

2-1-1993

## All's Not Fair in Art and War: A Look at the Fair Use Defense After *Rogers v. Koons*

Willajeanne F. McLean

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

---

### Recommended Citation

Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 Brook. L. Rev. 373 (1993).  
Available at: <https://brooklynworks.brooklaw.edu/blr/vol59/iss2/4>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

# ALL'S NOT FAIR IN ART AND WAR: A LOOK AT THE FAIR USE DEFENSE AFTER *ROGERS v. KOONS*\*

Willajeanne F. McLean\*\*

Art is up for grabs.<sup>1</sup>

## INTRODUCTION

Consider this: "Wilma" has an idea for a painting—a collage of images from the contemporary art world. She decides to feature the artist Jeff Koons's aluminum bunny rabbit, puppy and vacuum cleaner,<sup>2</sup> and add to the collage a loaf of sliced bread. Using an optical scanner, she scans pictures of the items which are readily available from museum catalogs and magazines. Wilma arranges the design on her computer and sends a completed copy to a company that will create the picture for her. The finished picture looks just like the scanned images; yet she has combined the images in a "new" way. She exhibits this finished work with much success. It is certainly an appropriation,<sup>3</sup> but is it an infringement of copyright as

---

\* 960 F.2d 301 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 365 (1992).

\*\* Associate Professor of Law, University of Connecticut Law School. I am indebted to John B. Koegel, Esquire for taking the time to discuss with me the various issues involving the clash of copyright law and appropriation in general, and the *Koons* case in particular. I acknowledge with gratitude the helpful comments and criticisms of Peter Bloom, Rosemary Coombe, Sara Cox and Terry Tondro on earlier drafts of this Article. Thanks to my research assistant, Tamsin Shoultz, for her excellent assistance in the preparation of this Article.

<sup>1</sup> Jeff Koons, *quoted in* Tony Parsons, *Art Without Shame*, DAILY TELEGRAPH, Apr. 4, 1992, at 101.

<sup>2</sup> With the exception of the "sliced bread," the items that my hypothetical artist would use in her painting have all been exhibited by Jeff Koons. *Rabbit*, also known as the *Brancusi Bunny*, was exhibited in his 1986 "Statuary" show; *Puppy* was exhibited in 1992; and the vacuum cleaners, *New Shelton Wet/Dry Doubledecker*, were exhibited in 1981.

<sup>3</sup> Appropriation is an artistic strategy or technique that blurs the distinction between fakes and originals. It has also been defined as a "twentieth century manifestation of an aesthetic strategy which aims for the viewer to react to the work with the heart thumping immediacy of real-life events rather than with the

well? Were "Wilma" to be charged with copyright infringement, it is likely that she would lose the suit even if she argued that her use was "fair," that is, that her appropriation of Koons's work was a critical comment about his work, his philosophy and the current banality of art in society.<sup>4</sup>

In a recent decision, the Court of Appeals for the Second Circuit held that an artist's work is not "up for grabs" until the artist has granted prior permission for such appropriations.<sup>5</sup> The court affirmed the district court's findings that Jeff Koons's "use"<sup>6</sup> of Art Rogers' photograph, "Puppies," to make his sculpture "String of Puppies" was a (mis)appropriation of Rogers' work. Koons's principal argument against a finding of copyright infringement, which the Second Circuit rejected, was the copyright doctrine of "fair use." Part I of this Article considers the fair use doctrine and the requirements for making a fair use defense. Part II then considers the technique of Appropriation, its place in the current art world lexicon and its clash with copyright laws. Part III next reviews the Second Circuit's *Rogers v. Koons* decision, and critically examines the Second Circuit's application of the fair use factors. Part III argues that those factors are unwieldy and even anachronistic when applied to copyright infringements in the visual arts. It also contends that the court failed to articulate a standard by which post-modern artists such as Jeff Koons can create art

---

desiccated response often experienced by those for whom going to museums is a dreary cultural duty." I. Michael Danoff, *Jeff Koons*, in CATALOG OF MUSEUM OF CONTEMPORARY ART 16 n.27 (1988). For a discussion of Appropriation, see *infra* notes 60-106 and accompanying text. When discussing Appropriation as an artistic school of thought, the "A" will be capitalized.

<sup>4</sup> Fair use is an affirmative defense to a finding of copyright infringement. See discussion of fair use, *infra* notes 14-59 and accompanying text.

<sup>5</sup> *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 365 (1992). Even more recently, Koons has been found liable for copyright infringement in two other cases, stemming from the same "Banality" show. See *Campbell v. Koons*, No. 91 Cir. 6055, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Apr. 1, 1993); and *United Features Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

<sup>6</sup> Jeff Koons objected to the court's usage of "copied" when applied to his appropriation of Rogers' photograph. See *Rogers v. Koons*, 751 F. Supp. 474, 477 (S.D.N.Y. 1990) ("Koons prefers to avoid the verb 'copied.'"). The word "copy" has two possible meanings in copyright law: (1) to *duplicate* an original; or (2) to *imitate* an original by using it as a model. See L. RAY PATTERSON & STANLEY W. LUNDBERG, *THE NATURE OF COPYRIGHT* 146, 147 (1991) (noting that the 1976 Copyright Revision Act uses the second definition in limiting the rights of copyright owners' protection for sound recordings).

without the specter of lawsuits hanging like the sword of Damocles over their heads and suggests an alternative standard for evaluating copyright infringement in the visual arts.

## I. FAIR USE

Fair use is the most troublesome in the whole law of copyright.<sup>7</sup>

Under the powers granted to it by the United States Constitution, Congress may secure to authors and inventors exclusive rights in their writings and inventions.<sup>8</sup> The stated purpose for this monopoly grant was to promote the progress of science and the useful arts.<sup>9</sup> It has been recognized, however, that such rights,<sup>10</sup> if unlimited, "would stifle the very creativity that copyright laws were designed to foster."<sup>11</sup> Thus, the courts created an equitable remedy—the doctrine of fair use,<sup>12</sup>

<sup>7</sup> *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939); see Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1544 n.58 (noting that the quotation from Judge Learned Hand's opinion is repeated in nearly every major treatise, case book or law review article on the subject of fair use).

<sup>8</sup> Article 1, Section 8, Clause 8 of the United States Constitution provides Congress with the power "[t]o 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." U.S. CONST. art. 1, § 8, cl. 8.

<sup>9</sup> See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (copyright law was "intended . . . to grant a valuable, enforceable right to authors, publishers, etc., . . . 'to afford greater encouragement to the production of literary . . . works of lasting benefit to the world'" (quoting *Washingtonian Co. v. Pearson*, 396 U.S. 30, 36 (1939))).

<sup>10</sup> 17 U.S.C. § 106 states in pertinent part:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

<sup>11</sup> See *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57, 60 (2d Cir. 1980) (the doctrine of fair use allows courts "to avoid the rigid application of the copyright statute").

<sup>12</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901) (adjudi-

which in certain circumstances allows one to use another's copyrighted work without infringing upon the copyright.<sup>13</sup>

Fair use has been defined as "[a] privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."<sup>14</sup> Yet such a use also has its limits: it must be creative and inventive and result in an advancement of learning.<sup>15</sup> The judicially created doctrine of fair use, which was codified as section 107 of the Copyright Act of 1976, delineates four factors to be considered when determining whether a "use" is a fair one.<sup>16</sup>

---

cating a dispute over rights in the writings of George Washington). As articulated by Justice Story, the standard to be used in deciding questions of copyright infringement required a "look to the nature of the objects of the selections made, 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." *Id.* For a history of the development of fair use in the United States, see WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 18-64 (1985).

<sup>13</sup> The defense of fair use only comes into play once plaintiff has made a showing of defendant's copying and the existence of substantial similarity between the two works. The term "fair use" has been used to represent, interchangeably, a use which is non-infringing or one that is infringing, but exempt. See Thomas R. Leavens, *In Defense of the Unauthorized Use: Recent Developments in Defending Copyright Infringement*, 44 *LAW & CONTEMP. PROBS.* 3, 6 (1981) (discussing the doctrine of fair use). See generally *Elsemere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 743-44 (S.D.N.Y.) (although copied portion of copyrighted song was substantial, it constituted a non-infringing fair use), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

<sup>14</sup> *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Nonetheless, copyright protection is only available where the *expression* of the idea is copied, and not where the *idea* is copied. See 17 U.S.C. § 102(b) (1988), *infra* note 30.

<sup>15</sup> See generally *New Era Publications Int'l, Aps. v. Holt*, 695 F. Supp. 1493, 1499 (S.D.N.Y. 1988) ("[C]ertain forms of copying of artistic creation are indispensable to education, journalism, history . . . ; the statute . . . allows latitude in appropriate circumstances for copying of protected artistic expression and exempts such copying from a finding of infringement"), *aff'd*, 873 F.2d 576 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). But see Brian R. Landy, Comment, *The Two Strands of the Fair Use Web: A Theory for Resolving the Dilemma of Music Parody*, 54 *OHIO ST. L.J.* 227, 231 (1993) ("fair use does not require that the use be creative or productive").

<sup>16</sup> 17 U.S.C. § 107 reads, in pertinent part, as follows:

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. In determining whether the use made of a

The first factor calls for an analysis of the purpose and character of the use.<sup>17</sup> Under this requirement, a court must determine if the use is for the purpose of comment or criticism.<sup>18</sup> For example, parody is generally considered to fall within this category.<sup>19</sup> Additionally a court must consider whether the use is for commercial or nonprofit educational purposes.<sup>20</sup> Although it appears that Congress intended commercial or nonprofit educational purposes to be significant in but not conclusive of the determination of fair use,<sup>21</sup> courts tend to view commercial benefits redounding to the user as rendering the use "unfair."<sup>22</sup> This presumption of unfairness, however, is a rebuttable one.<sup>23</sup>

The second factor involves an inquiry into the nature of the copyrighted work.<sup>24</sup> Here the courts determine if the copyrighted work is primarily factual in its nature or a work of creativity.<sup>25</sup> If the copyrighted work is considered primarily

work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

<sup>17</sup> 17 U.S.C. § 107(1) (Supp. IV 1992).

<sup>18</sup> *Id.*

<sup>19</sup> For a discussion of parody, see *infra* note 160-71 and accompanying text.

<sup>20</sup> 17 U.S.C. § 107(1).

<sup>21</sup> H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 ("the commercial or nonprofit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions").

<sup>22</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (holding that every commercial use of copyrighted material was presumptively unfair); *Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 97 (2d Cir. 1977) (rejecting the defendant's use and characterizing it as "chiseling for personal profit"), *cert. denied*, 434 U.S. 1014 (1978). *But see* *Maxtone-Graham v. Burttschaell*, 803 F.2d 1253, 1262 (2d Cir. 1986) (§ 107(1) should not be read as requiring a clear cut choice between "commercial" and "nonprofit," as such reading would virtually obliterate "fair use"), *cert. denied*, 481 U.S. 1059 (1987).

<sup>23</sup> See *generally* *Consumers Union of United States, Inc. v. New Regina Corp.*, 664 F. Supp. 753, 763 (S.D.N.Y. 1987) (where the use has a commercial purpose, the presumption of unfairness can be rebutted).

<sup>24</sup> 17 U.S.C. § 107(2) (1988).

<sup>25</sup> See *generally* *Stewart v. Abend*, 495 U.S. 207, 237 (1990) ("in general, fair

factual, then public interest in, and access to, the facts may be considered paramount,<sup>26</sup> and wider latitude is afforded to those who appropriate factual parts from the work.<sup>27</sup> If the copyrighted material is determined to be creative in nature, such as literary or pictorial works,<sup>28</sup> then the author is given more protection from another's unauthorized use.<sup>29</sup> This distinction is consistent with copyright law, since facts and ideas are not *per se* protectable; only the *expression* of the idea or arrangement of the facts is protectable.<sup>30</sup> The rationale for this distinction between factual and creative work may lie in a perception of public benefit.<sup>31</sup> It is widely believed that the public dissemination of facts is more significant than the dissemination of those expressions contained in fictional or cre-

---

use is more likely to be found in factual works than in fictional works"); *Maxtone-Graham*, 803 F.2d at 1263 (Second Circuit found fair use by the defendant of excerpts from the plaintiff's book because the work was "essentially factual in nature").

<sup>26</sup> See *Consumers Union*, 724 F.2d at 1050 (the scope of the fair use doctrine "is undoubtedly wider when the information conveyed relates to matters of high public concern").

<sup>27</sup> See *id.* at 1049 ("the risk of restraining the free flow of information is more significant with informational work, the scope of permissible fair use is greater"). See generally 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.05[A], at 13-77 (1992) ("Copyright protection is narrower, and the corresponding application of the fair use defense greater, in the case of factual works . . ."); *Brewer v. Hustler Magazine*, 749 F.2d 527, 529 (9th Cir. 1984) ("the scope of the fair use defense is broader when informational works of general interest to the public are involved than when the works are creative products").

<sup>28</sup> See *Rogers v. Koons*, 751 F. Supp. 474, 480 (S.D.N.Y. 1990) (finding that Rogers' photograph was a creative work, closely akin to fiction).

<sup>29</sup> *Stewart v. Abend*, 863 F.2d 1465, 1481 (2d Cir. 1988), ("a use is less likely to be deemed fair when the copyrighted work is a creative product"), *aff'd*, 495 U.S. 207 (1990). But see Wendy Gordon, *Reality as Artifact: From Feist to Fair Use*, 55 LAW & CONTEMP. PROBS. 93, 96 (1992) (while imaginative works are creative, they may also be comprised of factual components, which need to be widely available for public dissemination).

