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The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era

Heather J. Meeker

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COMMENT

THE INELUCTABLE MODALITY OF THE VISIBLE:[1] FAIR USE AND FINE ARTS IN THE POST-MODERN ERA

I. THE LAW 196
II. THE ARTS 213
III. CLASH OF LAW AND ART: POST-MODERNISM AND FAIR USE 220
IV. RECONCILING LAW AND ART: SHOULD THE FAIR USE DOCTRINE BE EXPANDED TO ACCOMODATE APPROPRIATIONISM? 229
V. CONCLUSION 236

James Joyce, through his alter-ego Stephen Dedalus, spoke of the "ineluctable modality of the visible." Joyce was the undisputed master of the literary allusion. He fed on both the classical and the pedestrian; he twisted, allegorized, sub-referenced and transformed the written word, leaving generations of awed readers to trace, follow, and finally dance along his literary footprints.

Post-modern artists, like Joyce in literature almost a century before, speak in a symbolic language of quotations and allusions. The grammar of this language is Appropriationism - the incorporation of recognizable visual images into new works of art. The style and philosophy of post-Modernism is heavily dependent upon the practice of Appropriationism, which gives contemporary art its unique and irreverent flair.

To the law, appropriation is simple copyright infringement, for which only minor exceptions are allowed through the doctrine of fair use. Appropriationists have tried to avoid liability by invoking the defense of fair use, to little avail. The philosophical underpinnings of post-Modernism and intellectual property are fundamentally at odds. Artists and legal scholars therefore share a concern that the doctrines of copyright are acting to silence artistic expression. How do we weigh the interests of the quoted against those of the quoter?

1. JAMES JOYCE, ULYSSES 37 (1st American ed. 1934).

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This Article sets forth the legal calculus of fair use, and how the fair use doctrine has been applied to fine arts. It next sketches the context for the trends in contemporary fine art that have stretched the doctrine to its limits. It then explores whether Appropriationism warrants a re-formulation of the fair use analysis, and concludes that it is not the calculus of liability, but the availability of remedy that must be re-examined.

I. THE LAW

A. *Policy Considerations of Fair Use*

Article I of the Constitution states: "The Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] This "Promotion" is the constitutional mandate behind all of copyright law - the fostering of creative expression and dissemination of ideas.

In order to promote creative expression, the law must balance two competing goals.[3] The first goal is to encourage the creation of new expression that is entirely original. To provide incentives for such creation, the law must provide a remedy for the free goods problem inherent in the market for all intellectual property.[4] In the absence of copyright protection, any person could reap the benefits of an author's efforts by copying and selling his work. Copyright law corrects the potential for abuse by granting the author a legal monopoly on the work's exploitation.[5] The rents from this monopoly are aimed at "encouragement of individual effort by personal gain."[6] In the world of fine arts, the protection of copyright is the only means an artist has for reaping the economic fruits of his creation.

The second goal of the law is to avoid stifling the creation of new expression that is based on existing works.[7] The grant of copyright limits such creation by exposing the authors of derivative

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2. U.S. CONST., art. I, § 8.

3. *See* Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 246-47 (1988).

4. Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1611 (1982).

5. *See* Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 451 (1984).

6. Mazer v. Stein, 347 U.S. 201, 219 (1954).

7. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

works to legal liability.[8] However, copyright law makes allowances for the derivative work process through the fair use doctrine.[9] Fair use promotes this second goal by granting authors the right to make limited use of copyrighted works. This mechanism serves to "subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."[10] In the world of fine arts, the doctrine acts to protect creative expression that uses an underlying work as a springboard to greater and further expression. Authors who use another work "add something to the material by placing it in an analytical or critical context, thereby making it their property . . . ."[11]

When courts rule on whether a use is infringement or fair use, they must determine which goal is more important. Such a determination will depend on conceptions toward the creative process. If one believes that creation is better described as an act undertaken in a vacuum, then it is more important to protect author's rights.[12] This has been called the "romantic" or Wordsworthian conception of the author,[13] akin to "creating Aphrodite from the foam of the sea."[14] This conception leads to a narrow definition of fair use.

However, if one believes that creation is best described as a synthesis of existing expression, then it is more important to allow artists to use previous works as building blocks for new work. Most legal commentators argue that such a conception is more realistic. Jessica Litman writes:

> Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers,

8. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1126 (1990).

9. *See generally*, Litman.

10. Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir. 1954).

11. Laurie Stearns, *Copy wrong: Plagiarism, Process, Property and the Law*, 80 CAL. L. REV. 513, 529 (1992). Some commentators suggest that this should be one of the factors in determining fair use. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

12. Litman at 965.

13. *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of 'Authorship'*, 1991 DUKE L. J. 455, 459 n. 11; *see also* Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 1008 (1990).

14. Jaszi at 460 n.14.

> actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already "out there" in some other form. This is not parasitism: it is the essence of authorship.[15]

This could be termed the "Nothing New Under the Sun" conception of authorship. Artists and critics share this view. Roberta Smith, art critic for the *New York Times*, expressed it in her commentary on the work of Marcel Duchamp. "[W]orks such as his 'Ready made' bottle rack or 'L.H.O.O.Q.,' his mustachioed Mona Lisa, . . . in their original state questioned the whole notion of originality and autonomous artistic creativity."[16] This conception leads to a broad definition of fair use, one that would allow an author liberal access to existing works.

1. First Amendment Issues

Protection of authors' rights also creates a tension with the guarantee of freedom of speech. Insofar as copyright protection limits the author's ability to promulgate works that are substantially similar to existing works, it limits his ability to express himself.

In this country, freedom of speech has been largely conceived in political terms. Primarily, this is due to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]"[17] This preference for political speech is based on a paradigm of the "Marketplace of Ideas," in which all political speech, true or false, perceptive or ill-conceived, vies to sway the opinion of the voting public.[18] In the American view, it is dangerous to our political process to restrict the dissemination of ideas,[19] because our government is kept in

15. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990). This view is shared by Professors Merryman and Elsen. "The creative act is not an act of creation in the sense of the Old Testament. It does not create something out of nothing; it uncovers, selects, re-shuffles, combines, synthesizes already existing facts, ideas, faculties, skills. " JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 376 (2d ed. 1987) (quoting ARTHUR KOESTLER, THE ACT OF CREATION).

16. Roberta Smith, The *Whitney Interprets Museums' Dreams*, *N.Y. Times*, July 23, 1989, § 2, at 31.

17. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

18. This idea is set forth by Justice Holmes' famous quotation; "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes sagely can be carried out. That at any rate is the theory of our Constitution." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

19. Manifested, for example, in the Court's disfavor of prior restraints. *See* LAURENCE

check by the freedom of the "Market".[20]

Melville Nimmer posits that appropriation of visual images is justifiably restricted, since art lacks political significance in comparison to written materials.[21] Because of the open-ended character of the fair use inquiry, the Supreme Court's application of the doctrine can hinge on this distinction. In *Hustler Magazine v. Jerry Falwell*, Justice Rehnquist held that the copying of an ad parody was fair use, but emphasized that "graphic depictions and satirical cartoons have played a prominent role in public and political debate."[22]

Some commentators believe that freedom of expression is fundamentally at odds with copyright protection.[23] This position is difficult to defend in light of the artist's obvious dependence on copyright for his livelihood. It may be true that removal of copyright protection would increase an author's ability to express himself, however, an artist cannot take advantage of artistic freedom if he cannot make a living exploiting his art.

Given the constitutional mandate of protecting the dissemination of ideas, copyright protection does not significantly threaten freedom of speech. By definition, copyright protection only limits the copying of expression that has already been made public elsewhere.[24] In this respect, it does not restrict content.[25] However, an overly narrow definition of fair use threatens content, because it prevents criticism and commentary on what has gone before.

H. TRIBE, AMERICAN CONSTITUTIONAL LAW, §12-34 (1988).

20. *See generally*, Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

21. Patricia Krieg, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1577 (1984) (citing Melville B. Nimmer, *Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1197 (1970)).

22. 485 U.S. 46, 54 (1988).

23. Krieg at 1578.

24. The Copyright Act of 1976 pre-empted the common law doctrine that usually exempted unpublished works from fair use. Lisa Vaughn Merrill, *Should Copyright Law Make Unpublished Works Unfair Game?*, 51 OHIO ST. L.J. 1399, 1406-07 (1990). However, a fair use defense against the infringement of unpublished works is difficult to win because it encroaches upon the right to first distribute a work. *See* Harper & Row v. Nation Enterprises, 471 U.S. 539, 555 (1985).

25. "Copyright does not preclude others from using the ideas or information revealed by the author's work. . .[A]nyone is free to create his own expression of the same concepts, or to make practical use of them, as long as he does not copy the author's form of expression." REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 3 (Comm. Print 1961).

2. The Ineluctable Modality of the Visual

Issues of free speech and fair use in fine arts are inextricably bound to the theoretical difference between expression and thought in the law of intellectual property. Copyright does not protect the underlying idea.[26]

This issue is difficult to apply to fine arts. In an icon, the idea and the expression are one. Nimmer argues that the idea/expression dichotomy is inapplicable to the visual arts.[27] "No amount of works describing the 'idea' of the massacre could substitute for the public insight gained through the photographs."[28] The difference between the spatial or plastic arts (visual) and the temporal arts (music and poetry) has been approached by a number of disciplines for different reasons. It is behind the musings of Joyce about the ineluctable modality of the visual.[29] Joyce's famous reference is derived from Aristotle's argument that the eye passively perceives an image, but the ear participates in what it hears.[30] Aesthetician Gotthold Lessing discussed the unique qualities of the visual in his 1766 work *Laocoon*.[31] Arthur Koestler, in his *The Act of Creation*, calls visual thinking more primitive and of greater emotive potential than auditory or semantic thinking.[32] Once technology of the twentieth century advanced to the point where visual images could be easily reproduced and promulgated, various theoreticians took up this call. Vachel Lindsay examined the power of the visual in his "tableau logic" theory of film,[33] and Marshall McLuhan built a career discussing mass media and its effect on culture in the 1960's.[34]

Such discussions may seem to tread too far along the metaphysical path for most legal analysis, however, they are essential to

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26. *See* Krofft v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971).

27. Sigmund Timberg, *A Modernized Fair Use Code for Copyrights, in* JOHN LAWRENCE AND BERNARD TIMBERG, FAIR USE AND FREE INQUIRY 314 (2d ed. 1989). Elizabeth Wang persuasively argues that in abstract art, the idea/expression dichotomy is perfectly meaningless. Elizabeth Wang, *(Re)Productive Rights: Copyright and the Postmodern Artist*, 14 COLUM.-VLA J.L. & ARTS 261, 274 (1990).

28. 2 MELVILLE NIMMER, NIMMER ON COPYRIGHT, §9.232, at 28.22 (1973).

29. *See* DON GIFFORD, NOTES FOR JOYCE: AN ANNOTATION OF JAMES JOYCE'S ULYSSES 32 (1974).

30. *Id.*

31. *Laocoon*, in Sigmund Timberg, *A Modernized Fair Use Code for Copyrights, in* LAWRENCE & TIMBERG, *supra* note 22, at 311.

