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*(Mis)appropriation Art: Transformation and Attribution in the Fair Use Doctrine*

JOHN CARL ZWISLER\*

ABSTRACT

*Since the adoption of transformation by the Supreme Court, judicial decisions have continued to expand the fair use doctrine. Relying on transformation has led judges to subjectively critique and analyze artwork in order to make a legal decision. However, while a majority of circuits apply transformation, it is not followed by all of them. Transformation should no longer be a requirement in a fair use analysis concerning appropriation art, because it first requires subjective interpretation of an artist's work. Transformation also gives an advantage to artists appropriating the work, claiming fair use of another's copyrighted work. Instead, the emphasis should be on the overall effect on the market for the original work by the secondary use, with special consideration given to how attribution to the original author aids in the fair use test.*

\* B.M., 2010, Berklee College of Music; J.D. candidate, 2016, Northeastern University School of Law. I would like to thank Professor Kara Swanson, Ph.D., for her support and comments on early versions of this Note as well as Nathanael Karl Harrison, Ph.D., for our many discussions on the subject. I would also like to thank my parents, Yashira Agosto, and Nicholas Fede for their comments and support during the writing of this Note.

## I. INTRODUCTION

You are invited to attend the new exhibit of a well-known artist at one of the most famous galleries in New York City. Weaving your way through celebrities and critics, you notice a piece that looks very familiar. Upon closer inspection, you realize the artist has based the work on a photograph you took several years ago, but the photo has been slightly manipulated. Your name is not mentioned anywhere, and you never gave the artist permission to use your work. Frustrated with what you consider an objectionable use, you want to prevent the artist from further exploiting your creative work.<sup>1</sup> However, after consulting with copyright counsel, you learn that your ability to vindicate your rights under federal copyright law depends on where you file a lawsuit. As interpreted in the Second and Ninth Circuits, the fair use doctrine may allow the artist to easily convince a judge that the copying was necessary for his or her own creative vision, and you may be left without a remedy.

Fair use is an affirmative defense, allowing the use of a copyrighted work to not constitute infringement.<sup>2</sup> When analyzing a fair use defense, courts must look to four statutory factors to determine whether the defendant's taking of the copyright holder's work qualifies as a fair use: 1) the purpose and character of the use; 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.<sup>3</sup>

1. While the aforementioned is meant to be a hypothetical example, it is comparable to the events surrounding Richard Prince's *New Portraits* exhibit. Prince commented on others' Instagram pictures, took screenshots of them, and placed them on canvas. *New Portraits* was featured at the Gagosian Gallery in New York City in September and October of 2014. GAGOSIAN GALLERY, <http://www.gagosian.com/exhibitions/richard-prince—september-19-2014>. Since then, the works have sold for upwards of \$90,000 per piece. Jessica Contrera, *A Reminder That Your Instagram Photos Aren't Really Yours: Someone Else Can Sell Them for \$90,000*, THE WASHINGTON POST (May 25, 2015), <http://www.washingtonpost.com/blogs/style-blog/wp/2015/05/25/a-reminder-that-your-instagram-photos-arent-really-yours-someone-else-can-sell-them-for-90000/>. Donald Graham, a photographer, learned one of his photos was used in the exhibit and sent Prince and the Gagosian Gallery cease and desist letters. 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/>. Donald Graham's *Rastafarian Smoking a Joint, Jamaica* was uploaded to Instagram by a third party and Prince used the photo as the basis of one of his *New Portraits* without permission or attributing Graham. *Id.* Graham has since filed suit against Prince and the Gagosian claiming copyright infringement. Eileen Kinsella, *Outraged Photographer Sues Gagosian Gallery and Richard Prince for Copyright Infringement* (Jan. 4, 2016), <https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498>. Prince could potentially face several additional actions for his use of copyrighted images in *New Portraits*.

2. 17 U.S.C. § 107 (2012).

3. *Id.*

Twenty years ago, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court clarified the “purpose and character of the use” factor, stating that courts should determine if the new work is “transformative” of the original work.<sup>4</sup> The Court held that judges should look to whether the new work adds something to the first work, or alters it with a new meaning or message.<sup>5</sup> Such a task requires judges to subjectively interpret the meaning of both works at issue. If a court determines the new work is transformative, that would weigh heavily in favor of fair use.

This precedent has been interpreted differently among the circuits, and has led to much confusion. Specifically, in the world of appropriation art, the focus on transformation requires judges to rely on their personal views on art to determine if and how a work has been sufficiently transformed into a new work. As a result, many plaintiffs rely on judges who likely do not have substantial training in the fine arts. Additionally, it is counter to the words penned by Justice Holmes over a century ago: “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.”<sup>6</sup> As a result of the transformation test, judges are forced to ignore this warning when deciding art appropriation cases.

Appropriation artists use others’ work to create their own works. The prior works can be in the public domain, or protected under copyright law. Appropriation artists often take another’s material, and manipulate it by changing color, size, and orientation<sup>7</sup> or may simply enlarge the size of an existing photograph.<sup>8</sup> Only some of these early artists were consciously aware of the legal recourse they might face.<sup>9</sup>

4. 510 U.S. 569, 579 (1994).

5. *Id.*

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

7. *See Blanch v. Koons*, 467 F.3d 244, 248 (2d Cir. 2006) (creating the work “Niagara” by using a photograph from a high fashion magazine and “includ[ing] in the painting only the legs and feet from the photograph but “invert[ing] . . . the orientation of the legs so that they dangle vertically downward above the other elements of ‘Niagara’ rather than slant upward at a 45-degree angle as they appear in the photograph” and “add[ing] a heel to one of the feet and modify[ing] the photograph’s coloring”).

8. *See, e.g., Richard Prince, Untitled (Cowboy)*, 1980.

9. Laura Gilbert, Comment, *No Longer Appropriate?*, THE ART NEWSPAPER, 235 (May 2012), <http://old.theartnewspaper.com/articles/No%20longer%20appropriate?/26378> (last visited March 28, 2015). A pioneer of appropriation art, Sherry Levine, stated, “She made it clear that piracy, with its overtones of infringement and lack of authorisation, was the point.” *Id.*

One of the most popular appropriation artists is Jeff Koons.<sup>10</sup> His works are widely known, and include pieces such as an inflatable Incredible Hulk,<sup>11</sup> a giant stainless steel Popeye,<sup>12</sup> and paintings using images from famous magazines.<sup>13</sup> While Koons has held exhibitions all over the world and gained significant popularity, his success has not allowed him to avoid major copyright litigation.<sup>14</sup> In one such dispute, a French advertisement designer named Franck Davidovici claimed that Koons' sculpture, *Fait d'Hiver*, 1988,<sup>15</sup> was a copy of the photograph and advertisement he created for the clothing company Naf Naf.<sup>16</sup>

The advertisement, entitled *Fait d'Hiver*, was created in 1985 and featured a woman laying on her back with a pig at the top of her head, sporting a rum barrel around its neck.<sup>17</sup> Koons created four identical sculptures in 1988, each depicting a woman laying on her back with a pig at the top of her head.<sup>18</sup> However, Koons' sculptures differ from Davidovici's advertisement in that they include a penguin and its chick and depicts the pig wearing a lei with the rum barrel and the woman wearing a mesh top that exposes her breasts.<sup>19</sup> Davidovici's lawyer confirmed that legal action was

10. Jeff Koons was born in Pennsylvania in 1955, studied at the Maryland Institute College of Art and received a BFA in 1976. His artwork has been featured in galleries and institutions around the world, including the Metropolitan Museum of Art in New York, the Neue National Galerie in Berlin, and the Pompidou Center in Paris. *Biography*, JEFF KOONS, <http://jeffkoons.com/biography-summary> (last visited Jan. 2, 2015).

11. *Artwork*, JEFF KOONS, <http://jeffkoons.com/artwork/hulk-elvis/hulk-friends> (last visited April 28, 2015).

12. *Artwork*, JEFF KOONS, <http://jeffkoons.com/artwork/popeye/popeye-0> (last visited Jan. 2, 2015).

13. *Artwork*, JEFF KOONS, <http://jeffkoons.com/artwork/easyfun-ethereal/niagara> (last visited April 28, 2015).

14. See *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *United Features Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

15. See *infra* Figure 2.

16. Alexander Forbes, *Jeff Koons Sued for Plagiarism*, ARTNET NEWS (Dec. 18, 2014), <http://news.artnet.com/market/jeff-koons-sued-for-plagiarism-201510> (last visited Feb. 23, 2015). Davidovici's lawyer confirmed that "a 'legal action' was underway" but did not specify the nature of the action. *Id.* A case filing has not been locatable. A similar case has been filed in the United States. See Henri Neuendorf, *Jeff Koons Sued Yet Again Over Copyright Infringement* (December 15, 2015), <https://news.artnet.com/art-world/jeff-koons-sued-copyright-infringement-392667> (last visited Jan. 14, 2016). A photographer claims his photograph, which was used in a 1986 advertisement, was used as the basis for a work by Jeff Koons. *Id.* This Note does not explore this case.

17. See *infra* Figure 2.

18. Forbes, *supra* note 16.

19. *Id.*

underway in France, even though the sculpture was removed from display at the Centre Pompidou in Paris at the request of its owners.<sup>20</sup>

In past litigation, when facing a copyright infringement claim, Koons asserted the fair use defense.<sup>21</sup> Although Koons prevailed in only one of these cases,<sup>22</sup> a more recent decision coming from the Second Circuit has expanded the breadth of fair use.<sup>23</sup> This could lead to an increased likelihood of successful assertions of the fair use defense for Koons and other appropriation artists, because the court in *Cariou v. Prince* held that artists do not need to explain the meaning of the work they create,<sup>24</sup> thus easing the burden of proof for an appropriation artist.

