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## R. PRINCE'S NEW PORTRAITS—THE ART OF FAIR USE

MATHILDE HALLE\*

“He takes what we already know . . . and gives it back relatively unaltered, but forever changed.”<sup>1</sup>

“Making art became a series of mental decisions, the most crucial of which was choosing the right source image: as Warhol would contend some years later, ‘The selection of the images is the most important and is the fruit of the imagination.’”<sup>2</sup>

### INTRODUCTION: NEW PORTRAITS, SAME ISSUE

With his *New Portraits* series, artist Richard Prince has (again) pushed appropriation art to its culmination by re-using *verbatim* photos taken and posted by Instagram users as the center of his own works. And (again) his work has triggered some turmoil in the copyright and art law world as to whether or not it would qualify as fair use. With now four complaints filed by the copyright owners of the photos on which *New Portraits* are based,<sup>3</sup> courts will soon answer this question—an answer much expected by contemporary artists and art professionals, considering the current blurriness of the fair use standard.<sup>4</sup>

\* The author would like to pay special thankfulness, warmth, and appreciation to Professor Jeanne C. Fromer and Nicolas Delon, for all their support and recommendations and to all anonymous reviewers.

1. NANCY SPECTOR ET AL., *RICHARD PRINCE* 23 (2007).
2. TONY SCHERMAN & DAVID DALTON, *POP: THE GENIUS OF ANDY WARHOL* 113 (2009).
3. See, e.g., Julia Halperin, *Instagram Model and Makeup Artist Sues Richard Prince Over Copyright Infringement*, *THE ART NEWSPAPER* (Aug. 26, 2016), <http://old.theartnewspaper.com/news/news/instagram-model-and-makeup-artist-sues-richard-prince-over-copyright-infringement/>; Eileen Kinsella, *Sid Vicious's Photographer Sues Richard Prince for Copyright Infringement*, *ARTNET NEWS* (June 7, 2016), <https://news.artnet.com/market/richard-prince-sid-vicious-copyright-513263>; Eileen Kinsella, *Richard Prince Slapped With Yet Another Copyright Lawsuit*, *ARTNET NEWS* (Nov. 18, 2016), <https://news.artnet.com/art-world/richard-prince-copyright-lawsuit-754139>; Eileen Kinsella, *Outraged Photographer Sues Gagosian Gallery and Richard Prince for Copyright Infringement*, *ARTNET NEWS* (Jan. 4, 2016), <https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498>; Mahita Gajanan, *Controversial Artist Richard Prince Sued for Copyright Infringement*, *THE GUARDIAN* (Jan. 4, 2016), <https://www.theguardian.com/artanddesign/2016/jan/04/richard-prince-sued-copyright-infringement-rastafarian-instagram>.
4. See *Cariou v. Prince*, 714 F.3d 694, 713 (2d Cir. 2013) (Wallace, J., dissenting); see also Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee or Burn-Out of Transformativeness in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 321, 323 (2014) (“Transformative use has, by steady accretion, come to dominate fair use case law,

In September 2014, New York City art gallery Gagosian exhibited the *New Portraits* series including 38 new works by Prince. Each image is an inkjet print of approximately 6 x 4 ft. which includes a portrait (sometimes a self-portrait) photograph originally posted by Instagram users on their feeds. Each work also features several comments from other users, including one from Prince (under his own name), beneath the photo.<sup>5</sup> The individuals featured in the photos include several celebrities, such as model Kate Moss. Most of them feature young women in suggestive poses.

The art world immediately reacted very vividly to Prince's new work. "Possible cogent responses to [*New Portraits*] show include naughty delight and sincere abhorrence,"<sup>6</sup> summarized art critic Peter Schjeldahl in *The New Yorker*. Some praised the artist, calling the work "[g]enius [t]rolling."<sup>7</sup> Some were shocked by the straightforward, effortless creation process—basically taking a snapshot, sending the image and having it printed.<sup>8</sup> In a 'meta' response, some of the unwilling subjects of his works, notably members of the *Suicide Girls* collective, re-appropriated 'their' *New Portrait* by adding a comment under Prince's and started selling their own derivative works online for USD 90.<sup>9</sup> And, of course, some—including the four people who filed complaints against Prince—considered that Prince's work was plain and simple stealing, a clear (and outrageous) infringement of their copyrights.

While the outcome of the case could adversely affect contemporary art,<sup>10</sup> it may also be seen as a new provocation or challenge for lawyers. Indeed, this is not the first time Prince has appropriated others' works *and* been sued for it. Prince is one of the leading appropriation artists, assuming art ever was something other than appropriation. By appropriating other artists'

but has failed to provide the hoped-for consistent governing principles. It has, to the contrary, led courts to highly idiosyncratic results.")

5. Jerry Saltz, *Richard Prince's Instagram Paintings Are Genius Trolling*, VULTURE (Sept. 23, 2014), <http://www.vulture.com/2014/09/richard-prince-instagram-pervert-troll-genius.html>.

6. Peter Schjeldahl, *Richard Prince's Instagram*, THE NEW YORKER (Sept. 30, 2014), <http://www.newyorker.com/culture/culture-desk/richard-princes-instagrams>.

7. Saltz, *supra* note 5.

8. Indeed, "Prince finds an image he likes, comments on it, makes a screen-grab with his iPhone, and sends the file — via email — to an assistant. From here, the file is cropped, printed as is, stretched, and presto: It's art." *Id.*

9. Alex Needham, *Richard Prince v Suicide Girls in an Instagram Price War*, THE GUARDIAN (May 27, 2015), <https://www.theguardian.com/artanddesign/2015/may/27/suicide-girls-richard-prince-copying-instagram>.

10. See Brian Boucher, *Why Experts Say the Latest Copyright Lawsuit Against Richard Prince Matters*, ARTNET NEWS (Jan. 5, 2016), <https://news.artnet.com/market/richard-prince-lawsuit-expert-opinions-402173>.

work as raw materials for their own work,<sup>11</sup> appropriation artists are easy targets for infringement suits, even more so with the online proliferation of images and the banalization of digital copying techniques.<sup>12</sup> As Professor Amy Adler argues, “contemporary art depends so deeply on copying in a way that makes it doomed to clash repeatedly with copyright law.”<sup>13</sup> Together with Jeff Koons, Prince perfectly illustrates this artistic (and legal) trend: in addition to being renowned as appropriation champions and two of the best-selling artists alive, they have lent their names to significant fair use case law and are therefore familiar to many lawyers interested in art.