32. ARTHUR KOESTLER, THE ACT OF CREATION 321 (6th ed. 1964).

33. VACHEL LINDSAY, THE ART OF THE MOVING PICTURE (1915).

34. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7-21 (1965).

the application of copyright law to visual art forms. As Justice Story wrote in his famous opinion in *Folsom v. Marsh*, intellectual property issues come "nearer than any other class of cases . . . to what may be called the metaphysics of the law . . . ."[35]

B. Defining Fair Use

The Fair use doctrine has been called "the most troublesome in the whole law of copyright."[36] This troublesome nature is the result of the doctrine's fragmented development and its haphazard application to most modern means of expression.

1. Copyright

Copyright law was originally formulated to protect literary expression. Black's Law Dictionary defines "Copyright" as "The right of literary property as recognized and sanctioned by positive law . . . ."[37] Much of the activity in United States copyright law over the past century has tracked the attempt to adapt the traditional literary protection to new forms of expression; in the past half century, technological advancements have come faster and in greater leaps, and stretched copyright law far beyond its original focus.[38]

Some of the statutory rights now collectively called "copyright" existed at common law, and some of these rights continued to be applied until the passage of the 1976 Copyright Act.[39] The first statute in the modern era was the Copyright Revision Law of 1909, which was passed in response to the newly emerging record and phonograph industry.[40] The 1909 Act remained in effect until 1976, when Congress undertook a comprehensive revision of Title 17. The 1976 Copyright Act embodied a grand streamlining of statutory copyright law, and was the result of twenty-two years' deliberation, testimony of over 300 witnesses, and 51 executive meetings of the House Judiciary Subcommittee.[41]

The duration of copyright protection is currently the life of

35. 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

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

37. HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 336 (6th ed. 1990).

38. *See* Sigmund Timberg, *A Modernized Fair Use Code for Copyrights, in Lawrence & Timberg, supra* note 22, at 305.

39. *Id.* at 306.

40. *Id.*

41. John Lawrence, *Copyright Law, Fair Use, and the Academy: An Introduction, in Lawrence & Timberg, supra* note 22, at 3.

the author plus fifty years.[42] After that point, the work falls into public domain. Before the 1976 Act, duration was significantly shorter - a fourteen year term that was renewable for one additional fourteen year term.[43] Thus, after 1976, the flow of copyrighted material into the public domain was significantly delayed. Since the original function of the public domain was to provide new authors access to existing works, authors are more dependent on fair use now more than ever.[44] Although the 1976 Act's extended duration is formulated in deference to the needs of the author, omitting any calculus of public benefit, it is unlikely to change in light of the recent adherence of the United States to the Berne Convention, which requires a minimum duration of fifty years for all member countries.[45]

Copyright protection was extended to the visual arts relatively late, because the technology for reproducing visual images was in its infancy during the passage of the 1909 Act. Photographs were first held copyrightable in 1884, soon after the invention of modern photography.[46] However, it was not until 1954 that *Mazer v. Stein* held pictorial, graphic or sculptured works to be appropriate material for copyright protection.[47]

The copyright is not one right but a "bundle of rights" which include the right to publish and distribute, the right to publicly display or perform, and the right to create derivative works.[48] For the purposes of applying the fair use doctrine, the two important sticks in this bundle are derivative works and compilations.

Derivative works include "translation, musical arrangement, dramatization, fictionalization . . . abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[49] Compilation is a special kind of derivative work, which Title 17 defines as a work formed by the collection and assembling of preexisting materials coordinated, or arranged in such a way

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42. 17 U.S.C. § 302(a), (c) (1988). If there is no single identifiable author, the term of protection is 75 years from the date of the work's publication, or 100 years from the date of its creation, whichever is the shortest. *Id.*

43. ALAN LATMAN, THE COPYRIGHT LAW 6 (6th ed. 1986).

44. *See generally*, Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990).

45. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *revised* at Paris, July 24, 1971, art. 7(1).

46. LATMAN, *supra* note 43 at 68, citing Burrow-Giles Lithogaphic Co. v. Sarony, 111 U.S. 53 (1884).

47. 347 U.S. 201 (1954).

48. Sigmund Timberg, *A Modernized Fair Use Code for Copyrights, in* LAWRENCE & TIMBERG, *supra* note 27, at 306-09.

49. *Id.*

that the resulting work "as a whole constitutes an original work of authorship."[50]

The copyright for a derivative work extends only to the material contributed by the author of such a work, and "does not imply any exclusive right in the preexisting material."[51] Thus, an author who translates a novel into another language may claim a copyright in the translation, but not in the original work. The author owns only some of the rights to his creation and cannot license or exploit the translation without the permission of the novel's author. Moreover, the right to use the original work to create the translation belongs to the original author.

2. Copyright Infringement

Fair use was originally formulated as an equitable defense to copyright infringement claims. The prima facie case for copyright infringement has two elements, access and substantial similarity.[52] According to the Ninth Circuit, this can include either extrinsic similarity - that of general idea or "look and feel" - or intrinsic similarity - literally identical forms of expression.[53] Clearly, a substantial similarity based on "look and feel" would have devastating implications for artists, who are generally categorized in schools or movements, but the Supreme Court has not yet spoken on the issue.[54]

Intent is not extremely relevant to the analysis. Close similarity between the copied work and the copying work is sufficient to make out a prima facie case for infringement.[55] However, additional statutory damages for infringement are available if the infringement is "willful."[56]

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50. 17 USC § 101 (1993).

51. *Id.* at § 103(b).

52. 3 Melville Nimmer & David Nimmer, Nimmer on Copyright § 13.01[B], at 13-10.1 (1992).

53. *Id.* at § 13.03[A] at 13-34, citing Krofft v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)

54. Two Circuit cases have used such a formulation of substantial similarity. Roulo v. Russ Berrie & Co., Inc., 886 F.2d 931 (7th Cir. 1989) (defendant's greeting cards infringed plaintiff's generally similar group of cards); Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1166 (9th Cir. 1977) (defendant's McDonaldland characters infringed plaintiff's H.R. Pufnstuf characters).

55. *See* West Pub. Co. v. Lawyer's Co-op. Pub. Co., 79 F. 756, (New York, 1897).

56. 17 U.S.C. § 504(c)(2) (1993).

3. Development of the Fair Use Doctrine

The defense of fair use creates "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."[57] The first articulation of the doctrine is usually credited to Justice Story, who set forth the idea that use was not infringement if it was "justifiable use," which included "fair abridgment" or "fair and reasonable" criticism.[58] Justice Story examined "the nature and object of the selections, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work."[59]

The fair use doctrine's development proceeded in concert and counterpoint with the development of copyright law. Until 1976, the judge-created defense was developed and refined, based on factors drawn from the facts of each case and weighed in equity.[60] The 1976 Copyright Act codified these factors with little alteration.[61] Congress did not intend the codification to change the common law defense.[62] The factors set forth in the statute are not exhaustive and courts may continue to apply the equities as they see fit when resolving fair use questions.[63] As the legislative history states, "The courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[64]

However, the 1976 Act recast fair use as a reservation in the rights granted the author, rather than an equitable defense against an infringement claim.[65] The Act now states that notwithstanding

57. Rosemont Enterprises, Inc. v. Random House, Inc. 366 F.2d 303, 306 (2d Cir. 1966)(quoting H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).

58. Folsom v. Marsh, 9 Fed. Cas. 342, 345 (No. 4,091) (C.C.D. Mass. 1841).

59. *Id.* at 348.

60. For a detailed history, see WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 18-63 (1985).

61. John Lawrence, *Copyright Law, Fair Use, and the Academy: An Introduction, in* LAWRENCE & TIMBERG, *supra* note 27, at 10, 306-09. This avoids the necessity of applying two different doctrines, since works created before January 1, 1978 are still covered by the 1909 Act. MERRYMAN & ELSEN, *supra* note 15, at 175.

62. *See* Triangle Publications, Inc. v. Knight-Rider Newspapers, Inc., 626 F.2d 1171 (5th Cir. 1980).

63. *See* Encyclopedia Britannica Educ. Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982).

64. H.R. REP. No. 1476, 94th Cong. 2d Sess. 55-56 (1976); S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975).

65. *Id.*

the grant of copyright in Sections 106 and 106A, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[66]

In practical terms, this redefinition is not extremely important. It may have the effect of shifting the burden of proof for what is fair use. However, in civil cases, where the standard for proof is a preponderance of the evidence, the shift of such a burden means little. Moreover, courts are extremely reluctant to resolve fair use questions on summary judgment,[67] so the resulting resolution at trial means that both sides usually introduce evidence as to fair use. Thus, Congress' intention to leave the doctrine intact despite its codification was well served by this redefinition. The codification has had little impact and the doctrine remains essentially a weighing of equities.

4. The Four Factors of Fair Use

The Copyright Act specifies the factors to be taken into account when determining whether a possible infringement is fair use.

> (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.[68]

Each of these factors presents special analytical problems for application of the doctrine to fine arts.

a. Nature of Use

The fair use defense is most successfully invoked when the infringing work is created for scientific, educational or charitable purposes.[69] Similarly, this defense is better suited for non-profit activi-

66. 17 U.S.C. § 107 (1993).
67. *See* DC Comics v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982).
68. 17 U.S.C. § 107 (1993).
69. Patricia Krieg, *Copyright, Free Speech and the Visual Arts*, 93 YALE L.J. 1565, 1572 (1984).

ties as opposed to commercial activities.[70]

Many artists believe that art should not give way to commercial motives,[71] and consider their work something other than a commercial use. However, intention is not dispositive.[72] The Supreme Court has held, "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[73]

When the nature of use does not fit neatly into either a commercial or non-commercial category, the court will typically examine whether the use inures to the public benefit. Judge Leval, who wrote the opinion in *Salinger v. Random House*,[74] writes "[T]he inquiry should focus not on the morality of the secondary user, but on whether her creation claiming the benefits of the doctrine is of the type that should receive those benefits."[75] The Second Circuit has held, "While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain."[76]

Many artists may consider themselves amateurs and thus may believe that their work will escape the scrutiny aimed at commercial users. However, the lack of professional designation of the artist is not controlling. In *Bourne Co. v. Speeks*, fair use did not apply to the performance of entire songs by amateurs in a country music theater where admission was charged.[77] The court generally considers fine arts, despite their ability to edify and beautify, to be almost exclusively commercial uses.

Commercial designation is an important factor in the fair use analysis,[78] and it is clear that fine arts will generally not escape such a designation. Commentators have criticized the courts for classifying fine arts as a commercial use because the distinction be-

70. *Id.* (citing Henry Holt & Co. v. Liggett & Meyers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938)).

71. MERRYMAN & ELSEN, *supra* note 15, at 205 n.2. *See also* Harold Rosenberg, *The Art World: Adding Up*, THE NEW YORKER, Aug. 20, 1973, at 72-77.

72. Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966).

73. Harper & Row v. Nation Enterprises, 471 U.S. 539, 562 (1985).

74. 650 F. Supp 413 (S.D.N.Y. 1986).

75. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1126 (1990).

76. MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1989).

77. 670 F. Supp. 777 (E.D. Tenn 1987).

78. Financial Info., Inc. v. Moody's Investor's Serv., Inc., 751 F.2d 501 (2d Cir. 1984).

tween commercial and educational purposes is indistinguishable when applied to the fine arts.[79] Moreover, as art finds its way into museum collections or is displayed to the public, it does inure to the public benefit. If one believes, as Professors Merryman and Elsen do, that art belongs to the world,[80] then it is shortsighted to classify art as a commercial enterprise. Possibly in response, one California District Court has held that broader scope is given to fair use in the field of fine arts, than in "commercial enterprises."[81] However, this distinction has not been adopted by any other court.

b. Nature of Copyrighted Work.

