and turned instead to other criteria by which to analyze transformativeness. Intent and the artist's statement receded; instead the artworks themselves came into view. The court wrote: "The focus of our infringement analysis is primarily on the Prince artworks themselves."⁹⁵ And as the artwork came into view, the question arose as to who should be doing the viewing. Here the Second Circuit also had an answer: the viewer who mattered was "the reasonable observer."⁹⁶

As I have shown, the Second Circuit had now tried three different approaches to assigning meaning to art in fair use cases: intent, aesthetics, and the reasonable viewer. In the next Part, I explore the unrecognized problems posed by each of these three interpretive methodologies.

II. HOW SHOULD WE DETERMINE MEANING AND MESSAGE?

Here I evaluate in turn each of the three approaches that courts have used to determine transformative meaning and message. I argue that all of these standards are flawed.

A. Against Intent

What's so bad about relying on intent to determine fair use? It certainly seems alluring, both because it appears to simplify the inquiry and because the transformative test introduced by *Campbell* speaks directly of whether a user had "transformative character or purpose."⁹⁷ In spite of the appeal of this approach, I show that are two major problems with using intent as a guide to fair use. First, visual artists, even more than other creators, may be particularly ill-suited to articulating their intent about their work, or they may be particularly driven to resist the requirement to do so. Second, regardless of whether an artist can articulate it, intent is simply irrelevant to what her work "means." To the extent courts search for artistic intent to evaluate "meaning" and "message" in fair use, they are searching for a measure of meaning that has been rejected as meaningless in contemporary art.

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as showing transformative intent.

⁹⁵ *Prince II*, at 707.

⁹⁶ *Id.*

⁹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

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a. Visual Expression as Incompatible with “Meaning” or “Message”

“[W]hatever images are, ideas are something else.”
– W.J.T. Mitchell⁹⁸

“All [the artist’s] decisions ... rest with pure intuition and cannot be translated into a self-analysis, spoken or written, or even thought out.”
--Marcel Duchamp⁹⁹

Artists can be notoriously bad at describing the meaning of their work through words. As Isadora Duncan famously said, “If I could say it, I wouldn’t have to dance it.”¹⁰⁰ Picasso wrote: “But of what use is it to say what we do when everybody can see it if he wants to?”¹⁰¹ Limiting fair use privileges to only those artists who can describe their work in a way that’s palatable to courts would endanger the free speech interests that the fair use test implicates. As Judge Leval has noted in the trademark context, “First Amendment protections do not apply only to those who speak clearly.”¹⁰² Of course, there are artists who are hyper-articulate about their work; for example, Sarah Morris, a particularly cerebral artist, gave dissertation quality testimony about her art in defending her recent fair use case.¹⁰³ But there is also a longstanding tradition in which artists are seen as unable to communicate as effectively in words as in images, as if artistic expression were irreducible to words.¹⁰⁴

This difficulty of reducing art works—which often seem to revel in their multiplicity of meaning—to simple “messages” has proved fatal in court. As I recently argued, this is a recurrent problem in free speech law.¹⁰⁵ It has also reared its head in copyright. In *Hurley v. Irish American Parade*, the Supreme Court discussed the artist

⁹⁸ W.J.T. MITCHELL, *ICONOLOGY: IMAGE, TEXT, IDEOLOGY* 6 (1986).

⁹⁹ MARCEL DUCHAMP, *THE CREATIVE ACT*, lecture (1957), *reprinted in THEORIES AND DOCUMENTS OF CONTEMPORARY ART: A SOURCEBOOK OF ARTISTS’ WRITINGS* 972 (Kristine Stiles and Peter Selz eds., 2d ed. 2012).

¹⁰⁰ Quoted in Marci Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 74 (1996).

¹⁰¹ Quoted in Marius de Zayas, *Picasso Speaks*, *THE ARTS*, May 1923.

¹⁰² *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992).

¹⁰³ *Lang v. Morris*, No 11 Civ. 8821 (KBF) (S.D.N.Y. Feb. 01, 2013). Even so, the judge denied summary judgment. The parties settled; I think Morris had a compelling case for fair use.

¹⁰⁴ See Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 (2012); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012); Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205 (2000); see also Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 142, 1435-37 (2014) (exploring the problem of assigning meaning to art); Hamilton, *supra* note 85; Sheldon H. Nahmod, *Artistic Expression and Artistic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 245 (arguing that artistic communication is often not capable of “relatively precise, detached explication”).

¹⁰⁵ Amy Adler, *The First Amendment and the Second Commandment*, 57 N.Y.L. SCH. L. REV. 41 (2012–2013) (symposium on visual images in the digital age).

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Jackson Pollock to explain why it would be a mistake to require art to have an easily articulable “particularized message” in order to qualify for constitutional protection.¹⁰⁶ The Court opined in dictum that Pollock’s work was “unquestionably shielded” by the First Amendment.¹⁰⁷ Nevertheless, the Court noted that previous case law, which had required a finding of a “narrow, succinctly articulable message” in expression before it could qualify it for free speech protection, would have failed to protect this kind of visual art.¹⁰⁸ A search for a succinctly articulable message, the Court explained, “would never reach” Pollock’s work.¹⁰⁹

This problem plagues visual works in the free speech context.¹¹⁰ Consider the artist Richard Serra, who lost a famous First Amendment case against the government for destroying his site specific sculpture *Tilted Arc*.¹¹¹ The court noted Serra’s failure to “identify any particular message conveyed by the sculpture” as fatal to his case.¹¹² Given the resulting “uncertainty as to the meaning” of *Tilted Arc*, he could not claim that the government had destroyed it based on its content.¹¹³ The age-old problem that surrounds the visual, the way it cannot easily be described as having a “message,” was the artist’s undoing. Of course, message is precisely what fair use law searches for.

The same difficulty posed by translating the visual into the language of words or ideas persists in copyright law. In an important article, Rebecca Tushnet describes how visual images in copyright law repeatedly prove “unstable for courts accustomed to looking for meaning in words.”¹¹⁴ As Judge Kaplan mused in a recent case, “In the visual arts, the distinction [between idea and expression] breaks down. For one thing, it is impossible in most cases to speak of the particular “idea” captured, embodied, or conveyed by a work of art . . . Furthermore, it is not clear that there is any real distinction between the idea in a work of art and its expression.”¹¹⁵

As I will show below, this uncertainty of meaning that vexes courts is frequently the precise point of the art that they are trying to decipher. To the extent an artwork has any message or meaning at all, that message may be its defiance of a singular message or meaning—its uncertainty, its multiplicity.

¹⁰⁶ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

¹⁰⁷ *Id.* at 569.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Adler, *The First Amendment*, *supra* note 105 (documenting the problem in free speech law and theory).

¹¹¹ *Serra v. United States General Services Admin.*, 847 F.2d 1045 (2d Cir. 1988).

¹¹² *Id.* at 1051.

¹¹³ *Id.*

¹¹⁴ Tushnet, *Worth a Thousand Words*, *supra* note 46, at 702.

¹¹⁵ *Mannion v. Coors Brewing Company*, 77 F. Supp. 2d 444, 458 (S.D.N.Y. 2005).

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b. Lying to Make Meaning

“Your guess is as good as mine. That’s what I do, I make things up.”

--Richard Prince (deposition testimony in response to a question about the meaning of his work).¹¹⁶

“I don’t think the author of those pictures, meaning me—knew or wanted to know what was going on.”

--Richard Prince, (discussing his work) (1988).¹¹⁷

Put aside the problem that artists lie, just like other people lie. And put aside the possibility that the myth is true: perhaps artists are prone to lie a way that seems particularly . . . temperamental.¹¹⁸ Let’s focus instead on another problem: sometimes artists need to lie to be true to their art.

Why wouldn’t Richard Prince just give the court what it wanted? Instead of dutifully following the road map laid out in *Blanch v. Koons* about how to testify to win a fair use case, instead Prince gave moments of spectacularly Warholian testimony that seemed to enrage the district court. Consider his discussion of his painting *Graduation*, one of the remanded works. (An image of Prince’s *Graduation* is on the right. Cariou’s image is on the left.)

¹¹⁶ GREG ALLEN, CANAL ZONE: RICHARD PRINCE, YES RASTA 18 (2011).

¹¹⁷ Marvin Heiferman, *Richard Prince* (Interview), BOMB 24 (Summer 1988), available at <http://bombmagazine.org/article/1090/richard-prince>.

¹¹⁸ For example, Balthus famously gave what seemed to be false affidavits disclaiming his work presumably just to spite his ex-wife. *Herstand v. Gallery Gertrude Stein, Inc.* 636 N.Y.S.2d 74 (1995). An example of what some called temperamental: recently artist Cady Noland disclaimed one of her works as damaged even though a respected conservator found it to be in “very good condition.” Her word immediately rendered the potentially very valuable work unmarketable. Tracy Zwick, *Sotheby’s and Jancou Battle in Appeals Court over Cady Noland Artwork*, ART IN AMERICA, Jun. 7, 2013.

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When asked to identify the “message” of this work and how it transformed Cariou’s image, Prince testified: “He’s playing the guitar now, it looks like he’s playing the guitar, it looks as if he’s always played the guitar, that’s what my message was.”¹¹⁹ (One wonders what Prince’s lawyer might have done at this point in the deposition. Perhaps said, “Excuse me, my client is ill”?)

The district court dwelled on examples like this to conclude that Prince’s “own testimony showed that his intent was not transformative.”¹²⁰ But if the testimony didn’t give the court what it needed to check the box of fair use, it was at least perfect as art. I submit that we should read Prince’s deposition testimony as an extension of his paintings in this case, and as an art work in its own right. (I say this although I don’t know—and I don’t care—what Prince’s actual intent was in testifying this way.) I submit that Prince could not have answered any other way. His entire body of work is about erasing authorship and disrupting our search for stability in meaning.

This is a longstanding tradition, not only in Prince’s visual art, but also in his writing and interviews; he has cultivated a mythical self-narrative that blends truth and lies. For a long time the only biographical information you could find about him was a subtly faked interview.¹²¹ Critic and curator Nancy Spector seizes on this early fabricated text as the “key to Prince’s art.”¹²² As critic Doug Eklund explained, “It is typical of Prince that only in the form of an elaborate hoax can something approaching the truth be found.”¹²³ Thus from the very beginning of his career, Prince established that he would play with the

¹¹⁹ *Prince I*, at 349.

¹²⁰ *Id.*

¹²¹ EKLUND, *supra* note 4, at 153.

¹²² NANCY SPECTOR, *Nowhere Man*, in RICHARD PRINCE 22 (2007). For Spector, the fake text (like Prince’s body of work) “wreaks havoc on our sense of reality;” it works just like his appropriation of an image, which “bring us closer to its essential fiction, making it more real in the process.” *Id.* at 22-23.

¹²³ EKLUND, *supra* note 4, at 154.

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“core truths” about his own life just as he plays with the idea of “core truths” about representation.¹²⁴ His narratives of himself have always been part of his artistic project, another place where he taunts us with our fantasies that meaning can be transparent.