<sup>30</sup> See 17 U.S.C. § 102(b) which states:

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

<sup>31</sup> See generally *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966) (finding that fair use determination turns on whether the distribution of the work would serve the public interest in the free dissemination of information), *cert. denied*, 385 U.S. 1009 (1967). But see Elliot M. Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, Inconsistencies*, 61 TEMPLE L. REV. 133, 156 (1988) (taking issue with rationales for distinguishing between factual and creative works).

ative works.<sup>32</sup> Indeed an author may choose not to display or publish a work of art or fiction.

In addition to determining the factual or creative nature of the work, courts also consider whether or not a work has been published.<sup>33</sup> If the work has not been published and is appropriated, it is unlikely that such appropriation would be considered fair use,<sup>34</sup> because the author's right to choose the timing and forum for the debut of her work outweighs the public interest in access to the work prior to its publication.<sup>35</sup>

The third factor is a quantitative and qualitative evaluation of the amount of the copyrighted work used.<sup>36</sup> Although there are no concrete guidelines for determining how much appropriation is too much,<sup>37</sup> a court generally determines whether or not the taking was reasonable under the circumstances.<sup>38</sup> If, for example, the entire work has been repro-

---

<sup>32</sup> See generally *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 563-64 (1985) ("the law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.4 (1984) ("Copying a news broadcast may have a stronger claim to fair use than copying a motion picture."); *Diamond v. Am. Law Publishing Corp.*, 745 F.2d 142, 148 (2d Cir. 1984) ("informational works may be more freely published under § 107 than those of a creative nature").

<sup>33</sup> Publication, [as defined by the Copyright Act of 1976,] is the distribution of copies or phonorecords of a work to the public by a sale or other transfer of ownership, or by a rental, lease or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. § 101 (Supp. IV 1992).

<sup>34</sup> See *Harper & Row*, 471 U.S. at 554 ("the unpublished nature of a work is key, though not necessarily a determinative factor," tending to negate a finding of fair use). Congress, however, added a proviso to the statute in October 1992 stating that just because a work is unpublished does not in itself bar a finding of fair use. See 17 U.S.C. § 107 (Supp. IV 1992).

<sup>35</sup> See generally *Wright v. Warner*, 953 F.2d 731, 737 (2d Cir. 1991) (author's right to control the first public appearance weighs against a finding of fair use if the use occurs before its release). Accord *Harper & Row*, 471 U.S. at 564; *New Era Publications v. Holt*, 873 F.2d 576, 592 (2d Cir. 1989).

<sup>36</sup> 17 U.S.C. § 107(3).

<sup>37</sup> *Maxtone-Graham v. Burttschaell*, 803 F.2d 1253, 1263 (1986) ("There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use."); *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966) (the concept of fair use "is based on reasonableness and extensive verbatim copying . . . cannot satisfy that standard"), *cert. denied*, 385 U.S. 1009 (1967).

<sup>38</sup> See *Roy Export Co. Establishment of Vaduz, Liechtenstein, Black, Inc. v.*



duced, it is unlikely a court will make a finding of fair use.<sup>39</sup> Moreover, even if the entirety of the work has not been reproduced, a court may nevertheless make a qualitative finding that the use was substantial and "unfair" because the user appropriated the "essence" of the work.<sup>40</sup> In such cases the user may not defend her (mis)appropriation by demonstrating that most of her own work was not based upon the copyrighted work.<sup>41</sup> This analysis of qualitative appropriation—that is, a determination of whether or not the "essence" of the copyrighted work is taken—ties into the fourth factor:<sup>42</sup> the effect of the alleged infringer's use on the potential market of the copyrighted work.<sup>43</sup>

This last factor,<sup>44</sup> which has been held to be the most important,<sup>45</sup> considers whether the work replaces the original copyrighted work in the marketplace or fulfills the demand for

Columbia Broadcasting Sys., Inc., 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (taking 55 seconds of an 89 minute film was not fair use), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982). *But see* Keep Thompson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D. N.H. 1978) (15 seconds' use of 3 minute song was fair use).

<sup>39</sup> See generally *Weissmann v. Freeman*, 868 F.2d 1313, 1325 (2d Cir.) (reviewing the fair use factors and determining that where there has been extensive verbatim copying or paraphrasing of another's material, there can be no finding of fair use), *cert. denied*, 493 U.S. 883 (1989); 3 NIMMER, *supra* note 27, § 13.05[A], at 13-80 ("Whatever the use, generally it may not constitute a fair use if the entire work is reproduced."); Matthew W. Wallace, *Analyzing Fair Use Claims: A Quantitative and Paradigmatic Approach*, U. MIAMI ENT. & SPORTS L. REV. 121, 137 (1992) (noting that "courts sustained a fair use defense only 16.3% of the time" where the defendant has appropriated all or substantially all of a work).

<sup>40</sup> See *H. C. Wainwright & Co. v. Wall Street Transcript Corp.*, 418 F. Supp. 620, 625 (S.D.N.Y. 1976) (finding that the defendant's use of the plaintiff's stock market analysis "sucked the marrow from the bone" of the plaintiff's work), *aff'd*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

<sup>41</sup> *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 565 (1985) ("[A] taking may not be excused merely because it is insubstantial with respect to the infringing work."); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.) ("no plagiarist can excuse the wrong by showing how much of his work he did not pirate"), *cert. denied*, 298 U.S. 669 (1936).

<sup>42</sup> See *Pierre N. Leval, Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1123 (1990) ("as to the relationship of quantity to the market . . . the more taken the greater the likely impact on the copyright holder's market").

<sup>43</sup> 17 U.S.C. § 107(4).

<sup>44</sup> 17 U.S.C. § 107(4).

<sup>45</sup> See *Harper & Row*, 471 U.S. at 566 (the fourth factor is "undoubtedly the single most important element of fair use"); see also *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (the fourth factor set forth in statute is "most important and . . . central fair use factor") (quoting 3 NIMMER, *supra* note 27, § 13.05[A], at 13-81).

the original.<sup>46</sup> A showing that a substantial (qualitative) taking would have an impact upon the potential market for the original work would likely result in a presumption against fair use.<sup>47</sup> Conversely, a showing of no market impact might result in a finding of fair use.<sup>48</sup> In determining the market impact of the use, the court focuses on whether the use diminishes the potential sale of the original, copyrighted work.<sup>49</sup> The inquiry focuses not only focus on the market for the original, but also on the market for potential derivative works to which the original author has conclusive rights.<sup>50</sup> Despite the stated significance of the fourth factor, however, lawyers have been given no guidance in determining how much market impairment will lead to a presumption against fair use.<sup>51</sup>

---

<sup>46</sup> *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) (infringement found where the parody supplanted the market for the original); *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874, 876 (2d Cir. 1941) (where the defendant's book met the same demand and market as the plaintiff's book, the defendant's use of was not fair use).

<sup>47</sup> See *Leval*, *supra* note 42, at 1123; see also *Harper & Row*, 471 U.S. 539, 550 (1984) (use by one who cites the most important parts of the copyrighted work, "with a view . . . to supersede the use of the original work, . . . will be deemed in law a piracy." (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901)).

<sup>48</sup> See *Leval*, *supra* note 42, at 1123 ("One can imagine secondary works that quote 100% of the copyrighted work without affecting market potential."); see also *Harper & Row*, 471 U.S. at 599 n.23 (Brennan, J., dissenting) (As the statutory directive implies, it matters little whether the use is 1 or 100 percent appropriated expression if the taking . . . had no adverse effect on the copyrighted work.").

<sup>49</sup> See generally *H.C. Wainwright & Co. v. Wall Street Transcript Corp.*, 418 F. Supp. 620, 627 (S.D.N.Y. 1976) (finding that market for plaintiff's copyrighted financial reports was reduced due to publication of the defendant's infringing work), *aff'd*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

<sup>50</sup> See *Harper & Row*, 471 U.S. at 568 ("this inquiry must take account not only of harm to the original, but also of harm to the market for derivative works").

A "derivative work" is a work based upon one or more preexisting works, such as translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modification which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101.

<sup>51</sup> See generally *PATRY*, *supra* note 12, at 453-54 (arguing that the factor is so misunderstood that it permits courts to deny fair use in absence of adverse effect of the use on the market); see also *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1497 (1984) (holding that notwithstanding defendant's sales in a market in which the plaintiff did not operate, defendant's use was not fair). *But see* *Leval*,

Unfortunately, neither case law nor the statute have set forth a bright line for establishing when a use is or is not fair.<sup>52</sup> Nor does the statute provide guidance regarding the weighing of the four factors to be taken into consideration.<sup>53</sup> Thus, the results in any given case are largely unpredictable.<sup>54</sup> Nevertheless, the language of the statute makes clear that an evaluation of fair use cannot be made without addressing the four factors.<sup>55</sup> Equally unhelpful is the preamble to section 107 which sets forth illustrative examples of uses that would not constitute *per se* infringements. They include, *inter alia*, criticism, comment, news reporting and scholarship.<sup>56</sup> Although such uses might be regarded as fair, a court must still consider the four statutory factors when making such a determination.<sup>57</sup> The problems of applying the fair use factors,

---

*supra* note 42, at 1124-25 (market impairment should not weigh against the user unless impairment is substantial).

<sup>52</sup> See Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 235 (1988) ("doctrine has no crisp outlines, no precise standards and no obvious center or core"); John Shelton Lawrence, *Copyright Law, Fair Use and the Academy*, in FAIR USE AND FREE INQUIRY: COPYRIGHT AND THE NEW MEDIA 11 (Shelton Lawrence & Bernard Timbers eds., 2d ed. 1989) ("Cases provide no definitive specifications regarding the limits of fair use.") [hereinafter FAIR USE AND FREE INQUIRY]; Leval, *supra* note 42, at 1106 ("formulations furnish little guidance").

<sup>53</sup> See Abramson, *supra* note 31, at 61 (absence of guidance in weighing the factors makes the doctrine of fair use conducive to broad judicial discretion).

<sup>54</sup> See generally Leval, *supra* note 42, at 1105-06 (1990) (noting that "earlier decisions (regarding fair use) provide little basis for predicting later ones"); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137-38 (1990) (noting that the state of the doctrine of fair use is confused and disorderly, citing two contradictory Supreme Court opinions, Harper & Row, Publishers, Inc. v. National Enter., 471 U.S. 539 (1985) and Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).

<sup>55</sup> See *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984) (statute establishes a minimum number of inquiries that a court must carry out), *cert. denied*, 471 U.S. 1004 (1985); Dratler, *supra* note 52, at 260 ("Congress intended to replace the witches' brew of equity and ad hoc policy balancing with more finely refined elixirs, but without curtailing development of the doctrine in the common law tradition.").

<sup>56</sup> 17 U.S.C. § 107 (Supp. IV 1992). These examples are not exclusive. See also H.R. REP. No. 1476, 94th Cong., 2d Sess. 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678, which notes that the examples give an idea of the sort of activities a court might consider fair use under the circumstances. For example, parody, which is considered to be a fair use under certain circumstances, is not mentioned. See generally MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 296 (1989) (parody is not specifically mentioned in the preamble as presumptively fair but that the categories listed are sufficiently broad to include it).

<sup>57</sup> See *Pacific & Southern*, 744 F.2d at 1495 (trial court erred in failing to

particularly when confronted with technologies unanticipated at the time Justice Story articulated these standards, are widely recognized.<sup>58</sup> Application of the fair use factors in copyright infringement cases involving the works of visual art is especially fraught with difficulties.<sup>59</sup> The next section will briefly explore the concept of Appropriation as an artistic strategy, and the legal complications that result when it collides with copyright claims.

## II. THE CLASH OF ARTISTIC APPROPRIATION WITH COPYRIGHT

[T]he writers and artist of the present day will no longer be able to invent new styles and worlds—they've already been invented; only a limited number of combinations are possible; the most unique ones have been thought of already . . . [A]ll that is left is to imitate dead styles, to speak through the masks and with the voices of the styles in the imaginary museum. But this means that . . . postmodernist art is going to be about art itself in a new kind of way; even more it means that one of its essential messages will involve the necessary failure of art and the aesthetic, the failure of the new, the imprisonment in the past.<sup>60</sup>

The world is filled to suffocating. Man has placed his token on every stone. Every work, every image is leased and mortgaged. We know a picture is but a space in which a variety of images, none of them original, blend and clash. A picture is a tissue of quotations drawn from the innumerable centers of culture . . . We can only imitate a gesture that is always anterior, never original. Succeeding the paint-

---

consider four factors involved in fair use and in concluding that use was neither productive nor creative).

<sup>58</sup> See Sigmund Timberg, *A Modernized Fair Use Code for Visual, Auditory and Audiovisual Copyrights: Economic Context, Legal Issues and the Laocöon Shortfall*, in *FAIR USE AND FREE INQUIRY*, *supra* note 52, at 305 (noting that revolutionary technological developments have rendered copyright law obsolete).

