Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood

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This paper rests on two foundations. One is the conception of fair use that federal Judge Pierre N. Leval[1] has so eloquently articulated over recent years, i.e., that fair use is not an *exception* to copyright's overall objective but, rather, wholly *consistent* with that objective.[2] If copyright's initial purpose was, as Leval has argued, to be an incentive that would stimulate progress in the arts for the intellectual enrichment of the public, then what is basically required in order to determine whether any particular use is or is not a fair one is a two-pronged inquiry. First, is the use consistent with copyright's underlying purpose of stimulating further productive thought and public instruction?[3] Second, if so does it then do so without unduly dampening copyright's incentive for creativity?

The other foundation upon which this paper rests is the proposition that the realms of the verbal and the visual are so fundamentally different that the rules developed to govern fair use in the one realm—language-based rules developed primarily in the context of the printed word—are not necessarily the most productive rules by which to govern fair use in the other. What will be argued here is that the objective of copyright could better be achieved if the visual arts had a distinct and separate fair use regime of their own. In considering the outlines of such a regime, regard must be given not only to the ways in which the visual arts, taken as a whole, differ from their creative counterparts in other realms and most especially from the domain of the printed word, but also to the ways in which the various genres within the visual arts differ from one another. Four such differences are considered below.

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[1] Judge Leval was first appointed to the District Court for the Southern District of New York in 1977 and subsequently elevated to the U.S. Court of Appeals for the Second Circuit in 1993.

[2] *See generally* Pierre N. Leval, *Toward a Fair Use Standard,* 103 HARV. L. REV. 1105 (1990).

[3] Judge Leval refers to uses that meet this first test (i.e., uses that introduce additional creative elements rather than simply duplicate the original copyrighted material) as "transformative" uses. His views on fair use, which have proven highly influential, are set forth in an extensive series of opinions, speeches, and law review articles.

I.

In contrast to its relatively infrequent use in literature, appropriation has played and continues to play an important role in many of the most significant visual art movements of the past century. On a recent visit to the Hirshorn Museum and Sculpture Garden,[4] I was struck by how many objects that there were on view in which one artist made reference to the work of another. In the Museum's then-ongoing special exhibition, *Regarding Beauty,*[5] the first six works of art that a visitor encountered—works by artists as diverse as Jannis Kounellis, Michelangelo Pistoletto, Yasumasa Morimura and Cindy Sherman—all incorporated, in part or in whole, other works of art: casts of antique sculpture, a series of portraits from the Renaissance, and, in one instance, Manet's great painting *Olympia* in its entirety.

On another floor, Nam June Paik's *Video Flag*—its seventy thirteen-inch monitors arranged in the familiar format of the American flag—was pulsing out a barrage of micro-second-long snippets culled from television newscasts, documentaries, commercials and films. Elsewhere were Larry Rivers's witty reprises of Cezanne's *Cardplayers* and David's standing portrait of Napoleon together with Gerhard Richter's sumptuous repainting of Titian's *Annunciation* and Andy Warhol's own idiosyncratic version of the *Mona Lisa.* Outside the museum, in shimmering stainless steel, stood Jeff Koons's six-foot-high *Kiepenkerl,* a work cast directly from a twentieth-century replica of a nineteenth-century bronze sculpture depicting a local tenant farmer that once stood in a square in Munster, Germany.

This is more than coincidence. As the California-based experimental-music and art collective Negativland has said:

> Artists have always perceived the environment around them as both inspiration to act and as raw material to mold and remold. However, this particular century has presented us with a new kind of... human environment. We are now all immersed in an ever-growing media environment—an environment as real and just as affecting as the natural one from which it sprang.[6]

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[4] The Hirshorn Museum and Sculpture Garden is the Smithsonian Institution's museum of modern and contemporary art. Located on the national Mall in Washington, D.C., between Seventh and Ninth Streets, South West, it first opened to the public in October, 1974.