This tendency of Prince’s is typical of the generation of artists that have come to dominate contemporary art. Drawing on the legacy of Duchamp’s fake personas (R. Mutt or Rose Selavy), or Warhol’s insistent disclaimers of authorship of his own art, contemporary artists have made erasure of their own authorship the signature of their work.¹²⁵ To faithfully set forth their true authorial intent would contradict their artistic project.¹²⁶

In the next section I turn directly to this expurgation of the author that characterizes the contemporary moment in art to make a different argument: not only might artists be particularly unwilling to offer sincere statements of intent, but their work has also consistently undermined the notion that artistic intent has any bearing on meaning. By focusing on intent, fair use law looks for meaning and message in the precise place that contemporary art exposes as irrelevant.

2. The Irrelevance of Intent to Meaning

Even if we were sure that an artist could and would articulate his “true” intent, a larger problem looms—an artist’s statement of intent is irrelevant to the meaning of his work. The Supreme Court has come to understand this in the First Amendment context. In the 2009 case of *Pleasant Grove City v. Summum*,¹²⁷ the Court was asked to determine the “message” of a proposed monument for a city park. The Court reasoned that a monument’s meaning and may be “quite different from [the thoughts or sentiments] expressed by its creator or its donor.” It therefore dismissed as naïve the view of the respondent, that

¹²⁴ *Prince I*, at 349.

¹²⁵ See *infra* Part II.A.2 (discussing authorlessness as a theme in contemporary art). For a discussion of recent art blurring the line between truth and falsehood around artistic identity, see Carrie Lambert-Beatty, *Make-Believe: Parafiction and Plausibility*, 129 OCTOBER 51 (Summer 2009). For one historical example in this vein, see DAME EDITH SITWELL, ALEXANDER POPE 195-196 (1962) (describing Pope’s deliberate mystifications about his authorship). For an example of Prince’s artwork exploring this theme, see John Dogg, *In Propria Persona*, in SPECTOR, *supra* note 122, at 328 (purporting to be a transcribed conversation between Richard Prince and John Dogg, a fictional artist invented by Prince and the gallerist Colin de Land).

¹²⁶ Another major reason artists may refuse to describe their intent is that it could undermine the ambiguity of meaning that is central to the work. See Amy Adler, *What’s Left? Hate Speech, Pornography and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499 (1996) (discussing Andres Serrano’s refusal to condemn the Klan members he photographed in an arguably regal fashion; also discussing the values of multiplicity and ambiguity in contemporary political art).

¹²⁷ *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). For a recent decision dismissing an artist’s intent in favor of an “objective” determination of meaning, see *Kleinman v. City of San Marcos*, 597 F. 3d 323 (5th Cir. 2010) (finding that a junked planter did not qualify as speech in spite of the artist’s declaration of intended meaning).

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“seem[ed] to think that a monument can convey only one ‘message’—which is, presumably, the message intended.”¹²⁸

As I have documented in previous work, repeated art controversies show that the Supreme Court’s assumption is true.¹²⁹ A speaker’s professed intent is simply irrelevant to the way viewers interpret the meaning of his speech. There are numerous reasons that an artist’s intent is irrelevant to meaning.¹³⁰ One, of course, is that the artist may be unaware of his true intent—it is maddening how often people assume that artists can be relied on to understand their own work.¹³¹ Another is that so much art develops as a result of accident or the unconscious, as Marcel Duchamp,¹³² John Cage¹³³ and others taught us long ago.¹³⁴

It once made perfect sense to determine what a work meant by asking an artist about his intent.¹³⁵ Indeed, that question fit with the paradigm that guided art for most of the last two centuries. Consider Jackson Pollock. When we think of Pollock, we think not only of his canvasses, but of the process of his creation: the great, tortured genius in an existential confrontation with his art, pouring his soul onto the canvas in a burst of creative angst.¹³⁶ Pollock’s paintings became hallmarks of what modernism valued. Not only was his work a formal breakthrough, it was also a record of his inspired authenticity, originality and individual will. It is easy to see why we would consider Pollock’s art “an extension of

¹²⁸ *Summum*, 555 U.S. at 475. The Court noted that the meaning of expression becomes particularly fluid and divorced from intent in the case of non-verbal speech, writing “text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers and the effect of monuments that do not contain text is likely to be even more variable.” *Id.*; see also Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 198-99 (describing the First Amendment divergence between intent and meaning and noting that the “most direct manifestations of the distinction between a speaker’s intentions and society’s conventions of meaning arise” when speech is non-verbal.)

¹²⁹ Adler, *What’s Left*, *supra* note 129.

¹³⁰ For a classic account in literary theory of this point, see WILLIAM K. WIMSATT, JR. AND MONROE C. BEARDSLEY, *THE INTENTIONAL FALLACY*, IN *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* 3-18 (1954). The rejection of the author’s intent as a guide to meaning also permeates a great deal of subsequent theories of literary criticism such as reader response theory and post-structuralism.

¹³¹ Amy Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1369, 1376 (1990).

¹³² See Duchamp, *supra* note 63 (terming the relationship between “the unexpressed but intended and the unintentionally expressed” the “art coefficient”).

¹³³ E.g. John Cage, *4’33”* (1952).

¹³⁴ See, e.g., HENRI CARTIER-BRESSON, *THE DECISIVE MOMENT* (1952) (picturing Bresson’s work which famously captured transitory moments). For a contemporary example, consider the hot young artist Wade Guyton, whose work with appropriated material produced by laser printers highlights “beautiful accidents.” WADE GUYTON, WHITNEY MUSEUM OF AMERICAN ART (2014) <http://whitney.org/Exhibitions/WadeGuyton>.

¹³⁵ Note the concordance of this view with literary accounts of meaning based on authorial intent, such as E.D. Hirsch’s. E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (Yale U. Press, 1967).

¹³⁶ This is so both because the pictures themselves—action paintings—read like records of the artist’s movement, but also because Pollock was famously photographed by the press in the process of painting. Peter Schjeldahl called Pollock, as famously pictured in *Life Magazine* in 1949, a “pinup of seething manhood.” Peter Schjeldahl, *American Abstract: Real Jackson Pollock*, NEW YORKER (Jul. 31, 2006).

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his innermost being.”¹³⁷ Pollock’s paintings – aptly called “action paintings” – are a record of his transcendent struggle; we feel him in his work.¹³⁸ In short, there is an artist behind the art.

The idea that animates fair use analysis, that we can discern meaning by asking an artist what he meant, seems rooted in this vision of art as deeply connected to its creator. It stems from a remarkably tenacious, albeit transitory vision of artistic authorship: the romantic myth of the solo genius artist.¹³⁹ But while fair use law pictures the artist as all knowing “master mind”¹⁴⁰ behind the art, that is the precise vision of authorship that contemporary artists have made the target of their work.

Although we could date the start of this attack on authorship to Marcel Duchamp’s early twentieth century work, the assault was renewed in full force in the ‘60s as artists rebelled against the confines of late modernism.¹⁴¹ Perhaps no one was more important in this shift than Andy Warhol. Instead of the tortured artist baring his soul on canvas as an expression of his innermost being, Warhol gave us the vacant artist, reproducing celebrity photographs, Brillo boxes and cans of soup, rolling them off the production line in the studio he called the “Factory.”¹⁴² Warhol made art into a consumer product, and the hallowed artist into just another businessman. His subject matter and his technique were depersonalized and commercial. In his Factory, he mass produced photo-silkscreens that never even touched the romantic hand of the artist. (In modernism, the artist’s touch was the guarantor of his sincerity and presence; it invested the canvas with his magic).

The present era owes its spirit to Warhol.¹⁴³ Boasting of his lack of connection with his own objects, speaking to a group of admiring interviewers who wanted the great artist to speak about the meaning of his work Warhol replied: “Why don’t you ask my

¹³⁷ JOHN H. MERRYMAN & ALBERT ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 423 (5th ed. 2007).

¹³⁸ Harold Rosenberg coined the term “action painting” in 1952. HAROLD ROSENBERG, *The American Action Painters, in THE TRADITION OF THE NEW* 23 (1959).

¹³⁹ For some of the scholarship attacking romantic notions of authorship embedded in intellectual property law in general, see Martha Woodmansee, *The Genius and Copyright: Economic and Legal Conditions of the Emergence of ‘Author’*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455 (1991); James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); Mark Rose, *The Author as Proprietor: Donaldson v. Beckett: and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1990).

¹⁴⁰ The term “master mind” as applied to copyrightability comes from the Supreme Court in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1883). For its recent invocation, see *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (quoting *Burrow-Giles*) (describing an author as “the person to whom the work owes its origin and who superintended the whole work, the ‘master mind’”). For my scholarship exploring postmodern notions of authorship, see Adler, *Post-Modern Art* *supra* note 131; Adler, *What’s Left*, *supra* note 129; Amy Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009).

¹⁴¹ See Adler, *Post-Modern Art*, *supra* note 131 (offering a fuller history).

¹⁴² See generally ARTHUR C. DANTO, *ANDY WARHOL* (2009).

¹⁴³ And Warhol in turn to Marcel Duchamp. Danto wrote that the present will be dubbed the “age of Warhol.” ARTHUR C. DANTO, *ENCOUNTERS & REFLECTIONS ART IN THE HISTORICAL PRESENT* 293 (1997). Auction prices reflect this prominence. PAUL VIRILIO, *THE ACCIDENT OF ART* 64 (2005).

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assistant Gerry Malanga some questions? He did a lot of my paintings.”¹⁴⁴ Ripping off Warhol, Damien Hirst recently explained how he conceives of his authorship in relation to the hordes of assistants who paint his paintings: “I sit in a chair and watch, while they do the work.”¹⁴⁵

Thus one problem with relying on an artist’s intent as a guide to the meaning of his work is that there is no artist, or that there are multiple artists. Much contemporary addresses or at least assumes this condition, as artists work in collectives and under fictional identities¹⁴⁶ or otherwise flirt with erasing the boundary between the artist and the fabricator,¹⁴⁷ viewer,¹⁴⁸ installer,¹⁴⁹ curator¹⁵⁰ or the technology of art itself.¹⁵¹ To the extent that fair use analyzes transformativeness based on the artist’s intent, it thus relies on a criterion that contemporary art long ago abandoned.

Although assaults against the author as lone romantic genius tend to be associated with a postmodernist cast, one does not need to resort to postmodern jargon about the

¹⁴⁴ Quoted in CAROLINE A. JONES, MACHINE IN THE STUDIO 422 n. 35 (1996) (citations omitted).

¹⁴⁵ *Hockney Takes Swipe at Hirst Technique*, BBC NEWS (Jan. 3. 2010), <http://www.bbc.co.uk/news/entertainment-arts-16389446>.

¹⁴⁶ For two prominent examples, consider the collectives of Reena Spaulings and the Bruce High Quality Foundation. For an example of Prince’s own work under the fictional identity “John Dagg,” see *supra* note 125.

¹⁴⁷ See *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38 (1st Cir. 2010) (moral rights dispute in which museum fabricated and installed most of the work without the artist present).

¹⁴⁸ See MARCEL DUCHAMP, THE CREATIVE ACT, lecture (1957), reprinted in THEORIES AND DOCUMENTS OF CONTEMPORARY ART: A SOURCEBOOK OF ARTISTS’ WRITINGS 972 (Kristine Stiles and Peter Selz eds., 2d ed. 2012) (claiming the viewer completes the work).