Surprisingly to some, Prince has not lost a single case thus far. He has somehow managed to convince the courts that his works were fair use, or settled with the plaintiff instead.<sup>14</sup> However, one cannot rule out things turning out differently this time, considering not only the very similar (identical?) aesthetics of the *New Portraits* versus the original Instagram photos, but also given the current scope of the fair use doctrine that Prince has (involuntarily) helped to build through previous cases.

This Article aims to bring defenses of *New Portraits* into a new light. It will not discuss the current scope or merits of the fair use doctrine, or how it should evolve to adapt to contemporary art (already the subject of much valuable scholarship).<sup>15</sup> Instead, it adduces potential arguments open to a defense of *New Portraits* given the current state of the law. After a brief summary of the fair use standard as currently defined by courts, in particular the preeminence of the “transformativeness” criterion,<sup>16</sup> I will argue that *New Portraits* can fall under the parody doctrine and therefore be considered fair

11. Art critic David Joselit argues, “contemporary art marginalizes the production of content in favor of producing new format for existing images.” DAVID JOSELIT, *AFTER ART* 58 (2013).

12. See Barbara Pollack, *Copy rights*, ARTNEWS (Mar. 22, 2012), <http://www.artnews.com/2012/03/22/copy-rights/>.

13. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 562 (2016).

14. Even though the district court decided not to consider five out of thirty pieces in Prince’s *Canal Zone* series to be fair use, the Court of Appeals remanded the case back to the district court with respect to those five pieces for further evaluation whether Prince was entitled to fair use. Prince and Cariou ultimately settled their dispute regarding the five remaining pieces outside of court. *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013).

15. For a new two-factor fair use test, see John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 138–39 (1988) and E. Kenly Ames, *Beyond Rogers v. Koons: A Fair Use Standard For Appropriation*, 93 COLUM. L. REV. 1473, 1511–13 (1993). For a First Amendment protection argument for appropriation art, see Darren H. Hick, *Appropriation and Transformation*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1155, 1171–72 (2013) (quoting Patricia Krieg, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1578 (1984)). For a new “artistic purpose” standard leading the first factor inquiry, see Caroline L. McEneaney, *Transformative Use and Comment on the Original*, 78 BROOK. L. REV. 1521, 1547 (2013). For an argument to amend the Copyright Act to reform the fair use doctrine, see Debra L. Quentel, “*Bad Artists Copy, Good Artists Steal*”: *The Ugly Conflict Between Copyright Law and Appropriationism*, 4 UCLA ENT. L. REV. 39, 64 (1996).

16. See *infra* I.

use.<sup>17</sup> I will further try to show how *New Portraits*, if they were to fail under the parody doctrine, could still pass the fair use test based on an extensive interpretation of its first factor, or by the transformativeness criterion as designed by the Second Circuit in *Cariou v. Prince*.<sup>18</sup> Please note that, for the purpose of this Article, I will primarily focus on courts' opinions on visual arts as opposed to other copyrighted works.

## I. THE FAIR USE TEST AND THE PREEMINENCE OF THE TRANSFORMATIVENESS CRITERIA

The fair use doctrine is provided in the Copyright Act which states several non-exhaustive factors to be considered for a fair use inquiry. The first factor of the test is arguably the most critical.<sup>19</sup> It relates to the purpose and character of the use and comes down to the question of whether a given new work is transformative.<sup>20</sup> The second and third factors are usually less material since they depend closely on the first factor: the second one relates to the nature of the work being copied,<sup>21</sup> and the third one relates to the amount and substantiality of the portion of the original work used for the new one.<sup>22</sup> The fourth factor looks at whether the new work usurps the primary and secondary markets for the original.<sup>23</sup> But despite this four-prong test, whether or not the work is transformative under the first factor has become the driving factor of any fair use inquiry.<sup>24</sup>

### A. *A specific yet non-exhaustive test from statutory source*

The fair use doctrine is codified in Section 107 of the Copyright Act of 1976, which sets four non-exclusive factors to be considered in determining fair use. Those factors are

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes,
- (2) the nature of the copyrighted work,
- (3) the amount and substantiality of the portion used

17. See *infra* II.

18. *Cariou*, 714 F.3d at 706; see also *infra* III.

19. See discussion *infra* Section A.A.

20. See discussion *infra* Section A.B.

21. See discussion *infra* Section A.C.

22. See discussion *infra* Section A.D.

23. See discussion *infra* Section A.E.

24. See discussion *infra* Section A.F.

in relation to the copyrighted work as a whole, and (4) the effect of the use on the potential market for or value of the copyrighted work.<sup>25</sup>

Section 107 also provides examples of purposes for which a copyrighted work may be fairly used, including criticism and comments.<sup>26</sup> Section 107 thus leaves much room for courts to decide what, in practice, may or may not constitute fair use. Determination of fair use is therefore very fact- and context-sensitive.<sup>27</sup>

*B. Factor 1: the purpose and character of the use, or whether the new work has a “new meaning”*

The first step of the fair use test relates to the purpose and character of the use. It aims at assessing whether “the new work 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* . . . , in other words, whether and to what extent the new work is ‘transformative.’”<sup>28</sup> This transformativeness factor directly echoes the utilitarian rationale of copyright law, namely incentivizing creation and innovation.<sup>29</sup> For a use to be considered fair, and therefore to escape the monopoly of the owner of the original work, the secondary use must “add something.” On this assumption, “[f]air use should . . . be perceived as an ‘integral part of copyright, whose observance is necessary to achieve the objectives of the law.’”<sup>30</sup>

It is worth noting that the commercial motivation of the user has become much less relevant for courts. Indeed, courts used to consider that a use for personal gains suggested bad faith and was dispositive of fair use.<sup>31</sup> However, this approach was reversed in the *Campbell v. Accuf-Rose* opinion

25. 17 U.S.C. § 107 (1976).

26. *Id.*

27. *Id.* As underlined by the Supreme Court in *Campbell*, Section 107 calls for a “case by case analysis” and “provide[s] only general guidance[.]” *Campbell v. Accuf-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994).

28. *Blanch v. Koons*, 467 F.3d 244, 251 (2006) (emphasis added) (quoting *Campbell*, 510 U.S. at 579); see also Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (the seminal article by Judge Leval on the transformative test).

29. See U.S. CONST. art. I, § 8, cl. 8.

30. *Blanch*, 467 F.3d at 250 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 1107 (1985)).