In *Cariou v. Prince*, another well-known appropriation artist, Richard Prince, was able to partially avoid liability for copyright infringement by asserting a fair use defense.<sup>25</sup> In that case, the Second Circuit held that a new work need not comment on the original work to be considered fair use.<sup>26</sup> Therefore, the transformative nature of Prince's work alone was sufficient for twenty-five of the thirty challenged works to be deemed fair use.<sup>27</sup> This expansion of the transformative test further muddied the already confusing test the Supreme Court adopted just over twenty years ago.

In the landmark case *Campbell v. Acuff-Rose Music, Inc.*, the rap group 2 Live Crew was accused of copying Roy Orbison's "Oh, Pretty Woman" in the creation of their song "Pretty Woman."<sup>28</sup> 2 Live Crew argued that despite the commercial nature of the song, it was a parody, and should be considered fair use.<sup>29</sup> The Court dismissed the notion that the commercial nature of a new work alone was per se infringement, and clarified the fair use analysis by stating that transformation occurs when the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>30</sup> It also heavily focused on the

20. Alexander Forbes, *Jeff Koons Plagiarism Lawsuit Could Top Millions*, ARTNET NEWS (January 19, 2015), <http://news.artnet.com/market/jeff-koons-plagiarism-lawsuit-could-top-millions-225200> (last visited Feb. 23, 2015).

21. *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006); *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992); *United Features Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 378 (S.D.N.Y. 1993).

22. See *Blanch*, 467 F.3d at 259.

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

24. *Id.* at 698.

25. *Id.* at 698–99.

26. *Id.* at 698.

27. *Id.* at 698–99.

28. 510 U.S. 572, 572 (1994).

29. *Id.* at 574.

30. *Id.* at 574.

30. *Id.* at 579, 583.

transformative nature of the potentially infringing work, and stated that “the more transformative the new work, the less will be the significance of other factors.”<sup>31</sup>

In *Cariou*, the Second Circuit expanded “the purpose and character of the use” factor and granted a major victory for appropriation artists. However, the rationale the court used has not been adopted across all the circuits, because the Seventh and Ninth Circuits interpret the four statutory factors in the context of appropriation art differently.<sup>32</sup> Since the *Campbell* decision, the lower courts have struggled to determine what exactly makes a work transformative. As a result, judges act as art critics and add their subjective interpretation to the meaning of the copyrighted work and potentially infringing work, which the Supreme Court cautioned against over a century ago.<sup>33</sup>

The Supreme Court in *Campbell* erred in adopting the transformative test, because it led to widespread subjective interpretation of art among the lower courts and major uncertainty in fair use cases. Doing away with the transformative test and shifting the focus back to the other statutory factors, with an emphasis on the fourth factor—the effect the taking had on the potential market of the original work—will remove the mandate that judges make subjective interpretations of artistic works. Additionally, an appropriation artist who attributes his or her reliance on a copyrighted work to the original artist should be able to argue that the positive effect on the market for the original was, in part, due to the attention the appropriation artist brought to the original artist’s work. Focusing on the fourth statutory factor will also allow plaintiffs to bring infringement actions without fear of a subjective judicial decision and allow appropriation artists to make more compelling arguments when considering market effect.

This Note will use *Davidovici v. Koons*<sup>34</sup> to explain the fair use doctrine and will illustrate the circuit split regarding that theory. This Note will also explain the problems with the transformative test and will provide a solution that will increase consistency among appropriation art cases. Part II will then discuss a history of the fair use defense, tracing its origins from a focus on supplanting the market of the original work to where it lies today. Part II will also explain how transformation currently usurps the four statutory factors.

31. *Id.*

32. See *Kieintz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013).

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

34. Forbes, *supra* note 16. While a filing regarding this dispute has not been locatable, this Note will refer to the dispute as *Davidovici v. Koons*.

Part III will then describe appropriation art and its case history and will illustrate the wide variety of arguments that artists can make under the expanded fair use test. Part IV will address how different courts would analyze and decide *Davidovici v. Koons*, based on the respective tests each circuit employs. By doing so, this Note illustrates the circuit split and will show how artists do not enjoy uniform relief among federal circuits. Part V will then provide a solution to the fair use problem—eliminating the transformative test and replacing it with a more straightforward statutory interpretation by focusing on the fourth factor. Additionally, Part V will consider how attribution to the original copyright owner might influence the fair use analysis. Finally, Part VI will conclude with asking the Supreme Court to eliminate the circuit split by instructing lower courts regarding proper fair use analysis.

## II. A HISTORY OF FAIR USE

### A. *Supplanting the Market of the Original Work*

The common law doctrine of fair use did not develop from judges interpreting the works at issue, but rather focused on whether the new work would act as a substitute in the market for the original work. The first example of the fair use doctrine involved a dispute between a biography entitled *Life of Washington* and a previously published encyclopedia, both based on the writings of President George Washington.<sup>35</sup> Justice Story wrote that when the original and allegedly infringing works are compared, the court should answer the question of copying by relying on a

nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information.<sup>36</sup>

The court's primary concern was that the new work would prove to be a replacement for the original and that "[i]f so much is taken that, the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto."<sup>37</sup> Utilizing this framework, the court found the biography infringed the encyclopedia<sup>38</sup> and laid the basic underpinnings of what the fair use doctrine would later become.

35. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

36. *Id.* at 344.

37. *Id.* at 348.

38. *Id.* at 349.

### B. *The Codification of Fair Use*

Congress codified a version of the fair use doctrine in the 1976 Copyright Act.<sup>39</sup> The Act established fair use as an affirmative defense to a claim of copyright infringement, and lists several purposes in which fair use can be used as a defense. The fair use defense could be used for the following types of works: criticism, comment, news reporting, teaching, scholarship, or research.<sup>40</sup> In addition, the statute included four factors that need to be balanced in a fair use analysis: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted works as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>41</sup>

Congress intended each factor to weigh equally in the fair use analysis, and that each case needed to be decided upon its own set of facts.<sup>42</sup> While no factor was meant to be dispositive, courts heavily focused on the fourth factor before 1994, to the point that the Supreme Court called it “undoubtedly the single most important element of fair use.”<sup>43</sup> Fair use jurisprudence would retain this bias toward the fourth factor until the rise of the transformation sub-factor.

### C. *Toward a Fair Use Standard and the Rise of Transformation*

Considering the prevalence of the transformation consideration in the modern fair use analysis, its presence is conspicuously absent from the 1976 Copyright Act. Therefore, its rise can be partially attributed to an influential law review article penned by Judge Pierre Leval, which changed the way the fair use doctrine is applied.<sup>44</sup> In *Toward a Fair Use Standard*, Judge Leval

39. 17 U.S.C. § 107 (2012).

40. *Id.*

41. 17 U.S.C. § 107(1)–(4) (2012).

42. H.R. REP. NO. 94-1476, at 65 (1976) (finding that because circumstances in copyright cases can be so diverse, bright line rules are not as helpful as case-by-case analysis); *see also* *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578 (1994) (stating that all four statutory factors “are to be explored, and the results weighed together, in light of the purposes of copyright”).

43. *Harper & Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

44. Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years After Campbell v. Acuff-Rose Music*, 12 DUKE L. & TECH. REV. 92, 99–101 (2014) (“While the [Supreme] Court did not accept transformative use as necessary to a fair use . . . it was nonetheless regarded as highly auspicious in the new analytical scheme *Campbell* created. . . . Despite its legal murkiness, the transformative use doctrine gradually became central to fair use determination in many lower courts.”) (emphasis in original).

argued for a shift away from the contemporary application of the fair use statute, and towards a focus on whether the allegedly infringing work is transformative.<sup>45</sup> Judge Leval suggested that the purpose of fair use is to comply with the main objective of copyright protection: to stimulate the production of creative works to benefit society.<sup>46</sup> In order to achieve this objective, Judge Leval posited that courts should determine whether the new work is transformative of the original work by adding a different character with a new expression, meaning, or message.<sup>47</sup> Judge Leval believed that transformative works would further the underpinnings of copyright law, as well as the copyright clause of the Constitution.<sup>48</sup> However, Judge Leval was concerned that extensive borrowings would prohibit creative incentives.<sup>49</sup> Therefore, the justification for the appropriation could be outweighed “if the takings are excessive and other factors favor the copyright owner.”<sup>50</sup> Despite the caution from Judge Leval, the *Campbell* court endorsed the transformation consideration and allowed it to eventually dominate the fair use test.

#### *D. The Supreme Court Errs in Expanding Fair Use*

In 1989, Luther Campbell of the rap group 2 Live Crew wrote the song “Pretty Woman,” a parody of Roy Orbison’s famed “Oh, Pretty Woman.”<sup>51</sup> The parody heavily drew from Orbison’s work, and when faced with a claim of copyright infringement, 2 Live Crew argued a fair use defense.<sup>52</sup> The case is important for a variety of reasons, the most notable of which was the emphasis the Supreme Court chose to place on Judge Leval’s article.<sup>53</sup> While the Court stated that a finding of transformative use is not absolutely necessary for a finding of fair use, it also held that the goal of copyright is furthered by the creation of transformative works.<sup>54</sup> Therefore, “the more transformative the new work, the less will be the significance of other factors.”<sup>55</sup> Additionally, as if to reinforce the displacement of market harm

45. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 1107–08.

50. *Id.* at 1112.

51. *Id.*

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

52. *Id.* at 573.

53. *Id.* at 579–94.

54. *Id.* at 579.