¹⁴⁹ For an exploration of the struggle over installation and authorship in Minimalist art, see James Meyer, *The Minimal Unconscious*, 130 OCTOBER 141 (Fall 2009). For one example of work that contemplates the role of the installer in completing/creating it, see Eva Hesse’s *Expanded Expansion*, a sculpture that changed with each installation. EXPANDED EXPANSION (1969), image available at <http://www.guggenheim.org/new-york/collections/collection-online/artwork/1648>.

¹⁵⁰ For two of many prominent examples in which artists have made work by assuming the role of curator, see JOSEPH KOSUTH, THE PLAY OF THE UNMENTIONABLE: AN INSTALLATION BY JOSEPH KOSUTH AT THE BROOKLYN MUSEUM (1992) (documenting Kosuth’s curation of the museum’s collection); Fred Wilson and Howard Halle, *Mining the Museum*, 44 GRAND STREET 151 (1993) (discussing Wilson’s *Mining The Museum* Exhibition in which he curated the collection of the Maryland Historical Society). For my discussion of the artist as curator, see Adler, *Against Moral Rights* *supra* note 140. This interest in the artist as curator continues unabated. In the 2014 Whitney Biennial, several “artists,” rather than showing his or her own objects, made art by curating the works of others, including contributions by Julie Ault, Richard Hawkins and Catherine Opie. See STUART COMER, ANTHONY ELMS AND MICHELLE GRABNER, WHITNEY BIENNIAL 2014 93-96.

¹⁵¹ The role of digital technology has become a prominent theme in contemporary art for artists like Wade Guyton, Kelley Walker, and Seth Price. See Adam Jasper, *Wade Guyton, Seth Price, and Kelley Walker*, 101 FRIEZE 72 (Sept. 2006) (reviewing group show). I might argue that these works have been co-authored by technology. In some ways, I view this work as related to earlier artists who in my view assigned an authorship role to (non-digital) materials. For example, Robert Morris’s “Anti-Form” work envisioned the materials of art dictating their use in a way that wrenched control away from the artist. Robert Morris, *Anti-Form*, 6 ARTFORUM 33 (April 1968).

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“death of the author” to see that the romantic concept of a single, all-knowing artist was always a distortion.¹⁵² This has been evident, for example, throughout the history of photography, where the printer of a photograph (often someone other than the artist) exercises dramatic control over the resulting “work.”¹⁵³ Indeed, multiple authorship is built into photography, not only because of the half-man, half-machine quality of the art form, but also because of its reproducibility and the ease with which it can be altered.

Consider the hidden multiplicity of authorship behind one of the most iconic images in the history of documentary photography. Below is the famous photograph that won Nick Ut the Pulitzer Prize. And below that is the image that Ut actually took. The Pulitzer Prize winning image was cropped—in a way that I might call “transformative”—by a photo editor whose name we can’t be sure of.¹⁵⁴



¹⁵² This language is borrowed from Adler, *Against Moral Rights*, *supra* note 140, where I discuss the relationship between Pound and Eliot.

¹⁵³ See Michael Rips, *Who Owns Seydou Keita?*, N.Y. TIMES, Jan. 22, 2006 (showing how printer can alter meaning of photograph); *see also* Michael Kimmelman, Walker Evans. Or Is It?, N.Y. TIMES, Aug. 25, 2006 (same); *cf.* SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000) (reviewing a copyright dispute between printer and photographer).

¹⁵⁴ A recent blog post by a photographer who was a contemporary of Ut’s says the editor was either Horst or Carl Robinson. David Burnett, *Have You Ever Seen the Uncropped Version of the “Napalm Girl”?* BAGNEWS BLOG (Sept. 18, 2013), <http://www.bagnewsnotes.com/2013/09/have-you-ever-seen-the-uncropped-version-of-the-napalm-girl/>.

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Who is the “author” of this photo, the one whose intent might presumably govern its meaning: Nick Ut, the Pulitzer Prize-winning hero photographer who actually shot the photograph, or the unknown news editor who chose it from Ut’s roll of film and cropped it to produce the image that is now seared in our collective memory? The unsung photo editor, I would submit, certainly made the work “better.”¹⁵⁵ Not only did he make the photo more visually striking and more gracefully composed, but he also changed its “meaning” by cropping out the image of another war photographer reloading his film on the right of the frame. The unedited work’s inclusion of this figure invites an uncomfortable series of questions, “Who is that guy looking down at his camera, futzing with film, while a girl screams naked in pain?” And this photo of a photographer might in turn prompt questions about the man behind the camera. “Why did he shoot the picture rather than put down his camera and save the girl?”¹⁵⁶ This line of questioning haunts war photography. Susan Sontag wrote of how peculiar it is that “in situations where the photographer has the choice between a photograph and a life, [he will] choose the photograph.”¹⁵⁷ While Ut’s original image opened this reading up, the editor’s crop shut it down (albeit incompletely).

¹⁵⁵ See Adler, *Against Moral Rights*, *supra* note 140, (discussing how judgments about what makes an artwork “better” must always be considered provisional and potentially wrong).

¹⁵⁶ As this series of photographs shows clearly, Nick Ut did exactly that. But we cannot tell from this one frame. DENISE CHONG, *THE GIRL IN THE PICTURE* (2000).

¹⁵⁷ SUSAN SONTAG, *ON PHOTOGRAPHY* 11-12 (1977).

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Removing the visual and moral clutter that the original contained, he transformed it into a picture more clearly about the victims. (Note that both of the readings I offer here are no doubt unrelated to the intent of either of the two “authors,” the photographer or the editor.)¹⁵⁸

Consider the complexity of authorship hidden behind another iconic Vietnam photo.



Here the Pulitzer Prize winning author of the photo, Eddie Adams, took the shot and thought so little of it that he dropped off the film, went to lunch and forgot about it. A photo editor chose the shot from multiple images on Adam’s roll and put it on the front page of the New York Times where it caused a sensation. Adams said “I took the picture. I thought absolutely nothing of it . . . and I still don’t understand it even today.”¹⁵⁹

How should we think about the role of the photo editor in this example? He functioned, I would argue, as a second, hidden author. And in my view, the photo editor/author may be the more important of the two. In our image-soaked culture, we increasingly depend not on the person who can make yet more images, but on the person who can sort through the sea of images in which we are drowning and choose the right one. Creativity shifts away from the artist who creates something new toward the “artist” who

¹⁵⁸ On the accidental nature of the photo editor’s decision, David Burnett, Ut’s contemporary said: “In this case, there was very little discussion... [They just did what photo editors had always done: crop the ‘unnecessary’ bits out, and leave the key elements of the picture intact.” Burnett, *supra* note 154.

¹⁵⁹ *Interview with Edward Adams*, NEWSEUM, <http://www.newseum.org/exhibits-and-theaters/permanent-exhibits/pulitzer/videos/1969-spot-news-edward-adams--the-associated-press.html> (last visited Aug. 1, 2014). Critics have discussed this photo as a “reflex picture.” Donald Winslow, *The Pulitzer Prize Eddie Adams Didn’t Want*, N.Y. Times Lens Blog (Apr. 19, 2011), <http://lens.blogs.nytimes.com/2011/04/19/the-pulitzer-eddie-adams-didnt-want/>. In my view this once again suggests the role of accident and the unconscious in authorship.

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knows what to take from what we already have; this artist functions like a curator, an editor, a blogger, or maybe a thief.¹⁶⁰

This shift in the creative function can shed light on a recent fair use case involving another prominent contemporary artist: *Shepard Fairey v. The Associated Press*.¹⁶¹ At issue was the extraordinarily popular Obama Hope poster that Fairey created for the President's campaign. Fairey's poster is on the left below. The original photograph, owned by the AP but taken by photographer Mannie Garcia, is on the right.



Consider the relationship the original photographer had to his own image. Fairey had concealed which photograph he had appropriated to make the poster; it took the blogosphere months of sleuthing before the original Mannie Garcia photograph was identified as Fairey's source.¹⁶² Remarkably, even the photographer himself was surprised. He had taken so many images that day that he didn't even recognize his own work.¹⁶³ Instead, it took Shepard Fairey, for all his moral failings (he lied to the court¹⁶⁴) to have the vision to "see" which photo mattered, to choose amidst a surplus of pictures of Obama the

¹⁶⁰ Warhol saw "choosing the right source image" as the key to art. DAVID DALTON AND TONY SCHERMAN, *POP: THE GENIUS OF ANDY WARHOL* (2009). As MoMA's Poet Laureate, Kenneth Goldsmith, said, "Pointing at the best information trumps creating the best information [#stopcreating](https://twitter.com/kg_ubu/status/427125702887223297)" Kenneth Goldsmith on Twitter, (Jan. 25, 2014, 10:11 a.m.), https://twitter.com/kg_ubu/status/427125702887223297.

¹⁶¹ The case settled in 2011. *Shepard Fairey, Obey Giant Art Inc. v. The Associated Press*, No. 09-CV-1123, (S.D.N.Y. 2011). The Associated Press's complaint is available at <http://cyberlaw.stanford.edu/publications/fairey-v-associated-press-complaint>.

¹⁶² Fairey shamefully deceived the court and his own lawyers about the source photo. Liz Robbins, *Artist Admits Using Other Photo for 'Hope' Poster*, N.Y. TIMES Oct. 17, 2009, at C4.

¹⁶³ Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES, Mar. 23, 2009, at C2. Garcia said, "[O]n that one particular day alone, I must have made a thousand images, and that was a relatively light day, you know." *Id.*

¹⁶⁴ Robbins, *supra* note 162.

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one image that would launch a campaign and become its symbol. Once again the author function is divided. While the original artist was so disconnected from his own image that he didn't even know it when he saw it, the second artist acted much like a photo editor, or Andy Warhol. He had the vision to "choos[e] the right source image."¹⁶⁵ The work he made began from the premise that authorship, like meaning, is up for grabs, multiple and shifting.

While Fairey's work, like much contemporary work, simply assumes this shift in the author function, artists like Richard Prince and so many others make work that is directly "about" this shift. Prince takes as his subject matter not only the multiplicity of authorship but ultimately the authorlessness of creativity. Reconsider his early *Cowboys*. He begins by expunging the author of the "original" work he appropriated, revealing the previous author as always already reliant on others; after all, the "original" Marlboro shots were themselves beholden to the countless authors who mythologized the American west. As Prince said of these images, "I never associated [them] as having an author."¹⁶⁶ But in his own act of object appropriation, his refusal to make something "new," Prince not only erases the chain of authors who came before him but also erases himself. Ultimately, his work ushers in the death of all the authors of the photograph (Prince included). It "orphans"¹⁶⁷ the work, introducing it into a chain of re-users, none of whom ever really owned it, none of whom are original, and none of whom can control it.

To search for meaning by relying on the author's intent would be to ask precisely the wrong question, to miss that the author is dead and that the work is now living its own life.¹⁶⁸ Courts see it as straightforward way to get at the question of transformativeness: just ask the author what he meant. Yet this simple question reveals the extraordinary gap between the legal search for meaning and the assumptions about meaning that characterize contemporary art.

B. Against Aesthetics

"Whatever art is, it is no longer something primarily to be looked at."

--Arthur Danto, *After the End of Art*¹⁶⁹

¹⁶⁵ DALTON AND SCHERMAN, *supra* note 160.

¹⁶⁶ Randy Kennedy, *If the Copy Is an Artwork, Then What's the Original?*, N.Y. TIMES, Dec. 6., 2007, at C1.