Analysis of this factor proceeds along two lines. The first is whether the underlying work has been disseminated to the public. Courts generally hold that if an underlying work is unpublished, then the fair use defense is negated.[82] This is probably not an important consideration for artists. Art that makes references to images is pointless unless the underlying image is recognizable. Unpublished material is not recognizable enough to be an appropriate subject.

The second line of analysis categorizes the copyrighted work much as the first factor categorizes the derivative work. Courts generally give less latitude to artists than to authors of academic or news material. The Second Circuit has held that "When informational works are involved, as opposed to creative ones, the scope of fair use is greater"[83] and that "even substantial quotations might qualify as fair use in a review of a published work."[84] In *Sony v. Universal*, the Supreme Court held that "The law generally recognizes a greater need to disseminate factual works than works of fiction of fantasy."[85] Courts generally draw the line between these categories rigidly, turning a deaf ear to claims that artistic expression is intended to inform its viewer.[86]

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79. Sigmund Timberg, *A Modernized Fair Use Code for Copyrights, in* LAWRENCE & TIMBERG, *supra* note 27, at 313-14.

80. MERRYMAN & ELSEN, *supra* note 15, at 139.

81. Loew's Inc. v. Columbia Broadcasting Sys., Inc., 131 F. Supp. 165 (S.D. Cal. 1955)(The *Gaslight* case).

82. Harper & Row v. Nation Enterprises, 471 U.S. 539, 564 (1985).

83. *See* Wojnarowicz v. American Family Assn., 745 F. Supp. 130, 144 (S.D.N.Y. 1990).

84. *Harper & Row*, 471 U.S. at 564.

85. 464 U.S. 417, 455, n.40 (1984).

86. *Wojnarowicz*, 745 F. Supp. at 144.

c. Degree of Use

Commentators have criticized the application of this factor to the visual arts as entirely inappropriate.[87] Unlike text or music, which are essentially sequential in nature and can be easily excerpted, visual material comes in one, instantaneous image. One Court has held that every frame of a film is a work of art, thus rendering the use of any one frame a complete copying.[88]

If the purpose of using an image is to express some commentary or criticism of the underlying work, abbreviating the image is useless because it renders the original work unrecognizable. Thus, if a visual work is copied, it is usually copied to a substantial degree.[89] This is why visual artists so easily run afoul of the fair use doctrine. Although a fair use defense is rarely available to a user who copies an entire work,[90] the Supreme Court has held that complete copying does not preclude a fair use defense.[91] Some commentators have therefore suggested that the substantial use criterion should be inapplicable to visual works.[92]

Although case law applying this factor is scant, the same phenomenon is at work in the analysis of parody, upon which ample case law exists. Parody has long been held to be fair use.[93] The courts have recognized that parodies require enough imitation of the copied work to spark public recognition.[94] However, the Ninth Circuit has held that a parodist must copy only as much of the underlying work as is "necessary to recall or conjure up the original."[95]

This affords the parodist little peace of mind. Copying the most recognizable parts of a work can be dangerous. In *Robertson v. Batten*, the court held that it was unlawful to copy four bars of a song, when those four bars were the portion of the song on which

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87. Sigmund Timberg, *A Modernized Fair Use Code for Copyrights, in* LAWRENCE & TIMBERG, *supra* note 27, at 313.

88. Time, Inc. v. Bernard Geis Assoc., 293 F.Supp. 130, 159 (S.D.N.Y. 1968).

89. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 434 (1985).

90. Patricia Krieg, *Copyright, Free Speech and the Visual Arts*, 93 YALE L.J. 1565, 1572 (1984).

91. Hustler Magazine, Inc. v. Jerry Falwell, 606 F. Supp. 1526 (S.D. Cal. 1985).

92. Sigmund Timberg, *A Modernized Fair Use Code for Copyrights, in* LAWRENCE & TIMBERG, *supra* note 27, at 313.

93. 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[C], at 13-102.20.

94. *See* Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986)(the *When Sunny Sniffs Glue* case).

95. Walt Disney v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978).

its popular appeal depended.[96] Uses that extract "essentially the heart" of copyrighted material are less likely to be held fair use.[97]

In effect, however, the degree of copying is a threshold test.[98] If a work is not substantially copied, an action for copyright infringement will not be present. In some cases, this factor has been distinguished from the substantial copying issue by taking into account the percentage of the derivative work that is copied, rather than the percentage of the underlying work. In *Harris v. Miller*, the defendant copied a small part of Oscar Wilde's biography to write a play.[99] The court held that because the copied sections were nearly verbatim and comprised a significant part of the play (rather than the biography), the use fell outside the fair use doctrine.[100]

d. Effect on Potential Market

The Supreme Court has held this factor to be the "single most important element" of the fair use analysis.[101] In the 1980's, an economic analysis of the fair use doctrine gained popularity,[102] and such an analysis was adopted by the Supreme Court in *Harper & Row*, [103] If a use "dilutes the market for, or decreases the value of, the copyrighted work, that use is a copyright infringement."[104]

In *Hustler Magazine, Inc. v. Moral Majority*,[105] the court held that the lack of effect on sales of *Hustler* magazine was an important factor in finding that the parody of Jerry Falwell was fair use. In *Maxtone-Graham v. Burchaell*,[106] the court held that defendant's book, which quoted heavily from plaintiff's book of interviews, was fair use because the plaintiff's book was going out of print for lack of sales.

For artists, this factor can cut either way, depending not on

96. 146 F. Supp. 795 (D. Cal. 1956).

97. Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 565 (1985).

98. Nimmer appears to consider the issues of substantial copying and this factor identical. 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-102.3.

99. 50 U.S.P.Q. 306, 307 (S.D.N.Y. 1941).

100. *Id.* at 309.

101. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

102. *See generally*, Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

103. 471 U.S. at 559. *See also* MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981).

104. Patricia Krieg, *Copyright, Free Speech and the Visual Arts*, 93 YALE L.J. 1565, 1574 (1984).

105. 606 F. Supp. 1526 (S.D. Ca. 1985).

106. 631 F. Supp. 1432 (S.D.N.Y. 1986).

the equities of the case but on the vagaries of the art market. Sales of an underlying work may skyrocket simply because of the publicity involved in a lawsuit over appropriation. This could weigh against a plaintiff and result in a ruling of fair use. Such a phenomenon may have been at work in *Time, Inc. v. Bernard Geis Associates*,[107] where the court held the publication of frames from Zapruder's film of the Kennedy assassination to be fair use. The court found little injury to the plaintiff, saying, "Plaintiff does not sell the Zapruder pictures as such and no market for the copyrighted work appears to be affected. Defendants do not publish a magazine."[108] As at least one commentator has observed, there are two problems with such an analysis. First, any licensing fees that would have resulted from the use of the photograph would have been part of the market for the photographs, and second, the copyright holder had the right to make the business decision as to whether to license the work.[109]

In neither of the two cases most directly addressing the application of the fair use doctrine in fine art, *Koons* and *Wojnarowicz*, did the court take this into account.[110] In *Wojnarowicz*, the court stated, "While the current controversy may have sparked interest in plaintiff's art works, that interest is likely to last only as long as the controversy and is more likely to attract sensation seekers than purchasers."[111] It is unclear what evidence, if any, the court used in making such a statement. In the market for post-Modern art, where sensationalism is rampant, such a spark of interest may make or break a career.[112]

In *Wojnarowicz*, the court appropriately pointed out that where a work was excerpted for the purpose of criticism, liability cannot exist for a loss in sales that results from fair criticism.[113] Thus, damages due to economic effects must accrue from loss to the plaintiff due to unfair or misleading use of the work[114] or from economic benefits to the defendant from his infringement of plain-

107. 293 F.Supp. 130, 146 (2d Cir. 1982).

108. *Id.*

109. W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 99 (1985).

110. Rogers v. Koons, 960 F.2d 303 (2d Cir. 1992); Wojnarowicz v. American Family Assn., 745 F. Supp. 130 (S.D.N.Y. 1990).

111. *Wojnarowicz*, 745 F. Supp. at 145.

112. Robert Hughes suggests as much regarding the fame of photographer Robert Mapplethorpe, whose work he believed did not warrant the attention it received. Robert Hughes, *Art, Morals and Politics*, N. Y. REV. OF BOOKS, April 23, 1992, at 21.

113. *Wojnarowicz*, 745 F. Supp. at 146.

114. *Id.*

tiff's work.[115]

Some commentators have viewed fair use in entirely economic terms, framing the inquiry in terms of market failure and how to regulate it. Professor Wendy Gordon has argued that fair use should be granted whenever three conditions are met: 1) there is "market failure" (in other words, the user cannot license the use); 2) the use would serve the public interest; and 3) the copyright owner's economic incentives would not be substantially impaired by allowing the fair use.[116] Although the Supreme Court has not framed the inquiry in exactly these terms, such an analysis identifies the direction of the inquiry well.

e. The Functional Test

Because of seeming anomalies that can arise from reliance on the market factor, commentators and courts have sometimes resorted to a more refined analysis of market effect. In the functional test, "the scope of fair use is . . . constricted where the two works in issue fulfill the same function in terms of actual or potential consumer demand, and expanded where such functions differ."[117] As another commentator puts it, the issue is whether the derivative work is "capable of being substituted for the original."[118]

This factor could easily come into play for visual artists. Artists who use images from everyday objects or commercial advertisements will probably not interfere with the market for such goods or the ones they advertise. However, this test has not yet been adopted by the Supreme Court and cannot be relied upon to result in a ruling of fair use.

f. Other Factors

Since Title 17 supplies a non-exclusive list of factors,[119] courts may still apply facts unique to each case to weigh in the outcome of a fair use determination. Although First Amendment factors may come into play, the Second Circuit has held that "the fair use doctrine encompasses all claims of First Amendment in the copyright

115. 17 U.S.C. § 504 (1993).

116. Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982).

117. 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[C], at 13-102.20.

118. MCA, Inc. v. Wilson, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., Dissenting)(quoting ALAN LATMAN, THE COPYRIGHT LAW, (5th ed. 1979)).

119. 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-87.

field."[120] This language is inconclusive, since it does not seem to exclude First Amendment analysis. However, the court appears to be avoiding a First Amendment analysis that would result in a different calculus from the existing fair use criterion of public benefit.[121] Courts also seem to frown upon lewd parodies.[122] In addition, courts tend to rule against fair use when the copying distorts the meaning of or unfairly represents the underlying work.[123]

C. *Problems of Uncertainty*

Although there are clear statutory guidelines with which to assess claims of fair use, the doctrine is a balancing test, which suffers from the disadvantage of all balancing tests - uncertainty. The fair use doctrine is "exceptionally elusive even for the law."[124] It is difficult to foresee where a court will draw the line between infringement and fair use.

This difficulty is exacerbated by the tendency of courts to require full trials on the merits of the fair use defense. "Fair use does not assist parties, or industries, in making *ex ante* determination whether or not to copy, and if so, how much. It is a highly fact-specific defense usually deemed inappropriate for resolution at the summary judgment stage."[125]

The fair use doctrine also shares the principal advantage of balancing tests - flexibility. The fair use doctrine "permits courts to avoid rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to fos-

120. New Era Publications v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989). *See also* Roy Export v. CBS, 672 F.2d. 1095, 1099-1100 (2d Cir. 1982).