55. *Id.*

as the primary fair use consideration, Justice Souter added that when “the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”<sup>56</sup>

The *Campbell* Court held that the Court of Appeals erred in stopping its analysis after concluding the commercial nature of “Pretty Woman” rendered it unfair, and remanded the case to analyze transformation using Judge Leval’s ideas.<sup>57</sup> In doing so, the Court changed the way lower courts interpreted the fair use defense by shifting the test away from the fourth factor and towards determining how transformative the new work is of the original work. Lower courts have zealously adopted Judge Leval’s transformation consideration. In a study of fair use cases from 2006 to 2010, the data showed that the “fair use doctrine today is overwhelmingly dominated by the Leval-*Campbell* transformative use doctrine.”<sup>58</sup> As two scholars put it, “[u]nfortunately, in the ensuing two decades, the ambiguity surrounding the [fair use] doctrine has, if anything, increased.”<sup>59</sup> This has led to a wide variety of different rationales in opinions, causing uncertainty in fair use decisions.<sup>60</sup> This doctrinal murkiness<sup>61</sup> eventually found its way into the realm of appropriation art.

### III. APPROPRIATION ART AND CASE LAW HISTORY

#### A. Appropriation Art Primer

Appropriation art refers to the act of reusing existing elements to create a new work.<sup>62</sup> The term operates under a number of technical definitions, but the most relevant to this discussion is “[t]he use of pre-existing objects or images with little *transformation*.”<sup>63</sup> Appropriation artists “believe that in borrowing existing imagery or elements of imagery, they are re-contextualizing . . . the original imagery, allowing the viewer to renegotiate

56. *Id.* at 591.

57. *Id.* at 594.

58. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 736 (2011).

59. Bunker & Calvert, *supra* note 44, at 95.

60. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. OF PA. L. REV. 549 (2008).

61. Bunker & Calvert, *supra* note 44, at 95.

62. Hayley A. Rowe, *Appropriation in Contemporary Art*, 3 STUDENTPULSE 06 (2011), <http://www.studentpulse.com/articles/546/appropriation-in-contemporary-art>.

63. IAN CHILVERS & JOHN GLAVES-SMITH, A DICTIONARY OF MODERN AND CONTEMPORARY ART 27 (2nd ed. 2008) (emphasis added); see also *Appropriation*, TATE, <http://www.tate.org.uk/learn/online-resources/glossary/a/appropriation> (“Appropriation in art and art history refers to the practice of artists using pre-existing objects or images in their art with little transformation of the original.”).

the meaning of the original in a different, more relevant, or more current context.”<sup>64</sup>

Appropriation artists have argued that a change in medium<sup>65</sup> or context, such as a display in a gallery, can be transformative even if the actual work is not altered.<sup>66</sup> This has led to the appropriation artist movement being dubbed as “the most radical challenge to the copyright laws to date.”<sup>67</sup> While appropriation artists test the boundaries of copyright law, this has not stopped artists such as Jeff Koons from continuing to appropriate previous works to create their own.

### B. Pre-Campbell: Parody Versus Satire

Koons is no stranger to copyright infringement claims. While he has been a part of several lawsuits, his most infamous case involves a picture of a litter of puppies and a sculpture. In 1989, Art Rogers, a professional photographer, brought a copyright infringement action against Koons, alleging that Koons’ *String of Puppies*<sup>68</sup> infringed a commissioned photograph<sup>69</sup> Rogers had taken years earlier of an acquaintance’s puppies.<sup>70</sup> Rogers was convinced the photo would not work on its own, so he asked the owner and his wife to hold the eight puppies for the photograph.<sup>71</sup> After Rogers’ photograph was licensed, it was also produced and distributed as a notecard beginning in 1984.<sup>72</sup> Koons purchased the card in 1987 and demonstrated it to his team of artisans as what he envisioned for his new work; he wanted the sculpture to be “copied faithfully” from the photograph and for the work to “be just like the photo.”<sup>73</sup> In the subsequent copyright infringement suit, Koons asserted a fair use defense, but the district court granted summary judgment in favor of Rogers.<sup>74</sup>

64. Rowe, *supra* note 62, at 1.

65. John Koegel & Barton Beebe, *Article: The Interview: John Koegel & Barton Beebe*, 4 N.Y.U.J. INTELL. PROP. & ENT. LAW 183, 189–90 (2014). John Koegel, Jeff Koon’s counsel in the *Rogers* case stated, “I argued that a mere change in medium was sufficient to exempt a work from being infringing.” *Id.* However, he did go on to note, “changing medium should be significant, but not absolute.” *Id.*

66. Kim Landsman, *Cariou v. Prince Confirms Importance of Transformiveness*, LAW360 (May 1, 2013), <http://www.law360.com/articles/437497/cariou-v-prince-confirms-importance-of-transformiveness>.

67. Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 33 (1992).

68. *See infra* Figure 4.

69. *See infra* Figure 5.

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

71. *Id.*

72. *Id.*

73. *Id.* at 305.

74. *Id.* at 305–06.

In affirming the lower court's summary judgment motion, the Second Circuit conducted its own fair use analysis.<sup>75</sup> Because this case preceded the Supreme Court ruling in *Campbell*, the Second Circuit did not address the transformative nature of the allegedly infringing work. Instead, the court focused heavily on whether Koons' work was a parody or satire, because Koons claimed that *String of Puppies* was a "fair social criticism."<sup>76</sup>

The court found that *String of Puppies* was a "satirical critique of our materialistic society" but was unable to find any parody of the photograph itself.<sup>77</sup> It also held that for a work to be a parody, the "copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."<sup>78</sup> The court held that *String of Puppies* was a social commentary as a whole but found no parody of the original photograph. Therefore, there was no need to conjure up the original photograph, resulting in the first factor weighing against a finding of fair use.<sup>79</sup> The court then analyzed the remaining three factors, and found that all three factors weighed against a finding of fair use.<sup>80</sup> The court found that Rogers' work was a creative original expression subject to broad copyright protection and that Koons copied the essence of the photograph and incorporated the expression of the work Rogers created.<sup>81</sup> Because Koons only produced the work to sell it as high-priced art, the likelihood of future harm to Rogers was presumed.<sup>82</sup>

Koons was unable to mount a winning fair use defense, because his new work did not comment on or parody the original in any way. Koons would again face a copyright infringement action almost twenty years later when he compiled and used images from advertisements to create another work. However, this case followed the *Campbell* decision. With the new precedent set in a fair use analysis, Koons was able to change his strategy, focus on how his new work added a new meaning and message different from the original, and persuade the court that his work was transformative.

75. *Id.* at 308–12.

76. *Id.* at 309.

77. *Id.* at 310.

78. *Id.*

79. *Id.*

80. *Id.* at 310–12.

81. *Id.* at 310–11.

82. *Id.* at 312.

### C. Post-Campbell: Adopting Transformation

By the mid 2000's, Koons was a litigation veteran. However, the *Campbell* decision turned the tide in favor of appropriation artists, such as Koons. As a result, Koons, with help from his counsel, was able to change his defense by tailoring arguments to the change in the law.<sup>83</sup>

Andrea Blanch was an accomplished professional fashion photographer whose work appeared in numerous magazines, including *Vogue* and *Allure*.<sup>84</sup> Blanch took a photograph depicting a woman's legs and feet wearing Gucci sandals resting in a man's lap.<sup>85</sup> The photograph, entitled "Silk Sandals," was published in *Allure* magazine as part of a six-page feature on metallic cosmetics.<sup>86</sup>

Deutsche Bank commissioned Koons to create an art exhibition in collaboration with the Guggenheim Museum. For the exhibition, Koons created a collection of works entitled "Easyfun-Ethereal."<sup>87</sup> In creating "Easyfun-Ethereal," Koons gathered images from advertisements, scanned them, and digitally superimposed the images against backgrounds of pastoral landscapes.<sup>88</sup> Among the images Koons used to create his work "Niagara,"<sup>89</sup> he used Blanch's "Silk Sandals."<sup>90</sup> Koons incorporated only the legs and feet from the photograph, inverted the orientation of the legs, the number of pairs of legs used, and modified the photograph's coloring.<sup>91</sup> Blanch brought an action against Koons, claiming that "Niagara" infringed her copyright to "Silk Sandals."<sup>92</sup>

The Second Circuit, in affirming the lower court's summary judgment motion in favor of Koons, analyzed the fair use defense and the transformative nature of "Niagara." The court had already accepted the reasoning in *Campbell*, and as a result, was well-versed in applying the transformation test.<sup>93</sup> To do so, the court determined whether "Niagara's"

83. Koegel & Beebe, *supra* note 65, at 189. John Koegel, Jeff Koons' attorney, stated, "I was trying to get the judge to understand [Koons]'s artistic expression as something that ought to be within the safe harbor that [*Sony* and *Harper Row*] provided. Transformation was not a factor or consideration in *Rogers*. Transformation wasn't part of the lexicon. That did not come until later, until *Campbell*." *Id.*

84. *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2004).

85. *Id.* at 248.

86. *Id.*; see *infra* Figure 5.

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

88. *Id.*

89. See *infra* Figure 6.

90. *Blanch*, 467 F.3d at 247-48.

91. *Id.*

92. *Id.* at 249.

93. *Id.* at 251.

use of “Silk Sandals” was transformative, or whether “Niagara” “merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>94</sup> However, this determination required the court to consider the meaning of each work, and therefore, to make subjective judgments of the two artists’ intent in creating their works.