¹⁶⁷ I refer metaphorically to the problem of orphan works. See generally U.S. Copyright Office, Report on Orphan Works (2006) available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

¹⁶⁸ See Adler, *Against Moral Rights*, *supra* note 140, at 265, 269 (discussing "freeing the art from the artist" and the vision of the work as having "grown up and left home").

¹⁶⁹ ARTHUR C. DANTO, *AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY* 16 (1996).

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“Now there is one feature of contemporary art that distinguishes it from perhaps all art made since 1400, which is that its primary ambitions are not aesthetic.”

*--Arthur Danto, After the End of Art*¹⁷⁰

Throughout the Prince opinion, the Second Circuit repeatedly invoked “aesthetics” and side-by-side comparison as the way to analyze transformative use.¹⁷¹ “Looking at the artworks and the photographs side-by-side,” the court wrote, “[o]ur observation of Prince’s artworks themselves convinces us of the transformative nature of all but five . . . These twenty-five of Prince’s artworks manifest an entirely different **aesthetic** from Cariou’s photographs,” making them transformative “as a matter of law.”¹⁷² As it compared what it called the “serene” composition of Cariou’s work to the “jarring” and “hectic” aesthetics of Prince’s paintings, the court employed the language of formal art analysis (much to the consternation of Judge Wallace, concurring and dissenting in part on this very point).¹⁷³ To the majority, the differences between Prince and Cariou were obvious for most of the works. All you had to do was look at them.

What provoked this move toward formal analysis? Of course, aesthetics have always been part of the “transformative” inquiry since Judge Leval first conceived of it in his 1990 article.¹⁷⁴ The Second Circuit, while not relying exclusively on aesthetics, had quoted him on this point in previous cases, writing that if “the secondary use adds value to the original — if [the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”¹⁷⁵ Indeed aesthetics played a key role in *Blanch v. Koons* as well, supplementing the court’s

¹⁷⁰ *Id.* at 18.

¹⁷¹ For example, the court wrote, “Here, looking at the artworks and the photographs side-by-side, we conclude that Prince’s images, except for those we discuss separately below, have a different character, give Cariou’s photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou’s.” *Prince II*, at 708-09. The court cited the Seventh Circuit for the proposition that works should be compared side-by-side. *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir.2012). For another recent art case relying on a judge’s formal analysis, see *Morris v Guetta*, 2013WL 440127 (Feb. 2013) (one of two cases about Mr. Brainwash, from Banksy’s film *Exit Through the Gift Shop*). See also *Lennon v. Premise Media Corp.* 556 F.Supp.2d 310, 323 n.2 (S.D.N.Y. 2008) (relying primarily on testimony about intent but noting also that the transformative quality of the work “is apparent from a viewing of the movie”); *Gaylord v. United States*, 85 Fed. Cl. 59, 62 (2008) (finding different aesthetics to support transformative use), *rev’d* 595 F.3d 1364 (Fed. Cir. 2010).

¹⁷² *Prince II*, at 706. And the five paintings remanded also failed on the same grounds: aesthetics. They were “similar in key aesthetic ways” to Cariou’s. *Id.*

¹⁷³ *Id.* at 706 (“Cariou’s serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs. Prince’s crude and jarring works, on the other hand, are hectic and provocative”).

¹⁷⁴ Leval, *supra* note 41.

¹⁷⁵ *Castle Rock Entm’t, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting Leval, *supra* note 41, at 1111). Judge Leval described “aesthetic declarations” as one instance of fair use. *Id.*

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reliance on the artist's statement of transformative intent or purpose.¹⁷⁶

But in *Cariou v. Prince*, aesthetics took center stage. The reason for this, as I have argued, was the court's perception that Prince's testimony on transformative intent was insufficient.¹⁷⁷ In the absence of statements of intent that satisfy a court, where else to look for meaning but at the works themselves? We are, after all dealing with **visual** art. Formal, aesthetic analysis seems like the most obvious way one could possibly assess fair use in an art case. This is the way we have thought about art for centuries; side-by-side comparison is the stuff of every art history class.

And yet as much as this turn to formalism and aesthetics seems obvious, sensible and natural, I want to argue that it is exactly the wrong way to assess meaning in contemporary art. A reliance on formalism and aesthetics can lead us astray because it misses the key, defining feature of contemporary art, the locus of its radical break with art history.¹⁷⁸ Quite simply, contemporary art is no longer visual.

This may sound crazy. For centuries, the word "art" used to invoke beauty or, at the very least, visuality. But postmodern art, drawing on Dada and Pop, moved art from the realm of the beautiful, physical, or even visual to the realm of the conceptual. Renowned critic and art philosopher Arthur Danto wrote that in contemporary art, "visuality drops away, as little relevant to the essence of art as beauty proved to have been."¹⁷⁹ To analyze contemporary art through the lens of aesthetics, as the Prince court and others have done, is to evaluate it under the very criteria that it has abandoned; art is no longer "something primarily to be looked at."¹⁸⁰

¹⁷⁶ The court noted numerous aesthetic changes Koons had made to the underlying photo such as "changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details." *Blanch v. Koons*, 467 F.3d 244, 253 (2006). Although the court clearly saw these formal changes as relevant, it did not state whether such changes would suffice standing alone. Instead it listed these changes in addition to what it called "crucially, [the two works'] entirely different purpose and meaning." *Id.*

¹⁷⁷ For example, the court wrote "However, the fact that Prince did not provide those sorts of explanations [of transformative intent] in his deposition — which might have lent strong support to his defense — is not dispositive. What is critical is how the work in question *appears* to the reasonable observer, not simply what an artist might say about a particular piece or body of work." *Prince II*, at 707 (emphasis added). Note that the court recognized that Prince made statements that could have been considered evidence of "transformative" intent under existing case law, despite other moments where he had said that he was not "trying to create anything with a new meaning or a new message." *Id.* at 707 (quoting Prince).

¹⁷⁸ Oddly, it was not a bad way to think about Prince's work in this case. I believe the Court was right to see that Prince's and Cariou's work vary as a visual matter quite dramatically. Indeed, I think could have been said for all the works, including the ones the court remanded. Nonetheless, I believe that aesthetics is the wrong rubric to use to interpret art for the reasons argued here, primarily because it misses the way in which much contemporary art is no longer visual. In Prince's case the visual changes, so striking, were not the primary way in which we could say Prince's work differed from Cariou's.

¹⁷⁹ DANTO, *AFTER THE END OF ART*, *supra* note 169, at 16; *see also* HAL FOSTER, *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* (1983) (offering major postmodern critique of the aesthetic); DONALD KUSPIT, *THE END OF ART* (2004) (discussing the "post-aesthetic" moment in contemporary art).

¹⁸⁰ *Id.*

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Compare the experience of viewing a Duchamp urinal with the experience of viewing, say, a Leonardo painting. I am not claiming that viewing the former is devoid of value (although Duchamp himself was dismayed when people evaluated *Fountain* aesthetically).¹⁸¹ But, in contrast to the Leonardo, it is clear that a great deal of the value of the Duchamp is conveyed simply by describing it and how it was made (or not) by the artist: Duchamp took a manufactured urinal and put it in a gallery space.

Indeed much visual art represents a loss of interest not only in visuality but in the art object itself. The much-touted “dematerialization of the art object” that characterized the ‘60s has taken hold; in our present era, the physical object has famously become “contingent” to contemporary art.¹⁸² We take this for granted. Just casually walking around New York exhibits the last few years, one couldn’t have escaped the constant stream of art that reveled in its lowliness, transience, or immateriality: stuffed animals strewn on the floor, live animals strutting around (cats and iguanas at PS 1), dying Christmas trees shoved into a gallery, rooms made of rain or light, rotting food, jerry-rigged towers of chocolate, garbage on the floor, crumpled notes casually tacked to walls.

Of course there are still many artists who continue to make lushly beautiful, virtuosic work. Indeed, Richard Prince in his turn to painting, exemplified in his *Nurses* series, evidenced an increased fascination with the traditional visual markers of art.¹⁸³ But often artists who make such objects are working on both conceptual as well as formal levels. For example, the “hot” contemporary painter John Currin isn’t just a great painter; part of the point of his work is that he paints so masterfully after painting was pronounced dead.¹⁸⁴ Currin paints as if there were quotation marks around the word “painter,” marking it off as a sly conceptual move. Given this move of art from the physical to the conceptual realm, we will miss the locus of a work’s meaning if we search for that in the visual appearance, the aesthetics of a work.

But even if aesthetics *were* the right place to look for transformative use, how would we distinguish those formal changes that were transformative from those that were insufficiently so? What theory of formalism or aesthetics should guide our seeing? This was one of the mysteries of the Prince decision, where, based on “aesthetics” the court found twenty-five paintings transformative as a matter of law while another five paintings needed to be remanded because they failed this unspecified aesthetics test.¹⁸⁵

Compare the court’s treatment of the two Prince paintings, both referencing this photograph by Cariou shown below:

¹⁸¹ Duchamp complained that critics “admire [my readymades] for their aesthetic beauty.” DANTO, *AFTER THE END OF ART*, *supra* note 169, at 84.

¹⁸² MARTHA BUSKIRK, *THE CONTINGENT OBJECT IN CONTEMPORARY ART* (2005); *cf.* YVES KLEIN, *THE EVOLUTION OF ART TOWARDS THE IMMATERIAL* (1959) (artist’s call for dematerialization of art).

¹⁸³ RICHARD PRINCE AND MATTHEW COLLINGS, *RICHARD PRINCE: NURSE PAINTINGS* (2003).

¹⁸⁴ *See* ROBERT ROSENBLUM, JOHN CURRIN (2003) (exploring Currin’s blend of Old Master technique and kitsch).

¹⁸⁵ *Prince II*.