[5] *Regarding Beauty: A View of the Twentieth Century* was a group exhibition organized by the Hirshorn Museum and Sculpture Garden and shown in Washington from October 7, 1999, through January 17, 2000. It was subsequently shown at the Haus der Kunst in Munich from February 11 through April 30, 2000.

[6] NEGATIVLAND, FAIR USE, *available at* http://www.negativland.com/fairuse.html (last

In tandem with the emergence of this "ever-growing media environment" has been the emergence, not surprisingly, of a new legal environment as well. The environment by which artists had once been surrounded was a freely usable one of landscapes, seascapes, and townscapes, of cottages and cows. This new environment—the one that artists today are seeking to mold and remold—consists of an ever-greater measure of media and other human creations in which intellectual property rights generally subsist. A contemporary artist who today seeks to portray aspects of everyday life must, in the course of doing so, almost inescapably bump up against somebody else's copyrighted material.

Beyond this change in subject matter, the repertory of techniques available to contemporary artists has also expanded. One important early twentieth-century development was the emergence of collage, a technique that frequently depends upon the use of previously printed materials. A corollary technique—common to virtually all of the photography-based arts—is montage, which again, may rely heavily on pre-existing films, photographs, or video.[7] Artists who would avoid complications by limiting their appropriations to material in the public domain find that the public domain itself has shrunk and continues to shrink. The American artist Cindy Sherman, for example, is not yet fifty years old. If the artists of some future generation should choose to build upon her art in the same manner that she herself has chosen to build upon the work of still earlier artists, it could well be another one hundred years or more before her work would be safely in the public domain and those artists of the future were clearly at liberty to do so.

If our society is to continue to be enriched by the vigorous production and distribution of original works of visual art, then visual artists need a license to forage widely—far more widely than conventionally interpreted copyright law might permit—in gathering the raw materials out of which to compose their work. In *Campbell v. Acuff-Rose Music,*[8] the United States Supreme Court unanimously ruled that the rap group 2 Live Crew's 1989 version of Roy Orbison's 1964 hit song "Oh, Pretty Woman" could be characterized as a parody and that, accordingly—under a judicially crafted exception to the Copyright Law—it did not constitute an infringement of the original. Although the 2 Live Crew case might be read as a promising step in that direction, it should be read with great caution. In the end, 2 Live Crew's in-your-face rap music proved so outrageous that the Supreme Court could not escape its parodic element.[9]

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visited Feb. 10, 2001).

[7] A montage is "the combining of pictorial elements from different sources in a single composition." WEBSTER'S COLLEGE DICTIONARY 878 (1991).

[8] 510 U.S. 569 (1994).

[9] *Id.* at 578–85. Further details concerning this case, together with samples from the two

That the deadpan and often elusive ironies of post-modernist visual art are also parodies may not be quite so clear. *Rogers v. Koons,*[10] a case in which the court never really *got* what the artist intended, certainly seems a case in point.[11] Even had the *Koons* case been decided otherwise, it would still have left visual artists with a remarkably narrow fair use opening through which to wiggle. Parody is by no means the only mode by which one work of art may refer to another in order to achieve a desired artistic effect.

The American literary critic R.P. Blackmur once observed that poetry had the capacity to add to our "stock of available reality."[12] Works of visual art share that same capacity. When the copyright law is used—as it was in *Koons*—not merely to award damages but actually to suppress a work of art, then its effect is to diminish the stock of reality available to all of those who might one day have come into contact with that work. Or worse, as Louise Harmon has pointed out in an article raising questions about the *Koons* decision, the loss to the public in such an instance may go far beyond just that one particular work of art.[13] "Other artworks," she wrote, "may never reach maturation; some may never be conceived. There is much to mourn in Jeff Koons's defeat. Little unseen deaths inside you, inside me."[14]

In terms of the public's enrichment, the benefits to be expected from permitting visual artists to work at their imaginative fullest would seem to outweigh by far any resulting disincentives to creativity. Visual artists, above all, need a fair use rule that is both flexible enough and spacious enough to permit them a considerable degree of appropriation. To the extent that they might abuse such a privilege, remedies less drastic than to deprive the public of their work might better be established elsewhere than under the copyright law.