Koons wisely argued use of different mediums or other technical details, but also structured his defense upon the fact that his purpose in creating “Niagara” was in stark contrast with Blanch’s goal in creating “Silk Sandals.”<sup>95</sup> The court agreed, finding that Koons used Blanch’s image to comment on the social and aesthetic consequences of mass media. This different use of the image “confirms the transformative nature of the use.”<sup>96</sup> The court went on to say that the transformative test “almost perfectly describes Koons’s adaptation of ‘Silk Sandals,’”<sup>97</sup> and unsurprisingly, that Koons’ use of “Silk Sandals” was transformative.<sup>98</sup> The court further noted that Koons justified taking the “Silk Sandals” photograph.<sup>99</sup> In doing so, the court concluded that Koons had “a genuine creative rationale for borrowing Blanch’s image,” based entirely on Koons’ own word:

I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself. The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication. . . . I thus comment upon the culture and attitudes promoted and embodied in Allure Magazine.<sup>100</sup>

After finding the new work transformative, the court then gave less weight to the other statutory factors.

Addressing the second factor, “the nature of the copyrighted work,” the court concluded that although Blanch’s work was a creative expression close to the core of copyright protection, its weight in the fair use balance was diminished when the creative work of art was being used for a transformative

94. *Id.* at 253 (quoting *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994)).

95. *Id.* at 252. Koons stated that he wanted the viewer “to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.” *Id.* Comparatively, Blanch stated, “I wanted to show some sort of erotic sense.” *Id.*

96. *Id.*

97. *Id.* at 253 (“[T]he use of a fashion photograph created for publication in a glossy American ‘lifestyles’ magazine—with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects’ details and, crucially, their entirely different purpose and meaning—as part of a massive painting commissioned for exhibition in a German art-gallery space.”).

98. *Id.*

99. *Id.* at 255.

100. *Id.*

purpose.<sup>101</sup> Therefore, it did not matter that the second factor weighed in favor of Blanch.

The court also held in favor of Koons with regards to the third factor, “the amount and substantiality of the portion used,” finding that Koons’ appropriation to be reasonable, in light of his purpose for copying. Because Koons used only the legs from the photograph, the court determined that he only copied what was “necessary to evoke a certain style of mass communication,” and the court found the third factor to weigh in Koons’ favor.<sup>102</sup> Finally, the court found the fourth factor, “the effect of the use upon the potential market,” to weigh in favor of Koons, because Blanch had not published or licensed “Silk Sandals” in any other publication but *Allure*. Blanch further admitted that “Niagara” had not upset any plans she had for the photograph, or for future ones.<sup>103</sup> In light of those admissions, the court found no deleterious effect on the potential market value for “Silk Sandals.”<sup>104</sup>

As a result of the intervening *Campbell* case, the Second Circuit gave significant weight to the transformative nature of “Niagara,” and did not emphasize the other three statutory factors. However, this approach to fair use was not limited to *Blanch* alone. A more recent decision involving another appropriation artist, Richard Prince, took the focus of transformation one step further. This time, the Second Circuit, in *Cariou v. Prince*, further expanded the precedent set forth in *Campbell*, which many appropriations artists found to be a major victory.<sup>105</sup> However, not everyone believes the decision benefited the artistic community, because artists will no longer have to take responsibility for their work.<sup>106</sup>

101. *Id.* at 257.

102. *Id.* at 258.

103. *Id.*

104. *Id.*

105. Nicholas O’Donnell, *No Infringement in Cariou v. Prince-Second Circuit Plays Art Critic and Finds Fair Use*, ART LAW REPORT (Apr. 25, 2013), <http://www.artlawreport.com/2013/04/25/no-infringement-in-cariou-v-prince-second-circuit-plays-critic-and-finds-fair-use/>.

106. Nathanael Karl Harrison, *Appropriation Art and U.S. Intellectual Property Law Since 1976*, 121–22 (2014) (unpublished Ph.D. dissertation) (on file with the University of California, San Diego, library system) (“[W]hile the artist may have prevailed in the short-term, the long-term impact the [*Cariou*] court ruling will have on artistic practices is concerning—not from the standpoint of legal viability, but rather because the appeals court decision works toward absolving artists of the need to critically question the images, objects and texts they appropriate. I want to insist on the idea of the artist’s, if not legal, then *ethical* responsibility towards the images he or she uses.”).

*D. Transformation Usurps the Four Statutory Factors*

In 2013, the Second Circuit once again decided a copyright infringement case involving an appropriation artist and further expanded the fair use defense. The court's holding in *Cariou v. Prince* focused on the transformative nature of the allegedly infringing work, and expanded the exceptions to the exclusive rights of a copyright by holding that "the law does not require that a secondary use comment on the original artist or work, or popular culture."<sup>107</sup>

Patrick Cariou is a professional photographer who lived among Rastafarians in Jamaica for six years during the 1990's.<sup>108</sup> He developed a significant relationship with the Rastafarians, and as a result, they allowed him to take portraits and landscape photographs. Cariou compiled these photographs, and published them in a book entitled "Yes Rasta."<sup>109</sup> The book enjoyed limited commercial success, earning Cariou only \$8,000 from book sales. Except for a handful of private sales, Cariou never sold or licensed individual photographs.<sup>110</sup>

Richard Prince, an already established appropriation artist, came across a copy of "Yes Rasta" in 2005 at a bookshop.<sup>111</sup> Between 2007 and 2008, Prince held a show in St. Barth's that included 35 photographs torn out of "Yes Rasta" that were manipulated in various ways, including painting lozenges over the subjects' faces.<sup>112</sup>

Prince acquired three additional copies of "Yes Rasta" and went on to create an additional thirty works in what became known as the "Canal Zone" series.<sup>113</sup> The portions used from "Yes Rasta" vary from piece to piece, but in some of the "Canal Zone" pieces, Prince did as little as "paint blue lozenges over the subject's eyes and mouth, and paste a picture of a guitar over the subject's body."<sup>114</sup>

The Gagosian gallery in New York City held a show between November and December 2008 that included 22 works from Prince's "Canal Zone" series.<sup>115</sup> Prior to this show, a gallery owner named Christiane Celle contacted Cariou about a potential exhibit in New York City for "Yes

107. *Cariou v. Prince*, 714 F.3d 694, 698 (2d Cir. 2013).

108. *Id.* at 699.

109. *Id.*; see *infra* Figure 7.

110. *Cariou*, 714 F.3d, at 699.

111. *Id.*

112. *Id.*; see *infra*, Figure 8.

113. *Cariou*, 714 F.3d at 699.

114. *Id.* at 701.

115. *Id.* at 703.

Rasta.”<sup>116</sup> The two communicated back and forth discussing terms, but when Celle learned of Prince’s show at the Gagosian, she mistakenly concluded that Cariou was working with Prince and “decided that she would not put on a ‘Rasta show’ because it had been ‘done already.’”<sup>117</sup> When Cariou learned of the show at the Gagosian in December 2008, he sued Prince for copyright infringement.<sup>118</sup>

At the trial level, the court rejected Prince’s summary judgment motion, asserting a fair use defense concluding, “Prince did not intend to comment on Cariou’s Photos, or on aspects of popular culture.”<sup>119</sup> The Second Circuit held that the lower court applied an incorrect legal standard in denying Prince’s summary judgment motion, and clarified the correct standard, opining that instead of “confining our inquiry to Prince’s explanations of his artworks . . . The focus of our infringement analysis is primarily on the Prince artworks themselves.”<sup>120</sup> Subsequently, the court concluded that twenty-five of the thirty works from the “Canal Zone” series were transformative as a matter of law.<sup>121</sup>

The circuit court reached its decision by first discussing the Leval article and the *Campbell* decision, stressing that a transformative work need not comment on the author or the original work. However, the transformative work must still provide a “new expression, meaning, or message.”<sup>122</sup> The court went on to state that when transformative use is at issue, courts must examine works to determine how they “may reasonably be perceived in order to assess their transformative nature.”<sup>123</sup> The court compared the “Yes Rasta” and “Canal Zone” images side by side and concluded that Prince had not presented the same material as Cariou.<sup>124</sup> Instead, Prince added something new with a different aesthetic.<sup>125</sup> Cariou produced serene and deliberately composed photographs, while Prince’s “crude and jarring works, on the other hand, are hectic and provocative.”<sup>126</sup> Justice Holmes’ words from his *Bleistein* opinion seemed to be forgotten by this panel; the judges interpreted the meaning of an artist’s work in order to make legal judgments.

116. *Id.*

117. *Id.* at 704.

118. *Id.*

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

120. *Cariou*, 714 F.3d at 707.

121. *Id.*

122. *Id.* at 706 (quoting *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994)).

123. *Id.* at 707.

124. *Id.* at 707–08.

125. *Id.* at 707.

126. *Id.* at 706.

As a result of the transformative nature of Prince's works, the court gave significantly less weight to the fact that the works were for commercial purposes, that Cariou's work was a creative published expression, and determined that Prince only took the amount necessary to "fulfill its transformative purpose."<sup>127</sup> Additionally, the court stated that Prince's work did not dilute the potential market value for Cariou's photographs, as "Prince's audience is very different from Cariou's . . . [his] work appeals to an entirely different sort of collector than Cariou's."<sup>128</sup> While Prince's work attracted well-known celebrities, artists, and professional athletes, Cariou had not "actively marketed his work or sold work for significant sums."<sup>129</sup> With this in mind, the court held that Prince's work did not usurp the market of "Yes Rasta."<sup>130</sup>

The Second Circuit has continued to expand the fair use doctrine from *Rogers* to *Cariou*. In *Rogers*, the court concluded that Koons commented on society as a whole and not the original work.<sup>131</sup> Therefore, fair use was not valid defense.<sup>132</sup> In *Cariou*, the court concluded new works did *not* need to comment on the original and that the court should decide whether the use was transformative.<sup>133</sup> This determination would occur by deciding how the new work would be "reasonably perceived."<sup>134</sup> This shift in the fair use analysis can be traced back to the intervening *Campbell* case. The precedent the case establishes makes it substantially easier for appropriation artists to argue a work is transformative, while directing courts to give significantly less weight to the remaining statutory factors.<sup>135</sup> Finally, this excessive focus on the transformative nature of a secondary work requires judges to interpret and critique art, which Justice Holmes cautioned against long before *Campbell*.<sup>136</sup> While this may be the established precedent in the Second Circuit, at least one other circuit is not following suit.<sup>137</sup>

127. *Id.* at 710.