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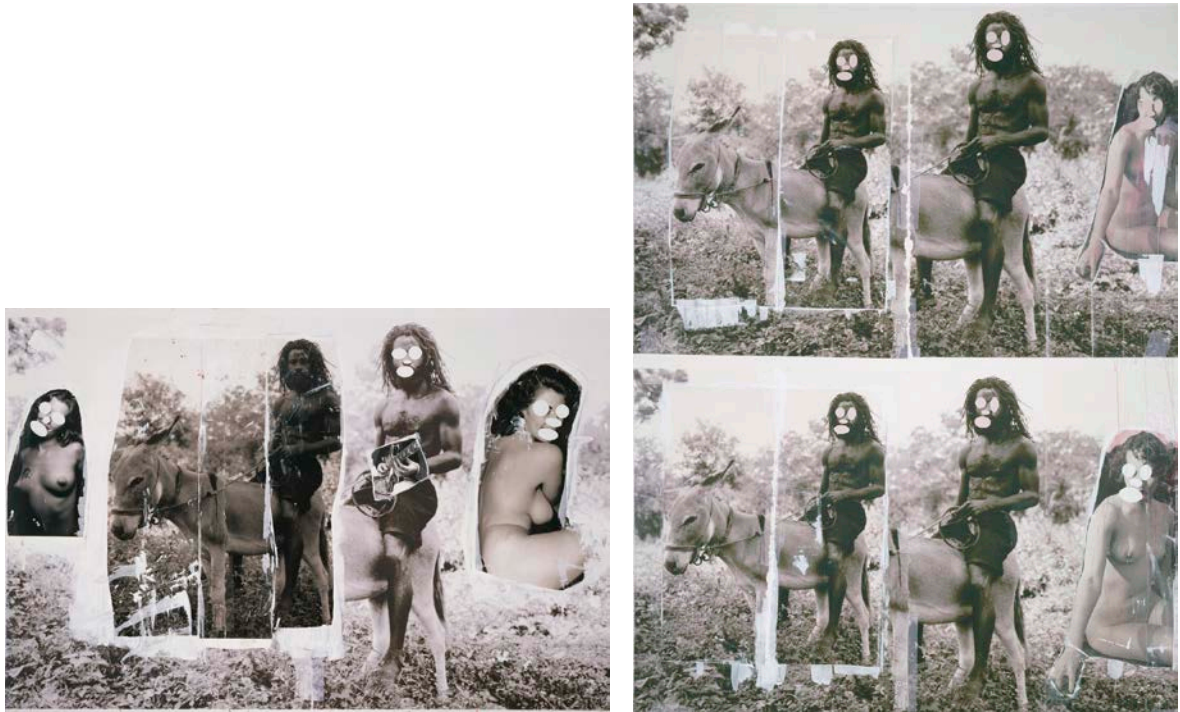
Below on the left is Prince's *Back to the Garden*, deemed transformative as a matter of law because it presented "fundamentally different aesthetics" from Cariou's work.¹⁸⁶ On the right is Prince's *Charlie Company*, remanded because it was "similar in key aesthetic ways" to the Cariou image.¹⁸⁷ Is there a theory of aesthetics that makes these two paintings distinguishable as a matter of law? They look pretty similar to me. What was the basis for the court's distinction?

¹⁸⁶ *Id.* at 708.

¹⁸⁷ *Id.* at 711.

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The court at one point warned that mere “cosmetic changes” would not suffice.¹⁸⁸ Was the court’s theory simply that some paintings looked too much like the photographs and others didn’t? Obviously that would be too murky and subjective a metric to suffice for guiding fair use law. Nor would it be a helpful way to think about aesthetic change as a proxy for changed meaning; this is, after all, what the transformative inquiry searches for. As we know from the history of art, an artist can affect a work’s meaning with nothing more than a few minor gestures. As the aesthetic philosopher Nelson Goodman wrote, “[e]xtremely subtle changes can alter the whole design, feeling, or expression of a painting. Indeed the slightest perceptual differences sometimes matter the most aesthetically.”¹⁸⁹ Consider this: Would Duchamp’s *LHOOQ* be insufficiently transformative because of the relatively small (if devastating) doodled changes Duchamp made to his postcard of the *Mona Lisa*? Is it “similar in key aesthetic ways” to the original?¹⁹⁰

¹⁸⁸ *Id.* at 708.

¹⁸⁹ NELSON GOODMAN, *LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS* 108 (2d ed., 1976).

¹⁹⁰ *Prince II*, at 711.

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Indeed, an overreliance on aesthetics might lead us to miss those very changes in meaning that characterize the most important art being made in the contemporary era, art that owes its legacy to Duchamp, “the primary generative thinker” whose work has “defined” the present moment.¹⁹¹ By focusing the inquiry on formal changes, we look for meaning in a place that is not only incidental or beside the point to many artists, but actually misses one point of their work: its use of copying and repetition to undermine the notion that art should be understood (purely) visually. Thus to evaluate contemporary work by its formal appearance is to subject it to the very standard it contests.¹⁹² And the turn to formalism seems particularly misguided not only because we live in a post-Duchamp, post-Warhol world, but also in a digital one, which only increases the centrality of copying to creativity.¹⁹³

In light of this, consider the two highly-acclaimed photographs below. They are

¹⁹¹ Danto, *supra* note 117, at 85.

¹⁹² It may still be the case that aesthetic analysis could yield a “correct” result under fair use in some circumstances. To return to Richard Prince’s work which entailed many formal, devastating changes to the underlying Cariou images, an aesthetic analysis, even naïve and untheorized (i.e. do these two things look different in some unspecified way?) should have dictated a finding of fair use.

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visually identical. The first, by Walker Evans, is called *Alabama Tenant Farmer Wife* (1936). Taken as part of the WPA during the Depression, depicting a woman ravaged by poverty, the photograph has become a celebrated symbol of art's power to reveal and document human suffering.¹⁹⁴ The second photograph, taken by Sherrie Levine in 1981, is formally indistinguishable from the Walker Evans. Indeed the photo, called "*After Walker Evans: 4*" is a photograph of a photograph, an exact replica.

What is the meaning of Levine's rephotograph? Instead of a means of conveying some truth about the world as Evans' photo was, it can be read instead as a meditation on the authorlessness of photography, its infinite reproducibility, its failure of originality, its predatory quality, even its ability to lie.¹⁹⁵ Levine's work has also been read through a feminist lens.¹⁹⁶ A woman artist who repeatedly captured and rephotographed the work of male master artists, her predatory taking of Evans' work suggests a reading about photography, gender and power. Walker Evans shot and took the photo of that poor woman; now a woman artist shoots and takes his work. Was he exploiting his subject, just as Levine is now exploiting him? Is photography in both cases, as Sontag would have it, an act of predation?¹⁹⁷



¹⁹⁴ WALKER EVANS AND JAMES AGEE, *LET US NOW PRAISE FAMOUS MEN* (2nd edition, 1960); LINCOLN KIRSTEIN, *WALKER EVANS: AMERICAN PHOTOGRAPHS, SEVENTY FIFTH ANNIVERSARY EDITION* (2012).

¹⁹⁵ See, e.g., Howard Singerman, *Seeing Sherrie Levine*, 67 *OCTOBER* 78 (1994) (analyzing Levine's work using photography theory).

¹⁹⁶ See, e.g., Abigail Solomon-Godeau, *Living with Contradictions: Critical Practices in the Age of Supply-Side Aesthetics*, 21 *SOCIAL TEXT* 191 (1989) (offering feminist reading of Levine).

¹⁹⁷ SUSAN SONTAG, *ON PHOTOGRAPHY* (1977).

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Note the two radically different readings I have offered of these two works.¹⁹⁸ Certainly a formal analysis would not help us arrive at them. The reason this example is important is because the problem is not unique but is instead fundamental to contemporary art. Like that of other artists from the “Pictures Generation,” Levine’s work has become a foundation for the current era.¹⁹⁹ The Prince court’s turn toward formalism and aesthetics and the incompatibility of this turn with the major thrust toward copying that characterizes contemporary art help to explain the extraordinary amicus support Prince received from major museums and art foundations during this litigation.²⁰⁰ As a commentator explained it, “[T]he museums correctly see this case as putting at risk *all* appropriation art and they want to undo the damage.”²⁰¹

It is perhaps unsurprising that one of the first artists caught in the wake of the *Prince* ruling was Lauren Clay, whose work takes this legacy for granted.²⁰² Clay had created a series of sculptures copying David Smith’s masterful ab-ex works. Although she made dramatic changes in scale, texture, and color, the works still bore a striking formal resemblance to Smith’s because they were line-by-line copies of his compositions. In my view, it was easy to read the works, small in scale and executed in delicate, colored papier mâché, as commentaries on what it would be like to claim Smith’s macho, imposing, steel sculptures from a heroic moment in the history of art and translate them into a traditionally “feminine” idiom. But the Smith estate saw Clay’s work as derivative knock-offs and sent a cease and desist letter; the young artist ultimately settled with the estate.²⁰³ In spite of Richard Prince’s partial victory for his own works, the reasoning of *Cariou v. Prince* and its reliance on an untheorized formalism has made it more risky, not less, for contemporary artists.

C. The Birth of the Viewer

“The death of the author ushers in a birth of the viewer.”
--Hal Foster²⁰⁴

¹⁹⁸ But see discussion *infra* Part II.C.1.A, in which I suggest that the two works might not be so different in how they are read, and that both works might be said to alter the meaning of the other.

¹⁹⁹ See, e.g., Solomon-Godeau, *supra* note 32.

²⁰⁰ Brief Amici Curiae of The Andy Warhol Foundation for the Visual Arts, Inc. and The Robert Rauschenberg Foundation in Support of Further Evidentiary Proceedings for Purposes of Determining Fair Use On Remand (No.: 08 Civ. 11327 (DAB) (ECF)) Oct. 22, 2013. S.D.N.Y. (written on behalf of 29 museums). Cariou received amicus support from the photography community. Brief for American Society of Media Photographers, Inc. et al. as Amici Curiae Supporting Petitioner, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (No. 11-1197-cv.).

²⁰¹ Brian Boucher, *Warhol and Rauschenberg Foundations Ask to Weigh in On Fair Use*, ART IN AMERICA, Oct. 24, 2013 (quoting Donn Zaretsky).

²⁰² Brian Boucher, *David Smith Estate Settles Copyright Tiff*, ART IN AMERICA, Oct. 15, 2013.

²⁰³ *Id.*

²⁰⁴ Foster, *supra* note 126. Foster drew on Roland Barthes’s classic formulation in ROLAND BARTHES,

The *Prince* court decided that the transformative inquiry must depend on the perception of the viewer, not the intention of the author.²⁰⁵ This had been preordained by the Supreme Court in *Campbell*. There the Court said that the proper question was whether a transformative character “**may reasonably be perceived**.”²⁰⁶ Thus the *Prince* court wrote, “What is critical is how the work in question appears to the reasonable observer.”²⁰⁷ This move foregrounded two factors: 1. the work’s formal appearance (or aesthetics as discussed above); and 2. “the reasonable observer’s” assessment of this appearance. The following two Sections explore the problems raised by the turn toward the observer’s perspective.

1. Which Viewer?

In *Prince*, the Second Circuit effectively killed the author and ushered in the birth of the viewer. But a pivotal question remains: who is “the reasonable observer” or viewer? Is she an ordinary observer—e.g., a woman on the street? Is she a judge, an art world insider, an expert, a consumer? The court didn’t say; the parties were vigorously fighting about that question on remand right before they settled.²⁰⁸ As I show below, the answer to this pivotal and unresolved question would likely have been outcome determinative there and will continue to determine outcomes in fair use cases going forward.²⁰⁹

IMAGE/MUSIC/TEXT 201 (Stephen Heath trans., 1977) (“The birth of the reader must be ransomed by the death of the Author”). On the manipulable construction of the art viewer, see Craig Owens, *The Birth and Death of the Viewer: On the Public Function of Art*, in DISCUSSIONS IN CONTEMPORARY CULTURE 16 (Hal Foster, ed., 1987).

²⁰⁵ *Prince II*.

²⁰⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) (emphasis added). The issue in *Campbell* was parody, but the point holds for any kind of transformative use. See also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113-14 (2d Cir. 1998) (evaluating how advertisement “may reasonably be perceived”); *Mattel v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2013) (following *Campbell*).

²⁰⁷ *Prince II*, at 707. Below I assert that the *Prince* court, in its slight variation from the Supreme Court’s language, actually undermined the free speech protections offered by the Supreme Court’s phraseology.