121. *See generally* Patricia Krieg, *Copyright, Free Speech and the Visual Arts,* 93 YALE L.J. 1565, 1574 (1984).

122. *See* MCA, Inc. v. Wilson, 425 F. Supp. 443 (S.D.N.Y. 1976) (Parody of "Boogie Woogie Bugle Boy of Company B" entitled "Cunnilingus Champion of Company C" held to infringe); DC Comics, Inc. v. Unlimited Monkey Business, Inc. 598 F. Supp. 110 (N.D. Ga. 1984) (Superstud and Wonder Wench characters, parodying Superman and Wonder Woman, held to infringe); Walt Disney Productions v. Nature Pictures Corp., 389 F. Supp. 1397 (S.D.N.Y. 1975) ("Mickey Mouse March" played during sex scene in movie held to infringe); Walt Disney Productions v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (copying Disney cartoon characters in a comic book where characters are portrayed in a "free thinking, promiscuous, drug ingesting counterculture" held to infringe). *But see* Pillsbury Co. v. Milky Way Productions, Inc. 8 Media L. Rep. 1016 (N.D. Ga. 1981) (picture of "Poppin' Fresh" engaged in sexual acts with "Poppie Fresh" held as fair use).

123. Wojnarowicz v. American Family Assn., 745 F. Supp. 130, 144-45 (S.D.N.Y. 1990).

124. Marvin Worth Products v. Superior Films Corp., 319 F. Supp. 1269, 1273 (S.D.N.Y. 1970).

125. Jane Ginsberg, *Creation and Commercial Value: Copyright Protection of Works of Information,* 90 COLUM. L. REV. 1865, 1926 (1990)(citing DC Comics v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982)).

ter."[126] Congress had this in mind when it codified the doctrine.[127] In a 1986 commentary, John Shelton Lawrence points out:

> The conception of fair use as a somewhat indeterminate rule of reason is by no means unique among legal notions. Other areas of the law employ such expressions as "reasonable, prudent man" (torts), "due process" (constitutional), "unfair competition" (antitrust), and "equitable settlement" (divorce proceedings).[128]

The problem with this argument is that none of these areas involve freedom of expression, which is easily chilled without a bright-line rule. Artists in particular may suffer from this chill, because it means that in order to avoid liability they must attempt to license those images they wish to use.[129] Many artists are unsophisticated as to licensing procedures and copyright law, and may be entirely unequipped to deal with such a requirement. The art dealer, upon which many artists rely almost to exclusion for their dealings with the law and the workaday world,[130] may also be ill equipped to oversee licensing arrangements. Moreover, it is impossible to force the holder of a copyright to license the work. As the holder of a monopoly interest in the property, he may simply refuse to deal.[131]

II. THE ARTS

A. *Modern Art: The Response to Technological Utopia*

The iconoclastic mission of modern art - to change perspective and challenge our ways of seeing - began with Cubism. At the turn of the century, western culture was ripe for and rife with change. The progression from Cezanne's moody yet recognizable countrysides to Marcel Duchamp's practically unrecognizable "Nude Descending a Staircase" took place in less than a decade - 1904 to 1912.[132] In the early twentieth century, artists began to incorporate the cultural responses to industrial development into their work. The icon of the era was the machine, and modernism embodied the

126. Iowa Univ. Research Found. v. American Broadcasting Co., 621 F.2d 57 (2d Cir. 1980).

127. H.R. REP. No. 1476, 94th Cong. 2d Sess. 55-56 (1976); S. REP. No. 473, 94th Cong., 1st Sess. 62 (1975).

128. John Lawrence, *Copyright Law, Fair Use, and the Academy: An Introduction*, in LAWRENCE & TIMBERG, *supra* note 27, at 11.

129. RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 343 (1988).

130. MERRYMAN & ELSEN, *supra* note 15, at 379-80.

131. Elizabeth Wang, *(Re)Productive Rights: Copyright and the Postmodern Artist*, 14 COLUM.-VLA J.L. & ARTS 261, 280 (1990).

132. ROBERT HUGHES, THE SHOCK OF THE NEW 19, 52-53 (1991).

belief that technology could transform the world.[133] The modernist movement remained vital well into the period of World Wars, after which its early faith in technology began to fade.[134]

Like modern art itself, Appropriationism is a natural response to the revolution in technology. The use of existing images in modern and post-Modern art has moved from the physical incorporation of other works - collage - to reproduction through the technology of mass production - electronic and photographic copying. Every succeeding technological advance stretches the possibilities for infringement and the application of fair use.

The first Appropriationist technology was collage, a natural outgrowth of the fragmented cubist style. The first use of collage (or "gluing") is usually credited to Pablo Picasso. In his 1912 painting "Still Life with Chair Caning," Picasso incorporated an oilcloth printed with a caning design found on the cafe tables, injecting an image from the real world into his composition.[135] Picasso continued to make extensive use of this technique in 1912, foreshadowing much of the style of post-Modern art. His compositions "Glass and Bottle of Suze" and "Table with Bottle, Wineglass and Newspaper," include newspaper headlines and newsprint, the mass media of the day.[136] Picasso incorporated artwork from lingerie advertisements into "Au Bon Marche," transforming the commercial images of the day into his work much as the Pop artists were to do half a century later.[137] Although Picasso did his early collages half a century before Appropriationism became a movement, he is regularly cited as its primogenitor.[138]

Collage was soon embraced by the Dadaists. In 1920, Max Ernst's Dadaist collage "Murdering Airplane" combined images of the German bi-plane, female limbs, and sepia-colored soldiers.[139] "Murdering Airplane" was significant because it used these images to criticize. The collage "sums up the feeling of being strafed."[140] Likewise, in 1920, Hannah Hoch created "Pretty Maiden," a collage replete with twenty-two BMW logos, a pneumatic tire, a wig

133. This was the particular philosophy of the futurists. *Id.* at 43.

134. *Id.* at 57-111.

135. *Id.* at 32.

136. David Cottington, *What the Papers Say: Politics and Ideology in Picasso's Collages of 1912*, ART J., Winter 1988, at 354-55.

137. Edward F. Fry, *Picasso, Cubism and Reflexivity*, ART J., Winter 1988, at 302.

138. Telephone interview with John Caldwell, Curator of Painting and Sculpture, San Francisco Museum of Modern Art, Dec. 12, 1992.

139. Hughes, *supra* note 132, at 72.

140. *Id.* at 71.

and a light bulb.[141] Her repetition of a commercial image is a striking premonition of the devices of the 1960's Pop art movement.[142] Contemporary art critics regularly draw the connection between today's post-Modernists and the Cubist and Dadaist movements of the early 1900's. Roberta Smith, critic for the *New York Times*, connects the work of Hannah Hoch with contemporary sloganeer Barbara Kruger.[143]

Collage is still a healthy practice. In the mid-1980's, artist Alexis Smith created a series of "Janes," thirty collages of iconographic images from commercial and advertising materials, each with the word "Jane" inscribed at the bottom.[144] Below that, each collage had a different subtitle: "Calamity" Jane, Jane Eyre, Dick and Jane, Jane Russell.[145] One such collage includes a picture of Frances Farmer, who played Calamity Jane in the 1941 film "Badlands of Dakota," and bears the following quotation from the real gunslinger: "I just wish they would leave me alone, and let me go to hell by my own route."[146]

As technology advanced, photography eclipsed collage as the preferred Appropriationist technique. Photography bridged the gap between fine art and science by taking the execution of the artwork entirely out of the hands of the artist and putting it into the black box of a machine. Because photographs are capable of mass distribution and reproduction, they were hailed as a technical revolution that would restore the egalitarianism of art. Aleksandr Rodchenko, a graphic designer who, between 1917 and 1920, created constructivist posters in the newly minted Soviet state, believed that photography was the medium of instant socialism.[147]

The advance of photography has redefined traditional notions of authenticity. Art critic Robert Hughes comments, "How many people by now can say that their experience of the *Mona Lisa* as a painting is more vivid than their memory of it as a postcard?"[148] As artist Sherrie Levine explains in a 1985 interview, "By the time a picture becomes a bookplate it's already been re-photographed

141. *Id.* at 72.

142. *Id.* at 249.

143. Roberta Smith, *Photomontages of the 20's Still Resonate in the 90's*, N.Y. TIMES, Sept. 11, 1992, at C22.

144. Hunter Drohojowska, *Alexis Smith*, ARTFORUM, Oct. 1987, at 87.

145. *Id.*

146. *Id.*

147. Hughes, *supra* note 132, at 95. Rodchenko wrote, "Art has no place in modern life . . . . Every cultured modern man must wage war against art, as against opium. Photograph and be photographed!" *Id.* at 95.

148. *Id.*

several times."[149] One recent legal commentator calls the concept of an "original photograph" absurd, and suggests that given the technology of photo-reproduction, the high value of original artwork is a mere product of consumerist culture.[150]

The Pop art movement of the 1960's is generally deemed to have been a reaction to the rise of media culture, and nowhere is this more evident than the black and white works of Roy Lichtenstein and Andy Warhol, all done in the years between 1960 and 1962.[151] At the current MOCA exhibit in Los Angeles, these works are exhibited together to emphasize that they were a reaction to the pervasive images of black and white photography.[152]

B. *The Philosophy of Post-modernism*

1. What is post-Modernism?

Intelligible statements of post-Modernist doctrine or philosophy are rare. Post-Modernists are able to describe modernism, and agree that post-Modernism is something subsequent to and different from modernism, but rarely progress further to a concrete definition.[153] In the post-Modern era, "[t]he central purpose of art and art criticism . . . has been dismantling the monolithic myth of modernism and the dissolution of its oppressive progression of great ideas and great masters."[154]

Peter Schjeldahl, a poet and art critic for the *New York Times* and *Village Voice*, comments, " 'Post Modern' makes so many assumptions about what 'Modern' means. Mainly it seems to me to translate into, we don't have to know what we're talking about because it's over. Which is a very Modern tenet. It seems like everything about all of the functions of the term 'post-Modern' in terms of thinking are very Modern, very Modernist. It's just the same old thing."[155] Many critics of post-Modernism similarly feel that it is

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149. Siegel, *After Sherrie Levine*, ARTS, June 1985, at 141.

150. Elizabeth Wang, *(Re)Productive Rights: Copyright and the Postmodern Artist*, 14 COLUM.-VLA J.L. & ARTS 261, 267 (1990).

151. Christopher Knight, *When Pop First Popped: 'Hand-Painted Pop: American Art in Transition, 1955-62' at MOCA Documents the Triumph of the Genre and Redefines its Place in Postwar Art.*, L.A. TIMES, Dec. 6, 1992, Calendar at 3, 88.

152. *Id.*

153. For example, "Modernism marginalized the issue of artistic motivations or interests outside the art system, denying that artworks were themselves bound by a web of connections to specific historical and artistic contexts." Brian Wallis, *What's Wrong with this Picture? An Introduction*, *in* ART AFTER MODERNISM: RETHINKING REPRESENTATION xiii (Wallis ed. 1984).

154. *Id.*

155. Ingrid Sischy, *We are Talking With. . .*, ARTFORUM, Feb., 1988, at 45.

nothing more than "the culture of responses to modernization"[156] and in that sense is not so much post-modern as anti-modern.