<sup>59</sup> See Jennifer T. Olsson, Note, *Rights in Fine Art Photography: Through A Lens Darkly*, 70 *TEX. L. REV.* 1489, 1490 (1992) ("standard applications of copyright law become more complicated when applied to fine art photography"); see also John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 *COLUM.-VLA J.L. & ARTS* 103, 140 (1988) (arguing for greater flexibility in the fair use exception when it is applied to artistic appropriation). According to Carlin, adaptation of copyright in this domain would be consistent with other adaptations made for other aspects of copyrights not foreseen when the initial revision of the Copyright Act occurred in 1976. *Id.*

<sup>60</sup> See Frederic Jameson, *Postmodernism and Consumer Society*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 111, 115-16 (Hal Foster ed. 1982) [hereinafter *THE ANTI-AESTHETIC*].

er, the plagiarist no longer bears within him passions, humors, feelings, impressions, but rather this immense encyclopedia from which he draws . . . .<sup>61</sup>

The two quotations above illustrate the ethos of the prevailing climate for artists working within the postmodern paradigm.<sup>62</sup> They must create in circumstances where, they claim, there is truly nothing new under the sun. But they are not the first to claim that absolute novelty is an impossibility; claims that *all* works are necessarily derivative have been made in copyright law for over a century.<sup>63</sup> Postmodern artists use as source material the "literature" that is omnipresent—the media-produced signs, symbols and images,<sup>64</sup> or they use pre-existing images in art.<sup>65</sup> In any case, such artists appropriate.<sup>66</sup>

<sup>61</sup> Sherrie Levine, *quoted in* MAGAZINE OF THE WADSWORTH ATHENAEUM 7 (Spring 1987) and in Paula Marincola, *Stock Situations/Reasonable Facsimiles*, in IMAGE SCAVENGERS: PHOTOGRAPHY 24 (Paula Marincola ed. 1982) [hereinafter IMAGE SCAVENGERS].

<sup>62</sup> Defining postmodernism is like trying to nail gelatin to a wall. For example, the term "postmodern" has been used to "describe everything from a broad cultural shift . . . to new directions in rock music." Brian Wallis, *What's Wrong with this Picture?*, in ART AFTER MODERNISM: RETHINKING REPRESENTATION XVII (Brian Wallis ed., 1984) [hereinafter ART AFTER MODERNISM]; see Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 577 (1991) ("if postmodernism is anything at all it comes in more than thirty-one flavors") (citations omitted).

<sup>63</sup> See *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4436):

In truth, in literature, in science and in art, there are and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.

*Id.* at 619.

<sup>64</sup> See Jameson, *supra* note 60, at 112 ("postmodernisms have been fascinated by that whole landscape of advertising and motels . . . the late show and Grade-B Hollywood film"); Wallis, *supra* note 62, at xv ("Typical cultural representations such as newspaper photographs, films, advertisements . . . carry ideologically charged messages."); see also Danoff, *supra* note 3, at 16-19 (discussing the impact the media has had on daily life and observing that "media can seem hyperreal").

<sup>65</sup> See Carlin, *supra* note 59, at 107 (there are two distinct types of references for postmodern artists: commercial imagery (advertisements) and existing artistic imagery (others' artistic works)). The appropriated image may be a film still, a photograph, or a drawing. See Craig Owens, *The Allegorical Impulse Toward a Theory of Postmodernism*, in ART AFTER MODERNISM, *supra* note 62, at 205 (discussing the link between allegory and contemporary art).

<sup>66</sup> Appropriation is a technique "in which one artist takes as her or his own images, often the extremely well-known images of another." Arthur C. Danto, *Narratives of the End of Art*, in ENCOUNTERS & REFLECTIONS: ART IN THE HISTORICAL

Appropriation is an artistic technique in which artists copy/borrow/quote<sup>67</sup> elements from another's work.<sup>68</sup> In some cases, the totality of another's work is appropriated, as in some of the works by Richard Prince, Barbara Kruger and Sherrie Levine.<sup>69</sup> Needless to say, Appropriation is not a twentieth century construct;<sup>70</sup> copying is an age-old technique, used in teaching others how to draw.<sup>71</sup> Yet in the hands of

PRESENT 331, 332 (1990) (discussing the use of appropriation in photography) [hereinafter ENCOUNTERS & REFLECTIONS]; see also Danoff, *supra* note 3, at 16 (defining Appropriation as "the physical incorporation into art of things not made by the artist and which, at the time of their being appropriated, are seen as belonging more to the realm of life, than of art").

Appropriation is not the only device employed by postmodern artists in their work. See Abigail Solomon-Godeau, *Photography After Art Photography*, in ART AFTER MODERNISM, *supra* note 62, at 80 (discussing the use of various postmodern techniques to refute or subvert the concepts of modernist aesthetics). For example, other techniques include seriality and repetition (a technique whereby an image is repeated in the same work of art, but with slight modifications), and simulation or pastiche (a work of art created in the style of another artist, but not a deliberate forgery of a work of art).

<sup>67</sup> Some would say "steal." See Constance L. Hays, *A Picture, a Sculpture and a Lawsuit*, N.Y. TIMES, Sept. 19, 1991, at B2 (Art Rogers, commenting on Jeff Koons's appropriation of his photograph, said, "This is elevating stealing to some level of art."); see also Carlin, *supra* note 59, at 104 n.5 ("artistic appropriation is often termed plagiarism, even by artists engaged in practice"); Olsson, *supra* note 59, at 1490 ("appropriation—what some would similarly consider stealing").

<sup>68</sup> See generally Marincola, *supra* note 61, at 5-6 (discussing Appropriation as an art form).

<sup>69</sup> See *id.* at 21-26. See generally David Robbins, *Richard Prince: An Interview*, 1985 APERTURE 6 (where the artist discusses the technique of rephotography that he initiated in 1977). For a discussion of Levine's work, see Douglas Crimp, *The Photographic Activity of Postmodernism*, OCTOBER 15 (1980) and Gerald Marzorati, *Art in the (Re)Making*, 85 ART NEWS 90-99 (1986). For a discussion of Barbara Kruger, see KIRK VARNEDGOE & ADAM GOPNIK, HIGH AND LOW: MODERN ART AND POPULAR CULTURE 390 (Kirk Varnedgoe & Adam Gopnik, eds., 1990).

<sup>70</sup> See generally Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, OCTOBER 82, 96 (1992) ("creation of copies and the use of methods of reproduction [are] hardly new to twentieth-century art"); Carlin, *supra* note 59, at 108 ("origin of appropriation as . . . [an] aspect of modern art can be traced back to Monet's "Olympia" [shown in 1865]"); Douglas Crimp, *On the Museum's Ruins*, in THE ANTI-AESTHETIC, *supra* note 60, at 45 (1983) (comparison of Manet's duplication of pose, composition and certain details of Titian's "Venus of Urbino" for his "Olympia" with Rauschenberg's photographic reproduction of an original painting onto a surface that also contains other images.) But see Cathy Curtis, *Art Imitates Art in Exhibit at CSUP*, L.A. TIMES, Nov. 18, 1991, at F1 ("there is a huge gulf between 'Old Masters and modern artists' use of visual 'quotes' from other sources . . . , [notably] the belief that [modern artists] no longer have 'real' experience of the world anymore").

<sup>71</sup> Remember school art classes and being told to "copy what you see?" I am

postmodern artists, "copying" has been transformed—it has become the means for making artistic comment upon or reacting to the presence and meaning of pervasive cultural icons.<sup>72</sup> For example, Barbara Kruger appropriates advertisement photographs, generally of women, and adds her own pithy captions, such as "I SHOP, THEREFORE I AM" or "YOU INVEST IN THE DIVINITY OF THE MASTERPIECE."<sup>73</sup> One of her purposes in using advertisements was to decry and expose the manipulative seduction of Madison Avenue.<sup>74</sup> Yet Madison Avenue continues to win by coopting, or appropriating the Appropriation.<sup>75</sup> Arguably, then, "advertising serves not so much to advertise products as to promote consumption as a way of life."<sup>76</sup> Artists who appropriate do so to get their viewers to acknowledge the "subtle tyrannies" that the media imposes on the public.<sup>77</sup> Therefore, Appropriation has become

---

indebted to John B. Koegel (an attorney) for reminding me of this experience. See also Olsson, *supra* note 59, at 1497 n.46 (describing copying as a longstanding tradition by which artists learn how to paint).

<sup>72</sup> See Jameson, *supra* note 60, at 111 (postmodernisms emerged against the established forms of high modernism; e.g., the museum, art gallery network and other cultural institutions); accord Douglas Crimp, *supra* note 69, at 15 ("[p]ostmodernism can only be understood as a specific breach with modernism, with those institutions which are the preconditions for and which shape the discourse of modernism"); Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1 (1992) (trends in postmodern art are a reaction to the "formalist ideals of modernism and the aesthetics of a media—and image-saturated society . . ."); Craig Owens, *The Discourse of Others: Feminists and Postmodernism*, in *THE ANTI-AESTHETIC*, *supra* note 60, at 57 ("postmodernism is usually treated . . . as a crisis of cultural authority, specifically of the authority vested in Western European culture and its institutions").

<sup>73</sup> See Hal Foster, *Subversive Signs*, in *RECODINGS—ART, SPECTACLE, CULTURAL POLITICS* 99, 111-15 (1985) (describing Kruger's work); Varnedog & Gopnik, *supra* note 70, at 390 (containing photographic reproductions of Kruger's work).

<sup>74</sup> At the same time Kruger comments on the status of women. See Foster, *supra* note 73, at 115 (discussing the work of Barbara Kruger as pertaining to the "discourses of high art and mass culture, of sexual politics on cultural power").

<sup>75</sup> See J.S.G. Boggs, *Who Owns This?*, 68 CHI.-KENT L.REV. 889 (1993) (discussing Newsweek's Appropriation of Kruger's style); VARNEDOG & GOPNIK, *supra* note 69, at 390-91 (Kruger's style inevitably became the newest style of mainstream advertising).

<sup>76</sup> See Danoff, *supra* note 3, at 13, quoting CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* 137 (1979).

<sup>77</sup> *Id.*; see Curtis, *supra* note 70, at F1 ("the most important work the appropriationists do is to get us to look at the big picture, in particular, the subtle tyrannies imposed by a media culture"). For example, Jeff Koons's early works, such as his installations of new, unused vacuum cleaners, focused on issues of

prominent because "it reflects the continual attempt to secure a position in this culture by physically possessing its endlessly emerging products," which include those very images and texts that advertise those products.<sup>78</sup>

In addition to reacting to the commodification of society,<sup>79</sup> Appropriationists also question the concepts of originality and authenticity.<sup>80</sup> Traditionally, originality and authenticity in art came from the association of the work with its cultural milieu, copyright law and in the ability to sense the presence of the artist in the work.<sup>81</sup> Yet in this age of mechanical reproduction, the idea of an "original" has become passé, even irrelevant.<sup>82</sup> By "taking" the original and remaking it, the artist shows that the "original" image itself was just a (re)presentation.<sup>83</sup> In effect, the taking/copying/appropri-

consumerism. See generally BRIAN WALLIS, *A PRODUCT YOU COULD KILL FOR* 29-31 (discussing the work of consumer artists and suggesting that these artists provoke questions and introduce humor by their use of new consumer objects); Danoff, *supra* note 3, at 10-14 (discussing the works of Koons within the consumerism tradition).

<sup>78</sup> Danoff, *supra* note 3, at 16 ("The act of buying puts us in touch with ourselves.").

<sup>79</sup> See generally Martha Buskirk, *supra* note 70, at 94 (the images that surround us are either linked to the modification of commodities, or are themselves a form of commodity); Rosemary J. Coombe, *Tactics of Appropriation and the Politics of Recognition in Late Modern Democracies*, 21 POL. THEORY 411, 414-15 (1993) (suggesting that trademarks and other signifiers are the focus of cultural investments and social inscriptions).

<sup>80</sup> See Douglas Crimp, *Appropriating Appropriation*, in *IMAGE SCAVENGERS*, *supra* note 61, at 33 (discussing appropriation and stating that "[n]otions of originality, authenticity and presence . . . are undermined by the use of confiscation, quotation . . . and repetition of already existing images"); Greenberg, *supra* note 72, at 14 (finding that works using appropriated images "function as direct attacks on the primacy of originality"); Marzorati, *supra* note 69, at 91 (1986) (discussing Sherrie Levine's intent in appropriation to "flatly undermin[e] those most hallowed principles of art in the modern era: originality, intentions, expression").

<sup>81</sup> See Crimp, *supra* note 70, at 94. ("The presence of the artist in the work must be detectable; that is how the museum knows it has something authentic."); Olsson, *supra* note 59, at 1496 ("In the art world, original tends to mean authentic, a term endowed with spiritual connotations.") (citations omitted).

<sup>82</sup> See Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 364, 373 (1992) ("This notion of the original, necessary to the idea of authenticity and to the work's authority, increasingly becomes irrelevant in an age of technical reproduction."); Rosalind Krauss, *The Originality of the Avant Garde: A Postmodernist Repetition*, in *ART AFTER MODERNISM*, *supra* note 62, at 14 ("authenticity empties out as a notion as one approaches those mediums which are inherently multiple . . . to ask for the 'authentic' print makes no sense").