²⁰⁸ The Andy Warhol Foundation (later joined by the Robert Rauschenberg Foundation) argued throughout the litigation that the observer’s judgment must be guided by expert opinion. Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc. in Support of Defendants-Appellants and Urging Reversal, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (No. 11-1197-cv); Brief Amici Curiae of The Andy Warhol Foundation for the Visual Arts, Inc. and The Robert Rauschenberg Foundation in Support of Further Evidentiary Proceedings for Purposes of Determining Fair Use On Remand (S.D.N.Y. 2013) (No.: 08 Civ. 11327).

²⁰⁹ Jeannie Fromer’s and Mark Lemley’s recent article shows the differences that can result across different fields of intellectual property depending on whether we frame the relevant audience as a consumer, an expert, or an ordinary person. Jeanne Fromer and Mark Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251 (2014).

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a. Possible Viewers

Let me return to the example of Sherrie Levine to illustrate the decisive nature of this choice. Reconsider the two image reproduced earlier, Sherrie Levine's *After Walker Evans 4* (1981) and Walker Evans' *Alabama Tenant Farmer Wife* (1936). Would an ordinary observer, a man or woman on the street, see the difference in meaning and message between these two identical images?²¹⁰ I think the answer is likely to be no.²¹¹ A lay observer who hasn't been enmeshed in the contemporary art scene would be likely to perceive these images as having identical meaning and message, given that they are, after all, identical.

Let's face it: contemporary art is an insider's game. It has become nearly impenetrable these days for people who haven't been paying attention to it. Indeed, contemporary art might alienate the reasonable observer. It is frequently discussed in jargon-ridden language ("phantasmagoric" comes to mind again as a key word in the Jeff Koons litigation). And to make things worse, think about the nature of the artworks themselves. Many only gain their status as art by contesting their status as art in the first place.²¹² For example, would a lay viewer, one who has not been following recent art, even recognize as art this work by Marcel Duchamp?

²¹⁰ See *supra* notes 194-197 and accompanying text for the two readings of the works that I proposed.

²¹¹ If expert testimony were admitted this would increase the likelihood of the lay observer finding fair use, but it would not guarantee the finding. See, Adler, *Post-Modern Art and the Death of Obscenity Law*, *supra* note 131 (positing likelihood that jurors might disregard the view of experts when dealing with contemporary art).

²¹² As I have previously argued, attacks by "artists" on the category of "art" have at once constituted and begun to destroy the meaning of that term. Amy Adler, *The Folly of Defining 'Serious' Art*, in *THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS* 90 (Christopher Hawthorn, András Szántó et al. eds., 2003).

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Marcel Duchamp, Fountain 1917, Tate Museum

The example matters because of how much this work matters to the contemporary moment; although the work dates from 1917, a recent poll of 500 art critics called Duchamp's *Fountain* "the most influential work of modern art" by any artist.²¹³ If a work that resists its own status as art, one that looks like (and in some sense still is) a toilet, now rules as the most influential work of art, one can see the problem posed with asking lay observers to make judgments about meaning in the current art world. If the reasonable viewer is thought to be an ordinary viewer, Sherrie Levine loses. And remember that Levine, like Prince, is a bellwether for contemporary art more generally, which depends on copying (as well as other methods that resist the traditional markers of art) as its most important component.

In the same vein, if we posit the judge as reasonable observer, we confront similar problems with the ordinary observer formulation. Even before art became so famously impenetrable, Justice Holmes recognized the risk: "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."²¹⁴

²¹³*Duchamp Urinal Tops Survey*, BBC NEWS, Dec. 1, 2004, <http://news.bbc.co.uk/1/hi/entertainment/arts/4059997.stm>.

²¹⁴*Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). In *Mattel v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2013), the court made this determination, stating it was a question of law whether transformativeness could be reasonably perceived. The court seemed to use its own perception of meaning, writing "*It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie's influence on gender roles.*" *Id.* at 802 (emphasis added).

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In contrast, if we posit the reasonable observer as having art world knowledge or occupying the role of expert, then Sherrie Levine would win. The difference between her work and Walker Evans's is obvious to a person versed in contemporary art, just as the difference between a Richard Prince Cowboy and the ad from which he appropriated it would be obvious. This is Contemporary Art 101.

Finally, what if the reasonable observer were the consumer, often figured as the right audience to evaluate works in other areas of intellectual property law?²¹⁵ Immediately a pivotal subsidiary question arises: which consumer? Should we consider the consumer to be a potential buyer in the contemporary art market—i.e. the consumer who “shops” at the Gagosian Gallery and spends (if she's thrifty) a mere two million dollars or so on a work of art, usually after conferring with her art consultant?²¹⁶ Or is the consumer the person who might want reproductions such as postcards or posters of the work in question? Once again, the difference could be decisive. The art world consumer, a Gagosian shopper, would never choose a Sherrie Levine instead of a Walker Evans, or vice versa. This is inconceivable; it's simply not the way sophisticated art market buyers collect.²¹⁷ But of course, if the relevant consumer is someone who simply liked the image qua image, or even a person who shops in the museum gift shop (and not at the gallery that is in bed with the museum), the difference between Walker Evans and Sherrie Levine may become immaterial, just as, indeed, it is invisible. In the same way, we can see a crossover between consumers of Richard Prince's Cowboys and the Marlboro Man advertisements they appropriated. The Prince Cowboy may appeal to a Marlboro smoker, just as a Marlboro image may substitute as a “reproduction” of a Prince for someone who can't afford the real thing. Indeed, if Prince's art taught us anything, it may be that the best way to own an “authentic” Richard Prince would be to use the ad. I admit I bought an obviously

²¹⁵ See Fromer & Lemley, *supra* note 209 (explaining why the consumer is often the right audience to consider across different fields of intellectual property law). Cf. *Mattel*, 353 F.3d at 801. *Mattel* had offered into evidence “a survey in which they presented individuals from the general public in a shopping mall ... and asked them what meaning they perceived.” The Court rejected this evidence, writing “The issue of whether a work is a parody is a question of law, not a matter of public majority opinion.” *Id.*

²¹⁶ In other words, I am speaking about a consumer who is a participant in the “art world”—comprising an elite circle of galleries, museums and auction houses that continually make front page news for record breaking prices. Other institutions, galleries or “artists” may conceive of themselves as belonging in this world but I would exclude them, elitist as it seems, from the definition. See Arthur Danto, *The Artworld*, 61 J. PHIL. 571 (1964) (presenting Danto's his well-known institutional theory of art, in which a work becomes “art” only if it is deemed “art” by the art world—museums, galleries, and critics). See generally DON THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* (2010) (shedding light on the opaque economics of the art world). For one of many recent accounts of the art world's record-breaking prices, see, e.g., Scott Reyburn, *Christie's and Sotheby's Auctions in London Keep the Bubble Afloat*, N.Y. TIMES, Feb. 12, 2015, at C28 (asking whether “the 21st-century contemporary art boom [could] be a bubble that never really bursts?”). For a comment on the ubiquitous presence of the art consultant, see Felix Salmon, *The Business of Art Fairs*, REUTERS (May 7, 2012), <http://blogs.reuters.com/felix-salmon/2012/05/07/the-business-of-art-fairs/>.

²¹⁷ Interview with Felix Salmon, Senior Editor, Fusion, in N.Y., New York (Feb. 12, 2015); see also THOMPSON, *supra* note 216 at 9-15 (describing rise of artist as brand).

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bootlegged, pixelated copy of a Richard Prince copy of a Marlboro ad. To me in all its fakery, it's the perfect Richard Prince.²¹⁸

b. Normative Considerations

In my view, the proper viewer should be an art world insider—an art expert or consumer.²¹⁹ In an important article, Jeannie Fromer and Mark Lemley argue for just such a position for fair use more generally. As they explain, fair use is intended to protect works that “do not compete in the market with the copyrighted work and ... are valuable to promote the progress of culture and knowledge. These two reasons are precisely those that draw from the expert and consumer vantage points in copyright law.”²²⁰

In my view, this result is dictated not only by fair use principles, but also by First Amendment law, which undergirds fair use analysis. Remember that fair use acts as a First Amendment safeguard in copyright law; the doctrine contains “built-in” First Amendment considerations.²²¹ And First Amendment law shows that nuances about what constitutes a “reasonable” viewer have dramatic free speech significance.²²²

First Amendment law can help us understand what is at stake in postulating a viewer of artistic expression. In *Pope v. Illinois*²²³ the Court insisted that when judging the value of art in the obscenity context, it was essential that the proper observer be a reasonable one in contrast to an ordinary one. This (rather fine) distinction was of great constitutional significance according to the Court because the reasonable person

²¹⁸ This discussion shows is that although the language of market substitution properly figures in the fourth factor of the fair use test, the question of how we figure the consumer also bears on the first factor: we need to decide which consumer is relevant and also which market, primary or derivative.

²¹⁹ As my discussion of Sherrie Levine suggests, there is little reason to think that in the current art market, where there is dramatic crossover between market forces and “experts,” that the two views would ever lead to different results. The buyer is usually informed by “experts.” In turn, art collectors often play the role of experts, sitting on museum boards, writing criticism, etc. Collectors exert enormous influence on what art gets seen. Arguably, they have usurped the role of critics. By consumer, I mean a consumer in the art market, rather than a consumer of reproductions, a distinction I address above. The former is usually informed by art world insider knowledge whereas the latter may at times rely only on ordinary or lay knowledge, a distinction of significance as I show below.

²²⁰ Fromer & Lemley, *supra* note 209.

²²¹ *Golan v. Holder*, 132 S.Ct. 873, 890 (2012) (describing the “speech-protective purposes and safeguards” embraced by copyright law”); *see also* *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (describing fair use as a “First Amendment safeguard[]”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (stating that First Amendment protections are “embodied in” in the “latitude for scholarship and comment” safeguarded by the fair use defense). *Cf.* NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 63 (2008) (calling fair use an “exceedingly feeble” check on copyright law); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (arguing that the equivalence drawn between fair use and free speech has had a narrowing effect on both concepts).

²²² Below I show that the Court’s and the Second Circuit’s formulations are not equivalent and that there are First Amendment policy reasons to favor the former over the latter.

²²³ 481 U.S. 497 (1987).

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formulation ensured that a work “need not obtain majority approval to merit protection.”²²⁴ In contrast to the ordinary person standard, which posed a threat to free speech values, the reasonable person standard could save a work even if it was appreciated by only a “minority of the population.”²²⁵

This concern about minority viewpoints is particularly urgent in the context of the contemporary art world; as my previous discussion suggests, the majority of people might find contemporary art impenetrable and even perverse. To the extent that the reasonable observer test is interpreted to allow for the “ordinary” viewer, it jeopardizes the assuredly minority perspective that characterizes the art world. To be sure, the Court has not insisted in the free speech context that a reasonable viewer is necessarily an *expert* viewer. Nonetheless, I submit that the expert standard in this context would best serve the purpose that the Court promoted in the obscenity context, to protect the minority viewpoint.