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musical versions, can be found at THE COPYRIGHT WEBSITE, FINALLY, FAIR USE, http://www.benedict.com/audio/crew/crew.htm (last visted Jan. 12, 2001).

[10] 960 F.2d 301 (2d Cir. 1992).

[11] In *Rogers v. Koons,* the work of art at issue was a sculpture entitled *String of Puppies* that the well-known New York artist Jeff Koons had based directly (and without authority) on an image by the relatively lesser-known California photographer Art Rogers. Rogers sued for copyright infringement. Koons's defense was that his sculpture was essentially satiric or parodic in nature and, accordingly, was immune from any charge of infringement as a form of fair use. In rejecting that claim and finding for Rogers, the court noted that parody can function as such only when the work subject to parody was already familiar to the audience for the parodic version and found that such was not the case in this instant situation. *Id.* at 310.

[12] JAMES D. BLOOM, THE STOCK OF AVAILABLE REALITY: R.P. BLACKMUR AND JOHN BERRYMAN (1984).

[13] *See* Louise Harmon, *Law, Art and the Killing Jar,* 79 IOWA L. REV. 367, 412 (1994).

[14] *Id.*

II.

For the visual arts to achieve their maximum vigor, not only do artists require the freedom to work at their imaginative fullest but they also require the support provided by an "artworld" of collectors, curators, critics and others. Such an artworld cannot function properly, however, without the relatively unimpeded circulation within it of images of contemporary art in such forms as slides, transparencies, and printed illustrations. Of the several sensory dominions we inhabit, that of the visual is arguably the most complex—both in the richness of the elements by which it is composed and in the simultaneity with which those elements may be apprehended. At any given moment, our visual field can encompass hundreds or even thousands of these elements, each of a distinctive color, contour, and texture. In terms of color alone, the appearance of any single element may change from moment to moment depending upon the distance from which it is seen, the light by which it is illuminated, and the proximity it has to one or more other elements. If Eskimos truly do have thirty words for snow, that number pales by comparison to the vocabulary that would be required—perhaps a million words or more—to name all the distinct colors among which the human eye can purportedly differentiate. The computer does even better. A 24-bit monitor has the capacity to produce over sixteen million different colors.

Regard must be given here to those differences alluded to earlier between the realms of the verbal and the visual. That words can be adequately defined by other words is what makes a dictionary possible. By that same token, most verbal compositions—a novel, a play, even a narrative poem—can be effectively summarized or even paraphrased. A reviewer, for example, might write a perfectly intelligible review of a new novel or play without ever actually quoting a single line of text.

In general, though, images cannot be adequately defined at all, either by words or by other images. Likewise, works of visual art—because they partake of the simultaneity and infinite complexity of the visual realm—cannot be adequately summarized or paraphrased. Neither can they be accurately described. Imagine trying to provide an adequate verbal account of Botticelli's *Primavera*[15] or Rembrandt's *Night Watch.*[16] Unlike the situation of the literary critic, it would be virtually impossible for an art reviewer to write an intelligible review of a new painting without providing the reader with some pictorial notion of what the painting itself looked like. Not even quotations can help. Works of visual art, unlike literary ones, are incapable of yielding up quotable extracts—some small

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[15] Sandro Botticelli (1445–1510), *Primavera* (c. 1477–78), Uffizi Gallery, Florence.

[16] Rembrandt van Rijn (1606–69), *The Militia Company of Captain Frans Banning Cocq ("Night Watch")* (1642), Rijksmuseum, Amsterdam.

detail that might give a better sense of the whole.

If works of contemporary visual art are to be discussed, analyzed, debated, compared, championed, criticized, demonized, or otherwise to serve as the center of any serious discourse, then images of those works—images of them in full, not just details—must be available to circulate among those who participate in that discourse and who ultimately provide a support system for the creators of those works.