128. *Id.* at 709.

129. *Id.*

130. *Id.*

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

132. *Id.* at 310–12.

133. *Cariou*, 714 F.3d at 698.

134. *Id.* at 707.

135. *See Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2004).

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

137. *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014), *cert denied*, 2015 U.S. LEXIS 1921 (2015).

#### IV. THE FAIR USE PROBLEM ACROSS THE CIRCUITS

##### A. Introduction

As the preceding sections have illustrated, the Supreme Court's focus on transformation has led the lower courts to interpret the doctrine in ways that have expanded fair use. However, the Seventh Circuit has refused to analyze the transformation sub-factor entirely. This has led to a split among the circuits, which the Supreme Court recently had an opportunity to resolve.<sup>138</sup>

This section will analyze how three different circuits would interpret *Davidovici v. Koons*, based on the leading fair use case in each circuit.

##### B. The Second Circuit and Fair Use; The Transformative Test

Applying the rationale of *Cariou* to the facts of *Davidovici*, it is likely the Second Circuit would find fair use. The heavy reliance on the transformation of the new work, and the fact that Koons' work need not comment on the original Naf Naf advertisement tips the scale in favor of fair use.

To begin, the court would look at the two works side by side to determine how Koons' work would be reasonably perceived and conclude that the sculpture has a different character, gives Davidovici's photograph a new expression, and employs new aesthetics distinct from Davidovici's.<sup>139</sup> Koons' addition of a lei on the pig and the two penguins are notable differences, but a justice might find the most persuasive difference to be the see through top the woman wears.

Just as the court concluded that Cariou's photographs were "serene and deliberately composed portraits and landscape photographs,"<sup>140</sup> it would come to a similar conclusion looking at Davidovici's photograph. The Second Circuit would describe the photograph as a woman laying peacefully in the snow with a contemplative gaze. Also, because the *Cariou* court concluded, Prince's works were "crude and jarring" and "hectic and provocative,"<sup>141</sup> it would also conclude that Koons' work is similarly

138. *Kienitz v. Sconnie Nation LLC*, 2015 U.S. LEXIS 1921 (2015) (holding that Kienitz's photograph of the mayor of Madison, Wisconsin, was appropriated by defendant Sconnie Nation on commercial t-shirts in order to criticize the mayor's attempt to shut down an annual block party); *Kienitz*, 766 F.3d, at 757, 758–59 (deciding not to follow *Cariou* and instead determining the copying was fair use).

139. *See Cariou*, 714 F.3d at 707–08.

140. *Id.* at 706.

141. *Id.*

provocative, because the sculpture depicts a nearly identical looking woman with her breasts exposed. The court would see Koons' statue as it was described in the original exhibit catalog for his "Banality" series, "a Walt Disney version of an erotic fantasy."<sup>142</sup> This would lead the court to the conclusion that Koons' work has a different character, and therefore, is transformative. The first factor would be decided based on the aesthetic findings of the judges— persons who likely have no training in the fine arts, yet are compelled to make these findings as a result of the transformative test.

The *Cariou* court did not find that the commercial nature of Prince's work was a factor that substantially weighed against a finding of fair use.<sup>143</sup> It would do the same in this instance, as "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism."<sup>144</sup> Similarly, the court would give less weight to the other statutory factors as well.

Turning to the next statutory factor, the nature of the copyrighted work, the court would find that Davidovici's photograph is a work worthy of copyright protection. However, just as the court found with the commercial nature of the work, this factor "may be of limited usefulness where . . . [a] creative work of art is being used for a transformative purpose."<sup>145</sup>

The *Cariou* court determined that Prince had not taken more than necessary from the original photographs, and it would reach the same conclusion here. The court would conclude that Koons needed to "conjure up at least enough of the original to fulfill its transformative purpose,"<sup>146</sup> and create a new distinct work. In finding that this factor weighed heavily in Prince's favor, the *Cariou* court stated he "transformed those photographs into something new and different."<sup>147</sup> Similarly, the court would find Koons only took what was necessary to conjure up the original and created something new. The main components of Davidocivi's photograph were the woman in the snow and the pig above her head.<sup>148</sup> The court would conclude that in order to conjure up enough of the original, Koons needed to include these components in his sculpture. Moreover, Koons added differences, such

142. Luke Malone, *Jeff Koons Sued for Ripping Off Artists-Again*, VOCATIV (Dec. 17, 2014) <http://www.vocativ.com/culture/art-culture/jeff-koons-copyright-infringement-naf/>.

143. See *Cariou*, 714 F.3d at 706.

144. *Id.* at 708.

145. *Id.* at 710 (internal quotations omitted).

146. *Id.*

147. *Id.*

148. See *infra* Figure 1.

as the mesh top the woman wears and the lei around the pig, in order to create something new.

The court would then look to any effect on the potential market for Davidovici's photograph. Currently, there is no information about any lost profits or licenses Davidovici incurred. If he suffered any lost profits or licenses, it would be wise to argue them fiercely, in order to persuade the court of a non-fair use. However, because the Second Circuit has called the first factor "[t]he heart of a fair use inquiry,"<sup>149</sup> it would assign significant weight to the transformation of the new work, and less weight would be given to the market effect factor. This would ultimately lead to a finding in favor of Koons and fair use.

### C. *The Ninth Circuit and Fair Use; The Transformative Test*

A similar rationale would be used in the Ninth Circuit, as it follows the precedent set forth in *Campbell*. In *Seltzer v. Green Day*, the Ninth Circuit was tasked with determining whether the use of an artist's drawing in a music video qualified as fair use.<sup>150</sup> Dereck Seltzer created a drawing entitled *Scream Icon* in 2003,<sup>151</sup> which he posted around Los Angeles as street art.<sup>152</sup> Seltzer used the design to identify himself and licensed it for use in another music video.<sup>153</sup> Roger Staub, video designer for the band Green Day, created backdrop videos for each of the 32 songs the band played on its 2009-2010 tour.<sup>154</sup> In 2008, he took a photograph of a wall in Los Angeles, which included *Scream Icon*.<sup>155</sup> Staub used the photograph to create a modified version of *Scream Icon* and included the new work in a four minute long video for the song "East Jesus Nowhere."<sup>156</sup> Seltzer eventually learned of the unauthorized use and filed a claim for copyright infringement, to which the band asserted a fair use defense.<sup>157</sup>

The circuit court began its fair use analysis by stating that whether the new work is transformative is a key factor, but that "is a[n] often highly contentious topic," citing the then-recent *Cariou* decision.<sup>158</sup> The court did

149. *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2004).

150. *Seltzer v. Green Day Inc.*, 725 F.3d 1170 (9th Cir. 2013).

151. *Id.* at 1173; *see infra* Figure 9.

152. *Seltzer*, 725 F.3d at 1174.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*; *see infra* Figure 10.

157. *Seltzer*, 725 F.3d at 1175.

158. *Id.* at 1176.

not follow the Second Circuit's rationale and concluded that it should follow the test set forth in *Campbell*.<sup>159</sup> It then determined whether the new work added a new expression, meaning, or message to the original.<sup>160</sup> In order to do this, the court examined each work and found that the message and meaning of *Scream Icon* was debatable, even though it appeared to "be a directionless anguished screaming face."<sup>161</sup> Although the ultimate meaning behind the work was not decided, the court concluded that it did not have anything to do with religion, while Staub's video was "surrounded by religious iconography," accompanying a song "about the hypocrisy of religion."<sup>162</sup> The court determined that the video backdrop conveyed "new information, new aesthetics, new insights and understandings," as Seltzer admitted during his deposition.<sup>163</sup> With this in mind, the court concluded that the new work was transformative.<sup>164</sup>

The *Seltzer* court then addressed the second fair use factor—the nature of the copyrighted work—and determined that *Scream Icon* was a creative work "meriting strong protection."<sup>165</sup> The court found that Seltzer's work was published, because it was widely disseminated on the Internet, as well as the streets of Los Angeles.<sup>166</sup> Published works are more likely to qualify as fair use, because the first appearance of the artist's expression has already occurred.<sup>167</sup> Therefore, the court determined that this factor weighed only "slightly in Seltzer's favor."<sup>168</sup>

When analyzing the third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, the *Seltzer* court concluded that unlike a television show or book, *Scream Icon* was "not meaningfully divisible."<sup>169</sup> The court noted that an alleged infringer would not have this factor weighed against him or her, even if they copied the whole work, if no more of the original work is taken than is necessary for the

159. *Id.*

160. *Id.*

161. *Id.* at 1177.

162. *Id.*

163. *Id.* During his deposition Seltzer stated that the backdrop "tainted the original message of the image and [] made it now synonymous with lyrics, a video, and concert tour that it was not originally intended to be used with." *Id.* (omission theirs).

164. *Id.* at 1178.

165. *Id.*

166. *Id.*

167. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003).

168. *Seltzer*, 725 F.3d at 1178.