<sup>83</sup> "It is only in the absence of the original that representation may take place.



ating/stealing of the image may be a critique of the underlying work as well as the social values that prompted it and gave it authority.<sup>84</sup>

These postmodernist attitudes, however, conflict with the underlying tenets of copyright law.<sup>85</sup> Under copyright law, a work must be an original work of authorship in order to qualify for protection,<sup>86</sup> although such originality may be *de minimis*.<sup>87</sup> Furthermore, the term "original" simply means that the work has not been copied.<sup>88</sup> Yet in Appropriation, the name of

And representation takes place because it is always already there in the world as representation." Crimp, *supra* note 69, at 98 (discussing post modernist artists' use of photographic images to question the concept of originality); see Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in MODERN ART AND MODERNISM: A CRITICAL ANTHOLOGY, 218, 220 (Frances Frascina & Charles Harrison eds., 1982) (discussing the lost "aura" of art in the age of mechanical reproductions because it is now possible to have several "originals") [hereinafter MODERN ART AND MODERNISM]; Krauss, *supra* note 82, at 17 (noting that we are "clinging to a culture of originals which has no place among the reproductive mediums").

<sup>84</sup> See Foster, *supra* note 73 (discussing the artists' appropriation of emblematic images from contemporary advertisements and art to comment upon the artists (of the appropriated image) as well as upon society (the ad)); Hal Foster, *Re: Post*, in ART AFTER MODERNISM, *supra* note 62, at 197 ("[postmodernist art] . . . may 'steal' types and images in an "appropriation" that is seen as critical—both of a culture in which images are commodities and of an aesthetic practice that holds (nostalgically) to an art of originality"); Thomas Lawson, *Last Exit: Painting*, in ART AFTER MODERNISM, *supra* note 62, at 161 (noting that "representing someone else's work as one's own is an attempt to sabotage a system that places value on the privileged production of individual talent"); Patricia Krieg, Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1566 (1984) ("the appropriated photographs serve to document the norms which the artist is criticizing").

<sup>85</sup> Copyright law is based upon the concepts of originality and authorship. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 974 (1990) ("originality is a keystone of copyright law"). However, these are ideas that postmodernists find outmoded and question. See P. Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 173 (1990) ("Postmodernism questions the integrity, the coherence, and . . . identity of the humanist individual self").

<sup>86</sup> 17 U.S.C. § 102(a): "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . ." For a discussion of originality, see *infra* notes 79-84 and accompanying text.

<sup>87</sup> See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951) ("All that is needed is that the author contributed something more than a 'merely trivial' variation, something recognizably his own").

<sup>88</sup> See *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 267 (S.D.N.Y. 1959) ("to be entitled to copyright, the work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another") (citation omitted). *But see supra* note 2 and accompanying text (discussing the definition of originality in an artistic sense). See also Litman, *supra* note 85, at 969 (arguing that originality is a legal fiction).

the game is to copy,<sup>89</sup> thereby undermining traditional cultural and artistic values, which include copyright law and its modern ideas of authorship, originality and the unique personality that animates discrete works.<sup>90</sup> While the copyright statute fails to define the term "author"<sup>91</sup> for purposes of determining whether or not photography is protected under copyright laws,<sup>92</sup> the United States Supreme Court has defined the term to mean "he to whom anything owes its origin." Thus, the photographer, by virtue of posing the subjects or choosing the lighting, has created something original and, therefore, is an author.<sup>93</sup>

Entrenched in the modernist aesthetic tradition, therefore, is the idea that one can look at a particular painting of water lilies and know that it is a "Monet." This artistic concept of authorship<sup>94</sup>—the attribution of a painting to its creator as its sole source of origin—is challenged by Appropriation.<sup>95</sup> An appropriated image, particularly one that exactly copies the original work, defies the notion of a masterpiece or a master.<sup>96</sup> In addition, the techniques employed by postmodern

<sup>89</sup> See William Zimmer, *Appropriation: When Borrowing From Earlier Artists is Irresistible*, N.Y. TIMES, June 14, 1992, § 13 (CN), at 22 (discussing Appropriation and noting that the "whole point is the taking and the commentary on the state of art and society that can ensue from it"); see also Greenberg, *supra* note 72, at 14 (the act of Appropriation raises "serious questions about ownership and the mythic sanctity of the original work"); Marzorati, *supra* note 69, at 91 ("[Levine] made it clear that piracy with its overtones of infringement and lack of authorization was the point.").

<sup>90</sup> See Carlin, *supra* note 59, at 135 ("value of Appropriation is not only that of bringing copyright issues to the fore, but that of challenging the basic assumptions upon which they rest").

<sup>91</sup> See LEAFFER, *supra* note 56, at 131 ("This key term, *author*, is left undefined in the [1976] Act."). In fact, the phrase "works of authorship" was purposefully left undefined so as not to "freeze the scope of copyrightable subject matter at the present stage of communications technology." See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51 (1976), reprinted in 1976 U.S.C.A.N. 5679.

<sup>92</sup> *Burrow-Giles Lithograph Co. v. Savony*, 111 U.S. 53, 57-58 (1884).

<sup>93</sup> *Id.* But see Jane M. Gaines, *The Portrait of Oscar Wilde, in CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 57 (1991) (contending that "[a]uthorship in the photograph is a requisite fiction").

<sup>94</sup> Authorship is "[t]he idea of the individual artist who, as a geni[us], creates" original work. THE BULFINCH POCKET DICTIONARY OF ART TERMS (3d rev. ed. 1992).

<sup>95</sup> See Carlin, *supra* note 59, at 108 ("Appropriation is important 'because it challenges the traditional notions of originality and authorship upon which value all fine art typically has been judged.'").

<sup>96</sup> See *id.* at 129 n.106 ("Appropriation . . . underscores the role of the artist

artists to create—that is, multiple editions often fabricated by others—also strain the idea of authorship and originality.<sup>97</sup>

In the hands of postmodernists, therefore, the entire concept of what an author is breaks down. All work is derivative at best.<sup>98</sup> The trend has been to remove the author from the text,<sup>99</sup> thereby allowing the reader or viewer to determine what is intended.<sup>100</sup> This viewpoint clashes with the goal of copyright: to reward and protect the author of the text from whom the work is seen as solely originating.<sup>101</sup> It is not sur-

as the manipulator or modifier of existing material, rather than of the inventor or creator of new forms.”); Greenberg, *supra* note 72, at 15 (noting that the emphasis of simulating the styles of artistic masters “undercuts the celebrated originality and uniqueness of these masters’ processes”); Charles Hagen, *The Case of the Missing Masterpieces*, N.Y. TIMES, Feb. 14, 1993, § 2 (“It has become fashionable to attack the idea of the masterpieces, on the ground that it distorts the nature of artistic creation.”).

<sup>97</sup> See Danoff, *supra* note 3, at 23 (discussing Koons’s work; noting that Koons’s use of artisans to produce his sculptures is a means to avoid “overt personal expression”); Krieg, *supra* note 84, at 1579 n.74 (discussing Andy Warhol’s Factory and noting that postmodern art may be “a product of collective process rather than individual effort.”).

<sup>98</sup> See Krieg, *supra* note 84, at 1579 (“By incorporating mass-produced images into creative works, the artist asserts that conceptions of individual expression, creativity, and genius are outmoded in a mass society.”); Monroe E. Price & Malla Pollack, *The Author in Copyright: Notes for the Literary Critic*, 10 CARDOZO ARTS & ENT. L.J. 703 (1992) (“[f]or the modernist, perhaps, all work is collaborative, all work is derivative”); Wallis, *supra* note 62, at xviii (“Our society, supersaturated with information and images not only has no need for individuality, it no longer owns the concept.”).

<sup>99</sup> See Gaines, *supra* note 93, at 63 n.62:

There is no such thing as literary “originality,” no such things as the “first” literary work: all literature is intertextual. A specific piece of writing thus has no clearly defined boundaries: it spills over constantly into the works clustered around it, generating a hundred different perspectives which dwindle to a vanishing point. The work cannot be sprung shut, rendered determinate, by an appeal to the author, for the “death of the author” is a slogan that modern criticism is now confidently able to proclaim.

*Id.* (quoting TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 138 (1983)).

<sup>100</sup> Deconstruction of a text is not a purely literary technique. It has also been applied to art. See generally Louis Marin, *Toward a Theory of Reading in the Visual Arts: Poussin’s ‘The Arcadian Shepherds,’* in *THE READER IN THE TEXT: ESSAYS ON AUDIENCE AND INTERPRETATION* (S. Suleiman & I. Crosman eds., 1980); Amy Adler, *Note: Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1368 (1990) (“Post-Modern art often pressures the viewer to consider the absence of the artist, and the presence of multiple possibilities of interpretation which arise when the artist’s intent becomes unknowable.”) (citation omitted).

<sup>101</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.* 464 U.S. 417, 429 (1984) (“copyright law strikes a difficult balance between the interests of authors

prising that the underlying and incompatible notions of Appropriation and copyright would lead to litigation.<sup>102</sup> What is surprising is that there have been few adjudicated cases. Although suits were brought by lesser-known, but still irate, artists against Andy Warhol and Robert Rauschenberg for unauthorized appropriation, the cases never went to trial,<sup>103</sup> in general, such conflicts are settled out of court.<sup>104</sup> As a result, no court has established firm guidelines for determining how much visual "quotation" was, legally speaking, in fact too much.<sup>105</sup> The first published opinion to examine whether Appropriation constitutes fair use is *Rogers v. Koons*.<sup>106</sup>

---

and inventors in the control and exploitation of their writings . . . and Society's competing interest in the free flow of ideas, information, and commerce"). But see *Feist Publications, Inc. v. Fural Tel. Serv. Co.*, 111 S. Ct. 1282, 1290 (1991) ("[t]he primary objective of copyright is not to reward . . . the authors, but to promote progress of science and useful arts.") (citations omitted); George E. Marcus, *The Debate Over Parody in Copyright Law: An Experiment in Cultural Critique*, 1 YALE J.L. & HUMAN., 295, 299-300 (1988) (original purpose of copyright law was to induce authors and artists to give their gifts to the public).

<sup>102</sup> The underlying notions of copyright and Appropriation pit one artist's rights to her creation squarely against another's right to create.

<sup>103</sup> See Buskirk, *supra* note 70, at 100-01; Carlin, *supra* note 59 at 127-28 (discussing lawsuits brought by artists against artists for unauthorized appropriation); Gay Morris, *When Artists Use Photographs*, ARTNEWS, Jan. 1981, at 102.

<sup>104</sup> See Jessica L. Darraby, *Is Culture a Justiciable Issue?*, 18 PEPP. L. REV. 463 (1991) (noting that artists, dealers and museums usually settle their difficulties in the "back room"); Morris, *supra* note 103, at 104 (discussing the settlements).

<sup>105</sup> See Carlin, *supra* note 59, at 107-08 (lack of clear guidance may lead artists inadvertently to violate someone else's rights).

<sup>106</sup> Although the question of fair use of a photograph in another's work of art is implied in *Heyman v. Salle*, 743 F. Supp. 190 (S.D.N.Y. 1989), the court never reached the question. Instead, it determined that although Salle had copied Heyman's photograph to create a backdrop for a play, there were disputed issues of material fact concerning whether or not the backdrop was substantially similar, which precluded a finding of summary judgment. *Id.* at 193-94.

The *Koons* decision has spawned much controversy, not only among artists but also in legal circles. For other analyses of the case, see generally Greenberg, *supra* note 72; E. Kenly Ames, Note, *Beyond Rogers v. Koons, A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473 (1993); Marlin H. Smith, Note, *The Limits of Copyright: Property, Parody, and the Public Domain*, 1993 DUKE L.J. 1233.

### III. *ROGERS V. KOONS*: "TRANSFORMATIVE REINTERPRETATION OR TOTAL RIP OFF"<sup>107</sup>

The art work is, to be sure, a thing that is made, but it says something other than the mere thing itself is . . . . The work makes public something other than itself; it manifests something other; it is an allegory. In the work of art something other is brought together with the thing that is made . . . . The work is a symbol.<sup>108</sup>

It was only a postcard photo and I gave it spirituality, animation and took it to another vocabulary.<sup>109</sup>

#### A. *The Facts*

In 1980, Art Rogers, a professional photographer, was hired to take photographs of eight German Shepherd puppies. The black and white photograph, "Puppies," which eventually became the basis for a lawsuit, depicted the puppies being held by their owners, who were seated on a bench. In 1984, Rogers licensed the photo to Museum Graphics, a company that produces and sells photo reproductions as note cards and posters.<sup>110</sup>

In 1986, Jeff Koons, an artist and sculptor in the postmodern framework, was preparing for an exhibition at the Sonnabend Gallery, the theme of which was "Banality."<sup>111</sup> In his travels, Koons came across the Museum Graphic reproduction of "Puppies," and bought the card because it possessed certain criteria which made it a possible reference for his

---

<sup>107</sup> *Transformative Reinterpretation or Total Rip-off?*, N.Y. TIMES, Sept. 19, 1991, at B1; see Leval, *supra* note 42, at 1111 (justification for use of the owned work turns on whether the use was transformative).

<sup>108</sup> See Owens, *supra* note 72, at 212 (quoting Martin Heidegger, *The Origin of the Work of Art*, in POETRY, LANGUAGE THOUGHT 19-20 (Albert Hofstadter, trans., 1971)).

<sup>109</sup> Ronald Sullivan, *Appeals Court Rules Artist Pirated Picture of Puppies*, N.Y. TIMES, Apr. 3, 1992, at B3 (quoting Jeff Koons).

<sup>110</sup> *Rogers v. Koons*, 960 F.2d 301, 304 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 365 (1992).