Just as it might be sound copyright policy to provide contemporary visual artists with greater latitude than other creative practitioners as to what they may incorporate into their own work, it may also be sound policy to limit the ability of such artists to use copyright to impede the free circulation of images of that work within the cultural and commercial marketplaces. Also important is that artists (or, as may be more frequently the case in actual practice, the surviving spouses or other heirs of artists) not be able to use copyright in wholly arbitrary ways as a means to stifle and/or control the views expressed by others with respect to their work. To put too great an emphasis on the exclusionary aspects of copyright is to undermine its fundamental public service objective.

Section 107 of the Copyright Act provides that, in determining whether certain uses for purposes such as criticism, comment, news reporting, teaching, scholarship, or research might be "fair uses" and consequently non-infringing, the factors to be considered in any particular case shall include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[17]

Arguably, then, in determining the fairness or unfairness of producing and distributing photographic and/or printed copies of a work of art for educational purposes or for comment and criticism, little or no weight should be given to the third of section 107's four fair use factors—the amount and substantiality of the portion used in relation to the copyrighted work as a whole.[18] Because visual images cannot be summarized, paraphrased, described, or even quoted from, it follows that uses intended for the purposes of education, criticism, and comment must—if they are to engender the meaningful discourse essential to ongoing well-being of the visual arts—necessarily include some greater "amount and substantiality" of the copyrighted original than might be the case for some other kind of a use or in some other area of creativity. Instead, added weight must go to

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[17] 17 U.S.C. § 107 (1994).

[18] § 107(3).

factor one—the purpose and character of such a use.[19]

Thus approached, a use that is truly aimed at encouraging a broader and/or more discriminating appreciation of a work of visual art should, absent some fatal problem under factor four, per se qualify as a fair use. Factor three, then, might regain some greater weight only when the purpose of the use did not pertain to education, criticism, or comment.

III.

The extent to which strong copyright protection *is* warranted for a work of visual art may depend upon the business model by which it is distributed to the public and the medium in which it was originally created. Works of visual art are distributed to the public through a broader variety of business models than are the products of other creative domains. Consider the spectrum along which these might be arrayed.

At one extreme is the model employed by Thomas Kinkade, the California painter of sentimental landscapes and rain-glittering city scenes whom *The New York Times* recently described as this country's most commercially successful artist.[20] Kinkade reportedly does not sell his original paintings at all. What he sells instead are prints made from these. Distributed by a captive network of more than two hundred galleries (the "Signature Galleries"), these prints are offered in a dazzling variety of formats: Studio Proofs, Gallery Proofs, Renaissance Editions, versions touched up with a little paint by a studio assistant, and versions touched up with quite a bit more paint by the artist himself. Prices can range from thirty-five dollars for a small framed gift card to ten thousand dollars or more for a large hand-touched paper print mounted on canvas. While some editions are limited in size, those limits can run up to several thousand for each size of each image. For fiscal 1999, Kinkade's publisher—the New York Stock Exchange listed Media Arts Group, Inc.—reported net revenues of one hundred twenty-six million dollars. Assuming that half the retail sales proceeds were retained by the galleries, that would suggest that the volume of Kinkade sales to the public is now in the vicinity of two hundred and fifty million dollars annually.

At the Kinkade end of the spectrum, then, what we have is the work of art as the source of a valuable image. At the other end of the spectrum, though—in total contrast—is the work of art as a precious object. The most familiar example of a work of art of this latter type is the hand-painted canvas that an artist has

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[19] § 107(1).

[20] Tessa DeCarlo, *Landscapes by the Carload: Art or Kitsch?*, N.Y. TIMES, Nov. 7, 1999, at 51 (describing Kinkade's working methods, marketing strategy, philosophy and audience).

personally created in a single copy—a copy that he or she hopes to sell for a price that will generally constitute the entire income ever to be realized from its production. As a specific example, consider a work by the contemporary British figurative painter Lucian Freud who has reportedly sold several of his most recent paintings for prices that were upwards of two million dollars each.