169. *Id.*

intended use.<sup>170</sup> The court concluded that in order for the new meaning of the backdrop video to be achieved, the “use of the entire work was necessary.”<sup>171</sup>

The court ultimately concluded that the use of *Scream Icon* did not deplete any market value for Seltzer, and that the fourth factor weighed in favor of Green Day.<sup>172</sup> Seltzer admitted that no one ever told him they would not buy his work, because of the use of the image in the video. Instead, he claimed “that *Scream Icon* was ‘tarnished’ for him personally.”<sup>173</sup> Green Day also presented evidence that the video backdrop did not provide the same market function as the original, because it was never used for any marketing purposes.<sup>174</sup> Further, Seltzer did not provide any evidence of lost licensing opportunities for the image, although he did state that it was used in a music video by the band People. However, he did not provide any additional information about a licensing agreement with People.<sup>175</sup> The court found these reasons were sufficient for it to conclude that the fourth factor did not weigh against a finding of fair use.<sup>176</sup>

If the *Davidovici* case were to be brought in the Ninth Circuit, the court would likely find that Koons’ work was a transformation. While this circuit does not follow the *Cariou* rationale, which dictates that the secondary work need not comment on the original, the judges would still be forced to provide their own subjective views and determine the meaning behind both works. They may split on the actual meanings behind the work or works, just as the meaning of *Scream Icon* was not determined. However, the judges will use their limited knowledge of the fine arts to determine the transformation of Koons’ and Davidovici’s work. The court would look at the works side by side, and determine their meanings based on subjective aesthetic judgments. As the *Seltzer* court found the new work to be transformative, the same would likely be found in *Davidovici*.

Looking at the nature of Davidovici’s photograph, the court would conclude that it is an original work of authorship warranting the same amount of protection as Seltzer’s *Scream Icon*. Additionally, the advertisement was published, because it was used in a magazine. Therefore, the first appearance of Davidovici’s expression already occurred. Thus, the court would

170. *Id.*

171. *Id.* at 1178–79.

172. *Id.* at 1179.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

determine that the photograph is a creative expression worthy of protection, but would only weigh the factor slightly in favor of Davidovici.

The *Seltzer* court determined that the defendant's copying was necessary to achieve the alternate meaning behind the new work.<sup>177</sup> The same analysis would likely be applied in the *Davidovici* case, and the court would determine that Koons' taking from the original work was not more than necessary, because it was needed to establish the new meaning of Koons' work.

While the *Seltzer* court did not declare that the fourth factor should be given substantial weight, it did seem to implicitly state that if Seltzer provided more information about his licensing of *Scream Icon*, he might have been able to sway the court in his favor, at least on the issue of the fourth factor.<sup>178</sup> If the *Davidovici* case were to be brought in this circuit, Davidovici would be best served by bringing forth evidence about any significant licensing opportunities he had concerning his original image, and any diminution of value he may have incurred. While the Second Circuit did not emphasize Cariou's lost gallery opportunity, and easily divided the markets of the two artists,<sup>179</sup> the Ninth Circuit did not draw a significant distinction between Green Day's market and Seltzer's market. If Davidovici were to bring strong evidence of market diminution, it has the potential to be a significant, and possibly dispositive factor in the court's fair use analysis.

While the Ninth Circuit adamantly follows the *Campbell* precedent, and the Second Circuit has further broadened the scope of fair use, the Seventh Circuit refused to follow the transformative test altogether. In its recent opinion, *Kienitz v. Sconnie Nation LLC*, this circuit cautioned against the Second Circuit's expansion of the fair use doctrine and called for a return to the factors listed in the statute.<sup>180</sup>

#### *D. The Seventh Circuit and Fair Use; The Statutory List Test*

While the Second and Ninth Circuits would focus on the transformation of Koons' work, the Seventh Circuit would take an entirely different approach. In *Kienitz v. Sconnie Nation LLC*, the court was asked to determine if appropriating a photograph of a former mayor for use on a t-shirt was fair

177. *Id.* at 1178–79.

178. *Id.* at 1179 (“Seltzer provides no additional information about . . . licensing . . . [w]ithout further context, this fact does not suffice to show that Green Day's use harmed any existing market or a market that Seltzer was likely to develop.”).

179. *Cariou v. Prince*, 714 F.3d 694, 709 (2013).

180. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014), *cert denied*, 2015 U.S. LEXIS 1921; *see infra* Figure 11; *see infra* Figure 12.

use.<sup>181</sup> The court stated it was skeptical of the Second Circuit's, and of "Cariou's approach, because asking exclusively whether something is 'transformative' not only replaces the list in § 107 [the four fair use factors] but also could override 17 U.S.C. § 106(2)."<sup>182</sup>

The *Kienitz* court decided that it would not address transformative use and that it was "best to stick with the statutory list, of which the most important usually is the fourth (market effect)."<sup>183</sup> Without bringing in aesthetic judgments, such as determining the meaning of each work or finding any transformation, the court quickly considered the purpose and character of the new work.<sup>184</sup> It determined that while the defendants did sell their t-shirts for profit, they chose the design "as a form of political commentary."<sup>185</sup> The judge stated the first factor did not "do much in this case,"<sup>186</sup> but concluded that the factor did weigh in favor of fair use.<sup>187</sup>

The court found the second factor, the nature of the copyrighted work, to be "unilluminating,"<sup>188</sup> and did not give it significant analysis. After analyzing the third factor, the amount and substantiality of the portion used in relation to the copyrighted work, the court determined the defendants had not taken more than was necessary from the original photograph.<sup>189</sup> The court concluded that the defendants removed the colors, shading, and the original background.<sup>190</sup> Further, the lighting was significantly altered from the original work, so that after all the changes, only the mayor's smile remained from the original work.<sup>191</sup>

Analyzing factor four—the effect on the market for the original work—the court concluded that there was no effect, because the plaintiff admitted that the defendant's use did not disrupt any plan to license the photograph for apparel, or that the use reduced demand for the original.<sup>192</sup> However, at the end of the majority opinion, Judge Easterbrook outlined an argument that *Kienitz* could have made to persuade the court that the fourth factor should

181. *Kienitz*, 766 F.3d at 758; *see infra* Figure 11; *see infra* Figure 12.

182. *Kienitz*, 766 F.3d at 758; 17 U.S.C. § 106 (2012) (reserving the exclusive right to the author to "prepare derivative works based upon the copyrighted work").

183. *Kienitz*, 766 F.3d at 758.

184. *Id.* at 759.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

be weighed against a fair use finding.<sup>193</sup> He stated that the use could injure long-range commercial opportunities, despite the value of the particular picture not being diminished.<sup>194</sup> He posited a scenario where “[f]ewer people will hire or cooperate with Kienitz if they think that the high quality of his work will make the photos more effective when used against them!”<sup>195</sup>

If the *Davidovici* case were brought in this circuit, the court would not consider the transformation test. Instead, it would look to the commercial nature of Koons’ work. The commercial nature of the work is easily identifiable, because Koons sells his statues. The court may additionally look at any comments, if any, on the original work. Just as this factor proved to be of little help in *Kienitz*, it would likely be of little help in *Davidovici*. Therefore, the first fair use factor would not weigh significantly in favor of either party.

The court would not dwell on the second factor—calling this factor “unilluminating”<sup>196</sup>—and would instead move to the third factor, the amount and substantiality of the portion used in relation to the copyrighted work. Koons took significant parts of Davidovici’s photograph to create his work, including: the pose of the woman lying in the snow, her facial expression, and the pig at the top of her head with a barrel around its neck. All of these elements are prominent in Koons’ work. The similarities between Davidovici’s photograph and Koons’ sculpture are readily apparent, and this court would likely not weigh this factor the same way as it did in *Kienitz*.<sup>197</sup> Therefore, the *Davidovici* court would likely hold that Koons had taken far more than was necessary in order to comment on the original

The fourth factor would be heavily discussed in the Seventh Circuit, because the *Kienitz* court stated it is usually the most important factor.<sup>198</sup> While it is not known whether Davidovici incurred any loss of licensing opportunities or if the value of the original photograph diminished, he might be able to prevail overall if he provided sufficient evidence of market harm, because the market effect factor is heavily stressed in this circuit.

As demonstrated above, it is possible that there would be a finding of fair use in *Davidovici*, but the Seventh Circuit would reach that conclusion using an approach that differs from its sister circuits. Without the subjectivity required in finding whether or not the new work is a transformation, the court

193. *Id.* at 759–60.

194. *Id.* at 759.

195. *Id.* at 759–60.

196. *Id.* at 759.

197. *Id.* at 758.

198. *Id.*

would analyze the four fair use factors in a more straightforward, and efficient manner. Additionally, if Davidovici has suffered market harm from Koons' use, he may successfully argue that the fourth factor weighs in his favor and ultimately succeed.

As this section has illustrated, the fair use doctrine is not applied in the same manner throughout the circuits. Appropriation artists could have a greater opportunity for a winning fair use defense if the circuit the suit takes place in is favorable to them. Additionally, the transformative test requires judges to make subjective interpretations about art in order to determine a legal outcome. The next section will discuss a new approach to the fair use test, and consider how attribution of copyrighted works will benefit fair use analyses.

## V. A NEW FAIR USE APPROACH

This section argues that the Seventh Circuit is correct in holding that the transformative test should no longer be applied in appropriation art cases, because it requires judges to act as critics. Courts should shift back to a more straightforward four-factor analysis, and mostly focus on the fourth factor—the market effect. While many courts are inclined to only consider the market harm of a plaintiff, this section describes the need for the balancing of the positive effect an appropriation artist can have on the market for another's work, against any market harm to the plaintiff. Additionally, this section will consider what effect attributing the original copyright holder would have on a fair use analysis.