<sup>111</sup> For a discussion of PostModern art, see *supra* notes 60-105 and accompanying text. The gallery was also a named defendant in the case. Discussion of the court's opinions will be limited to defendant Jeff Koons. The Southern District decision will be referred to as *Rogers*; the Second Circuit's decision will be referred to as *Koons*.

sculpture.<sup>112</sup> The photograph depicted a scene that was "typical, commonplace and familiar."<sup>113</sup> In other words, it was banal. Koons decided to use the note card as a source for his work and sent the half of the note card containing the photo to his artisans in Italy with instructions to construct the work "as per photo."<sup>114</sup> The other half, which contained Rogers' copyright notice, previously had been discarded.<sup>115</sup> The resulting larger-than-life sculpture<sup>116</sup> depicted a seated couple holding eight German Shepherd puppies. The puppies were painted blue with huge bulbous noses.<sup>117</sup> The couple was also garishly painted with daisies arranged in their hair.<sup>118</sup> After its successful showing in the Sonnabend Gallery in New York, the Banality Show, including the sculpture entitled *String of Puppies*, traveled to California. It was exhibited at the Los Angeles Museum of Contemporary Art. In connection with the exhibition in Los Angeles, Rogers learned of Koons's use of his photograph.<sup>119</sup>

After registering his photograph with the Copyright Office,<sup>120</sup> Rogers brought an action against Koons and Sonnabend Gallery alleging copyright infringement and unfair competition under section 43(a) of the Lanham Act<sup>121</sup> and

<sup>112</sup> *Koons*, 960 F.2d at 305.

<sup>113</sup> *Id.*

<sup>114</sup> *Koons*, 960 F.2d at 305. Koons, however, insisted that the instructions cited by the plaintiff (and the court) as evidence of misappropriation were six instructions from 35 pages of letters and faxes to the artisans. Reply Brief for Defendants-Appellants-Cross-Appellees Jeff Koons and Sonnabend Gallery, Inc. at 6 n.10, *Koons*, 960 F.2d at 303 (No. 91-7396) [hereinafter Defendants' Reply Brief].

<sup>115</sup> This became a crucial point for the court. The court and the plaintiff inferred bad faith on Koons's part, which ultimately militated against a finding of fair use. *Id.* at 309. See generally *infra* at notes 195-97 and accompanying text.

<sup>116</sup> Although Koons works in limited editions of three, I will refer to the sculptures in the singular.

<sup>117</sup> According to Koons, the choice of the puppies' colors was to take "the sculpture out of the realm of reality," but without eliminating a sense of believability. Brief and Addendum for Defendants-Appellants Jeff Koons and Sonnabend Gallery, Inc. at 11, *Koons*, 960 F.2d at 303 (No. 91-736) [hereinafter Defendants Brief].

<sup>118</sup> See *id.* at 37.

<sup>119</sup> Art Rogers was notified of the sculpture when the actual owner of the puppies called and wanted to know why *Rogers* had colorized the photo. *Koons*, 960 F.2d at 305.

<sup>120</sup> Receipt of a copyright registration in the Copyright office for a work is not necessary under the 1976 Copyright Act until or unless one wants to bring a suit for infringement. Pub. L. No. 94-533, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

<sup>121</sup> 42 U.S.C. § 1142(a) (1989) provides for a finding of liability against one who

state unfair competition laws. Rogers then moved for summary judgment on the issue of copyright infringement. Following oral argument, the District Court for the Southern District of New York granted partial summary judgment to Rogers on the issue of copyright infringement and an appeal followed.<sup>122</sup>

## B. *The Second Circuit Decision*

[T]he areas of law devoted to protecting intellectual property confront a strange dilemma. On the one hand protection stimulates individual creative productivity. On the other hand, it can stifle the advances of a collective effort in a specific arena of human interest or the "additive" refinements of an individual breaking new ground on an existing body of work.<sup>123</sup>

While the outcome of the *Koons* case may be consistent with current copyright doctrine,<sup>124</sup> the Second Circuit had an excellent opportunity to enunciate a standard within which artists working in the same artistic mode as Jeff Koons can create without fear of reprisals.<sup>125</sup> The court was seemingly inextricably bound to the status quo application of the fair use criteria, and resisted any impulse to adopt any new criteria based upon its exposure to postmodernist concepts.

### 1. Copyright Infringement

The Second Circuit began its discussion by considering the issue of copyright infringement.<sup>126</sup> In order to establish copyright infringement, a plaintiff must establish both the owner-

---

misrepresents the nature, characteristics, qualities, or geographic origin of his or her goods, services or commercial activities.

<sup>122</sup> Cross appeals were filed. Rogers appealed the district court's failure to set damages, and Koons appealed, *inter alia*, the order granting partial summary judgment.

<sup>123</sup> Boggs, *supra* note 75, at 889..

<sup>124</sup> See Greenberg, *supra* note 72, at 32 (acknowledging that outcome may be correct based upon current doctrine, but criticizing the opinion for its breadth).

<sup>125</sup> While it may be appropriate to broaden the fair use doctrine to include the Appropriation movement, it has been argued that the driving force behind the movement is its illicit nature. See Elizabeth H. Wang, Note, *(Re)Productive Rights: Copyright and Postmodern Artist*, 14 COLUM.-VLA J.L. & ARTS 261, 281 (1990). To legitimize Appropriation, therefore, would rob it of its cachet. *Id.*

<sup>126</sup> If the appellate court found, as did the district court, that there was infringement, then a review of Koons's fair use argument would be necessary.

ship of a copyright in a work and that the defendant misappropriated that which was protected in the work.<sup>127</sup> To show ownership, one must have a work that: (1) is original,<sup>128</sup> (2) falls within the statutory criteria of a work of authorship,<sup>129</sup> and (3) is fixed in a tangible medium of expression.<sup>130</sup> The court found that Rogers' photograph met all of these requirements.<sup>131</sup> In addition, Rogers' Certificate of Registration of his photograph from the United States Copyright Office was *prima facie* evidence of the valid ownership of copyright protection.<sup>132</sup> While Koons did not challenge the validity of Rogers'

<sup>127</sup> 3 NIMMER, *supra* note 27, § 13.01, at 13-5; *Koons*, 960 F.2d at 306.

<sup>128</sup> The term "original" is not defined in the copyright statute. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664 (the intent of the committee to leave the term undefined was based upon its desire not to enlarge the standards of copyright protection to require novelty, ingenuity or aesthetic merit). The definition of originality has evolved through case law. Thus, a work is original and copyrightable if it was independently created and has some *de minimis* creativity. See generally *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1287 (1991) ("original . . . means only that the work was independently created by the author . . . and that it possess at least some minimal degree of creativity"). For a more detailed discussion of the importance of originality, see generally Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990) (discussing problems of copyright law with the concept of originality).

<sup>129</sup> 17 U.S.C. § 102 (1992). Photographs are protected under this section, falling within the category of pictorial, graphic and sculptural works. *Id.* § 102(a)(5); see *Burrow-Giles Lithograph Co. v. Sarony*, 111 U.S. 53 (1884) (Court determined that a photograph could be an original work of art). *But see* Charles Baudelaire, *The Salon of 1859: The Modern Public and Photography*, in MODERN ART AND MODERNISM, *supra* note 83, at 19-20 ("the photography industry [is] the refuge of every would-be painter . . . [and] if [photography] is allowed to supplement art in some of its functions, it will soon have . . . corrupted it altogether").

<sup>130</sup> A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.

17 U.S.C. § 101 (1992).

<sup>131</sup> *Koons*, 960 F.2d at 307.

<sup>132</sup> 17 U.S.C. § 410(c) states:

In any judicial proceedings, the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

A defendant, however, may rebut the presumption of validity. See *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985) ("certificates of copy-



copyright registration, the court nonetheless evaluated the photograph to determine whether or not the portion appropriated by Koons was an original work of authorship protectable by copyright.<sup>133</sup> Relying on the influential case *Burrow-Giles Lithograph Co. v. Sarony*,<sup>134</sup> which established copyright in simple photographs, the court established that Rogers' work indeed met the criteria of originality. The court further found that the originality of Rogers' photograph resided, *inter alia*, in the posing of subjects, lighting, angle, selection of film and evoking of expression.<sup>135</sup>

Having determined that Rogers owned a valid copyright in his work, the court turned to the issue of copying.<sup>136</sup> According to case law, a plaintiff must prove that the defendant has copied the protected work, and that the copying rises to the level of an unlawful infringement.<sup>137</sup> These criteria are imposed to ensure that a defendant is not held liable for coincidental duplication of the plaintiff's labors. In order to prove copying, the plaintiff must show that the defendant actually copied the plaintiff's original. As proof of actual copying is difficult and rarely available, a plaintiff may make a showing that the defendant had access to the original work.<sup>138</sup> In addition the plaintiff must also demonstrate that the allegedly infringing work is substantially similar to the plaintiff's original work.<sup>139</sup> While determining substantial similarity is diffi-

---

right registration are *prima facie* evidence that the copyrights are valid, shifting to [the defendant] the burden of proving the contrary").

<sup>133</sup> *Koons*, 960 F.2d at 306.

<sup>134</sup> 111 U.S. 53 (1884) (first case to determine that a photograph is an appropriate subject for copyright).

<sup>135</sup> *Koons*, 960 F.2d at 307. *But see* Smith, *supra* note 106, at 1244-45 (court did not expound upon the creative elements of Rogers' production of the photograph).

<sup>136</sup> Even if the defendant's work is identical to the plaintiff's, that fact in and of itself, is not conclusive that there was an infringement of copyright. The defendant must have copied the copyrighted work. *See generally* Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (independently created work that coincidentally duplicates copyrighted material is not infringement); Marx v. United States, 96 F.2d 204, 208 (9th Cir. 1938) ("there is no infringement where two authors produce identical works, provided the second one arrives at his composition independently").

<sup>137</sup> 3 NIMMER, *supra* note 27, § 13.01[B], at 13-8 to 13-9.

<sup>138</sup> *See* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (setting forth the criteria for establishing copyright infringement).

<sup>139</sup> 3 NIMMER, *supra* note 27, § 13.03[A], at 13-27.

cult to define, the test generally used to determine substantial similarity is the response of the ordinary observer; that is, whether she would recognize the allegedly infringing copy as having been taken from the original work.<sup>140</sup>

The court found that Koons's admission that he used the photograph together with his instructions to the artisans to make the sculpture "as per photo," was direct evidence of copying and, therefore, was sufficient to support granting summary judgment to Rogers.<sup>141</sup> Although Koons conceded using the photograph, he argued that his use of the photograph was not sufficient to support a finding of infringement; i.e., copying *and* unlawful appropriation, as a matter of law.<sup>142</sup> Koons contended that the court below had failed to inquire into the substantial similarity between the two works.<sup>143</sup> According to Koons, his (re)presentation of the couple holding eight German Shepherd puppies was not a literal, verbatim reproduction of the photo because of the "differences in mood, medium, style, size, color and impression" of the two works.<sup>144</sup>

The court rejected Koons's arguments by finding that he had appropriated the protectable expression captured by Rogers' photo, and not merely the idea expressed in the original work.<sup>145</sup> According to the court, Koons incorporated into the sculpture the composition, poses and expressions captured by Rogers.<sup>146</sup> Under the ordinary observer test,<sup>147</sup> "no

---

<sup>140</sup> *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); see *infra* note 147.

In some cases, courts will find that proof of substantial similarity for purposes of proving copying-in-fact is so strong that it also proves wrongful appropriation. *Arnstein*, 154 F.2d at 468-69 (similarities between the plaintiffs and defendant's works were such as to justify an inference of and to prove misappropriation). *But see* Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1189-90 (1990) (courts have erroneously construed the requirement of substantial similarity to infer that there was copying *and* also that the copyist copied a substantial portion of the plaintiffs work).

<sup>141</sup> *Koons*, 960 F.2d at 307.

<sup>142</sup> Defendants' Brief at 20.

<sup>143</sup> *Id.* at 22-25.

<sup>144</sup> *Id.* at 28.

<sup>145</sup> *Koons*, 960 F.2d at 307 ("It is not the idea of a couple with eight small puppies seated on a bench that is protected, but Roger's [sic] expression of this idea . . .").

<sup>146</sup> *Id.*

<sup>147</sup> The "ordinary observer" test is a method of determining whether or not

reasonable jury could have differed on the issue of substantial similarity."<sup>148</sup> Furthermore, the changes in color and texture, along with additions of flowers and bulbous noses, were insufficient to raise an issue of material fact.<sup>149</sup> Based upon its findings that Rogers had valid ownership of a copyright in a work that Koons had copied, the Second Circuit held that the district court had properly granted summary judgment to the plaintiff.

## 2. The Fair Use Argument

Koons also argued that despite the court's findings of substantial similarity and use of the copyrighted photo, the use was exempt under the doctrine of fair use.<sup>150</sup> He argued that the district court had erred in holding that the sculpture did not meet the criterion of "comment or criticism" under section 107(1)<sup>151</sup> and, therefore, that summary judgment was inappropriate.<sup>152</sup> The Second Circuit reviewed Koons's claims of fair use by applying the statutory four factors<sup>153</sup> to the circumstances of the case.

### a. *The First Factor*

Koons claimed that the first factor, the nature and the purpose of the use, should weigh in his favor. He argued that the sculpture was both a commentary on society and the mes-

---

there is "substantial similarity" between two works. It asks what the response of an ordinary, reasonable person would be when exposed to the two works. As posed by the Second Circuit, the question becomes "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work". *Ideal Toy Corp. v. Fab-Iu-Ltd*, 360 F.2d 1021, 1022 (2d Cir. 1966).