31. *Id.*; see generally *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984) (where the Supreme Court develops arguments on the dispositive nature of commercial gains when it comes to assessing fair use).

where the Supreme Court held that “[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of Section 107, including news reporting, comment, . . . since these activities are generally conducted for profit in this country.”<sup>32</sup>

To assess whether the new work conveys a “new expression, meaning or message,” courts used to rely mainly on the author’s intent. In *Blanch v. Koons* (as in the district court decision in *Cariou v. Prince*), the court looked for such new meaning through the artist’s intent.<sup>33</sup> However, the opinion of the Court of Appeals in *Cariou v. Prince* rejected this way of assessing “new meaning” and refocused the analysis on the aesthetics of the work, through a side-by-side comparison in search of significant physical alterations.<sup>34</sup> As argued by many authors,<sup>35</sup> this methodology seems at first sight irrelevant to assessments of meaning in contemporary art, for two reasons. First, contemporary art often focuses more on concepts than aesthetics. Second, not every observer can grasp the conceptual implications of any given contemporary work of art, especially when it comes to appropriation art. Yet, as discussed in Section III below, this shift from the author’s intent to the audience’s perception may motivate adopting a broader approach to transformativeness, by relying on third-party views of the work.

*C. Factor 2: the nature of the work being copied, or whether it is creative*

The second factor of the fair use test relates to the nature of the work being copied. The creative, fictional or otherwise expressive nature of a work protected by copyright tends to go against a finding of fair use. For instance, in *United Feature Syndicate, Inc. v. Koons*, the court stated, in accordance with higher courts’ precedents, that “fair use is less likely to be found when

32. *Campbell*, 510 U.S. at 584. The Supreme Court rejected the idea that the commercial nature of a use could be dispositive of fair use, thus emphasizing on the aggregate weighting of all four fair use factors. The Court noted that “nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship and research . . . are generally conducted for profit” and that “Congress could not have intended a rule that commercial uses are presumptively unfair.” *Id.* In addition, the Supreme Court noted in *Blanch* that “notwithstanding the fact that artists are sometimes paid and museums sometimes earn money, the public exhibition of art is widely and we think properly considered to ‘have value that benefits the broader public interest.’” *Blanch*, 467 F.3d at 254.

33. *Blanch*, 467 F.3d at 251; *see also* *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).

34. *Cariou*, 714 F.3d at 707–08.

35. *See* Adler, *supra* note 13 (for an account of the irrelevance of aesthetics comparison when it comes to contemporary art).

the original copyrighted work is fictional, rather than a factual or informational work such as a biography, a telephone directory, a textbook.”<sup>36</sup> Courts may take into account various elements in assessing the nature of the copyrighted work, such as “whether the original is creative, imaginative, or represents an investment of time and anticipation of a financial return also should be considered.”<sup>37</sup> However, this factor is never dispositive of fair use.<sup>38</sup> More specifically, courts tend to consider that the nature of the work copied is irrelevant when the first factor has been fulfilled, i.e., when the secondary work is transformative. In *Blanch*, the court expressly held that “[t]he second factor may be of lilted usefulness where the creative work of art is being used for a transformative purpose”<sup>39</sup> In other words, this second factor tends to follow the findings under the first factor inquiry.

*D. Factor 3: Amount and substantiality of the portion used, or whether the copy is integral or not*

Under the third factor courts must look at the amount and substantiality of the portion used. Prince was sued by photographer Patrick Cariou in 2008 for using photos of Rastafarians from Cariou’s *Yes Rasta* book in his *Canal Zone* series. Many of Prince’s artworks used Cariou’s works in whole or substantial parts of it. In some works, Prince hardly even altered much of the source photograph.<sup>40</sup> To put things simply, this should have been bad for Prince. However, the Second Circuit considered this was not dispositive against fair use “because copying the entirety of a work is sometimes necessary to make a fair use of the image.”<sup>41</sup> Giving the third factor a similar treatment as the second one, the court held that “the extent of permissible copying varies with the purpose and character of the use.”<sup>42</sup>

36. *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 380 (S.D.N.Y. 1993).

37. *Id.* (internal quotations omitted).

38. *Blanch*, 467 F.3d at 257.

39. *Id.* (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2006)). As underlined by the Court in *Blanch*, “[a]ccepting that [Silk Sandal] is a creative work, though, it does not follow that the second fair-use factor, even if somewhat favors Blanch, has significant implication for our overall fair-use analysis.” *Id.* at 257. The court concluded the second factor had limited weight “because Koons used Blanch’s work in a transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues.” *Id.* The same reasoning was applied in *Cariou*. See 714 F.3d at 710.

40. See *Cariou*, 714 F.3d at 710 (noting that Prince did not alter the source photography very much at all in his work titled *Charlie Company*).

41. *Cariou*, 714 F.3d at 710 (quoting *Bill Graham Archives*, 448 F.3d at 613).

42. *Id.*



*E. Factor 4: the effect of the use on the potential market for, or value of, the copyrighted work, or whether the secondary work usurps the original work's markets*

The fourth factor shifts the focus from the works to their markets. By assessing the effect of the use on the potential market for, or value of, the copyrighted work, it comes back (again) to the utilitarian rationale of copyright law by asking whether the secondary work economically harms the copyright owner by usurping the market(s) of the former work or its derivative works. In *Blanch*, the court found that “Koons’s use of her photograph did not cause any harm to her career or upset any plans she had for ‘Silk Sandals’ or any other photograph, and that the value of ‘Silk Sandals’ did not decrease as the result of Koons’s alleged infringement.”<sup>43</sup> The Second Circuit went further in the *Cariou* opinion and clarified that usurpation is established “where the infringer’s target audience and the nature of the infringing content is the same as the original.”<sup>44</sup> But here again, the first factor weighs in the analysis and market substitution is less certain when the second use is transformative.<sup>45</sup>

*F. Transformativeness as the driving factor in the fair use test*

As shown above, the first factor is leading in the fair use inquiry. As summarized by Professor Amy Adler, “[s]ince 1994, fair use, in all its complexity, has boiled down to a deceptively basic question: Is the new work ‘transformative?’”<sup>46</sup> More specifically: Does it add something new, with a further purpose or different character, altering the first with the new expression, meaning or message, or does it merely supersede the original? Despite its simplicity, this question is particularly tricky for contemporary art given the difficulty faced by courts in articulating the criteria for finding transformativeness, as discussed above. Courts themselves have recently recognized that whether or not a work is transformative has become a highly contentious issue.<sup>47</sup> So the question I address here is not so much: Is the *New Portraits* series fair use? but rather: Is the *New Portraits* series transformative in light of the standard built by precedents?

43. *Blanch*, 467 F.3d at 258.