2. Pop and the Visualization of Culture

Pop art was the beginning of Appropriationism in the post-Modern era. Pop was art's response to "the overpowering presence of media,"[157] appropriating the images of advertising and consumer products into artwork. Marshall McLuhan, the leading philosopher of Pop era, theorized that the pervasiveness of mass media would work fundamental changes in American culture.[158] There is no question that this has come to pass in the sense that the media has changed both our culture and the art that reflects it. As McLuhan said, "Information pours upon us, instantaneously and continuously."[159]

Much of this information now comes in the form of visual images, and art has responded to the deluge. The catalog for the 1989 Whitney Museum exhibit "Image World: Art and Media Culture" explains:

> Today across America 260,000 billboards line the roads . . . 23,076 newspapers and magazines are on sale, 162 million TV sets will be turned on for an average of 7 hours, 23,237 movie theaters will project films, and 27,000 stores will rent videotapes. By the time the day ends, you will have been exposed to 1,600 commercial messages. Tomorrow there will be more. Welcome to Image World, America's postwar visual environment.[160]

Even Robert Hughes, one of the more outspoken critics of post-Modern art, shares this view. "Nature has been replaced by the culture of congestion: of cities and mass media. We are crammed like battery hens with stimuli, and what seems significant is not the quality of meaning of the messages, but their excess. Overload has changed our art."[161] *ArtForum*, the voice of the avant-garde art community, agrees. "All post-Modern culture is in some sense a response to the triumph of television. The schizoid demands that

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156. *Id.*

157. Paul Richard, *Welcome to the 'Image World'; At the Whitney, a Sleek, Chic and Shallow Response to the Media Blitz*, WASH. POST, Nov. 12, 1989, at G1, quoting the catalog of the 1989 Whitney Museum exhibit, *Image World: Art and Media Culture.*

158. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7-21 (1965).

159. MARSHALL MCLUHAN & QUENTIN FIORE, THE MEDIUM IS THE MESSAGE 63 (1967).

160. Paul Richard, *Welcome to the 'Image World'; At the Whitney, a Sleek, Chic and Shallow Response to the Media Blitz*, WASH. POST, Nov. 12, 1989, at G1.

161. Hughes, *supra* note 127, at 324.

the mass media make leave an artist torn between mockery and envy, and much of the work that ensues tries fretfully to engage the esthetic of banality without embodying it."[162] In other words, the media is the message of post-Modern art.

3. Self-Referent Art

At least one of the messages of post-Modernism appears to be that the mechanics of the art market should be one of the principal subjects of art.[163] It is this self-referential tendency that, some critics contend, has turned contemporary art into a series of abstruse messages that are inaccessible to everyone but the denizens of the art world itself. Adam Gopnik, art critic for the *New Yorker*, comments that "the popular audience for modern art is disappearing, and has been displaced by a professional constituency."[164] Gopnik claims that in Appropriationism the point is "to create a kind of in-group art, which looked like the art the audience admired but could be understood in a mode of vengeful irony."[165] John Baldessari, a post-Modernist photographer and teacher, in "Source," a 1987 mixed-media photo-collage, depicts three persons, holding two canvases as if to display them, with round dots obscuring their faces.[166] A 1988 Baldessari portrays a group of people watching a painter at his easel, with their faces obscured by dots.[167] The message is clear: it is not the artist, or even the art consumer who is important, but the process itself.

The Whitney's 1989 exhibit "Image World" included a piece with the following verbal messages: "institutional taste analysis," "museum fatigue" and "institutional unconscious."[168] The exhibit also included a piece which critic Roberta Smith described as "vehemently self-aware and self-sufficient," an Ashley Bickerton sculpture which included a digital readout of its rising market value, verified by the museum.[169] One of the most prominent artists to use this self-referential approach is Hans Haacke, whose

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162. Richard Goldsten, *The Ethics of Banality*, ARTFORUM, Jan., 1988, at 77.

163. Adam Gopnik, *The Death of an Audience*, THE NEW YORKER, Oct. 5, 1992, at 143.

164. *Id.* at 141.

165. *Id.* at 143.

166. John Miller, *John Baldessari*, ARTFORUM, Mar. 1988, at 135.

167. Advertisement for the 3rd International Contemporary Art Fair, ARTFORUM, Oct. 1988, at 167.

168. Roberta Smith, *The Whitney Interprets Museum's Dreams*, N. Y. TIMES, July 23, 1989, Sec. 2 at 31.

169. *Id.*

work "Spurt's 'Les Poseuses' (Small Version)" traces the ownership of a Paul Seurat painting from collector to collector, including biographical sketches of the owners, and the prices and details of the exchanges.[170]

This tendency toward self-reference has made the "quotation" an essential element of post-Modern art. "[T]he basis of Postmodernism is the idea of the quote, the pastiche and the reference . . . ."[171] Last summer, an entire exhibition entitled "Quotations: The Second History of Art" at the Aldrich Museum was devoted to the practice of "art quoting" or appropriation.[172]

4. De-emphasizing Artistic Merit

Another tenet of post-Modernism is its notion that quality and originality are "sinister devices of cultural control."[173] Artists, faced with the boon of the technology of mass production, are now able to create images with little or no technical training. The first to publicly capitalize on that idea was Andy Warhol, who set up his "Factory," a studio in which hired artisans mass produced his ideas.[174]

This phenomenon, too, is a subject - all grist for the post-Modernist's mill. Mark Tansey's work "Triumph Over Mastery II", depicts a man effacing Michelangelo's "Last Judgment" with a paint roller.[175] If the media is the message, then quality is no longer the issue. The focus of art is condensed to a short attention span - like a sixty-second television spot or a billboard disappearing down the side of the road. There is no imperative to stop and admire or examine post-Modern art; it is meant for immediate consumption.

5. Critique of Private Property

Some artists and critics view the very act of appropriation as a challenge to conventional notions of property. Legal commentators are quick to point out appropriation's relationship to property law.

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170. *Id.*

171. Adrian Dannat, *The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, at 20.

172. William Zimmer, *Appropriation: When Borrowing From Earlier Artists is Irresistible*, N. Y. TIMES, June 14, 1992, sec. 13CN at 22.

173. Paul Richard, *Welcome to the 'Image World'; At the Whitney, a Sleek, Chic and Shallow Response to the Media Blitz*, WASH. POST, Nov. 12, 1989, at G1.

174. David Lister, *Post-War Image of Fun and Rebellion*, THE INDEPENDENT, May 9, 1991, at 5.

175. Andy Grundberg, *Attacking Not Only Masters but Mastery*, N .Y. TIMES, Nov. 23, 1990, at C29.

"[T]he act of appropriation itself imparts a political message. It reveals that society (and its legal system) is laden with assumptions that financial incentives promote individual creativity, and that property interests supersede society's right of access to ideas and information."[176] This view is widely repeated.[177] While embraced by critical legal theorists, it is not a new idea. Pierre Proudhon set forth a socialist critique of copyright as early as 1966.[178]

Of course, this issue goes far beyond the fair use doctrine. If we are to question the basic tenets of property law, a reformulation of the fair use doctrine will not do much to change it. Moreover, expanding the fair use doctrine to accommodate this idea would rob the commentary of its bite. If wholesale appropriation were sanctioned by the law, the act of appropriation would no longer have any meaning as a criticism of property law.

III. Clash of Law and Art: Post-modernism and Fair Use

For the purpose of this inquiry, artists who run afoul of the fair use doctrine fall into three categories. Most common are the Appropriationists, who incorporate images from commercial art or fine art into new works of art, and claim authorship for themselves. Next are Simulationists, who set out to duplicate either the style or the exact work of a well-known artist or school of artists. Last are Conceptualists, who take ordinary images, re-contextualize them, and claim authorship of the concept of positioning them in a new way. The application of fair use to each of these schools of art presents different policy issues.

It is useful to note that these categories roughly coincide with the definitions of derivative works in Title 17. Those artists who transform images in some way, rather than merely duplicating or re-contextualizing them, are creating derivative works. Those who simulate existing works are by definition merely copying, or creating a reproduction of the same work. Those who re-contextualize images may be creating compilations by placing things into new juxtapositions.

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176. Patricia Krieg, *Copyright, Free Speech and the Visual Arts*, 93 Yale L.J. 1565, 1578 (1984).

177. "Appropriating ineluctably involves politics." William Zimmer, *Appropriation: When Borrowing From Earlier Artists is Irresistible*, N. Y. Times, June 14, 1992, sec. 13CN at 22; "When Sherrie Levine raises serious issues about ownership when she photographs Walker Evans' works and claims them as her own." Carl Jerome, *Non-Traditional Photography*, U.P.I., May 12, 1989, BC Cycle, at 1.

178. Pierre Joseph Proudhon, What is property?: An Enquiry into the Principle of Right and of Government 393-98 (1966).

A. *Appropriationists*

1. Appropriation of Commercial Images

The patron saint of appropriation is Andy Warhol. Warhol was the figurehead of the pop art movement in the 1960's, which liberally appropriated images from a variety of sources. Warhol's trademark style reproduced commercial images that had become cultural icons. The 1962 work "200 Campbell's Soup Cans" depicts two hundred cans in ten rows of twenty, in a random pattern of about a dozen different flavors.[179] In addition, Warhol used images from film and photography.[180] His serial photographs of Marilyn Monroe and news stills are now cultural icons in their own right.

The heir to Warhol's artistic vision is widely considered to be Richard Prince. Prince is most famous for his appropriation of the men from Marlboro cigarette ads.[181] He has been called the inventor of Appropriationism,[182] but such a statement would ignore Warhol's contribution to the practice. Used with and without advertising copy, the subjects of Prince's work are "instantly recognizable" as Marlboro men and emphasize the depth to which advertising images are buried in our cultural unconscious.[183] In 1983, Prince ran afoul of the law by appropriating a photograph of Brooke Shields, which he entitled "Spiritual America No. 1" and exhibited in a fake art gallery he had set up.[184] The picture's original photographer, Gary Gross, attempted to serve Prince with a lawsuit but was thwarted by the disappearance of the fake gallery.[185]

Claes Oldenberg, another famous Appropriationist, may be credited with creating some of the most hated public art in the United States. His trademark style, consisting of monumental sculptures of utilitarian items such as lipstick[186] and clothespins[187],

179. Hughes, *supra* note 132, at 349.

180. *See* Donald Kuspit, *The Modern Fetish*, ARTFORUM, Oct. 1988, at 140.

181. Robert Hughes, *Mucking with Media; The Whitney Offers a Long Trek through the Alien Goo*, TIME, Dec. 25, 1989, at 93.

182. Paul Taylor, *Richard Prince, Art's Bad Boy, Becomes (Partly) Respectable*, N.Y. TIMES, May 17, 1992, Arts & Leisure sec. at 31.

183. Kenneth Baker, *Borrowed Images of Richard Prince*, S.F. CHRON., June 30, 1992, at E3.

184. William Zimmer, *Appropriation: When Borrowing From Earlier Artists is Irresistible*, N.Y. TIMES, June 14, 1992, sec. 13CN at 22.

185. Paul Taylor, *Richard Prince, Art's Bad Boy, Becomes (Partly) Respectable*, N.Y. TIMES, May 17, 1992, Arts & Leisure sec. at 31.