### A. *No More Transformation*

Requiring judges to determine transformation compels them to look to the meaning of the artworks at issue, and requires them to determine what the artists intended to create. That is exactly what the court did in *Cariou* when the judges looked at the artworks and photographs side-by-side and determined that Prince's work gave "a different character . . . new expression[] and employ[ed] new aesthetics with creative and communicative results distinct from Cariou's."<sup>199</sup> In a dissenting opinion, Judge Wallace quoted the words of Justice Holmes from the *Bleistein* opinion and stated "I, for one, do not believe that I am in a position to make

199. *Cariou v. Prince*, 714 F.3d 694, 708 (2013).

these fact-and-opinion-intensive decisions.”<sup>200</sup> He came to this conclusion, in part, because of his “limited art experience.”<sup>201</sup>

A number of scholars agree that because of the emphasis placed on transformation when analyzing fair use, judges critique art in direct contrast to a century old precedent.<sup>202</sup> Doing away with the transformation sub-factor will eliminate this obligation for judges and end its domination of the fair use analysis. This will lead to more consistency among fair use decisions, because they will not be contingent upon judge’s personal subjective views of the works at issue. Specifically, in appropriation art cases, judges will not be forced to determine the meaning of the works at issue and allow that to be the driving force behind their decisions.

While the transformative nature of the secondary work should be abandoned in appropriation art cases, courts should continue to look to other comments or critiques of the original work. Moreover, courts should additionally consider the purpose of the use or why the artist chose to use the original as source material. The precedent set forth in *Cariou* allows appropriation artists to use works with minimal limits and allows for minimal analysis of the purpose and character of the use, the original considerations of the first statutory factor.

### *B. Putting the Emphasis on the Fourth Factor*

With the focus no longer on whether the second work is a transformation, a judge will not act as a critic to determine a finding of fair use in appropriation art cases. Additionally, plaintiffs like Patrick Cariou, Dereck Seltzer, and Michael Kienitz will be able to bring potentially compelling arguments concerning market effect, arguments that helped Art Rogers succeed in his case. Plaintiffs will additionally be able to bring strong and potentially decisive arguments similar to what Judge Easterbrook laid out at the end of the *Kienitz* decision.<sup>203</sup>

While plaintiffs, such as Dereck Seltzer, may object to the use of their work in appropriation art on moral grounds,<sup>204</sup> those arguments will not

200. *Id.* at 714

201. *Id.*

202. See, e.g., Brittani Everson, *The Narrowest and Most Obvious Limits: Applying Fair Use to Appropriation Art Economically Using a Royalty System*, 63 CATH. U. L. REV. 729 (2014); Arjun Gupta, “I’ll Be Your Mirror”—*Contemporary Art and the Role of Style in Infringement Analysis*, 31 U. DAYTON L. REV. 45 (2005); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

203. *Kienitz*, 766 F.3d at 759–60.

204. *Seltzer v. Green Day Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013) (claiming that “*Scream Icon* was tarnished for [Seltzer] personally”).

compel a court to a finding of a non-fair use, because moral rights in the United States are limited.<sup>205</sup> Moral rights only apply to visual artists who create a limited amount of works, and provide artists with the opportunity to have their names applied to or withheld from a work of visual art, prevent distortion or mutilation of a work, as well as prevent the destruction of a work of recognized stature.<sup>206</sup> However, a focus on the fourth factor will allow a plaintiff to strategically and effectively argue against an appropriation when sharing Seltzer's sentiment.

Had the focus been on the fourth factor in prior cases, perhaps the plaintiffs in *Blanch*, *Seltzer*, and *Kienitz* would have provided more evidence of lost licensing opportunities or other negative effects on the market demand of their works. Instead, those cases focused on the transformative nature of the secondary work. Rather, as Judge Easterbrook suggested in *Kienitz*, plaintiffs should highlight how long-range commercial opportunities are affected when their work is used against them.<sup>207</sup>

While an emphasis should be placed on the fourth factor, it is important for courts to not allow a plaintiff to claim that a second artist's use of their material depleted the market that he or she had not already developed, or a market the plaintiff is unlikely to develop in the future. While some courts have held that it is the original copyright holders' right to enter or not enter certain markets,<sup>208</sup> a copyright holder who suffers no market harm—either in current markets or in markets they do not intend to develop—is not economically burdened by secondary use. Therefore, courts should be wary not to weigh the fourth factor in favor of a would-be infringer if the original artist cannot show he or she faced harm in relevant markets that are likely to be entered. Rather, a court could place a burden on the original artist with a standard such as preponderance of the evidence that he or she would likely enter into a market that the secondary user has usurped.

A shift back to the fourth factor as usually being the most important should yield the aforementioned positive results, but it cannot be the only consideration. While appropriation art challenges the boundaries of

205. 17 U.S.C. § 106A (2012).

206. *Id.*

207. *See Kienitz*, 766 F.3d, at 759–60.

208. *See Castle Rock Ent. v. Carol Pub. Group*, 150 F.3d 132, 145–46 (2d Cir. 1998) (noting that a trivia book based on the television show *Seinfeld* was not fair use: “[a]lthough Castle Rock has evidenced little if any interest in exploiting . . . derivative works based on *Seinfeld*[,] . . . the copyright law must respect that creative and economic choice”); *see also Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987) (stating in its factor four analysis that “the proper inquiry concerns the ‘potential market’ for the copyrighted work . . . [an author] is entitled to protect his *opportunity* to sell his [copyrighted material]”) (emphasis in original) (citing 17 U.S.C. § 107(4) (2012); *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490, 1496–97 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985)).

copyright law, it is a respected form of art, and should not be stifled. Appropriation artists that do not infringe others' work are providing more creative work for the world, and therefore, are fulfilling the directive of the intellectual property clause of the Constitution to "promote the progress of . . . useful works."<sup>209</sup> Under the proposed legal framework, appropriation artists could counter plaintiffs' potential negative market effects arguments by showing how the use of the original work improved market demand for that work. A court, looking at the effect on the market for the original work in totality, or the net market effect of both negative and positive effects to the market, could then determine whether a secondary use was a fair use or not.

### *C. Market Harm Balanced Against Market Help*

The language of the fourth statutory factor states that a court shall examine, "the effect of the use upon the potential market for or value of the copyrighted work."<sup>210</sup> Nowhere does it state that courts must only look at any market harm a plaintiff has suffered. However, after *Campbell*, "market harm" has become the most common way to refer to the fourth factor.<sup>211</sup> While some courts have not followed this commonality,<sup>212</sup> some scholars have begun exploring net market effects that include any market help by unauthorized use in addition to market harm.<sup>213</sup>

Alternatively, "market help" has been described as the "underappreciated role of the economic upside of unauthorized use for owners"<sup>214</sup> by a secondary work. This would be an appropriation artist's ideal argument. Economic loss suffered by the original copyright owner must be balanced against any economic gain; one example was noted in Judge Leval's famous *Toward a Fair Use Standard*.<sup>215</sup> An appropriation artist, such

209. See U.S. CONST. art. I, § 8, cl. 8. (stating that Congress shall have the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

210. 17 U.S.C. § 107 (2012) (emphasis added).

211. David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359, 366 n.28 (2014) (string-citing cases associating the fourth factor with the degree of market harm by defendant's unauthorized use).

212. See, e.g., *Authors Guild v. Google*, 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013) ("[A] reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders."); *Faulkner Literary Rts. v. Sony Pictures Classics, Inc.*, 953 F. Supp. 2d 701, 711 (N.D. Miss. 2013) ("[T]hat the [secondary work] indeed helped the plaintiff and the market value of [the original work] if it had any effect at all.").

213. See Fagundes, *supra* note 211, at 377-78.

214. *Id.* at 361.

215. Leval, *supra* note 45, at 1124 ("An unjustified taking that enhances the market for the copyrighted work is easy to imagine. If, for example, a film director takes an unknown copyrighted tune

as Richard Prince or Jeff Koons, has the potential to use another's work to create their own revenue stream, and increase the demand for the original work. These artists attract athletes, musicians, and other famous individuals who pay high prices for their pieces.<sup>216</sup> These consumers may want to buy the original work as well. Thus, a piece of art that had little-to-no success may enjoy an increase in demand through secondary use.<sup>217</sup>

However, while a popular appropriation artist may be able to bring another artist to the limelight quickly and increase demand, this is only one aspect of the market that needs to be addressed. Licensing is an important aspect of generating revenue from creative works. In each case mentioned herein, the courts discussed licensing opportunities.<sup>218</sup> The original artist may argue that while demand in sales for their work has gone up, they also inherently lost revenue and a market opportunity because the secondary artist did not pay any licensing fee.<sup>219</sup> Moreover, courts are not only to look at the market of a work at the time of a suit, but must also look to the *potential* effect on the market a secondary use may have.<sup>220</sup> Therefore, it is necessary for courts to look to the potential for future lost revenue, such as the lost opportunities to license a work, which the original artist may suffer. This must be balanced against any positive effect on the market the secondary use may have had.

Courts should look to the overall market effect of the original work and not solely examine market harm. While it is possible that an appropriation artist can bolster market demand of another artist's work, it would be difficult to do if consumers cannot find out who the original artist is.

for the score of a movie that becomes a hit, the composer may realize a windfall from the aftermarket for his composition.”).

216. See *Cariou v. Prince*, 714 F.3d 694, 709 (2013) (“Certain of the *Canal Zone* artworks have sold for two million or more dollars. The invitation list for a dinner that Gagosian hosted in conjunction with the opening of the *Canal Zone* show included a number of the wealthy and famous such as . . . Jay-Z and Beyonce[,] . . . Tom Brady[,] . . . Robert DeNiro, Angelina Jolie and Brad Pitt.”).

217. Fagundes, *supra* note 211, at 381 (“[W]hen Shepard Fairey used one of Garcia’s photos of Barack Obama to make Fairey’s iconic ‘Hope’ poster, it was a boon to Garcia as well as to Fairey (and to Obama). Thanks to the affirming effect of Fairey’s unauthorized use, Garcia had a show of his Obama photo at a swanky Chelsea art gallery in 2009, where prints of Garcia’s work went for a cool \$1,200 apiece.”).