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

45. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

46. Adler, *supra* note 13, at 562.

47. *Seltzer v. Green Day Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013); see also Jacqueline Morley, *The Unfettered Expansion of Appropriation Art by the Fair Use Doctrine: Searching for Transformative-ness in Cariou v. Prince and Beyond*, 55 IDEA: THE INTEL. PROP. L. REV. 385, 411 (2015).

The next Section examines the extent to which *New Portraits* can be seen as a parody of the underlying works—hence as highly transformative—and consequently qualify as fair use.

## II. *NEW PORTRAITS* FALLS WITHIN THE PARODY DOCTRINE

After briefly laying out the definition of parody as designed by the Supreme Court,<sup>48</sup> I will show that *New Portraits* can qualify as parody because, both expressly and impliedly, they comment on the photographs selected by the artist,<sup>49</sup> and because they clearly acknowledge the presence and source of these original photographs.<sup>50</sup> Once the parodic nature of *New Portraits* is established, then the three remaining factors of the fair use test will not weigh against a finding of fair use.<sup>51</sup>

### A. *The definition of parody*

I argue that *New Portraits* could be considered a parody of the underlying photographs and thus strongly support a fair use defense. Parody was precisely the use invoked by the alleged infringer in the last major case on fair use decided by the Supreme Court, i.e., *Campbell*. In this case the Supreme Court defined parody as “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s work.”<sup>52</sup> The Court further explains that “[p]arody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin.”<sup>53</sup> The Court further held that “[i]t is this jolter of reference and ridicule that marks off the author’s choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.”<sup>54</sup> The Court also defined parody by contrast with satire. It ruled that “[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>55</sup>

48. See discussion *infra* Section A.A.

49. See discussion *infra* Section A.B.

50. See discussion *infra* Section A.C.

51. See discussion *infra* Section A.D.

52. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

53. *Id.* at 588.

54. *Id.* at 583.

55. *Id.* at 580–81.

In *Campbell*, the Supreme Court also underlined that despite its generally high transformative value, parody does not benefit from any presumption of fair use. The Court notably underlined that “[l]ike a book review quoting the copyrighted material criticized, parody may or may not be fair use.”<sup>56</sup>

This being said, the standard for assessing whether a parodic work may be considered transformative seems low. According to the Supreme Court in *Campbell*, “[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.”<sup>57</sup> This standard is therefore objective and relies on the *potential* perception of a reasonable viewer. Accordingly, I understand that two elements are required to establish the parodic nature of a work: (i) the new work may reasonably be perceived as commenting on the original work (as opposed to the genre or the topic of the original work), by distorting it in a manner that makes it transformative, and (ii) the original work must be acknowledged and recognizable by the viewers.

*B. New Portraits comments, both expressly and impliedly, on the underlying Instagram photographs*

As mentioned above, to be considered parodic a secondary works needs to comment on the original work used. In *Leibovitz v. Paramount Pictures*,<sup>58</sup> defendant had used a famous nude portrait of pregnant Demi Moore by Annie Leibovitz in an advertisement for an upcoming movie, by mimicking Moore’s style and pose in a new photo feature one (male) actor of the movie. According to the court,

[p]lainly, the ad adds something new and qualifies as ‘transformative’ work. Whether it ‘comments’ on the original is a somewhat closer question. Because the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original.<sup>59</sup>

56. *Id.* at 581.

57. *Id.* at 582.

58. 137 F.3d 109 (2d Cir. 1998).

59. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998).

The assessment of the parodic nature of the secondary work is based on this objective standard according to which critical comments on the original work *can* reasonably be expected to be noticed.

Assessing whether *New Portraits*' comment on the original Instagram photographs may seem challenging, considering the fact that Prince used them without distorting them aesthetically. On the face of it, it does look like Prince was not interested in the specific images he selected but rather in the genre (scenarized portraits posted on Instagram). Under this interpretation, *New Portraits* could be seen as a satire of e.g., social media (see Section III below). However, what makes the series interesting and valuable for the art world lies precisely in Prince selecting these specific pictures, their being original posts, and commenting as a way of "rebranding" as one's own. No one knows that any other selection would have had a comparable effect. And had Prince not used *actual* Instagram posts, his work would most likely have been pointless and devoid of value.

On the assumption that Prince used these specific Instagram posts for themselves (and not only as illustrations of a genre), his work *can* be seen as commenting on them (rather than just about social media users generally), and as a result qualify as parody. Even if some may find the parodic nature of *New Portraits* subtler than in *Leibovitz*, there is little doubt for observers even remotely familiar with Prince's work, name, or contemporary art for that matter, that Prince was commenting on these specific photos. Indeed, one may argue that each of the *New Portraits* highlight the vanity, ubiquity, and lack of authenticity of each of the representations selected on Instagram, not only by putting his name under the photographs and therefore "rebranding" them, but by expressly *commenting* on them (before taking the snapshots, Prince commented on each post under his own name). But for any piece of work to be considered parodic under *Campbell*, it must not only comment on the original work being used, viewers must also be able to recognize in some way the underlying original.

*C. The original photographs used in New Portraits are recognizable by the viewers*

The parody doctrine not only requires that the parody comment on the original work, it also requires that the latter be acknowledged. In *Rogers v. Koons*, the court refused to consider Koons's sculpture *String of Puppies* as a parody of Roger's photograph because it failed to acknowledge and inform

the viewer of the presence of an underlying original work attributable to another author.<sup>60</sup> The court underlines that “[t]his awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.”<sup>61</sup> In other words, such attribution may result from the fact that the original work is widely known, but also from a direct attribution within the secondary work. This “recognition” element is seen by the *Rogers* court as a condition for a potential finding of parody.

Here, *New Portraits* clearly acknowledge the reference to the original work. First, this recognition results from the fact that the photographs are entirely copied. This makes it very unlikely that the public will ignore that the photographs in *New Portraits* are distinct preexisting works. Moreover, the fact that each of Prince’s works features the Instagram users’ names right above the photographs confirms this. Indeed, the public is not only made aware of the existence of a stand-alone underlying work, but also of its (likely) author, if only through a nickname, unlike in *Rogers*.<sup>62</sup> In fact, acknowledging the existence of the underlying works while commenting on them may be precisely what Prince intended through his *New Portraits*.