186. Oldenberg's lipstick, now in the courtyard of Morse College at Yale University, has been moved at least once due to student complaints. Students routinely sneer at it, or at least did so in 1976-1979, when I lived there.

is a classic example of appropriation of a commercial image. Oldenberg, whether consciously or not, has avoided legal liability by appropriating functional items, which are not granted copyright protection.[188]

A very recent example of appropriation suggests that the practice is alive and well. Maguire Thomas Partners, a real estate developer whose managing partner is current president of the Los Angeles County Museum Board of trustees, commissioned artist Dennis Oppenheim, for $30,000, to create a sculpture for a Santa Monica business development.[189] The sculpture was entitled "Virus," and resembled "a jungle gym with 34 fiberglass figures of Mickey Mouse and Donald Duck skewered on a matrix of bronze rods."[190] Oppenheim cast the figures from plastic toys made 60 years ago in Japan.[191] He molded them into Fiberglas in "dull shades of green, orange and yellow."[192]

The Walt Disney Company discovered the artwork less than a year after it was completed, filed suit and demanded the sculpture's removal, alleging copyright infringement.[193] Disney offered to settle the matter with a $15,000 retroactive license, but Oppenheimer refused.[194] The artist claimed that, due to fabrication difficulties, he made no profit on the sculpture and could not afford the license.[195] He offered to cut up the figures to make them less recognizable, but Disney in turn demanded removal of the sculpture.[196] Oppenheim made this comment about the lawsuit: "You go to a flea market, you buy a bunch of figures, two of them turn out to be Mickey mouse and Donald Duck, and you put them in a sculpture or a collage. Artists do this all the time. That's appropriation."[197]

Artists who, like Oppenheim, re-cast cartoon characters risk exposure not only to copyright infringement but to unfair competition as well.[198]

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187. Hughes, *supra* note 132, at 361.

188. *See* Kieselstein-Cord v. Accessories by Pearl, 632 F.2d 989 (2d Cir. 1980).

189. Suzanne Muchnic, *Disney Orders Removal of Sculpture*, L.A. TIMES, Oct. 16, 1992, at B1, B8.

190. *Id.* at B1.

191. *Id.* at B8.

192. *Id.*

193. *Id.* at B1.

194. *Id.* at B8.

195. *Id.* at B1.

196. *Id.*

197. *Id.* at B8.

198. ALAN LATMAN, THE COPYRIGHT LAW 47-49 (6th ed. 1986). *See* DC Comics, Inc. v. Unlimited Monkey Business, Inc., 598 F.Supp. 110 (N.D.Ga. 1984).

Meeker: The Ineluctable Modality of the Visible: Fair Use and Fine Arts i

2. Appropriation of Images from Fine Art

By far the most famous example of appropriation is embodied in the case *Rogers v. Koons*.[199] Jeff Koons, the most notorious artist of the 1980's and 1990's, appropriated a photograph by Arthur Rogers, a commercial photographer, to create a sculpture for his "Banality" show.[200] Rogers had been commissioned by an acquaintance, Jim Scanlon, to make a photographic portrait of his dogs.[201] Rogers photographed Scanlon and his wife holding eight German Shepherd puppies between them in a row.[202] The photograph was exhibited in the San Francisco Museum of Contemporary Art and sold under license as a commercial postcard.[203]

Rogers was one of the rare cases of copyright infringement in which there was direct evidence of copying.[204] "Banality," consisted of twenty sculptures to be fabricated by an Italian studio.[205] Koons neither draws nor paints, and does not keep a studio.[206] Koons bought a copy of the postcard, tore the copyright notice off, and sent it to Italy to be copied.[207] He visited the studio and directed the artisans to use the same angles, poses, and expressions "as per photo."[208] He altered the work in minimal ways, placing daisies in the couple's hair and adding vivid colors.[209] The sculpture was made in an edition of four, three of which Koons intended for exhibition and sale and one of which he reserved for himself.[210] Koons entitled his sculpture "String of Puppies."[211]

Art Rogers learned of the sculpture when it was reviewed in the Los Angeles Times.[212] He filed suit in federal district court for

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199. 960 F.2d 303 (2d Cir. 1992).

200. *Id.* at 304.

201. *Id.*

202. *Id.*

203. Adrian Dannat, *Art/The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, Arts sec. at 20.

204. David Goldberg and Robert Bernstein, *'Puppies'—Parody or Plagiarism?*, N.Y.L.J., May 15, 1992, at 3.

205. *Id.*

206. Kristine McKenna, *'The Art World is Ripe for Me'; Jeff Koons' High Profile Marketing at Media Manipulation Makes his Talent Seen Secondary*, L.A. TIMES, Jan. 22, 1989, Calendar at 4.

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

208. *Id.*

209. Martin Garbus, *Law Courts Make Lousy Art Critics*, NEWSDAY, April 22, 1992, at 46.

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

211. *Id.*

212. Goldberg, *supra* note 204, at 3.

copyright infringement.[213] Cross motions for summary judgment were filed, and Rogers' motion on liability was granted.[214] Koons asserted the fair use defense, claiming that he was parodying not the original postcard but the sentimental and maudlin elements of our culture that it symbolized.[215] Although his argument was probably sincere from an artistic standpoint, the court rejected it entirely, ruled that the sculpture was not fair use and affirmed the lower court's judgment.[216] It identified the elements of the photograph that created a copyrightable work - lighting, pose, angle, selection of film and camera - and held that since Koons copied these elements, he had substantially copied the work.[217] The court ordered a remand on damages and required Koons to return the sculpture he had retained for himself.[218]

Koons' "Banality" show appropriated other images as well, with fewer legal repercussions. The cornerstone of his "Banality" phase work, currently on exhibit at the San Francisco Museum of Modern Art, includes a 1988 sculpture entitled "Michael Jackson and Bubbles." The sculpture, like "Puppies," is done on a semi-monumental scale and painted with exaggerated, garish colors. Michael Jackson, with white skin and gold clothes and decoration, is seated aside his pet chimpanzee. The image was copied directly from a publicity photograph.[219] John Caldwell, Curator of Painting and Sculpture at SFMOMA, reports that no liability resulted because the photo was uncopyrighted, and according to Koons, Michael Jackson is pleased with the work.[220] In previous works, Koons has appropriated the Pink Panther and Odie (of the Garfield cartoon), and faced lawsuits for each.[221]

Martin Garbus, a New York attorney specializing in constitutional law, commented in a 1992 *New York Times* article that the decision in *Rogers v. Koons* may have been unduly influenced by the fact that the court never viewed the actual sculpture.[222] The

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213. *Rogers*, 960 F.2d at 305.
214. *Id.* at 305-06.
215. *Id.* at 309.
216. *Id.* at 313.
217. *Id.* at 307.
218. *Id.* at 313.
219. Captions from the "Banality" room at *Jeff Koons*, exhibit at the San Francisco Museum of Modern Art, Dec. 10, 1992 through Feb. 7, 1993.
220. Telephone interview with John Caldwell, Curator of Painting and Sculpture, San Francisco Museum of Modern Art, Dec. 12, 1992.
221. *It's Art, but is it Theft as Well?*, N.Y. TIMES, Sept. 22, 1991, at D7.
222. Martin Garbus, *Law Courts Make Lousy Art Critics*, NEWSDAY, Apr. 22, 1992, at 46.

decision was written on the basis of Rogers' photograph and a photograph of Koons' work.[223] Both were black and white, and both were the size of a postcard.[224] Garbus felt that the photograph did not adequately bring out the differences in Koons' work - the unique coloring, huge size and obvious satirical intent.[225] Curator John Caldwell agrees that it is not possible to judge artwork like Koons' from a small photograph.[226] He comments that many visitors to the current exhibit of Koons' work, after reading about or seeing photographs of the artwork, are surprised with what they see — and surprised at how much they enjoy it.[227] Caldwell calls the decision in *Rogers v. Koons* "outrageous."[228] He comments that Rogers, who has possession of Koons' sculpture, does not deserve it. "It's not his work," he explains.[229]

Two other famous appropriation cases have settled out of court. Robert Rauschenberg created a print entitled "Pull," which incorporated a photograph by Morton Beebe entitled "Diver." Since both parties were fine artists with established reputations, the tension between the two copyright goals manifested itself in their colloquy. Beebe wrote to Rauschenberg, "You having been in the lead in protecting artists' rights, I was stunned to see one of my images so obviously borrowed without recognition."[230] Rauschenberg replied, "I have received many letters from people expressing their happiness and pride in seeing their images incorporated and transformed in my work."[231] A similar dispute took place in 1965 over the Andy Warhol series "Flowers," which was based on a photograph by Patricia Caulfield. Warhol was estimated to have painted over nine hundred "Flowers."[232] The settlement in each of these cases included copies of the offending print. Rauschenberg also settled with a cash payment and Warhol promised Caulfield a royalty on future sales of "Flowers."[233]

Roy Lichtenstein, the famous cartoon Pop artist of the 1960's,

223. *Id.*
224. *Id.*
225. *Id.*
226. Telephone interview with John Caldwell, Curator of Painting and Sculpture, San Francisco Museum of Modern Art, Dec. 12, 1992.
227. *Id.*
228. *Id.*
229. *Id.*
230. Gay Morris, *When Artists Use Photographs: Is it Fair Use, Legitimate Transformation, or Rip-Off?*, ARTNEWS, May 1982, at 19.
231. *Id.*
232. MERRYMAN & ELSEN, *supra* note 15, at 202.
233. *Id.*

employed variations on the work of modern masters. His 1963 "Femme d'Alger" portrays a cartoon-cubist woman, after Picasso's 1907 cubist masterpiece "Les Demoiselles d'Avignon."[234] Lichtenstein added his own commentary to Picasso's work by re-styling it. An *ArtForum* critic comments, "While Picasso's originals suggest an ambivalent attitude to woman, presenting her as at once deliriously sensual flesh and comically monstrous and characterless, Lichtenstein's negation of her is more thoroughgoing. She has been completely dephysicalized by being resolutely flattened, and her monstrousness has been made self-caricaturing . . . ."[235]

Lichtenstein's work demonstrates the importance of copyright duration and its effect on the legality of derivative works. In this particular case, Lichtenstein's piece is such a complete transformation that it may not even be considered derivative. However, Picasso lived until 1973,[236] admittedly a long life for a modern master. For works created in 1963, the 1909 Act was still in effect, and only provided a duration of twenty-eight years, thus Picasso's work was in the public domain. In contrast, under the terms of the Berne Convention, the copyright would not expire until 1957, with no change in result. But under the terms of 1976 Act, the copyright would not have expired until 2023, and Lichtenstein might have been subject to liability.

Finally, no description of appropriation would be complete without a passing mention to Marcel Duchamp's 1919 work "L.H.O.O.Q." - his mustachioed Mona Lisa. If Da Vinci held a copyright in 1919, it would be certain that this work never could have survived its legal exposure. On the other hand, what was important about Duchamp's statement was that he had graffitied one of the icons of western culture, and it is unlikely that any underlying work would command such reverence any less than fifty years after its author's death.

B. *Simulationists*

Simulationism is the practice of copying the exact work of preceding artists. In theory it is a "kind of Dada gesture directed against the myth of artistic originality."[237] One of the first simulationists was Elaine Sturtevant, who, as early as the late 1960's and early

234. Donald Kuspit, *Roy Lichtenstein*, ARTFORUM, May 1988, at 141.
235. *Id.* at 142.
236. MERRYMAN & ELSEN, *supra* note 15, at 468.
237. Eleanor Heartney, *Simulationism: The Hot New Cool Art*, ARTNEWS, Jan. 1987, at 134.