218. See *Cariou*, 714.3d at 699; *Seltzer v. Green Day Inc.*, 725 F.3d 1170, 1174 (9th Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 249 (2d Cir. 2004); *Rogers v. Koons*, 960 F.2d 301, 304 (2d Cir. 1992).

219. Gilbert, *supra* note 9 (“Koons hasn’t stopped using copyrighted material but now gets licences (sic) first—his ‘Popeye’ series, shown in 2009 at London’s Serpentine Gallery, is just one example. [Koons’ attorney] says that although responses to Koons’ requests vary, ‘hordes of people’ have granted permissions, including United Feature Syndicate, which had earlier sued him, and Marvel Comics.”).

220. *Harper & Row, Pubs. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (“[T]o negate fair use one need only show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.”) (emphasis in original) (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984)).

However, appropriation artists should provide attribution to the original artist in order to make them known to consumers and to bolster a fair use defense.

*D. Encouraging Appropriation Artists to Attribute Original Authors*

Applying a “market help” analysis to *Cariou*, Fagundes observed the Second Circuit’s implication “that the publicity generated by Prince’s infringement could only have helped the commercial success of Cariou’s book.”<sup>221</sup> While such a holding is possible, two factors stand in the way. First, in its analysis of the fourth factor, the *Cariou* court split the markets that Patrick Cariou and Richard Prince appealed to, stating that the former’s work would not appeal to the latter’s.<sup>222</sup> Second, fans of Prince’s work could not know he used Cariou’s photographs if they were not already familiar with Cariou’s work, since Prince provided no attribution to the original work.

The Visual Artists Rights Act (“VARA”), codified in 17 U.S.C. § 106A, provides that an author of a work of visual art shall have the right to “claim authorship of that work.”<sup>223</sup> However, the statute begins by stating that the rights are subject to section 107,<sup>224</sup> the fair use doctrine. While the majority of Prince’s work was considered to be a transformation by the Second Circuit and thus protected by fair use,<sup>225</sup> he had no mandate under VARA to give Cariou any attribution for the use of his photographs. Unless one was already familiar with Cariou’s photographs, one would not know to look for them or any of his other works after viewing Prince’s artwork. Additionally, without attribution, viewers of Prince’s work would not know which parts of his artwork were appropriated, and which parts were not,<sup>226</sup> leading a viewer to believe that perhaps the entire work was Prince’s. This is similar to a music listener’s mistaken belief that a “cover” is the original version of a song.<sup>227</sup> Therefore any “market help” to Cariou would be slim, because as the Second

221. Fagundes, *supra* note 211, at 383.

222. 714 F.3d 694 at 709 (“Prince’s audience is very different from Cariou’s.”).

223. 17 U.S.C. § 106A(a)(1)(A) (2012).

224. *Id.*

225. *Cariou v. Prince*, 714 F.3d 694, 698–99 (2013).

226. Vartanian, *supra* note 1 (tweeting a photo of the exhibition along with the caption “Appropriated Exhibit. The only way you’d know my work was a part of this display is . . . well, that’s just it, you wouldn’t know. #PrinceofAppropriation.”).

227. See Jordan Runtagh, *Cover Me: 20 Famous Songs You Had No Idea Were Covers*, VH1 MUSIC, (Apr. 18, 2013) <http://www.vh1.com/music/tuner/2013-04-18/cover-me-20-famous-songs-you-had-no-idea-were-covers/> (last visited Feb. 23, 2015).

Circuit noted, “Prince’s work appeals to an entirely different sort of collector than Cariou’s.”<sup>228</sup>

If appropriation artists attributed the works they use to their original copyright holders, there would likely be more evidence that the use bolstered the market for the original. However, Cariou would not have benefitted from “market help,” because Prince was not obligated to inform his audience that he used Cariou’s photographs.

Attribution is now being encouraged among younger waves of artists. The College Art Association, whose mission is to promote the visual arts and their understanding, states that when copying another’s work, an artist should cite the source.<sup>229</sup> Additionally, artists themselves seek attribution, such as Donald Graham whose photograph was used in Richard Prince’s recent exhibition.<sup>230</sup> Graham clearly wanted his work to be attributed when he specifically posted about Prince’s work on social media.<sup>231</sup> Other organizations that encourage a radical overhaul to our copyright system<sup>232</sup> still encourage attribution to source materials.<sup>233</sup> Market help arguments are therefore derived from attribution, counter market harm, and lost licensing arguments.

Attribution also plays into analyzing the first factor of fair use, “the purpose and *character* of the use.”<sup>234</sup> Without looking to whether the new work is a transformation, attribution allows courts to determine whether the original art was used in good faith, because “propriety of the defendant’s conduct” is relevant to the character of the use.<sup>235</sup> Fair use “presupposes ‘good faith and fair dealing,’”<sup>236</sup> and when the defendant’s conduct has been

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

229. *Code of Best Practices in Fair Use for the Visual Arts*, COLLEGE ART ASSOCIATION 11, (Feb. 2015), [www.collegart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf](http://www.collegart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf).

230. Vartanian, *supra* note 1. Donald Graham’s *Rastafarian Smoking a Joint, Jamaica* was uploaded to Instagram by a third party and Prince used the photo in his *New Portraits* exhibit without permission or attributing Graham. *Id.*

231. *Id.* (posting on Donald Graham’s Instagram account saying “How to credit a work: ‘Rastafarian Smoking a Joint’ © 1997 Donald Graham”).

232. QUESTIONCOPYRIGHT.ORG, <http://questioncopyright.org/about> (last visited Mar. 28, 2015) (stating that QuestionCopyright.org’s mission is “to provide advocacy and practical education to help cultural producers embrace open distribution”).

233. QUESTIONCOPYRIGHT.ORG, [http://questioncopyright.org/minute\\_memes](http://questioncopyright.org/minute_memes). The organization created a series of videos called “minute memes,” which address and question certain aspects of current copyright law. *Id.* One of the videos, entitled “Credit is Due (The Attribution Song),” encourages artists to always attribute the original author when using their work. *Id.*

234. 17 U.S.C. § 107(1) (2012) (emphasis added).

235. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1][d], n.121 (Matthew Bender, ed.) (string-citing cases stating this principle).

236. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (quoting Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832 (1968)).

found to be in bad faith, it tips the scales of the first factor in favor of a non-fair use.<sup>237</sup> Attribution to the original author provides additional evidence that the appropriation artist acts in good faith. Weighed with the other factors in light of the purpose of copyright, attribution could be beneficial under both the first and the fourth fair use factors.<sup>238</sup>

A reversion to the fourth factor as being usually “the most important”<sup>239</sup> will prevent judges from interpreting art with their own subjective views. It will also allow appropriation artists to argue “market help” within a fair use analysis. The fair use test should heavily stress the fourth factor, so that courts can consider the net effects of an allegedly infringing use on markets for the original work. The fourth factor should also be heavily stressed so that appropriation artists can support a fair use defense while judges leave their personal views on art in their chambers.

## VI. CONCLUSION

Courts have continued to expand the fair use doctrine ever since *Campbell* used the transformation test as a nearly dispositive fair use analysis. The transformative test requires judges to find meanings in works of art by comparing them side-by-side, applying their own views, and making determinations with little-to-no fine arts experience. Conversely, the statutory factors, which do not mention transformation, are weighed in light of each other. An emphasis on the statutory list does not require judges to make subjective, uninformed decisions. Additionally, attribution to copyrighted works provides for a good faith defense against a market harm argument under the fourth factor of fair use by rebutting any market harm arguments with a market help argument. The Supreme Court should no longer require an examination of whether the new work is a transformation in appropriation art cases. Instead, it should provide guidance to the lower courts about how to objectively and effectively apply the four statutory factors.

There is no statutory requirement for appropriation artists to give attribution. Requiring one would impose a burden to make a formal

237. See *Harper & Row, Publishers. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“The Nation knowingly exploited a purloined manuscript . . . [u]nlike the typical claim for fair use, The Nation cannot offer up even the fiction of consent as justification.”). Cf. *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (“[G]ood faith also weighs in . . . favor [of the first] prong of the fair use test. . . . Although acknowledgement does not excuse infringement, the failure to acknowledge counts against the infringer.”).

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

239. See *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 759 (7th Cir. 2014).

requirement. However, Congress could amend the statute to encourage artists to give attribution by allowing market help arguments when there has been attribution, and not assigning significant weight to those arguments when there has been none. Focusing on the fourth factor will allow plaintiffs to bring infringement actions without fearing what a judge will think of the artworks in question, and allow appropriation artists to have more compelling arguments when considering overall market effect.

## APPENDIX



Figure 1.  
"Fait d'Hiver 1988" by  
Franck Davidocivi



Figure 2.  
"Fait d'Hiver 1988" by Jeff Koons



Figure 3.  
"Puppies" by Art Rogers



Figure 4.  
"String of Puppies" by Jeff Koons



Figure 5.  
"Silk Sandals" by Andrea Blanch



Figure 6.  
"Niagara" by Jeff Koons

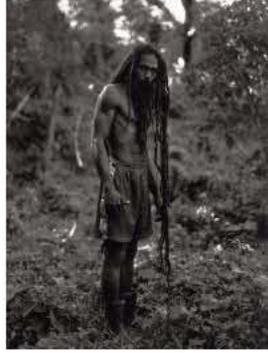


Figure 7.  
Photograph from “Yes Rasta”  
by Patrick Cariou



Figure 8.  
“Graduation” by Richard Prince



Figure 9.  
“Scream Icon” by Dereck Seltzer



Figure 10.  
Video Backdrop for Green Day  
by Roger Staub



Figure 11.  
Photograph by Michael Kienitz



Figure 12.  
Tee Shirt Design  
by Scennie Nation LLC