*D. The three other fair use factors would not weigh against a finding of fair use if the parodic nature of New Portraits was established*

If *New Portraits* qualifies as a parody of each underlying (copied) photo, then transformativeness is more easily established. And, as seen in Section I above, a high level of transformativeness weighs heavily in the analysis of the three other factors of the fair use inquiry. The second factor would bend in light of the highly transformative nature of the works. The third factor would not weigh against fair use, given that parody precisely needs to conjure up a portion of the original work that is sufficient for the audience to recognize it.<sup>63</sup> In our case, as in *Leibovitz*, the parody could only be achieved by copying photos in their entirety. “Copying does not become excessive in relation to parodic purpose merely because the portion taken

60. *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992); see also Willajeanne F. McLean, *All’s Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 BROOK. L. REV. 373, 403 (1993).

61. *Rogers*, 960 F.2d at 310. The court considered Koons’s *String of Puppies* did not ridicule Roger’s photograph because the object of the sculpture, satirical, was neither acknowledged nor known well enough to be recognized.

62. *Id.*

63. *Campbell*, 510 U.S. at 588.

was the original's heart."<sup>64</sup> Otherwise the parodic character would not be recognizable.

As for the fourth factor, courts usually consider that when the secondary use is parodic, there cannot be market substitution. This follows the Supreme Court's holding in *Campbell*, according to which,

[t]here is no protectable derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.<sup>65</sup>

Indeed, "[a]s to parody pure and simple, it is unlikely that the work will act as a substitute for the original, since the two works usually serve different market functions."<sup>66</sup>

Based on the above it would not be unreasonable for a court to hold that the *New Portraits* works are parodies and therefore fair use of the original photographs. However, Prince's art generally challenges the notions of authorship and originality. As argued by Professor Amy Adler, Prince "[o]rphans the work, introducing it into a chain of re-users, none of whom ever really owned it, none of whom are original, and none of whom can control it."<sup>67</sup> Referring to Prince's artistic project, a court could well find that the use of any other Instagram photos would actually have led to the same result. On that basis, the parodic nature of the work could not be asserted. This is why we will now turn to the alternative argument that the *New Portraits* series, even if not a parody, remains transformative enough to be considered fair use.

### III. ALTERNATIVELY, *NEW PORTRAITS* ARE TRANSFORMATIVE ENOUGH TO CONSTITUTE FAIR USE

Arguing that *New Portraits* is fair use without using the parody doctrine appears challenging. However, despite the blurriness around the interpretation of the first factor, I believe the recent shift towards a more audience-

64. *Id.*

65. *Id.* at 592.

66. *Id.* at 570–71.

67. Adler, *supra* note 13, at 598.

based inquiry under the first factor can be very helpful to establish *New Portraits*' transformativeness.<sup>68</sup> If a new meaning can be perceived by looking at *New Portraits*, then the second and third factor of the test will not weigh against a finding of fair use.<sup>69</sup> As for the fourth factor, the absence of any market usurpation by Prince—quite the opposite in fact—would not only support a finding of fair use, but could also be seen as a further way to prove the transformativeness of *New Portraits*.<sup>70</sup>

A. *The challenge of assessing New Portraits' transformativeness*

The difficulty of finding transformativeness in appropriation art, and therefore for *New Portraits*, is caused by its post-modern conceptual purpose, and more specifically by the difficulty of assessing Prince's intent or intended meaning,<sup>71</sup> and by the fact that a side-by-side comparison of the two-works' aesthetics would not be helpful to support transformativeness.<sup>72</sup> However, the recent shift in case law from the author's intent to the public's perception may actually be relevant to support a finding of transformativeness in *New Portraits* because it enables to identify potential new meanings.<sup>73</sup>

1. *The difficulty of articulating Prince's intent*

The artist's intent in creating the new work has long been a key element for courts when assessing whether it is transformative. In *Blanch*, Koons had reused parts of a photo made by plaintiff as part of his "Niagara" collage painting. The original photo was an ad picture showing a woman's legs. Koons's collage features several pairs of legs, including those from Blanch's photograph. The Second Circuit found that the use was transformative because of differing purposes between the two works, and because, as a consequence, Koons's use of the photo conveyed new information, aesthetics and insights.<sup>74</sup> To reach this conclusion, the court used Koons's statements and considered that he had established a proper justification for borrowing the picture based on the following declaration: "the photograph is typical of a

68. See discussion *infra* Section A.A.

69. See discussion *infra* Section A.B.

70. See discussion *infra* Section A.C.

71. See discussion *infra* Section 1.a.1.

72. See discussion *infra* Section 1.a.2.

73. See discussion *infra* Section 1.a.3.

74. *Blanch v. Koons*, 467 F.3d 244, 252–53 (2d Cir. 2006) (The court specifically highlights the "entirely different purpose and meaning" of the objects pictured to conclude that the use in question was transformative.).

certain style of mass communication. . . . By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary.”<sup>75</sup> Based on these statements, the court considered that “Koons *saw* certain criteria in the notecard that he thought made it a workable source. He *believed* it to be typical, commonplace and familiar . . . [H]e *viewed* the picture as part of the mass culture—’resting in the collective sub-consciousness of people regardless of whether the card had actually ever been seen by such people.”<sup>76</sup>

The district court’s opinion in *Cariou v. Prince* reiterated the “requirement that the new work in some way comment on, relate to the historical context of, or critically refers back to the original works,”<sup>77</sup> and interpreting again this requirement in light of the artist’s intent to create the work. Based on Prince’s testimony (which some may consider part of his artistic project)<sup>78</sup> that he did not have any intent to comment on Cariou’s photographs or on aspects of society more broadly,<sup>79</sup> the district court granted summary judgment to Cariou. Prince’s statement that he did not have any specific intent in creating *Canal Zone* was immediately dispositive of fair use of the court. Similarly, relying on Prince’s intent in creating *New Portraits* may prove difficult. Considering that the absence of meaning in images lies at the core of Prince’s postmodern work, to the point where Prince’s statements in *Cariou v. Prince* could be considered part of the work of art itself,<sup>80</sup> asking again for Prince to articulate a clear transformative intent might be a perilous path. Nevertheless, courts have recently adopted a different approach when it comes to determining whether new work has new meaning, which we will now investigate.

## *2. Aesthetic side-by-side comparisons are silent on New Portraits’ transformativeness*

The artist’s intent is not necessarily relevant when it comes to assessing whether a work of art incorporating another work of art has a new meaning, as recently acknowledged by the Second Circuit. In *Cariou*, the Court of Appeals for the Second Circuit reversed the district court’s decision (based

75. *Id.* at 255.

76. *Id.* at 305 (Katzmann, J., concurring) (emphasis added).

77. *Cariou v. Prince*, 784 F. Supp. 2d 337, 348 (S.D.N.Y. 2011).