<sup>148</sup> *Koons*, 960 F.2d at 307. However, neither the district court nor the appellate court saw the actual sculpture. Their considerations were based upon photographs of the sculpture and the Rogers photo. See Defendants' Brief at 22, n.6; Martin Garbus, *Law Courts Make Lousy Art Critics*, N.Y. NEWSDAY, Apr. 22, 1992, at 46.

<sup>149</sup> *Koons*, 960 F.2d at 307.

<sup>150</sup> *Id.*

<sup>151</sup> Defendants' Brief at 35.

<sup>152</sup> According to Koons, summary judgment was inappropriate because there was an "inadequate and disputed factual record respecting each of the four fair use factors." Defendants' Brief at 36.

<sup>153</sup> See *supra* notes 17-51 and accompanying text.

sage evoked by Rogers' photograph.<sup>154</sup> In addition, Koons claimed that his sculpture should be exempt because of its social commentary.<sup>155</sup> Koons's fair use argument emphasized that his work belonged within the postmodernist tradition—that is, the incorporation of commonplace objects or themes into artistic work.<sup>156</sup> In Koons's view, the sentimental, kitschy<sup>157</sup> theme of Rogers' photo-post card fit squarely within the parameters of banality—the concept which defined Koons' evaluation of Middle America, and which was the idea that both animated and united the works displayed in the Sonnabend show.<sup>158</sup> Koons's additions of unnatural color, along with placing flowers in the ears of the woman and out the middle of the man's head, thereby rendering the sculpture surreal, was intended as a critique of the work itself and its underlying social values.<sup>159</sup>

While acknowledging that the postmodernist practice of Appropriation existed, the court nonetheless rejected Koons's arguments.<sup>160</sup> Koons's sculpture did not fit within the court's narrowly drawn definition of parody/satire: "[T]hough the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work . . . ."<sup>161</sup> Although, the court did not indicate why it came to this conclusion, it did provide a definition of the term "parody." As employed by the court, parody "is when one artist, for comedy or social commentary, closely imitates the style of another" thereby creating a new art work that makes ridiculous the style and expression of the original.<sup>162</sup> Arguably, one could consider blue puppies with

---

<sup>154</sup> See *Koons*, 960 F.2d at 309.

<sup>155</sup> See *id.*

<sup>156</sup> Defendants' Brief at 36 ("Jeff Koons is part of a tradition of artists who incorporate mass produced or commonplace objects in their work . . . as the object of criticism . . .").

<sup>157</sup> The term *kitsch* comes from the German verb *verkitschen*: to make cheap. As an art form, it refers to the artifacts of everyday life, encompassing, for example, Elvis Presley paintings on velvet. See ROBERT ATKINS, ARTSPEAK: A GUIDE TO CONTEMPORARY IDEAS, MOVEMENTS, AND BUZZWORDS 94 (1990).

<sup>158</sup> Defendants' Reply Brief at 11.

<sup>159</sup> Defendants' Brief at 37.

<sup>160</sup> *Koons*, 960 F.2d at 310.

<sup>161</sup> *Id.* (citations omitted).

<sup>162</sup> *Id.* at 309-10.

clown-shaped noses and garishly painted humans with daisies sprouting from their heads to be a manner of ridiculing the benign cheerfulness of the original. Yet the court stated that it could not "discern any parody of the photograph 'Puppies.'"<sup>163</sup>

A possible explanation for the court's inability to "discern a parody" is that it had erroneously interchanged the terms "satire" and "parody."<sup>164</sup> Although parody is a form of satire, the target of parodic criticism is primarily another creative work, while satire primarily criticizes the subject matter of the original.<sup>165</sup> The imprecise use of terminology, it is argued, allowed the court to discount Koons's arguments about the sculpture's purpose.<sup>166</sup> The problem faced by the court in defining Koons'[s] work as "parody", "satire" (or even "piracy") is engendered not so much by its failure to use terminology precisely (although that compounds the problem) but instead lies in its approach.

The Second Circuit's approach to parody in *Koons* is the traditional (modernist) response that may no longer be appropriate in a postmodern age,<sup>167</sup> particularly if the concept of

---

<sup>163</sup> *Id.* at 310.

<sup>164</sup> See generally *id.* at 310 (using the terms interchangeably); cf. Smith, *supra* note 133, at 1248 (distinguishing between the goals of parody and satire). But see Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1601 (1993) (noting that "[t]here are two types of parody: one where the owned work is a vehicle for a parody of other aspects of culture or society and where the owned work is itself the object of the parody").

<sup>165</sup> See generally *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y.) (where the court defined "parody" as "a work in which the language or style of another work is closely imitated" and "satire" as a work which uses "wit, irony or sarcasm for the purpose of exposing and discrediting vice or folly"), *aff'd*, 604 F.2d 200 (2d Cir. 1979).

<sup>166</sup> See Smith, *supra* note 133, at 1249 (noting that the court's linguistic mistake prevented it from truly understanding Koons's arguments regarding his use of the photograph); see also LINDA HUTCHEON, *A THEORY OF PARODY* 104 (1985) (commenting that parody must be separated from satire and noting that some of the most interesting work on parody is made confused and muddled by the "lack of such a distinction"). Furthermore the *Koons* court expressed no opinion on how the parodist could put into effect the recognition requirement. According to the court, either the recognition stemmed from the fact that the underlying work is "publicly known," or its existence would be "in some manner acknowledged by the parodist."

<sup>167</sup> See Marcus, *supra* note 101, at 296-97 (noting that although American legal discourse takes a liberal view of parody and copyright, it has failed to go beyond a very limited vision of the artist and works of art).

parody itself has degenerated under the constant barrage of a consumeristic society. One commentator on the postmodern wrote:

Pastiche is, like parody, the imitation of a peculiar or unique style, the wearing of a stylistic mask, speech in a dead language: but it is a neutral practice of such mimicry, without parody's ulterior motive, without the satirical impulse, without laughter, without that still latent feeling that there exists something normal compared to what is being imitated is rather comic. Pastiche is blank parody, parody that has lost its sense of humor . . .<sup>168</sup>

Therefore, in order to judge effectively what is parody-turned-pastiche,<sup>169</sup> the courts must begin to factor into their fair use calculus the influence of contemporary social factors upon the "infringing" author's intent.<sup>170</sup> It is obvious that the Second Circuit failed to do so.<sup>171</sup>

With respect to the commercial purpose of the work, Koons argued that the district court incorrectly characterized his use of the photograph as commercial, particularly when the finding was based solely upon his sales of the sculpture. Generally, the defendant may rebut the presumptive unfairness attributable to the unauthorized use upon a showing of a purpose that qualifies as fair use.<sup>172</sup> According to Koons, the court's conclu-

<sup>168</sup> See Jameson, *supra* note 60, at 114. *But see* Margaret A. Rose, *Parody/Postmodernism*, 17 *POETICS* 49, 50 (1988) (questioning whether parody in postmodernism has been reduced to the lower and less reflexive form of imitation known as pastiche); *see also* Marcus, *supra* note 101, at 312 (discussing the criticism of Jameson, but finding that there is power in Jameson's theory of parody-turned-pastiche because "such basic notions of conventional aesthetics as originality, authenticity, genius, and the author have been seriously challenged").

Pastiche means "the compilation of motifs from several sources." *See* Rose, *supra*, at 51. It also has come to mean counterfeit in English, and has been used synonymously with "parody" in French. *Id.*

<sup>169</sup> *See* Marcus, *supra* note 101, at 312 ("it is certainly pastiche . . . that is at stake in the cases that have defined the parody literature in copyright law").

<sup>170</sup> *See* Weinreb, *supra* note 54, at 1152-53 (suggesting that the community's attitudes towards a practice implicating copyright issues may dictate the outcome of a fair use case).

<sup>171</sup> Judge Cardamone paid lip service to the idea of Appropriation and accepted it as a "definition of the objective of some postmodern artists," but he apparently believed that one's "mode" of artistic expression must be constrained by the traditional limits of copyright. *See* *Rogers*, 960 F.2d at 309-10.

<sup>172</sup> *See generally* *Fisher*, 794 F.2d at 437 (where the court held that "[t]he defendant can rebut the presumption [of unfair use despite the commercial nature of the use] by convincing the court that the parody does not unfairly diminish the economic value of the original").

sion was contrary to the law in the Second Circuit<sup>173</sup> that the commercial motivation of an author is "irrelevant to a determination of whether a particular use of copyrighted material in a work which offers a benefit to the public constitutes a fair use."<sup>174</sup> Rogers contended that Koons's use of the photograph was unquestionably commercial in nature, citing the profits earned from the sales of the sculptures and Koons's expressed goals to acquire money through his art.<sup>175</sup>

In its review of the profit element of the first factor, the Second Circuit seemed to be mesmerized by the commercial character of the Koons sculpture.<sup>176</sup> Although the court stated that the profit element in the fair use calculus was not controlling,<sup>177</sup> it nevertheless found that Koons's "substantial" profit, realized from the sales of the statues, weighed in Rogers' favor.<sup>178</sup> In fact, other commentators, in criticizing the court's interpretation of commercial use, have noted that the court's interpretation suggests that "anytime a work is sold, it will not be protected as fair use."<sup>179</sup> While this may overstate the effect of the court's review of the commercial nature of the work, the court's attitude towards Koons's commercial success is still troubling.<sup>180</sup> Its opinion seems to fly in the face of the stricture that the commercial purpose of the work should not tradi-

---

<sup>173</sup> Defendants' Brief at 47. Koons cited *Consumers Union v. General Signal*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984) (commercial purpose does not necessarily defeat a fair use defense).

<sup>174</sup> *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) ("both commercial and artistic elements are involved in almost every [work]").

<sup>175</sup> Brief of Plaintiff-Appellee-Cross-Appellant at 31, *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 365 (1992) (No. 91-736) [hereinafter Plaintiffs' Brief].

<sup>176</sup> For example, the court began its opinion by noting that the sculptures "bettered the price of the copied work by a thousand to one." 960 F.2d 303. At another instance, the court commented that Koons's works "sell at substantial prices." *Id.* at 304. In the body of the decision, where the court reviewed the first factor, it found "that Koons[s] substantial profit . . . militates against the finding of fair use." 960 F.2d at 309.

<sup>177</sup> *Koons*, 960 F.2d at 309.

<sup>178</sup> *Id.*

<sup>179</sup> Greenberg, *supra* note 72, at 28 (concluding that the court's opinion leaves "all artists who sell their work vulnerable"); see Olsson, *supra* note 59, at 1518 (commenting on the *Rogers* decision and noting: "It seems that the use becomes commercial merely because Koons is fortunate to make money off of his art.").

<sup>180</sup> See Greenberg, *supra* note 72, at 25 (characterizing the language of the holding as "decidedly hostile to Appropriation strategies").

tionally be controlling in the fair use calculus.<sup>181</sup>

The next argument that the court advanced to justify its findings that the sculpture was not a parody was that Koons's sculpture failed to acknowledge Rogers as its referent for the copied work. In other words, the sculpture failed to inform the viewer-audience that there was an underlying original and separate expression that was attributable to another artist.<sup>182</sup> The court stressed that there had to be viewer-audience recognition of the original and separate expression underlying the parody. This recognition factor was important because it "ensure[d] that credit [was] given" where due.<sup>183</sup> In the court's view, it would not be chilling to Koons's work to require that the audience be made aware that underlying the parody was a work by a different artist. Indeed, such a ruling ensured that the rights of the copyright owner would be acknowledged or noted.<sup>184</sup> Without this limitation, the court contended, one could make use of another's copyrighted work "solely on the basis of the . . . claim to a higher or different artistic use."<sup>185</sup> This fear seems to be meritless, particularly because a determination of fair use requires a review of *all* the factors, even when the user's work has been judged a parody.<sup>186</sup>

It appears that the court has suggested somewhat disingenuously that the mere presence of a cite—for example, a plaque engraved with the words, "Inspired by Art Rogers' photograph, 'Puppies,'" and placed on the "String of Puppies"

---

<sup>181</sup> See generally *Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 307-08 (2d Cir. 1966) (noting that the commercial motives of the user are irrelevant to a fair use determination), *cert. denied*, 385 U.S. 1009 (1967); *Consumers Union of Unites States v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983) (finding that commercial purpose alone is not fatal to a fair use defense).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* A proviso crediting the "original" artist has been used in settlement of appropriation cases. See *Carlin*, *supra* note 59, at 127 (discussing the terms of settlement arranged between Robert Rauschenberg and Morton Beebe). *But see Marzorati*, *supra* note 69, at 97 (discussing Sherrie Levine's clash with the Weston estate, despite her credit of his work).

<sup>184</sup> 960 F.2d at 310.