This worry about allowing majority viewpoints to squelch artistic expression has also found traction in fair use case law. For example, in a dispute involving artworks that parodied Barbie dolls, the Ninth Circuit rejected Mattel’s attempt to introduce survey evidence about mainstream perceptions of the art’s meaning. The court wrote that “[t]he issue of whether a work is a parody is a question of law, not a matter of public majority opinion.”²²⁶ Because transformative work like a parody had “socially significant value as free speech under the First Amendment” this required special vigilance to resist majority views.²²⁷ As the court explained: “Use of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception.”²²⁸

Finally, there is a subtle distinction in phraseology between the *Campbell* view of the viewer and the *Prince* court’s view of the viewer; I suggest that when analyzed from a free speech perspective, this distinction is pivotal. The *Campbell* Court did not talk about “the reasonable observer” as the *Prince* court did.²²⁹ Instead, the Supreme Court in *Campbell* phrased the relevant question this way: whether a transformative character “may reasonably be perceived.”²³⁰ The distinction is significant from a First Amendment standpoint because it suggests that to the *Campbell* Court, the *possibility* of a perceiving a transformative meaning was all that was required. In my view, this is a more forgiving standard than “**the** reasonable observer” test, which seems to assume that there exists a

²²⁴ *Id.* at 497.

²²⁵ *Id.* at n. 3 (“As noted above, the mere fact that only a minority of a population may believe a work has serious value does not mean the ‘reasonable person’ standard would not be met.”) Justice Stevens continued the point in dissent. *Id.* at 507-19 (Stevens, J., dissenting).

²²⁶ *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

²²⁷ *Id.* (internal citations omitted).

²²⁸ *Id.*

²²⁹ *Prince II*, at 707.

²³⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).

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stable, universal viewpoint.²³¹ Taken together, both the Court’s First Amendment analysis and its phraseology in *Campbell* show that the standard of what may be reasonably perceived should be an expansive one, taking into account minority viewpoints—in this case, those of the art world—and possible readings, not definitive ones.²³²

But of course, there are problems with my position. The art world insider standard that I propose might be both overprotective and underprotective. It would certainly ensure broad fair use protection for contemporary art, but at the risk of making fair use potentially limitless: if we protect exact copies because they have new meanings for some art world audiences, have we in effect eradicated copyright protection?

Conversely, positing the viewer as an art world expert or art market consumer might not be only potentially overprotective but also underprotective and elitist. It would certainly protect well-established artists whose work depends on copying like Sherrie Levine or Richard Prince; they are art world royalty. But it is less clear that an undiscovered or unpopular artist would garner the same recognition under this standard. And as we know from the history of art, undiscovered and unpopular artists may be the ones we most care to protect; their work may represent the future of art.²³³

2. The Endless Play of Meaning

*“[I]t frequently is not possible to identify a single ‘message’ that is conveyed by an object.” – Supreme Court in Pleasant Grove City v. Summum*²³⁴

Even if we were able to resolve the question explored above, there still remains a deeper problem at the heart of the reasonable viewer inquiry. While fair use law begins from the assumption that the viewer will unearth a work’s single, stable meaning, contemporary art often begins from the assumption that a viewer doesn’t unearth meaning but helps create it, and that meaning constantly changes as a result.

The fair use formulation seems premised on a once-standard model of interpretation in which a work is “an objective entity whose meaning a [viewer simply] unfolds.”²³⁵ But contemporary artists and critics have repeatedly contested this vision of meaning.²³⁶ Instead, they picture the viewer as helping to create, rather than merely extract, the meaning of a work. Once again, Duchamp’s extraordinary influence exerts itself here. As

²³¹ *Prince II*, at 707 (emphasis added).

²³² As I will discuss in Section 2, *infra*, even this formulation is problematic.

²³³ See Adler, *Against Moral Rights*, *supra* note 140 (describing history of “great” artists going unrecognized in their day).

²³⁴ 555 U.S. 460, 476 (2009).

²³⁵ Meyer, *supra* note 149.

²³⁶ See, e.g., DAVID JOSELIT, *AFTER ART* 37-43 (2013) (arguing that with recent work, it is often “not sufficient to derive a ‘meaning’”; contrasting emerging meaning that unfolds in time with the idea of “singular meanings”).

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he wrote, “[T]he creative act is not performed by the artist alone; the spectator ... adds his contribution to the creative act.”²³⁷ The observer in this sense becomes a co-author of the work.

This raises an immediate problem for administering any test that depends on the observer’s perspective. If each viewer is in part a co-author who shapes as well as extracts meaning, a potentially infinite range of meanings becomes possible. Critic James Meyer writes about the literary view that the “text is only realized in the act of reading, and so is open to countless readings.”²³⁸ Because each viewer or reader “will fill the gaps in his own way,” meaning is continually changing.²³⁹

Contemporary art embraces this view. Perhaps surprisingly, so does the Supreme Court in the free speech context. Discussing public monuments, the Court addressed this phenomenon directly: “A monument may in fact be interpreted by different observers in a variety of ways.”²⁴⁰ In the Court’s view, the probability of fluctuating meaning is even more pronounced with visual expression. It wrote, “Text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.”²⁴¹ Furthermore, as the Court recognized, meaning fluctuates not only based on the interpretations of viewers but also based on time and context; the Court discussed the way new surroundings could alter the meaning of a work,²⁴² or how “‘people reinterpret’” meanings over time.²⁴³

This vision of ever-shifting meaning, varying from viewer to viewer and across time and space, is worlds away from what the Prince court envisioned: that the viewer’s perspective would reveal an unproblematic, stable meaning. Once again we see the fundamental tension between assumptions about meaning that inform the transformative test and the assumption of multivalent, unfixed and ever-unfolding meaning that undergirds contemporary art.²⁴⁴

²³⁷ DUCHAMP, THE CREATIVE ACT, *supra* note 135.

²³⁸ Meyer, *supra* note 149.

²³⁹ Wolfgang Iser, *The Reading Process: A Phenomenological Approach*, in READER RESPONSE CRITICISM FROM FORMALISM TO POST-STRUCTURALISM 50 (Jane P. Tompkins, ed., 1980).

²⁴⁰ *Pleasant Grove v. Summum*, 555 U.S. 460, 474 (2009).

²⁴¹ *Id.* at 475.

²⁴² *Id.* at 477 (explaining that meaning could be “altered by the subsequent addition of other monuments in the same vicinity.”).

²⁴³ *Id.* (citations omitted).

²⁴⁴ Does the Prince court’s call for a *reasonable* viewer, not mentioned in *Campbell*, save the day? The formulation rests on the controversial assumption that reason can be brought to bear on artistic judgment; Justice Scalia has staunchly criticized this view in the obscenity context, writing : “Since ratiocination has little to do with esthetics, the fabled ‘reasonable man’ is of little help in the inquiry.” *Pope v. Illinois*, 481, 497, 504-05 (1987) (Scalia, J., concurring).

For a possible resolution to this problem, consider Rebecca Tushnet’s proposal that given the multiplicity of meanings available in works, the proper standard for finding fair use should be when reasonable audience members *could* discern commentary on the original work even when other reasonable audience members

III. “SELL THE HOUSE, SELL THE CAR, SELL THE KIDS:”²⁴⁵ A RETURN TO THE MARKET?



While the main point of this Article has been to show why the transformative test poses a threat to contemporary art by requiring courts to adjudicate art’s “meaning,” here I pause briefly to consider what might be left if we abandoned the test altogether. This Part sketches out a preliminary argument: if we jettison the transformative test, we could turn instead to a controversial but, in my view, helpful way to think about copying and contemporary art—to the art market itself. What follows is an outline of a way to reconceive fair use, and ultimately the relationship between art and copyright, in a post-transformative test world.

When the Supreme Court injected the concept of “transformativeness” into fair use law in 1994, it retreated from the market centered paradigm that had previously characterized the doctrine. Prior to *Campbell*, the fourth factor of the test, which evaluates “the effect of the use upon the potential market for or value of the copyrighted work,”²⁴⁶ had been paramount.²⁴⁷ The transformative inquiry shifted the focus from market harm to a focus

could disagree. Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 *LAW & LIT.* 20 (2013) I find this view appealing, but based on the picture of meaning I present, I think the answer should always be yes.

²⁴⁵ Christopher Wool, *Apocalypse Now* (1988).

²⁴⁶ 17 U.S.C.A. § 107 (2000).

²⁴⁷ In 1985, the Supreme Court called the fourth factor “the single most important element of fair use. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 566 (1985). Wendy Gordon’s early scholarship was highly influential. Wendy J. Gordon, *Fair Use as Market Failure: A Structural Analysis of the Betamax Case*

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on meaning. This new emphasis was proposed by Judge Leval to liberalize fair use and to offer greater protection to the free speech and creative interests of secondary users.²⁴⁸

As I have argued, the transformative test failed to accomplish this goal. Yet, ironically, it seemed perfectly designed to capture the expressive interests that fair use law is meant to serve. By asking about “expression,” “meaning,” and “message,” the test directs courts to consider terms that are weighted with free speech significance.²⁴⁹ The previous approach under the fourth factor, which emphasized the market status of a work, risked giving insufficient consideration to those expressive values.

Paradoxically, I suggest that the best way to protect the vital creative and free speech interests in copying may be to stop thinking about art in terms of its expressive value, its meaning or message, as the transformative test requires, and to turn instead to thinking about art as market commodity. Indeed, I have argued in the past that contemporary art has begun to function less as creative personal expression and more as a luxury good marketed to the very rich.²⁵⁰ As prices soar in the contemporary market, artworks have become de rigueur trophies for newly minted billionaires.²⁵¹ So prominent is this new commodity model of art that market watchers now describe the artist not as author but as “*brand*”; the value of art is no longer a function of aesthetics but of the market power of the artist-brand who created it.²⁵² Several of the most highly acclaimed contemporary artists make works that use “the art market as [their] medium,” simultaneously critiquing and catering to this new market reality.²⁵³ Christopher Wool’s stenciled painting, pictured above, containing the words “Sell the house, sell the car, sell the kids” captures this spirit. Sold for \$26.5 million in 2013, it broke the artist’s record at auction.²⁵⁴ (Appropriately for our purposes,

and its Predecessors, 82 COLUM. L. REV. 1600 (1982) (arguing that courts should find fair use only when transaction costs impede licensing and when public benefit outweighs harm to owner).

²⁴⁸ Leval, *supra* note 41, at 1135 (discussing fair use’s role in facilitating free speech and creative purposes of copyright); *see also id.* at 1116 (calling transformative inquiry “the soul of fair use”).

²⁴⁹ When the Court called the test “the heart of the fair use doctrine’s guarantee of breathing space,” it once again used language freighted with free speech significance. *Campbell*, 510 U.S. at 579.

²⁵⁰ Adler, *Against Moral Rights*, *supra* note 140, at 298.

²⁵¹ James B. Stewart, *With Art, Investing in Genius*, N.Y. Times, Nov. 28, 2014, at B1 (“For better or worse, fine art is now firmly planted alongside equities, bonds, commodities and real estate as an asset class.”)

²⁵² *See generally* THOMPSON, *supra* note 216 (arguing that artist as brand is central feature of art market; also specifying relevance of gallery’s brand).

²⁵³ Calvin Tomkins, *A Fool for Art*, NEW YORKER, Nov. 12, 2007, at 64. *See also*, Felix Salmon, *Adventures in Art-Market Commodification*, REUTERS, Jan. 17, 2014, <http://blogs.reuters.com/felix-salmon/2014/01/17/adventures-in-art-market-commodification-enhanced-hammer-edition/> (stating that “Business art” has arguably come to be the dominant form of art in our time”); *see also* Alanna Martinez, *Artist Dustin Yellin Shredded \$10K for the Spring/Break Fair*, OBSERVER, Mar. 2, 2015, <http://observer.com/2015/03/dustin-yellin-and-the-bazaar-teens-collective-to-shred-10k-at-springbreak-art-show/> (describing artist’s work consisting of shredding \$10,000 cash and using the shredded money to create eight paintings selling for \$10,000 each, inspired by the art fair’s theme, “Transaction”).