78. *See generally* Adler, *supra* note 13, at 588–89 (for more details on Prince’s declared intent (or absence thereof) when creating the *Canal Zone* series).

79. *Cariou*, 784 F. Supp. 2d at 349. On appeal, Prince argued that his reluctance to express a clear message for the *Canal Zone* series was aligned with the postmodern background of his whole art and the absence of any set and defined meaning. Joint Brief and Special Appendix for Defendants-Appellants at 29, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (No. 11-1197-CV).

80. *See* Adler, *supra* note 13, at 589.



on the *Rogers* reasoning),<sup>81</sup> and ruled that the absence of articulated comments from the author on the original work was not dispositive of transformativeness, reiterating the non-exhaustive nature of the enumeration in Section 107 of the Copyright Act.<sup>82</sup>

In this opinion, the Court of Appeals reversed the district court's decision and ruled that "the law does not require that a secondary use comment on the original artist or work, or popular culture."<sup>83</sup> In this case, Prince had used photographs from Cariou's *Yes Rasta* in a series of paintings and collages titled *Canal Zone*. Prince had significantly altered most of the photographs, mainly by painting lozenges over their subject's faces, and by using only portions of the pictures.<sup>84</sup> Based on the *Campbell* ruling, the court considered that Prince's series had an entirely different aesthetic than Cariou's photographs, and that *Canal Zone* was transformative "even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so."<sup>85</sup>

To support its finding of fair use, the court asserted that "Prince's images . . . have a different character, give Cariou's photographs a new expression, and employ *new aesthetics with creative and communicative results distinct from Cariou's*."<sup>86</sup> The court put its focus on the works themselves, and more specifically on "how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work."<sup>87</sup> The focus therefore turned from the artist's subjective intent (assuming it can be articulated) to the aesthetics of the works and whether the two works, compared side-by-side, appear to have different "new expression, meaning, or message."<sup>88</sup> In other words, the *Cariou* decision from the Court of Appeals marked the "shift away from the singular, subjective intent of the putative fair user towards a more audience-focused inquiry."<sup>89</sup>

Based on these criteria, the court considered that 25 of Prince's works were fair use, but remanded five works to the district court to assess transformativeness, because Prince's alterations were not significant enough to allow the court to directly find fair use. The fact that the court did not find that these five works were fair use can be troubling, especially since these

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

82. *Id.* at 707–08.

83. *Id.* at 698.

84. *Id.* at 699.

85. *Id.* at 707 (emphasis added).

86. *Id.* at 708 (emphasis added).

87. *Id.* at 707.

88. *Id.* at 706.

89. Andrew Gilden & Timothy Green, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. DIALOGUE 88, 88 (2013).

works were aesthetically very similar to some of the other 25 other that the court deemed fair use.

With *New Portraits*, a side-by-side comparison would not be very helpful for Prince's defense. Indeed, the only alterations that Prince made consisted in including comments (including his) *under* the photos, which remain unaltered in themselves. A reasonable observer could well consider, in light of *Cariou v. Prince*, that a side-by-side comparison is dispositive of fair use. As this strict application of the *Cariou* precedent to *New Portraits* shows, a side-by-side comparison by any reasonable observer may preclude lots of works from adequate protection by the fair use doctrine.<sup>90</sup> Such a standard can be relevant for many appropriation artists. However, it still fails to capture the conceptual nature of appropriation art and to address the issues raised by verbatim copying like Sherrie Levine's *After Walker Evans* or Prince's *New Portraits*.<sup>91</sup> Indeed, in contemporary art generally, but even more so in appropriation art, "the artist's technical skills are less important than his conceptual ability to place images in different settings and, thereby, change their meaning. Appropriation art has been commonly described 'as getting the hand out of art and putting the brain in.'"<sup>92</sup> Looking only in the square picture of the work might be the wrong question to ask when assessing whether new work has new meaning. As emphasized by Professor Amy Adler,

[a]s we know from the history of art, an artist can affect a work's meaning with nothing more than a few minor gestures. The aesthetics philosopher Nelson Goodman wrote: 'Extremely subtle changes can alter the whole design, feeling, or expression of a painting. Indeed, the slightest perceptual differences sometimes matter the most aesthetically . . .'<sup>93</sup>

Relying too heavily on aesthetics may actually lead one to miss the real change in meaning in the reappropriated work. As argued by some, "[t]he precedent set in *Cariou v. Prince* infantilizes appropriation art by requiring

90. Johnathan Francis, *On Appropriation: Cariou v. Prince and Measuring Contextual Transformation in Fair Use*, 29 BERKELEY TECH. L.J. 681, 713 (2014) ("The *Cariou* transformation test divorces artwork, especially appropriation artwork, from an individual's contextual and experiential engagement with the artwork.").

91. *Id.* at 702–03.

92. Rachel Isabelle Butt, *Appropriation Art and Fair Use*, 25 OHIO ST. J. ON DISP. RESOL. 1055, 1060 (2010) (quoting William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2000)).

93. Adler, *supra* note 13, at 605 (quoting NELSON GOODMAN, LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS 108 (1976)).

courts to compare two works of art based on facially observable content alterations, as opposed to the purpose or conceptual innovation of the artist.”<sup>94</sup>

Nevertheless, the Second Circuit ruling’s swift from the artist to the public may be seen as an opportunity to broaden the category of reference viewers by including art expert’s opinions.

*3. Shifting from intent to perception: how art professionals’ opinions matter to assessing transformativeness in New Portraits*

It could be argued that the court referred to the works’ aesthetics in *Cariou* only as one empirical basis for its finding of distinct “creative and communicative results,”<sup>95</sup> one proxy, among others, for finding new meaning. More specifically, aesthetics could be considered one way, among others, that a “reasonable observer” could assess new meaning in secondary work. On this assumption, I suggest there is a case to be made for Prince based on the *Cariou* opinion. Indeed, the *Cariou* court seems to acknowledge the limits of this aesthetics-only approach to transformativeness. When the court held that “[a] secondary work may modify the original without being transformative,”<sup>96</sup> this may simply mean that not just any physical alteration will pass the transformativeness test. But this may also be the court acknowledging the conceptual nature of art. If alterations are not sufficient for new meaning something else must be responsible for it. In fact, alterations may not even be necessary. A secondary work can be transformative without much modification to the original work. Hence, the *Cariou* opinion motivates a shift in focus from the aesthetics of the works to the audience’s perception of its meaning.