<sup>185</sup> *Id.* The court complained that without a rule requiring the copied work to be an object of the parody, there is no "practicable boundary to the fair use defense." *Id.*

<sup>186</sup> See *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (holding that classification of a work as a parody is not presumptively fair use, but that the parody must be considered "in light of the statutory factors, reason, experience, and . . . the general principles developed in past cases").



sculpture—might have rendered Koons's work a fair use. Citing a source, however, does not necessarily free an artist from the threat of liability for infringement.<sup>187</sup> The court also failed to consider whether a "cite" would immunize the user from a claim of infringement where the source is (largely) unknown to the viewing public. If, as case law is currently interpreted, the copied work *must* "conjure up" the original work in order to be classified as a parody,<sup>188</sup> then it appears that the value of a "cite" under these circumstances is severely limited, if not useless. Thus, the court seems to suggest that only when one uses a well-known image is Appropriation less likely to be viewed as "exploitation."<sup>189</sup>

This, however, is where the conflict occurs between postmodern artists and the law of copyright as presently expounded by the Second Circuit. The postmodern artist is always looking for an unexplored domain of contemporary culture upon which to comment.<sup>190</sup> As previously discussed, the chief aim of Appropriation is to demonstrate that art is always engaged in the imitation of dead styles,<sup>191</sup> the only way to accomplish that goal is for the postmodern artist to move on to

<sup>187</sup> Sherrie Levine can attest to this. See Marzorati, *supra* note 69, at 97 (discussing Levine's move to appropriate photographs "free of copyright snags" after the Edward Weston estate "suggested that the courts might be the proper venue" to determine her right to appropriate).

<sup>188</sup> See Gordon, *supra* note 164, at 1604 (noting that "[a]n entire genre can have an effect on an artist without any one work or copyright holder being dominant." If dominance is required, then artists and audiences affected by the genre would be left without any work in that genre to satirize.)

<sup>189</sup> In point of fact, this has not proven to be the case, at least not for Jeff Koons. See *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (1993) (court found that Koons's use of the "Odie" character was not parody). It is significant that in this case, Koons claimed that he did not know that the puppy figure he used was "Odie" until after the show, and that had he known, he would not have used it for the piece. *Id.* The court ruled that since "Odie" was not the targeted object of parody, the teachings of the *Koons* case required that his parody argument be rejected.

<sup>190</sup> However, the new source for the postmodernist must be something that is already within the culture. If the artist were to make up the item of critical enquiry, then it is not about popular culture, and is not authentic. Interview with John B. Koegel, Attorney for Jeff Koons (June 8, 1993). See also *Petition for a Writ of Certiorari* at 17 n.19, *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1991) ("[I]t would contravene the very essence of the post-modern artistic tradition for an artist like Koons to make up images intended to represent popular culture, rather than incorporating real ones.")

<sup>191</sup> See discussion of Appropriation *supra* notes 60-106 and accompanying text.

new areas of existing forms<sup>192</sup>—areas that are non-obvious in order to make the point in a new context. So far, the Second Circuit has turned a deaf ear to the argument. While the court recognized that requiring the criticized work to be well-known might chill an artist's expression,<sup>193</sup> it felt that such a limitation was necessary.<sup>194</sup>

In determining whether Koons's use of the photo was fair under the first factor, the Second Circuit also examined Koons's conduct in appropriating the photo. The court found that Koons's use was intentionally exploitive, and that he had exhibited bad faith in removing the copyright mark from the note card.<sup>195</sup> Without determining here whether or not Koons's use was indeed exploitive, the court's determination of bad faith at this juncture of its analysis is questionable. The issue was not Koons's conduct, but whether or not his use was fair.<sup>196</sup> As one experienced commentator has put it, no justification exists for adding a "morality test" to the scope of fair use.<sup>197</sup> Arguably, this is just what the Second Circuit has done.

---

<sup>192</sup> Finding a source that is not protected by intellectual property rights is no longer an easy proposition. See Greenberg, *supra* note 72, at 29 (postmodern artist will have problems finding legitimate source material because the most interesting images are already protected); see also Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866 (1990) ("in a world where mass media tends to monopolize the dissemination of signifying forms, the cultural resources available to us . . . are increasingly the properties of others"); Gordon, *supra* note 164, at 1569 (images that capture artists' attention and become "part of them are often owned by others").

<sup>193</sup> The court accepted the possibility that its finding could inhibit Koons's expression. 960 F.2d at 310.

<sup>194</sup> *Id.*

<sup>195</sup> See *id.*; see also Marincola, *supra* note 61, at 26 (noting that the risk in appropriating images is that it may be misconstrued as exploitation, "secretly using what it claims to deny").

<sup>196</sup> Leval, *supra* note 42, at 1126 (criticizing the use of bad faith in determining fair use). But see Weinreb, *supra* note 54, at 1152 (more general considerations of fairness, such as how the uses obtained the copy of the original work, may be important in determining fair use).

<sup>197</sup> Judge Leval also noted that the fair use enquiry should not focus on the conduct of the second user, but should turn on whether the created work was of the type to benefit from fair use. Leval, *supra* note 42, at 1126. But see *Wright v. Warner*, 953 F.2d 731, 737 (2d Cir. 1991) (finding the "propriety of the defendant's conduct is relevant to the 'character' of the use) (quoting *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 562 (1985)).

Since the court failed to "discern any parody of the photograph 'Puppies,'"<sup>198</sup> and found evidence of bad faith and profit-making intent on the part of Koons, it concluded that Koons had failed to satisfy the requirements of the first prong of fair use.<sup>199</sup> The court believed that allowing a fair use exemption under these circumstances would eviscerate the doctrine.<sup>200</sup>

### b. *The Second Factor*

Under the second factor, the nature of the copyrighted work, the court then examined the nature of Rogers' photograph. It considered Koons's argument that "photography is more properly characterized as a 'factual' or literal medium," thus meriting less protection than a fictional work.<sup>201</sup> Nevertheless, the court decided that Rogers' photograph, as a work of art, merited greater protection from copying than, for example, would a dictionary.<sup>202</sup> It gave short shrift to Koons's argument that the idea embodied in the photograph—i.e., the couple seated on a bench holding eight puppies—constituted its factual basis and, therefore, was entitled to little, if any, protection.<sup>203</sup> According to Koons's argument, the couple and the eight puppies are facts embedded within the culture and, therefore, are available for use.<sup>204</sup> While the court seemed to agree that the idea of a seated couple with puppies was a part of Americana,<sup>205</sup> it ignored the commonness of the theme

---

<sup>198</sup> *Koons*, 960 F.2d at 309.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* ("there would be no practicable boundary to the fair use defense").

<sup>201</sup> Defendants' Brief at 49.

<sup>202</sup> See *Koons* 960 F.2d at 310.

<sup>203</sup> Defendants' Brief at 31; see Olsson, *supra* note 59, at 1493 n.24 (quoting Alex J. Sweetman, *The Death of the Author: Garry Winogrand, 1928-1984*, in 26 THE ARCHIVES 5, 7 (1990) ("[T]he photograph, whatever else it may be, is a literal fact."); see also Beryl Jones, *Factual Compilations and the Second Circuit*, 52 BROOK. L. REV. 679, 695 (1986) (noting that "the photograph often reflects facts in the most accurate form possible").

<sup>204</sup> Defendants' Brief at 31. See generally Wang, *supra* note 125, at 273-74 (noting that ideas, when applied to visual arts, serve as the equivalent of the subject matter or theme of the piece; therefore the use of thematic material is not protectable by copyright since it encompasses an idea in the public realm); Kreig, *supra* note 84, at 1570 (history of Western art is full of recurring themes which an artist may appropriate).

<sup>205</sup> Judge Cardamone characterized the photograph as "a typical American scene—a smiling husband and wife holding a litter of charming puppies." *Koons*,

when it decided the appeal.

Moreover, Koons contended that there was no other way to portray the common idea of a seated couple holding puppies. Therefore, the use of that idea was not an infringement of Rogers' copyright.<sup>206</sup> It is settled copyright law that where there may be limitations in the number of ways one might express an idea, the expression of that idea does not constitute infringement of another's copyright in a similarly portrayed idea.<sup>207</sup> For example, in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, the Ninth Circuit found that the expression of a jeweled "bee pin" was inextricably bound to the idea of a jeweled bee pin.<sup>208</sup> As it could not be demonstrated that the idea of such a pin was separable from its rendition, the expression of the idea was not protectable.<sup>209</sup> Thus, where the "merger" of idea and expression occurs, copyright protection is denied to the merged expression because ideas are not protectable by copyright.<sup>210</sup> Similarly, settings that are indispensable to the portrayal of a given topic are not protectable under copyright law.<sup>211</sup> In short, Koons's argument encompassed the merger doctrine; that is, that the literal, factual elements and scene depicted in Rogers' photograph were not protectable because there were limits to the ways in which the underlying theme and its presentation could be portrayed. The court also seem-

---

960 F.2d at 303.

<sup>206</sup> See Defendants' Brief at 32-33. Rogers objected to this characterization by responding that there existed at least fifty ways of depicting the couple and the puppies. See Plaintiffs' Brief at 23 n.18. However, this argument ignores the fact that the idea is so mundane that any expression of it would likely duplicate another artist's prior expression of the same idea.

<sup>207</sup> See generally *Baker v. Selden*, 101 U.S. 99 (1880). This case is considered to have propounded the idea-expression dichotomy in the United States. For a full discussion of the idea-expression dichotomy, see Edward Sammuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989).

<sup>208</sup> 446 F.2d 738 (9th Cir. 1971) (expression and idea merge).

<sup>209</sup> "There is no greater similarity between the pins of plaintiff and defendants than is inevitable from the use of jewel-encrusted bee forms in both." *Id.* at 742.

<sup>210</sup> The "merger" argument has rarely worked. For one example where the argument prevailed, see generally *id.* at 738.

<sup>211</sup> This concept is called *scènes à faire* and also applies to incidents and characters. See generally *Whelan Assoc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236 (3d Cir. 1986) (court denied copyright protection to certain elements of computer program because the result program sought to achieve could be accomplished only in very limited number of ways), *cert. denied*, 479 U.S. 1031 (1987); *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir.) (finding no infringement of copyright in use of children's book), *cert. denied*, 429 U.S. 980 (1976).

ingly ignored Koons's proposition that these factual elements of the photograph were so mundane that if protected, any possible new expression of the scene would likely infringe on the prior expression. Thus, it appears that the Second Circuit protected both the idea and the expression when it precluded Koons from adopting the theme or idea underlying Rogers' work.

In addition, Koons contended that the issue of the photograph's publication was a significant consideration. According to Koons, Rogers' photo had been widely distributed, thus deserving less protection than an unpublished work.<sup>212</sup> The court, however, failed to give any weight to Koons's argument.<sup>213</sup> This is particularly surprising because the Second Circuit has ruled in several cases that a work could receive greater protection where the author had not already had sufficient opportunity to profit from her artistic expression.<sup>214</sup> It is reasonable to expect that the converse would be true: where the work has been published, and the author has had an extensive opportunity to profit from its licensing and circulation, the court would be inclined to find that another artist's use of it was "fair."<sup>215</sup> Nevertheless, the court found that Rogers' "hope to gain a financial return for his efforts with the photograph"<sup>216</sup> tilted its finding in favor of Rogers.

### c. *The Third Factor*

The court noted that the same analysis applied to the determination of the amount and substantiality of work used, as that used to determine if the copied work was substantially

---

<sup>212</sup> Defendant's Brief at 32-33

<sup>213</sup> At the time that the suit was initially brought, the operative presumption was that the unpublished nature of the work militated against fair use. *See generally* Harper & Row Publishers, Inc. v. National Enterprises, 471 U.S. 539, 564 (1985) ("the scope of fair use is narrower with respect to unpublished works").

<sup>214</sup> *See generally* Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) ("[unpublished] works normally enjoy complete protection against copying any protected expression").

<sup>215</sup> *See* New Era Publications v. Carol Pub. Group, 904 F.2d 152, 157 (2d Cir.) ("no persuasive reason given why a court should be less, rather than more likely to find fair use when . . . the copyrighted material has been published"), *cert. denied*, 111 S. Ct. 297 (1990).

<sup>216</sup> *See Koons*, 960 F.2d at 310.

similar and infringing.<sup>217</sup> Koons argued that he had made significant changes in the expressive elements of the photograph due to the textural differences—the colors and the mood—evoked by the sculptural form.<sup>218</sup> Koons claimed to have appropriated only the “factual” visual information contained in the photograph; that is, he took the “two people with eight puppies, a bench and a background.”<sup>219</sup>

The court, however, had little difficulty in finding that the balance tilted in Rogers’ favor. Despite Koons’s arguments to the contrary,<sup>220</sup> the court found that Koons had impermissibly copied the very essence of Rogers’ photograph and had incorporated “the very expression of the work.”<sup>221</sup> The court found that, in appropriating nearly the totality of the photograph, Koons’s quantitative use exceeded the level permitted under the fair use doctrine. Since Koons’ work did not reach the level of parody, it would not be afforded the leeway reserved for parodies.<sup>222</sup>

Koons, however, contended that the underlying idea of Rogers’ photograph, which he admittedly used, was not protected by copyright. In fact, in copyright cases involving photographs, courts have held that the plaintiff-photographer cannot monopolize the various poses he used to create a photograph because the protection only extends to the “*photographic expression* of these poses and not the underlying ideas therefor.”<sup>223</sup> It is submitted that the Second Circuit, in analyzing Koons’s substantial use of Rogers’ photograph, failed to make that very significant distinction.

It is widely acknowledged that differentiating the non-protectable idea from the expression eligible for protection is mystifying, calling for distinctions between the two that border on the metaphysical.<sup>224</sup> Part of the problem in *Koons* may lie

---

<sup>217</sup> *Id.* at 311.

<sup>218</sup> Defendants’ Brief at 52 (“‘String of Puppies,’ because it is a three-dimensional sculptured work, has none of the ‘photographic’ qualities of the note card.”).