Let us now suppose, first, that each of these artists still retains copyright to his work and, second, that an art museum—the Philadelphia Museum of Art, for example—without the authorization of either artist, produces and offers for sale in its on-site museum shop, a set of full-color postcards of paintings by both these artists, Kinkade and Freud. Assuming that the museum can successfully argue that its distribution and sale of postcards is at bottom educational, thereby meeting the threshold test of section 107; and assuming that the third section 107 fair use factor is not to be given any weight; how confidently can we proceed to apply the fourth fair use factor—the one that addresses the effect of this use on the market?

In the case of Kinkade, the fourth factor makes an excellent fit. Kinkade's business model is essentially that of a book publisher who, without ever attempting to sell the underlying manuscript itself, simultaneously offers deluxe, clothbound and paperbound editions of the text. Under those circumstances, the unauthorized Kinkade postcard might compete directly with the small-framed gift cards that Kinkade's galleries themselves offer for thirty-five dollars. An attempt to defend such a use as fair under section 107 might very well founder over this fourth factor, potentially having an effect on the market for or value of the copyrighted work. To permit the manufacture and distribution of such postcards could only, in Judge Leval's analysis, diminish the artist's incentives for creativity without providing the public with any substantial benefit beyond that which it already enjoys.

The case of the Freudian postcards is different. Freud's business model—a very traditional model for painters—is to sell his original paintings and to suppress whatever urge he may otherwise feel to traffic in printed copies of these. The fourth factor of section 107 scarcely fits his situation at all. Assuming in the first place that the paintings depicted on the postcards were for sale—they might not be; they might be in the hands of museums that never dispose of works of art from their collections—it would still be ludicrous to contend that these postcards might adversely affect the artist's market because a potential purchaser of one of his paintings would not likely be tempted to acquire a postcard as a substitute.

Alternately, although such an unauthorized postcard might be competitive with an *authorized* small-scale printed version of the painting—in which case its manufacture and distribution might be palpably unfair—what if no such

authorized small-scale version is to be anticipated? The 2 LIVE CREW case,[21] discussed earlier, suggests that an unauthorized derivative work may constitute a fair use when there is little likelihood of a similar version ever appearing with the copyright owner's authorization. If these postcards and other small-scale printed versions are unauthorized derivative works, then it might be arguable, again in Levallian terms, that the museum's production and distribution of these Freudian postcards is enriching to the public without diminishing the artist's incentive for continued creativity in any substantial way.[22]

Between these Kinkadian and Freudian extremes are a host of other business models, each with its own following among visual artists. In every instance, to what extent and how the section 107 factors can be applied to even so seemingly simple a copy as a picture postcard will depend on very specific facts and circumstances. And picture postcards, in turn, are only the tip of the complexity. Offered within every museum shop, beyond those postcards, are a host of other art-derived products, some of such hefty and indisputable educational value as scholarly catalogues and some of such tangential or even dubious educational value as coffee cups and tee-shirts. Notwithstanding the fantasies of those who hope that copyright law might be smoothed out to an easy, uniform application, each of these many uses might still require a separate determination, on the basis of all of its particular facts and circumstances, to determine whether or not it was a fair one.

Further complicating the application of the fourth fair use factor in section 107 is that the range of materials and techniques employed to create both original works of visual art and copies of those works is also far broader than that to be found in other creative domains. Notwithstanding the variety of forms they may take, literary works are invariably embodied in language. Determining whether, and to what degree, any particular text may be a copy of some other—even when the language of the original has been changed through translation—may be little more, at least conceptually, than a case of comparing apples with apples. Within the visual arts, however, comparisons can rapidly escalate to the level of apples and oranges.

Until late in the nineteenth century, the visual fine arts largely consisted of painting in a variety of media and on a variety of surfaces, sculpture (both cast metal and carved wood or stone), printmaking, and drawing. In the years since, however, that list has expanded to include collage, constructed sculpture, sculpture cast or otherwise fabricated in glass, plastic and ceramic, conceptual

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[21] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[22] In other words, it is arguable that such a use might tend to be of benefit to the public without unduly discouraging the artist from further production. *See supra* note 2 and accompanying text (discussing the two-pronged test proposed by Judge Leval).

art, fabric art, earth art, and, perhaps most importantly, the whole and still-expanding range of photography-based fine art forms including still photography, motion pictures, video art, and, now just emerging, Internet art. Also expanded has been the range of materials and techniques by which these original works of fine art may be copied, sometimes in their original media, sometimes in other media altogether.