Focusing on the artworks as they are perceived to assess transformativeness may seem challenging when it comes to appropriation art. As argued by Professor Amy Adler, “art is no longer ‘something primarily to be looked at.’”<sup>97</sup> While acknowledging the increasingly conceptual nature of art, I believe that the concrete object embodying the work still matters, even in appropriation art. This is why people visit museum and galleries, and why some spend millions on artworks. Therefore, referring to the works of art *in them-*

94. Shoshana Rosenthal, Note, *A Critique of the Reasonable Observer: Why Fair Use Fails to Protect Appropriation Art*, 13 COLO. TECH. L.J. 445, 450 (2015).

95. *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013).

96. *Id.*

97. Adler, *supra* note 13, at 601 (quoting A. C. DANTO, *AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY*, 16 (1997)).

*selves* for assessing transformativeness is not necessarily ill suited to contemporary art. Taking account of the materiality of artworks makes all the more sense the “reasonable observer” referred to by the Court of Appeals need not be bad news for appropriation artists. Granted, relying on the average observer’s judgement may be tricky, insofar as the underlying theories of appropriation art are hardly widespread. Yet, the shift from the artist’s intent to the reasonable observer refocuses our attention onto audiences more generally and the (new) message they can *potentially* perceive. A reasonable observer need not be totally alien contemporary art. There is nothing in the court’s opinion preventing any supplementation of the “reasonable observer” test by art amateurs or experts.<sup>98</sup> After all, courts already regularly rely on expert testimony to assess infringement, and more precisely to determine “substantial similarity.” To support this, some scholars have drawn a parallel between art and computer programs to determine whether an average audience is well positioned to make the assessment.<sup>99</sup> Indeed, even in fine arts, courts sometimes defer to the art world’s judgement, as shown in some authenticity cases and defended by copyright scholars such as Professor Jeanne C. Fromer.<sup>100</sup> Also, courts sometimes take into account how *target* audiences, not just any average audience, perceive art, in order to assess the potential meaning or effects of visual art, especially in cases involving child pornography.<sup>101</sup> Hence, despite *Cariou*’s court’s reference to the “average observer,” strong arguments support the provision of art experts’ opinions to establish *New Portraits*’ meaning and transformativeness.

On that basis, a reasonable yet informed observer of *New Portraits* could well find that the series conveys new meaning. The use of expert testimony or statements from the target audience for the purpose of comparing

98. See generally *id.*; see also Rosenthal, *supra* note 94, at 460.

99. Rosenthal, *supra* note 94, at 462; see also FED. R. EVID. 702 (providing that expert evidence is admissible when “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”) (emphasis added).

100. See, e.g., Thome v. Alexander & Louisa Calder Foundation, 70 A.D.3d 88, 99 (N.Y. App. Div. 2009) (“Since art authentication involves the exercise of the expert’s informed judgment, it is highly subjective, and even highly regarded and knowledgeable experts may disagree on questions of authentication. Simply put, determinations of the authenticity of art work are complex and highly subjective assertions of fact. As such, disputes concerning authenticity are particularly ill-suited to resolution by declaratory judgment. The law cannot give an art owner a clear legal right to a declaration of authenticity when such a declaration by definition will not be definitive.”) (internal citations omitted); see also Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 MICH. L. REV. 1251, 1288–89 (2014).

101. This is particularly true for child pornography cases where courts assess whether or not the pictures depict a “lascivious exhibition of the genitals” by relying on pedophiles’ perception. See *U.S. v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994) (where the court suggested on this basis that a playground is a sexual setting); see also *U.S. v. Johnson*, 639 F.3d 433, 441 (8th Cir. 2011).

works side-by-side would be extremely helpful for appropriation art in general, and for Prince in particular (considering his international recognition by art professionals). This informed observer could base her finding of a potential new meaning on many art critics' opinions about *New Portraits*, such as:

it's what he does in the comments field that is truly brilliant, and which adds layers on top of the disconcerting images. Here he is delving as deep as he ever has into privacy, copyright, and appropriation, twisting images so that they actually seem to undergo some sort of sick psychic-artistic transubstantiation where they no longer belong to the original makers;<sup>102</sup>

or: "Prince's appropriations of existing photographs are never merely copies of the already available. Instead, they extract a kind of photographic unconscious from the image, bringing to the fore suppressed truths about its meaning and its making."<sup>103</sup> A reasonable observer could find that *New Portraits*' new message is one of vanity, artificiality, and lack of originality, like "an invitation to think anew of an already accepted reality."<sup>104</sup> In addition to enabling courts to make more informed decisions based on knowledge they might miss (as with computer programs), this approach would also keep the fair use doctrine consistent and compliant with its First Amendment rationales, i.e., that fair use "does not require that meaning be understood or valued unanimously."<sup>105</sup>

As soon as *New Portraits*' transformativeness would be established, mainly by experts or professional testimonies, the commercial nature of Prince's work would be irrelevant, as stated by the Supreme Court in *Campbell*. As noted by the *Cariou* court, "[a]lthough there is no question that Prince's artworks are commercial, we do not place much significance on that fact due to the transformative nature of the work."<sup>106</sup> Nevertheless, the three other factors of the fair use test would still require examination.

102. Jerry Saltz, *Richard Prince's Instagram Paintings Are Genius Trolling*, VULTURE (Sept. 23, 2014), <http://www.vulture.com/2014/09/richard-prince-instagram-pervert-troll-genius.html>.

103. SPECTOR, *supra* note 1, at 26.

104. *Id.* at 22.

105. Brief for the Andy Warhol Foundation for the Visual Arts, Inc. and the Robert Rauschenberg Foundation as Amici Curiae in Support of Further Evidentiary Proceedings for Purposes of Determining Fair Use on Remand at 7 n.6, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. Oct. 22, 2013) (No. 08-CIV-11327).

106. *Cariou*, 714 F.3d at 708.

*B. Factors 2 and 3 are made irrelevant to fair use by transformativeness*

As for the three remaining factors, they would likely be of little significance if transformativeness were to be established. In *Cariou*, the Second Circuit used transformativeness (the first factor) as the central focus of the fair use inquiry.<sup>107</sup> As for the second factor, the court concluded that the fact that Cariou's work was published and creative was of limited significance as transformativeness was established.<sup>108</sup> Similarly, the court disposed quickly of the third factor and considered that the amount and substantiality factor should be interpreted in conjunction with transformativeness.<sup>109</sup> Finally, the court held that the more transformative the use, the less significant the market substitution factor.<sup>110</sup> In other words, based on a strict interpretation of the *Cariou* opinion, the three other factors would probably not bar any fair use finding should Prince's work be considered transformative.