1970's, produced exact replicas of Warhol's work.[238] Claes Oldenberg applauded her efforts - until she started reproducing his work as well.[239]

The best known Simulationist in the contemporary crop of post-Modern artists is Sherrie Levine. In 1981 Levine began photographing Edward Weston's and Walker Evans' photographs, reproducing them as exactly as possible.[240] Sherrie Levine's work raises serious issues about ownership and authorship.[241] Levine ran afoul of the copyright laws, and stopped appropriating Weston's work under pressure from his estate.[242]

Levine's appropriation brings into relief the issue of the importance of printing techniques to photographers. One of Weston's sons, a photographer himself, was so protective of his negatives that he burned them rather than let anyone else make prints from them.[243] Another son, who inherited his father's negatives, was the only person to print them, pursuant to his father's directions, for more than 30 years.[244] In contrast, some post-Modernist photographers and photograph-appropriators intentionally send their work to labs for printing, to de-emphasize the importance of craft in their work.[245]

One critic suggests that Simulationism is the ultimate embodiment of self-referent art. Critic Marc Owens comments about Sherrie Levine that "In all her work Levine has assumed the functions of the dealer, the curator, the critic - everything but the creative artist."[246] Similarly, artists like Koons who neither paint nor sculpt take on the role of curator to their artisans. Simulationism may still be active. One contemporary Cuban artist, Consuelo Castaneda, treads the line between Simulationism and Conceptualism by combining blown-up details of old masters with words and slogans.[247] It is a premise of post-Modernism that the role of the art-

238. Kevin Thomas and Suzanne Muchnic, *The Art Galleries: La Cienega Area*, L.A. TIMES, Oct. 16, 1987, Calendar at 24.

239. Adrian Dannat, *Art/The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, Arts sec. at 20.

240. Gerald Mazorati, *Art in the (Re)making*, ARTNEWS, May 1986, at 92.

241. Carl Jerome, *Non-Traditional Photography*, UPI, May 12, 1989, BC Cycle, at 1.

242. Elizabeth Wang, *(Re)Productive Rights: Copyright and the Postmodern Artist*, 14 COLUMBIA-VLA J. L. & ARTS 261, 262 n.11 (1990).

243. Charles Hagen, *Critic's Notebook: How Sacred Should Photo Negatives Be?*, N.Y. TIMES, Mar. 3, 1992, at C13.

244. *Id.*

245. *Id.*

246. Gerald Mazorati, *Art in the (Re)making*, ARTNEWS, May 1986, at 97.

247. Peter Plagens, Peter Katel and Tim Padgett, *The Next Wave From Havana*, NEWSWEEK, Nov. 30, 1992, at 77-78.

ist himself has changed from artisan - a romantic notion, to celebrity - a media-culture phenomenon.[248]

There are no copyright infringement cases reported based on Simulationist works. This is probably because, as in the Levine/Weston case, liability is so clear that the case is settled when the artist ceases appropriating the work. In cases of Simulationism, copying constitutes one hundred percent of both the underlying and derivative work. Given this extreme application of factors one and two, a court would be unlikely to apply the fair use doctrine to Simulationist work.

C. *Conceptualists*

The quintessential example of Conceptualism is perhaps Robert Rauschenberg's telegram, which read, "This is a portrait of Iris Clert if I say so."[249] Conceptualism is appropriation by designation. The pioneer of conceptualism was Marcel Duchamp, who in the second decade of this century began making his "readymades" - ordinary objects isolated and thus transformed into works of art.[250] He was perhaps most famous for his 1917 work "Fountain," a urinal set on its back - the most banal of objects transformed into art by the conception of the artist.[251]

Barbara Kruger, probably the most renown female post-Modernist, bridges the gap between Appropriationism and Conceptualism in her work. Described as a "photographer-poet," her earlier work appropriated photographs in montage with advertising slogans of political relevance.[252] She is best known, however, for her billboard-like slogan murals, such as "Untitled (Questions)" which was painted on the outside of the Temporary Contemporary in Los Angeles between 1990 and 1992.[253] The mural was an American flag the size of a football field with a series of questions emblazoned across it:

Who is beyond the law?
Who is free to choose?
Who salutes longest?
Who prays loudest?[254]

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248. *Id.* at 99.
249. Hughes, *supra* note 132, at 334.
250. *Id.*
251. *Id.* at 66.
252. Alice Kahn, *Too Scared to Go Home*, S. F. Chron., July 8, 1992, at D3.
253. Shauna Snow, *Paint Rollers Get the Last Word in 'Questions'*, L.A. TIMES, July 26, 1992, at B1.
254. *Id.*

Kruger escapes liability because her work appropriates layouts and typographic material, which are not copyrightable.[255] However, the disadvantage to this safe posture is that her work treads so close to the edge of copyrightability that it would be difficult to enforce her copyright against any infringer. When The *New Republic* appropriated Barbara Kruger's slogan style for one of its magazine covers, Kruger responded, "What are you going to do? . . . I don't have a copyright on Futura Bold Italic."[256]

Another interesting example of a contemporary conceptualist is James Stephen George, also known simply as "Boggs." Boggs travels around the world drawing that country's currency and attempting to barter his art for its face value in goods or services.[257] Boggs keeps a log of every exchange, and explains that it is the exchange and not the drawing that constitutes his art. Boggs has had legal problems with a particular sort of "copyright infringement": in Britain, he was tried for counterfeiting. However, the jury acquitted him after deliberating for ten minutes.[258]

Conceptualists do not always appropriate, and when they do, they generally do not copy items, but reuse them. Those who, like Duchamp, use commercial items in their work, benefit from copyright law's exclusion of utilitarian articles from copyrightability. However, by using objects in concert with others or by incorporating them into artwork, conceptualists may be creating derivative works or compilations that can be construed as copyright infringements.

IV. Reconciling Law and Art: Should the Fair Use Doctrine be Expanded to Accommodate Appropriationism?

A. *The Law Should not Evaluate post-Modernism*

As a foundation, it is important to appreciate the wisdom of Justice Holmes' directive against judicial art criticism. In *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court rejected a claim that a circus poster was not eligible for copyright protection because it did not rise to the level of "fine art."[259] Writing for the majority, Justice Holmes reasoned:

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255. The Copyright Office will not register, for instance, "common geometrical figures or shapes." COMPENDIUM OF COPYRIGHT OFFICE PRACTICES §53.02(a) and (b) (1984).

256. Charles Hagen, *Barbara Kruger: Cover Girl*, N.Y. TIMES, June 14, 1992, at B25.

257. Paul Dean, *A Tough Way to Make a Buck on Rodeo Drive*, L.A. TIMES, Dec. 16, 1987, at E2.

258. *Id.*

259. *See* 188 U.S. 239, 251 (1903).

> Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use - if use means to increase trade and to help to make money . . . . It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.[260]

It seems axiomatic that if we are to expand a legal doctrine for the sake of an art movement, we are making an affirmative policy decision, and placing the imprimatur of the law upon that movement. This is both futile and inappropriate. Artists may not desire the legitimating stamp of the law, no matter how much we may wish to accommodate them.

Moreover, trends in art are too ephemeral for the pace of the law. The value of appropriation is being already questioned by the art world that created it. As early as 1987, the practice was beginning to lose its charm. "Oh no, not another appropriationist, simulationist image-stealer," lamented one art critic, calling the Appropriationists the "rerun tribe."[261] Robert Hughes calls Appropriationism a "dead end."[262] An art critic for the *New York Times* comments, "Post-Modernism has already made its points."[263]

The trend in Europe is away from post-Modernism.[264] Many of the stars of post-Modernism have moved on to other things. Jasper Johns is returning to a more abstract style.[265] Barbara Kruger has stopped focusing on appropriative photography and begun doing magazine covers for Esquire and Newsweek.[266] Jeff Koons has moved on from his "Banality" phase into his "Made in Heaven" series, which feature images of him and his wife (Ilona Staller, a former Italian 'adult film' star and parliamentarian) in explicit sexual poses.

John Caldwell of SFMOMA acknowledges that the appropriation trend is "no longer at its height."[267] However, he expects that

260. *Id.*

261. Kevin Thomas and Suzanne Muchnic, *The Art Galleries: La Cienega Area*, L. A. TIMES, Oct. 16, 1987, Calendar sec. at 24.

262. Robert Hughes, *Mucking with Media; The Whitney Offers a Long Trek Through the Alien Goo*, TIME, Dec. 25, 1989, at 93.

263. Andy Grundberg, *As It Must To All, Death Comes To Post-Modernism*, N.Y. TIMES, September 16, 1990, § 2, at 47.

264. *See id.*

265. Jill Johnston, *Trafficking With X*, ART IN AMERICA, Mar. 1991, at 103.

266. Charles Hagen, *Barbara Kruger: Cover Girl*, N. Y. TIMES, June 14, 1992, at B25.

267. Telephone interview with John Caldwell, Curator of Painting and Sculpture, San

Appropriationism will continue to be a force in modern art. "It is hard to see that what Picasso and Duchamp started will come to an abrupt end."[268] Moreover, he acknowledges that the pieces created in the early 1980's will continue to be shown for many years to come, as museum curators re-assess the merit of existing artists and continue to unearth their works.[269]

Post-Modernism seems to have given way to the next "ism" - Multi-culturalism. Amei Wallach writes, "This year, outsiders are in. That means African-Americans, Hispanic-Americans, Chinese-Americans, Native-Americans . . . and anyone else in non-white, non-middle-class, non-male America."[270] After all, the dominant culture portrayed in the media was the white, middle class. If that culture existed at all, it is now a thing of the past. It is fitting that in the age of multi-culturalism the profession of parodying media culture is losing its head of steam.

B. The First Amendment Exception Should not be Enlarged to Accommodate the Failure of Fair Use

In her 1984 article, Patricia Krieg argues that the First Amendment exception to copyright should be expanded beyond the fair use defense,[271] and concludes that appropriation should be allowed under a version of the functional test. "Appropriation for the purpose of commentary generally does not result in a product which serves the same function as the original copyrighted material."[272] This is certainly true of the Appropriationist techniques of Pop Art. However, Simulationists necessarily create a derivative work that could substitute for the original. If Appropriationism is an important enough form of speech to warrant a First Amendment defense, then Simulationism should be just as important, but the functional test would not protect it.

Krieg's argument that art can serve the same purposes as speech is suspect. She illustrates her argument with some of the few overtly political appropriationist works, and in the process only proves the premise she is trying to refute - that political imagery in art, like news value in photographs, is a limited phenome-

Francisco Museum of Modern Art, Dec. 12, 1992.

268. *Id.*

269. *Id.*

270. Amei Wallach, *Lorna Simpson: Right Time, Right Place*, NEWSDAY, Sept. 19, 1990, Part II, at 8.

271. Patricia Krieg, *Copyright, Free Speech and the Visual Arts*, 93 YALE L. J. 1565, 1578 (1984).

272. *Id.* at 1584.

non for which only a narrow exception could be made.[273] In fact, Pop Art is for the most part "totally apolitical,"[274] "a celebration of post-war materialism."[275] It was "never a movement . . . [and] had no single, coherent manifesto."[276] Artists, moreover, might not wish to balance their artistic freedom upon a platform of political purpose, since this in itself would be a restriction of content. Such a limited definition of First Amendment protection is reminiscent of the totalitarian Soviet philosophy, condemning art for art's sake.