Returning to our hypothetical on-site museum store—the one that specializes in unauthorized copies—the least perplexing cases for fair use purposes might be those in which an original work of art was copied so exactly in terms both of its medium and its appearance as to be virtually indistinguishable from the original. That might, for example, be the case with a minimalist sculpture by Donald Judd or Carl Andre, a black and white photograph by Robert Mapplethorpe or a work of digitalized video art by Bruce Nauman. In those instances, the fourth fair use factor of section 107 again appears to make an easy fit. Setting aside their lack of appeal to that perhaps handful of collectors with the means to pay a premium price for a real Judd, Andre, Mapplethorpe, or Nauman original, the production and distribution of these copies might readily be enjoined on competitive grounds, i.e., that—to use another Levallian term—they are wholly duplicative rather than in any sense transformative.[23] Here the balance tips toward protection. For the public, no gain. For the artists, some pain.

Not so obvious, however, might be the outcome when the copy is in a different medium: a small black and white photograph of a monumental and brilliantly colored kinetic sculpture, for instance; or a videotape of the works hung in a painting exhibition. Consider the case of the sculpture. Even if the assertion that the photograph of the sculpture was fundamentally educational in purpose failed to eliminate the third fair use factor from consideration, it would by no means be clear how the "amount and substantiality" of the portion used in the photograph would weigh in relation to the monumental sculpture as a whole. As for the fourth fair use factor, its application to the museum-made photograph might, in turn, depend on whether the sculptor herself was seeking to exploit a market in such a derivative. At a policy level, this photographic copy—more transformative, less duplicative—might be understood as providing the public with a benefit beyond that furnished by the original without unduly penalizing the copyright owner in the course of doing so. Thus understood, such a use might, on balance, qualify as a fair one.

Again, as was the case with the different business models, generalities may be misleading. The determination of whether any particular unauthorized copy does or does not qualify as a fair use requires a careful examination of all the facts and circumstances surrounding both the original and that copy.

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[23] *See supra* note 3 (discussing Leval's concept of "transformative").

IV.

Particularly applicable to works of visual art is Susan Sontag's dictum that "art is not only about something; it is something."[24] It is here that the situation of the visual arts diverges most radically from that of the literary ones. With the possible exception of lyric poetry, literary works are primarily *about* something. This is not so for works of visual art. They are about, but they also *are.*

That distinction has not always been recognized. In the second of his *Bridgeman Art Library* opinions,[25] for example, Judge Lewis A. Kaplan observed that photographic "transparencies stand in the same relation to the original works of art as a photocopy stands to a page of typescript."[26] Notwithstanding whatever accuracy that analogy might have had in the particularly narrow context in which he invoked it—the question before Judge Kaplan concerned the degree of originality involved in making photographs of paintings—beyond that context the analogy he offered is wholly misleading. A transparency or other photograph of a work of art most emphatically does *not* bear the same relation to such work as does a photocopy to a page of typescript. The photocopy is literally a reproduction. It includes virtually everything of importance about the typescript except perhaps the watermark, weight, weave, and finish of the paper on which it was originally typed. In terms of the information it conveys about the text, however, it can readily be considered complete.

By contrast, the transparency of the painting is anything but complete. A confection of celluloid and colored dyes, it may capture the painting's informational content—in essence, what it's about—but in no way does it reflect what the painting is: that it is a tangible object with a physical scale and presence, a canvas support or other surface encrusted and/or stained with a distinctively applied coat of paint in a range of pigment-based colors that in the depth of their hues and their subtle interplay far exceed anything that a camera might possibly record. That the various paper products commonly generated from such transparencies—catalogue and book illustrations, postcards, posters, and various size prints suitable for framing—are so frequently referred to as "reproductions" seems an unfortunately imprecise and misleading usage. If Judge Kaplan's photocopy is truly what counts as a reproduction of the typescript from which it

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[24] Susan Sontag, *On Style, in* AGAINST INTERPRETATION 39 (1969).