²⁵⁴ Eileen Kinsella, *Millionaires Love Richard Prince and Christopher Wool*, ARTNET NEWS, May 20, 2014

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the words are not his own but copied from *Apocalypse Now*.)²⁵⁵

In my view, we could seize on this emerging conception of art as commodity to rethink copyright law by giving renewed primacy to the market inquiry under the now-diminished fourth factor of the test. This return to the fourth factor would offer two advantages. First, it would take courts out of the doomed and unpredictable enterprise of adjudicating meaning. Second, surprisingly, I believe it would lead to greater protection of copying in art.

My proposal depends on a salient and peculiar feature of the art market that legal scholars have not yet recognized: quite simply, there is no possibility of market substitution of one artist for another given the current preferences of the art market. As I will explain, an artist who copies another's work, even without any evidence of transformative message, meaning, or purpose, even without any changes whatsoever, will not substitute in the art market for the artist she has copied. Because the Supreme Court has specified that the relevant harm under the fourth factor is whether the new use usurps the market for the original,²⁵⁶ this feature of the art market suggests that the fourth factor should never be satisfied in art cases.²⁵⁷

Why would even identical images not substitute for each other in the art market? The answer has nothing to do with changes in meaning, as the transformative inquiry assumes.²⁵⁸ Instead, it stems from two interlocking features of contemporary art and its market that I touched on. First, the value of art is no longer tied to its visual appearance; just as I earlier explained that art's meaning has become divorced from aesthetics, so too art's market price is equally unmoored from the visual.²⁵⁹ Second, and related to the first, since value is no longer to be found in the visual, it has come to reside almost completely in the reputation or "brand" of the artist.²⁶⁰ What this means for copyright is simple: because an artist who copies another's work takes the original artist's visual material but does not take her brand (which would be forgery), the second artist has taken something that is unrelated to the market value of the original work. In contrast, an artist who copies both the visual material and the artist's brand has created a forgery and a fake. It's as valuable as the original artist's work—unless and until it's discovered as a copy, in which case it becomes unmarketable.²⁶¹ In sum, given current market preferences, because the identity of the

²⁵⁵ Wendy Vogel, *Christopher Wool at Guggenheim*, MODERN PAINTERS, Feb. 2014, at 82.

²⁵⁶ *Campbell*, 510 U.S. at 591–92. Market substitution for derivative works is also part of this fourth factor inquiry; I discuss it below.

²⁵⁷ As I explain below, there are complications with my argument when it comes to the market for derivative works or for cases in which one of the users is not an "artist."

²⁵⁸ *Campbell*, 510 U.S. at 591 (stating that when "the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred").

²⁵⁹ Economist David Galenson has succinctly explained the art market: "Aesthetics have nothing to do with it." Stewart, *supra* note 251 (quoting Galenson, Professor of Economics at University of Chicago); see generally DAVID W. GALENSON, ARTISTIC CAPITAL (2006) (offering economic analysis of art's value).

²⁶⁰ *Id.*

²⁶¹ *Greenberg Gallery, Inc. v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993).

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artist defines the range of the relevant market, outside of forgeries, a copy by another artist cannot usurp the market for the original artist. This means that Richard Prince would win under a properly analyzed fourth factor, market usurpation analysis, but it works both ways: if Cariou copied Prince, Cariou would win.²⁶²

Let's return to the example of Sherrie Levine's rephotograph of Walker Evans' photograph. Earlier I argued that an art market consumer would never consider either image to be a substitute for the other. Auction results bear this out. Data for the valuation of art is hard to come by because the art market deals in unique or limited edition goods that only rarely change hands and often do so privately.²⁶³ Nonetheless, Levine's and Evans' works, the two identical images I discussed above, were recently auctioned within a year of each other at the same auction house. While Levine's version sold for approximately \$30,000, the same exact image by Walker Evans sold for approximately \$142,000.²⁶⁴

There are obvious objections to my suggestion that a fourth factor market analysis may be a solution to the fair use problem I document in this Article.²⁶⁵ For example, it doesn't address derivative markets, where market substitution may still occur.²⁶⁶ But certain distinctive features of the art market should alleviate many concerns about derivative markets. Surprisingly, most working artists have no market whatsoever for copies of their work.²⁶⁷ In addition, for those very few artists who manage to attain a market for derivative works, the value of this entire market is likely to be trivial compared to the value of the

²⁶² This would avoid the problem of elitism many critics saw in *Cariou v. Prince*. See, e.g., Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. DIALOGUE 88 (2014) (criticizing distributional concerns raised by case).

²⁶³ William J. Baumol, *Unnatural Value: Or Art Investment as Floating Crap Game*, 76 AMER. ECON. REV. 10, 11 (May 1986).

²⁶⁴ Compare Auction Results for Sale No. 1180, Lot 448, CHRISTIE'S, <http://www.christies.com/lotfinder/lot/sherrie-levine-untitled-4004386-details.aspx> (last visited ____) (information concerning sale of Sherrie Levine) with Auction Results for Sale No. 1287, Lot 139, CHRISTIE'S, <http://www.christies.com/lotfinder/lot/walker-evans-alabama-tenant-farmer-wife-4165505-details.aspx> (last visited ____) (information concerning sale of Walker Evans' *Alabama Tenant Farmer Wife* (*Allie Mae Burroughs*)). Obviously this is not a perfect comparison since prices at auction can be affected by issues such as provenance, condition, edition size, etc.

²⁶⁵ A second major objection to my approach is that it would require us to delineate "art" from commercial art; my market substitution claim applies only to the former. Drawing this line is no small feat. Indeed, the difficulty of defining "art" has vexed philosophers for centuries and has been a central theme of my scholarship. I note, however, that Congress has already drawn this line (for better or worse) in the copyright context, where for purposes of "moral rights" it has defined "fine art" and distinguished it from commercial art and other kinds of visual expression. 17 U.S.C. § 101.

²⁶⁶ My inclination is that many if not most buyers of reproductions will, like buyers of original art works, still make choices based on the brand of the artist not the image.

²⁶⁷ THOMPSON, *supra* note 216, at 21-22. In fact, most artists don't even have a resale market for their actual artworks, let alone for copies of them. As John Merryman has explained, the vast majority of artists have no market to "resell [their work] at any price." John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. OF COMP. L. 103, 106 (1993). Thus, "the only realistic source of income from their art is, for most working artists, first sales" *Id.* at 107.

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market for even one of the artist's actual artworks.²⁶⁸

In future work I hope to offer a fuller account of both my proposal and the objections to it. For now I note that my proposal points the way to a surprising potential solution to the mess the transformative test has created for visual art. Paradoxically, the expressive and creative value of copying in art may be best protected by a test that ignores this value. In light of certain features of the art market, the maligned, market-centered fourth factor that once dominated the fair use inquiry may represent the future of fair use.

IV. CONCLUSION

Twenty-five years ago in a seminal article in the *Harvard Law Review*, Judge Leval changed the course of copyright jurisprudence by introducing the concept of “transformativeness” into fair use law.²⁶⁹ Soon thereafter, the Supreme Court embraced Judge Leval's new creation, calling the transformative inquiry the “heart of the fair use” doctrine.²⁷⁰ As Judge Leval conceived it, the purpose of the transformative inquiry was to protect the free speech and creativity interests that fair use should promote by offering greater leeway for creators to build on preexisting works. In short, the transformative inquiry would ensure that copyright law did not “stifle the very creativity it was meant to

²⁶⁸ Consider one of the few artists who has a market in copies: Andy Warhol, who has the biggest market for derivative goods of any contemporary artist. Eileen Kinsella, *Warhol Inc.*, ARTNEWS, Nov. 1, 2009, <http://www.artnews.com/2009/11/01/warhol-inc/>; THOMPSON, *supra* note 216, at 79. Warhol's images are frequently licensed not only for art posters, but for a dizzying range of products such as sneakers, snowboards, high fashion, and even condoms. Cait Munro, *Converse X Andy Warhol Coming in February*, ARTNET NEWS, Jan. 21, 2015, <http://news.artnet.com/in-brief/converse-x-andy-warhol-coming-in-february-227472>; Kinsella, *supra*. Yet even for Warhol, the most reproduced, most iconic contemporary artist, the value of the derivative rights is trivial compared to the value of the unique art objects. The Warhol Foundation, which licenses Warhol's works, made approximately four million dollars last year from all of its many licensing activities combined. Email from Michael Straus, Chairman of the Board, Emeritus, The Andy Warhol Foundation (Feb. 19, 2015 10:11 EST). Contrast that figure with the value of one Warhol canvas: one sold for \$105 million in 2013; another for \$81.9 million last year. Lynn Douglass, *Warhol Painting Sells for \$105 Million at Auction*, FORBES, Nov. 11, 2013, at 16. Marion Menaker, *Making Sense of NYC's \$1.5 Billion Art Auction Week*, HYPERALLERGIC, Nov 13, 2014, <http://hyperallergic.com/162812/making-sense-of-nycs-1-5-billion-art-auction-week/>. The value of licensing markets for artists who attain them is always likely to be trivial compared to the value of the actual objects because the only artists who have licensing markets have attained a level of recognition that correspondingly makes their original works more valuable (given the brand driven nature of the art market).

Note that my assertion about derivative markets is limited to artists who occupy the “art world” as it has been understood and does not extend to commercial artists who are not part of this world. *See supra* note 216 (delimiting art world).

²⁶⁹ Leval, *supra* note 41.

²⁷⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

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foster.”²⁷¹

Yet as I have argued, the transformative test has not only failed to accomplish this goal; the test itself has begun to “stifle the very creativity it was meant to foster.”²⁷² In the realm of the arts, one of the very areas whose progress copyright law is designed to promote, the transformative test has become an obstacle to creativity. Art has emerged as a central and disastrous fair use battleground in the courts. At the same time that art depends on copying, the transformative test has made the legality of copying in art more uncertain, leaving artists vulnerable to lawsuits under a doctrine that is incoherent and that misunderstands the very creative work it governs. The transformative test has failed them.

As I have shown, this collision course between copyright and art is built into the very formulation of the test. This is because the transformative inquiry asks precisely the wrong questions about contemporary art. It requires courts to search for “meaning” and “message” when the goal of current art is to throw the idea of stable meaning into play. It requires courts to ask if that message is “new” when contemporary art depends on rejecting the idea of newness and questioning the possibility of originality by using copying and appropriation as the primary building blocks of creativity. Worse, even if we assume that we could conclusively determine a work’s “meaning,” the pivotal question of how to ascertain meaning remains remarkably untheorized by courts, which have approached it in a haphazard, undisciplined fashion, evaluating art by the very standards it contests.

The test that was designed to prevent copyright from “strangl[ing] the creative process”²⁷³ has itself come to strangle the creative process. Twenty five years after it was conceived, it is time to abandon the transformative test in fair use law and to rethink the relationship between copyright and art.

²⁷¹ *Id.* at 577 (internal quotation marks and citations omitted).

²⁷² *Id.*

²⁷³ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (internal quotation marks omitted) (quoting *Leval*, *supra* note 41, at 1108).