*C. Factor 4 supports the finding of transformativeness of New Portraits under factor 1*

The fourth factor (market substitution) could prove particularly helpful for Prince's defense. In *Cariou*, despite the fact that the plaintiff was a famous professional photographer, the court held that "Prince's audience is very different from Cariou's, and there is no evidence that Prince's work ever touched—much less usurped—either the primary or derivative market for Cariou's work . . . Prince's work appeals to an entirely different sort of collector than Cariou's."<sup>111</sup> The same reasoning can be used for *New Portraits*: what makes *New Portraits* valuable for the art world is not related to the value of the original underlying photographs.<sup>112</sup> Prince's art value does not really reside in the photos and the underlying comments in themselves, but rather on their selection by Prince as some kind of curator of our society on social media.<sup>113</sup> To me, the absence of any market substitution between

107. See Sarah L. Cronin & Joshua M. Keesan, *The Art of Appropriation Cariou v. Prince Concerns Whether Art That Incorporates Copyrighted Material Is Sufficiently Transformative to Qualify As Fair Use*, 37-MAR L.A. LAW. 23, 26 (2014).

108. *Cariou*, 714 F.3d at 709–10.

109. *Id.* at 710.

110. *Id.* (quoting *Castle Rock Entm't, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998)).

111. *Id.* at 709.

112. For a general argument that appropriation art does not usurp any market share for the original work, see *id.* at 708–09.

113. Adler, *supra* note 13, at 572.

Cariou and Prince even seems an additional element in favor of transformativeness because it clearly demonstrates that almost identical pictures can have different markets, which means that they have different audiences and that the target audience of the secondary work most likely perceives some meaning or message that is lacking in the original image.<sup>114</sup>

The issue of secondary markets may seem more complex, since it involves a more hypothetical projection of licensing options available to the initial work. As pointed out by some authors, this inquiry entails a circular analysis.<sup>115</sup> Indeed, “a work has licensing value if it is used in the secondary work, but the value is dependent on the transformativeness of that secondary work.”<sup>116</sup> For this reason, among others, the inquiry often leads to overvaluation of the initial work.<sup>117</sup> In any case, for reasons that also apply to the primary market, *New Portraits* would not usurp any secondary market share of the original works.

It could even be argued that, in addition to not usurping any market shares from the authors of the original photographs, Prince actually caused some kind of increase in their market value (in demand), as shown by the sale of some of their photos by the Suicide Girls collective. Even if the Suicide Girls' works were sold USD 90 (as opposed to the USD 90,000 reportedly cashed by Prince for the sale of one of his *New Portraits*), one could argue that the Suicide Girls had (almost) no market for the sale of their pictures before being appropriated by Prince. The same logic likely applied to Mannie Garcia whose photograph of President Barack Obama sold for higher prices after Shepard Fairey had appropriated it in his famous *Hope* poster work.<sup>118</sup>

Hence, I conclude that *New Portraits* would successfully pass the fourth factor test. The upshot of this inquiry could prove helpful for the purpose of assessing the work's transformative nature under the first prong of the fair use test.

114. While I believe that the fourth factor could be used in a more elaborate manner by courts to feed the transformativeness analysis regarding *New Portraits*, I disagree with Professor Amy Adler when she argues that it should become the leading factor in the fair use test. Despite the challenges raised by *Cariou v. Prince* for contemporary art, I appreciate that art history includes many examples of artists whose value became obvious long after their works were created (V. Van Gogh might be a case in point). *Id.* at 621. Prof. Adler pleads for “giving renewed primacy to the market inquiry under the now diminished fourth factor of the test” in a way which would “take courts out of the doomed and unpredictable enterprise of adjudicating meaning.” *Id.*

115. See e.g., Francis, *supra* note 90; see also Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES (Mar. 23, 2009), <http://www.nytimes.com/2009/03/24/arts/design/24photo.html>.

116. Francis, *supra* note 90, at 708.

117. *Id.*

118. Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES (Mar. 23, 2009), <http://www.nytimes.com/2009/03/24/arts/design/24photo.html>.

## CONCLUSION

A decade ago, Professor Lawrence Lessig noted that “fair use in America simply means the right to hire a lawyer.”<sup>119</sup> As this Article illustrates, this is especially true of appropriation artists, considering current precedents on the fair use doctrine—and considering that some of them *can* actually afford long legal proceedings. The blurriness of the fair use test as applied to contemporary art seems to favor rich artists, such as Prince, and can therefore have a chilling effect on more modest artists. At the same time, it could be argued that some of these artists can afford these suits, and that going beyond what the law clearly authorizes by relying more and more on copying is somehow inherent to their work. Although this may sound cliché, “art often uses law as a creative starting point, a boundary to break rather than follow.”<sup>120</sup> Yet I believe this trend, if rebel on its face, also has a constructive legal dimension. Works like the *New Portraits* that are legally disruptive can help courts better define the fair use doctrine by adapting the contour of the first factor in light of new trends in contemporary art. In the long term, this could prove beneficial for all potential creators, including more minor artists.

Despite its blurriness, there is no denying that recent case law on parody and more generally on fair use in visual art focuses increasingly on the audience’s *potential* perception. On this basis, I have argued that there are strong arguments under current case law to support the view that *New Portraits* constitutes fair use because a reasonable (and reasonably informed) observer would probably find that Prince’s works can count as parodies of the underlying works (or at least involve commenting that is transformative). Moreover, I have suggested that the inquiry under the fourth factor would be very favorable to Prince because *New Portraits* don’t usurp any primary or secondary markets shares from the original underlying photographs. In fact, *New Portraits* likely created some form of market for the originals, which they did not have beforehand. What with the first and fourth factors, using target audiences as the reference standard would be very helpful to support a fair use defense. However, this audience-focused approach to transformativeness also runs the risk of a more elitist conception of the arts, which could end up inducing a chilling effect on more minor (or just less well known) artists.<sup>121</sup> Indeed, “it is important that the new boundaries of fair use are not

119. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USED TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2005).

120. Adler, *supra* note 13, at 625; *see also* Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach*, 24 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 321, 328 (2014).

121. *See* Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 *U. CHI. L. REV. DIALOGUE* 88, 97–8 (2013).



set by socioeconomic status or judicial distinctions between high and low art.”<sup>122</sup> Nevertheless, having an elitist approach to fair use would only be consistent with the generally elitist approach of the art market itself, and it is doubtful that the role of judges includes determining assess what is valuable in art (hence deserves more protection) and what is not.

122. *Id.* at 104.