[25] Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

[26] *Id.* at 198. The principal question in *Bridgeman* was whether meticulously prepared color transparencies of two-dimensional works of art that were themselves in the public domain contained a sufficient degree of originality to entitle such transparencies to independent copyright protection. *Id.* The Court held that they did not. *Id.*

was made, then the only thing that ought comparably to count as a reproduction of a six-foot-square heavily impastoed abstract expressionist canvas would be another six-foot-square canvas—a full-scale and just as heavily impastoed copy of the original. The transparency and its progeny are not reproductions. A more accurate term for them might be "photoreductions."

Here again, the third of section 107's fair use factors comes into play. The degree to which these photoreductions omit substantial parts of what a painting "is" may arguably have implications in applying this third factor. In dealing with such a photoreduction, what is the "portion used" that is to be compared in "amount and substantiality" with the copyrighted work as a whole? For example, in the case of one of our Freudian postcards, might we not appropriately think of such a postcard as little more than a thin, pale reflection of the larger and more imposing original? Might we not even analogize such a postcard to the quotation of a brief passage excerpted from a longer text?

Such an interpretation would, of course, provide a further degree of fair use protection to many of the photoreduction-based images in which museum shops traditionally deal. As a possible improvement on Judge Kaplan's photocopier analogy, consider this: a photograph has the same relation to an original painting as the literal translation of a palindrome might have to the palindrome itself. *"Madame, je suis Adam"* may certainly catch the literal sense of "Madam, I'm Adam." With equal certainty, though, what it has lost in translation is everything that made the original a palindrome, and also that which made it interesting in the first place.

V.

Fair use has so integral a connection to the maintenance of a robust visual creativity in our society that we can ill afford even to limit its application no less to lose it completely. Of the several threats it faces, two seem particularly noteworthy. The first threat is any effort to simplify its application—to formulate a one-size-fits-all rule that might be incorporated into software and provide prompt, clear, and reliable answers as to which proposed uses were and were not fair ones. For better or worse, fair use in the visual realm—with its extreme reliance on particular facts and circumstances—may never be a neat or tidy affair. The other threat, perhaps equally dangerous, might be the restriction of access to copyrighted materials in cyberspace. That could be particularly damaging in the case of artists.

Fair use is quintessentially a "don't ask" practice. First comes the use; and the discussion of whether or not it was a fair use follows, if and when the original copyright owner objects. A use authorized in advance is only an authorized use, not a fair one. When the authors of the 1995 White Paper speculated in an

ominous footnote that fair use might be an "anachronism with no role to play" in the age of electronic commerce, what they presumably meant was that fair use was a potential stumbling block.[27] Fair use is far too fact-specific to make an easy fit with a seamlessly functioning, self-regulating, and encryption-guarded system in which all of the aspects of a copyright negotiation—the scope and terms of a proposed use, the fee to be paid, and perhaps even the payment itself—might be wholly integrated into one smooth process.

Whatever the advantages of such a system in commercial convenience, the potential threat to creative freedom could be considerable. If visual artists are to enrich our society by "molding and remolding" the environment in which we live, they require unfettered access to all of the aspects of that environment—including however much thereof may happen to consist of materials copyrighted by others—so that they can do their work and so that we may have its ultimate benefit. In its way, fair use is the "Robin Hood" provision of copyright. Within limits, it permits the artist—not infrequently envisioned as a sort of rogue—to poach on the content-rich so long as excessive harm is not done and so long as something with a value beyond that of the original is thereby made available to everybody else. Even now as the lush and enchanted forest of cyberspace springs up all about us, room—some place for play, some proper clearing in the woods—still needs to be left for Robin Hood.

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[27] U.S. INFORMATION INFRASTRUCTURE TASK FORCE, U.S. PATENT AND TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, 73 n. 227 (1995) (the "White Paper").