There is an undercurrent to Krieg's argument, also implicit in *Rogers v. Koons*, which is important to ferret out. The subtext to Koons' argument was that fine artists should be able to appropriate the images created by 'banal' artists. Koons' appropriationist work was "intended to win wry smiles of cultural superiority from their knowingly smart collectors."[277] Perhaps in response, the court made much of the fact that Rogers was a legitimate photographer.[278] The court was right in avoiding the temptation to accept this argument. According to both Koons and Krieg, it is more acceptable to appropriate a commercial image than to appropriate an image from fine art, even though both are copyrighted, both are created for profit and, given the necessity of many fine artists to work in commercial art a "day job," both may be created by the same person.[279] Not only does this argument run counter to Justice Holmes' admonition against courts going into the business of art criticism, it violates an important tenet of post-Modernism - that art should not require mastery, only the desire to express.

C. *Damages Should Function as a Compulsory License*

The issue of fair use and post-Modern art can be condensed into the following question: Was the decision in *Rogers v. Koons*

273. Melville Nimmer, *Does Copyright Abridge the Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970).

274. David Lister, *Post-War Image of Fun and Rebellion*, THE INDEPENDENT, May 9, 1991, at 5.

275. *Id.*

276. Andrew Graham-Dixon, *A Bang! Not a Whimper; What was Pop?*, THE INDEPENDENT, Sept. 17, 1991, at 12.

277. Adrian Dannat, *Art/The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, Arts sec. at 20.

278. *See* Rogers v. Koons, 960 F.2d 303, 304 (2d Cir. 1992).

279. Andy Warhol worked as a commercial artist; James Rosenquist worked as a billboard painter. Both men's "day jobs" had a stylistic effect on their later work. Hughes, *supra* note 127, at 348-53. Richard Prince worked in the tearsheet department of Time, Inc., and there developed his use of advertising in artwork. Paul Taylor, *Richard Prince, Art's Bad Boy, Becomes (Partly) Respectable*, N. Y. TIMES, May 17, 1992, Arts & Leisure sec. at 31.

correct? In *Rogers v. Koons*, the court granted not only damages but an injunction, and ordered that Koons return the unsold copies of the statue to Rogers.[280] Thus, not only was Koons' artistic expression held liable, it was effectively silenced. Therein lies the real danger. John Caldwell, the curator of Koons' most recent exhibit, expressed indignity at the outcome of the case — not at Koons' pecuniary liability, but at the fact that the statue was made unavailable for exhibit to any museum working with Koons to create a representative show.[281]

Section 504 of the Copyright Act sets forth the remedies available for copyright infringement, which include statutory damages, injunction, [282] and in cases of bad faith, attorneys' fees.[283] Statutory damages are provided because it is widely considered difficult to prove actual damages in cases of copyright infringement.[284] However, this homily is applicable only to assessment of the author's reputation, not to the calculation of royalties or proceeds from the infringing work. In cases of copyright infringement, irreparable injury is presumed, and this results in a judicial practice of granting injunctions against almost any failed fair use defense.[285]

This is what makes the art community believe the *Rogers v. Koons* decision is unfair - not its assessment of liability, but its application of injunctive relief. The artists who are most likely to be served with copyright infringement suits are those with a high profile, and thus a deep pocket. Assessing damages against them may strike some as unfair, but not as unfair as entirely preventing the art community from using appropriative techniques.

Title 17 specifies that damages may be assessed in proportion to the "elements of profit attributable to factors other than the copyrighted work."[286] In so stating, the Copyright Act is recognizing the important element of unjust enrichment in appropriative practice and directing that the author of the infringing work pay to the original author any royalties that result from his use of the underlying work. If the proceeds from the infringing use, and not

280. Rogers v. Koons, 960 F.2d at 313.

281. Telephone interview with John Caldwell, Curator of Painting and Sculpture, San Francisco Museum of Modern Art, Dec. 12, 1992.

282. 17 U.S.C. §504(a) and (b) (1993). In addition, if the infringement is committed willfully, the court may assess a fine of up to an additional $100,000. 17 U.S.C. § 504(c)(2) (1993).

283. MERRYMAN & ELSEN, *supra* note 11, at 205 n.1.

284. Michael J. Pollack, *Suing the Stars — 80's Style: The Copyright Infringement Lawsuit*, Ent. L. Rep., Feb. 1986, at Business Affairs sec.

285. ALAN LATMAN, THE COPYRIGHT LAW 278 n. 105 (6th ed. 1986).

286. 17 U.S.C. §504 (1993).

harm to the original author's reputation, are the basis for damages, then the infringement action effectively enforces a retroactive compulsory license for the underlying work. Except in extreme cases where the author's reputation suffers substantial and irreversible injury, the relief available in cases of appropriation should be limited to such damages.

The Copyright Act contains explicit provisions for compulsory licenses in only one other area - "mechanical royalties" for music publishing. Mechanical royalties are licensing fees imposed on the mechanical reproduction of sound recordings.[287] Section 115 of the Copyright Act provides that after a composition has been initially published, any person may re-record it and exploit his new recording by performing or distributing it, provided he obtains a compulsory license.[288] The Section sets a uniform rate of four and one half cents per composition, per copy sold, for the mechanical license fee.[289] In the record industry, it is common for songwriters and recording artists to negotiate lower licensing fees, but they are always tied to the statutory rate.[290] In addition, settlements and damage awards in song copyright infringement cases are generally based on a pro-rated share of mechanical and other royalties that are attributable to the underlying composition.[291] The compulsory license scheme was formulated to allay the music industry's fear of "monopolistic control of music for recording purposes."[292] If the goal in resolving the problems of fair use in fine art is to insure that artists may use existing works in their new creations, then some form of compulsory licensing scheme is an obvious proposition. However, there are too many fundamental differences between the song and art markets for a statutory scheme to work.

In the popular song market, compositions are in a sense fungible - most are of a short duration, are recorded separately, and are compiled together in albums.[293] Since they are easily interchangeable, it makes sense to set a statutory rate that is identical for each

287. 17 U.S.C. §115(a)(1) (1993). Even though sound recordings are now generally reproduced by magnetic or digital means, rather than mechanical means, the term "mechanical royalties" has not changed. *The Four Multimedia Gospels*, BYTE, February 1990, at 210.

288. 17 U.S.C. § 115(a)(1) (1993). The license must serve a "notice of intention" within thirty days after making the reproduction. 17 U.S.C. § 115(b) (1993).

289. SIDNEY SHEMEL & M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 19 (5th ed. 1985).

290. *Id.*

291. Michael J. Pollack, *Suing the Stars — 80's Style: The Copyright Infringement Lawsuit*, ENT. L. REP., Feb. 1986, at Business Affairs sec.

292. ALAN LATMAN, THE COPYRIGHT LAW 206 (6th ed. 1986).

293. *Id. at* 14.

composition. Sound recordings tend to appropriate sounds from other, similar recordings. The price of a recording to the consumer does not depend at all on the reputation of the songwriter, or even the recording artist.[294] The product is in clear competition with the record in the next bin, which would be considered an economic substitute. In contrast, works of fine art are difficult to value and compare. The price of a piece of artwork to the art consumer depends largely on the reputation of the artist, and there may be no economic substitutes for a given work. It would be even more difficult to compare a work of art with the underlying material whose images it appropriates - material that may range from Brillo boxes, to publicity photos, to inflatable toys. Such material may enjoy copyright protection that is entirely different in scope and nature from that afforded the work of art.

Moreover, in the market for musical compositions, as in the related intellectual property markets of film, television and literary properties,[295] most royalties are payable based on the number of copies sold.[296] To the songwriter or record company that markets the song, the goal is to sell as many recordings as possible, not to limit the edition. Artworks, in contrast, are usually created in single or limited editions, and much of their value springs from that limitation.[297] For instance, a contemporary "work of visual art" is defined by federal statute as less than 200 copies.[298] Works of fine art do not normally bear any royalties upon resale.[299]

These differences compel the conclusion that although a compulsory licensing scheme would address the needs of appropriative art, a statutory system such as the one in place for recorded music could not be implemented. Copyright infringement suits therefore must take on this role, in effect creating a compulsory license where the artist cannot attain it privately. The availability of injunctive relief should not be presumed, statutory damages should not be available, and damages should be formulated not to assess the damage to the underlying artist's reputation, but to redirect the proceeds from the appropriation of his work. A requirement of

294. Record companies typically set consumer prices based on top line and budget line goods only. Although the royalty rate may vary, the retail price does not. *Id.* at 4.

295. Richard Wincor, Literary Property 22-23, 99 (1967).

296. Shemel & Krasilovsky, *supra* note 289 at 4 (5th ed. 1985).

297. *See* Charles Hagen, *Critic's Notebook: How Sacred Should Photo Negatives Be?*, N. Y. Times, Mar. 3, 1992, at C13; Merryman & Elsen, *supra* note 15, at 525-551.

298. 17 U.S.C. §101, Sec. 6.01, Visual Artists Rights Act of 1990. California's fine arts law has similar provisions. Cal. Civ. Code § 987(b)(2) (1993).

299. The exception to this is the California Resale Proceeds Act, which assesses a 5% royalty on public sales of fine art. Cal. Civ. Code § 986(a) (1993).

good faith effort to negotiate a private license would be a reasonable pre-requisite for limiting damages in this way to insure that the mechanism was not abused.

Of course, every regulation has a price. Any scheme that purports to insure the availability of copyrighted works must limit the scope of the copyright.[300] The statutory compulsory license for music restricts the copyright owner in two ways: it takes away his right to decide whether to license the work, and it sets a price which he must accept for its use. A parallel compulsory license, enforced through application of the fair use doctrine, would also have the effect of removing the author's decision whether to license the work. In this sense, art would truly belong to the world. It would also remove his ability to set his own price for what he believes the possible dilution of his property is worth, insofar as the appropriator could force him to accept only the proceeds of the derivative work. The issue is whether this price is acceptable in order to make images available for appropriative use.

V. Conclusion

Courts have had understandable difficulty applying the fair use doctrine to works that embody the "ineluctable modality of the visible." Application has been particularly inadequate with respect to post-Modern art, whose appropriative techniques stretch the doctrine beyond its scope. However, re-formulation of the doctrine, through the creation of a First Amendment defense or a general widening of fair use itself, is an inappropriate response. The courts should maintain a narrow definition of fair use, for which no damages would be due, and accommodate appropriationists by changing not the calculus of liability, but the availability of remedies. Damages in copyright infringement actions involving appropriation should be limited to a pro-rated percentage of profits gained by the infringing work. The availability of injunctive relief should not be available by presumption, because of its silencing effect on expression.

With this limitation, artists would be free to appropriate what they wished, but would remain liable to the authors of appropriated works for a portion of the profits from the derivative works.

300. For instance, the device of public domain removes all copyright protection from older works. *See generally* Litman, *supra* note 7.

Thus, appropriationist expression would not be chilled, but the authors of underlying works would be compensated.

*Heather J. Meeker**

* J.D. Candidate, Boalt Hall School of Law, University of California, Berkely, 1994; B.A. Economics, Yale University, 1979.