<sup>219</sup> Defendants’ Brief at 53.

<sup>220</sup> *See id.* at 30-33

<sup>221</sup> *Koons*, 960 F.2d at 311.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* (emphasis added). In *Koons*, it appears the court found that Koons’s instructions to the artisans to “make the sculpture like the photo’ was evidence of his incorporation of the “essence” of Rogers’ work.

<sup>224</sup> *See generally* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487,

in the court's dual application of the "substantiality" factor in its analysis of both fair use and infringement.<sup>225</sup> Commentators have suggested that the overlapping use of the substantiality factor may be unsound because, by virtue of making the user vulnerable to liability for copyright infringement, it simultaneously denies his ability to make a tenable fair use defense.<sup>226</sup> In other words, if the substantiality requirement for infringement also satisfies the same test in the fair use determination, "every fair use defense would fail as a matter of law."<sup>227</sup> Furthermore, when determining infringement, the "substantiality" criterion fails to discriminate adequately between the permissible use of the "idea" and the impermissible use of the "expression."<sup>228</sup>

When the idea-expression dichotomy is applied to visual arts, its implementation becomes even more difficult because the "conceptual distinctions between idea and expression become almost impossible."<sup>229</sup> These distinctions are particularly hard to make when, for example, a photograph is at issue because the individual visual elements comprising the photograph seem to be inseparable.<sup>230</sup> It appears that the *Koons* court experienced this difficulty. Although the court found that the essence of Rogers' photo had been copied "nearly in toto," the court did not define the elements of the "essence" that it deemed crucial to these findings.<sup>231</sup> Thus, it is not clear that

489 (2d Cir. 1960) ("isolating the idea from the expression and determining the extent copying required for unlawful appropriation" [is] "troubling").

<sup>225</sup> See *Koons*, 960 F.2d at 311.

<sup>226</sup> See Abramson, *supra* note 31, at 157.

<sup>227</sup> *Id.*

<sup>228</sup> See Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 739 (suggesting that the ordinary observer test is likely to include the underlying (unprotectable) idea in determining if two works are substantially similar); Latman, *supra* note 140, at 1198 (the phrase "substantially similar" does not distinguish between "protected and unprotected elements").

<sup>229</sup> See generally Robert Yale Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. REV. 735, 751 (discussing the problems of applying the idea-expression to visual art infringement cases); Wang, *supra* note 125, at 274 ("with abstract art, however, the dichotomy between idea and expression becomes inoperative").

<sup>230</sup> See John Gastineau, Note, *Bent Fish: Issues of Ownership and Infringement in Digitally Processed Images*, 67 IND. L.J. 95, 118 (1991) (issue of substantial similarity poses problems when applied to photography because of the tendency to perceive the visual elements in photographs as "fully integrated and inseparable").

<sup>231</sup> In an earlier part of the opinion, the court stressed that the trial court's

the court successfully managed to separate the underlying idea of the photograph from its expression<sup>232</sup> and, thereby, may have unwittingly protected the totality of the photograph—its idea and its expression.<sup>233</sup>

Moreover, the court failed to take into consideration that copyright law was initially created for the protection of literary rather than visual works.<sup>234</sup> While it may be true that “it is not fair use when more of the original is copied than necessary,”<sup>235</sup> the court has yet to distinguish the differences in the quantitative character of “necessity,” which is characteristic of quoting a literary source and copying a visual one.<sup>236</sup> The court did not understand that visual information is not of the same nature as information that can be imparted verbally.<sup>237</sup> Rather, a visual work has a “complex, multi-layered character” that is not so easily discernable upon a first, second or even third glance.<sup>238</sup> The meaning of an artistic work, particularly

findings that the poses, the shading and the expressions (of the couple), which were the embodiment of the Rogers’ original contribution, were copied by Koons. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 365 (1992). The court, however, was discussing the infringement standard and not the fair use standard.

<sup>232</sup> See *Kisch v. Ammirati & Puris Inc.*, 657 F. Supp. 380, 383 (S.D.N.Y. 1987) (noting the difficulties involved in the application of substantial similarity).

<sup>233</sup> See Wang, *supra* note 125, at 273 (suggesting that the “substantial similarity” requirement effectively affords copyright protection to some ideas”).

<sup>234</sup> See Timberg, *supra* note 58, at 317 (concluding that the “qualitative substantiality” principle is an example of an irrational carryover from the law of literary copyright to visual arts”).

<sup>235</sup> See *Koons*, 960 F.2d at 311 (quoting *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.) *cert. denied*, 484 U.S. 890 (1987)).

<sup>236</sup> For example, there is a cartoon in which two mice are commenting on the decision in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). In its opinion, the court said that Air Pirates took too much of the original cartoon when effecting their parody. The gist of the conversation between the mice is that they are trying to decide how much Appropriation is too much from the viewpoint of the court, Disney and Air Pirates. Trying to explain the cartoon makes it even more clear that a written description is not a satisfying substitute for the visual experience. See Bernard Timberg, *New Forms of Media and the Challenge to Copyright Law*, in *FAIR USE AND FREE INQUIRY*, *supra* note 52, at 213 (“The best way to deaden a film’s statement is to reduce it to words.”).

<sup>237</sup> Remember the old adage that “a picture is worth a thousand words.”

<sup>238</sup> See Bernard Timberg, *supra* note 236, at 213 (“[v]isual information possesses a complex, multilayered character unlike that of the written word”) (quoting Richard Sorensen, *To Further Phenomenological Inquiry: The National Anthropological Film Center*, 16 *CURRENT ANTHROPOLOGY* 267, 268 (1975)).



one situated in the postmodernist vein, is even less fathomable, because within such a world view, images are understood to have multiple and indeterminate meanings. This does not accord with the copyright world view in which an image is viewed as the expression of a singular idea.<sup>239</sup>

Furthermore, a photograph is designed to be consumed in its entirety.<sup>240</sup> Unlike a book from which pertinent sections may be culled to illustrate a point, the complete photograph must be seen in order for the viewer to experience its import.<sup>241</sup> Making a "comment or criticism" of a visual work requires access to the entire work.<sup>242</sup> Although access to the complete work is different than use of the entire work, mere access to the work for an artist working in the postmodernist view point may not be sufficient. To criticize the work, the postmodern artist may need to use the entire image in order to engage effectively in a critique of it or the cultural values it espouses.<sup>243</sup> Thus, to limit an artist's (Koons's) use of another's art to some undefined quotient, limits his ability to analyze, criticize and comment upon the work as well as constricts his ability to engage in a new form of creativity, although that creativity may not have been foreseen by Congress when it designed copyright laws to foster progress in the arts.<sup>244</sup>

<sup>239</sup> Foster, *supra* note 84, at 196 ("As a textual practice, postmodern art cannot be translated."); see Wang, *supra* note 125, at 276 ("the idea in [A]ppropriation (art) that images have indeterminate meanings does not make sense in the copyright world where an image is viewed as the expression of one idea") (citations omitted).

<sup>240</sup> See Bernard Timberg, *supra* note 236, at 216 (fair use defense is unavailable when a photograph is used in its entirety; it is "designed to be consumed in this manner"); Patry, *supra* note 12, at 434 (discussing use of the entirety of cartoons; noting that due to the nature of pictorial, graphic and sculptural works, it is very difficult to use in "any manner other than their entirety").

<sup>241</sup> See Timberg, *supra* note 236, at 213 (noting that each picture is an aesthetic whole, "incapable of any excerpting or fragmentation").

<sup>242</sup> *Id.*

<sup>243</sup> See Owens, *supra* note 72, at 235 (noting that it is necessary to participate in the very activity denounced in order to denounce it); Carlin, *supra* note 59, at 125 n.96 ("primary purpose of Appropriation is to copy its source while simultaneously undermining or changing the ideas with which that source is typically identified").

<sup>244</sup> See Bernard Timberg, *supra* note 236, at 217 (noting that if the photograph is necessary for critical analysis, it must be used in its entirety and cannot be "analyzed adequately in part or in a verbal translation of [its] content"); see also

#### d. *The Fourth Factor*

As to the fourth factor which assesses the likely effect of the unauthorized use upon the potential market for the copyrighted work, the court also found against Koons. Koons argued that his limited edition of three sculptures did not satisfy the demand for the original photograph<sup>245</sup> because the sculpture satirizes the mood and sentiment that Rogers meant to convey in the photograph.<sup>246</sup> Due to the differences in affect (and effect), Koons claimed that the sculpture "String of Puppies" would appeal to an entirely different audience.<sup>247</sup> Thus, according to Koons, where the intended audience for the two art works—the photograph and the sculpture—were different, it was unlikely that Rogers would be harmed.<sup>248</sup> The court dismissed these arguments, noting that the critical inquiry was whether or not Koons had intended to profit from the production of the sculpture.<sup>249</sup> The court determined that Koons, had so profited.<sup>250</sup> Since Koons's work was primarily commercial in nature, this copying was deemed inevitably to undercut the demand for the original work.<sup>251</sup>

Rogers, contended that Koons's unauthorized use of the photo deprived him of the right to earn income through the sale of "art rendering rights" in his photograph.<sup>252</sup> According

Abramson, *supra* note 31, at 167 (suggesting that greater latitude be given to those who use photographs when determining substantial use); Sigmund Timberg, *supra* note 58, at 317 (finding that such limitations "cripple the creative efforts" of those wishing to use parody or satire for comment or criticism).

<sup>245</sup> Defendants' Brief at 42.

<sup>246</sup> Rogers claimed that the message his photograph evoked was one of "joy and pride." On the other hand, Koons intended to disturb the viewer with a nightmarish portrayal of a couple seated with puppies. He succeeded. *See* Defendants' Brief at 30 (art critic discussing the sculpture comments that "impression created by sculpture was 'horrific'"); Arthur C. Danto, *The Whitney Biennial, in ENCOUNTERS & REFLECTIONS, supra* note 66, at 281 ("There was a figure of a man smiling with benignity at an armful of puppies that haunts one like a bad dream . . .").

<sup>247</sup> Defendants' Reply Brief at 22 (commenting that "Koons produced a distinct work of art that mocks the cultural milieu of Rogers[s] photo. Consequently, there are entirely separate devotees for these disparate expressions . . .").

<sup>248</sup> *Id.* at 23. Koons cited for this proposition the district court's holding in *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp 1150 (M.D. Tenn. 1991). However, that judgment was eventually reversed. 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1642 (1993).

<sup>249</sup> *Koons*, 960 F.2d at 312.

<sup>250</sup> *Id.* at 310.

<sup>251</sup> *Id.*

<sup>252</sup> Plaintiffs' Brief at 36. "Art rendering" is an "[a]rt version or copy of a photo-

to Rogers, if all artists were allowed to appropriate, the market for art rendering would be destroyed.<sup>253</sup> In addition, Koons's use would adversely impact upon Rogers' ability to create or authorize art works derived from the "Puppies" photograph.<sup>254</sup>

According to Koons, however, there was no demonstrable evidence of "any reasonable likelihood (past, present or future) of economic injury" to Rogers resulting from the appropriation of the photograph.<sup>255</sup> Thus, Rogers' argument was based upon a claim that, in Koons's view, was groundless.<sup>256</sup> The court agreed with Rogers, noting that the market for "authorized" sculptures like the "Puppies" photograph was reduced because of Koons's sculpture.<sup>257</sup> The court also noted that the mere change of one medium (photography) to another (sculpture) did not reduce the harm to the copyright owner.<sup>258</sup> The pertinent question was whether or not there was a "meaningful likelihood of future harm,"<sup>259</sup> which did not depend upon demonstrable proof of actual harm. The court concluded that Koons's use of Rogers' note card was "piracy" and affirmed the district court's findings.<sup>260</sup> The court did not examine whether or not the sculpture competed in the same market with Rogers' photographic note card. Instead, the court focused on whether Koons had planned to profit from his use of the Rogers' photograph. The court reasoned that because Koons had realized a profit (and had intended to realize a profit), there was some meaningful likelihood of future harm.<sup>261</sup>

---

graph or a portion of one by an artist/illustrator in which the photograph is recognizable in the final art work." *Id.* at 37.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 40.

<sup>255</sup> Defendants' Reply Brief at 17 (arguing that the deficiency in Rogers' suit was the absence of evidence of economic injury).

<sup>256</sup> Koons argued that Rogers' assertion that destruction of the art rendering market would occur if appropriation was encouraged was a theoretical exercise. Defendants' Reply Brief at 19.

<sup>257</sup> This, of course, assumes that there is another artist who wanted to use Rogers' photo, and pay for such use. *See* 960 F.2d at 312.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 303. The court also reviewed Rogers' claim for infringing profits and remanded the case to the district court for a determination of the amount. It also reviewed the turnover order and found it appropriate. *Id.*

<sup>261</sup> *See id.* at 312 ("where the use is intended for commercial gain some meaningful likelihood of future harm is presumed") (citation omitted).

Yet the court's implicit assumption—that artists create without any thought of monetary compensation—is a romantic notion left from the modern era.<sup>262</sup> This is not to say that the creative process is no longer an ineluctable one for artists; it is still necessary for them to create.<sup>263</sup> The court's ruling, however, seems to imply that to care about making money is somehow crass and less than artistic.<sup>264</sup> The fairness of the use should not be determined solely by whether or not the appropriated work has been tainted by the profit realized by the appropriating author.<sup>265</sup> Rather, the court's determination should have focused on whether or not Koons's work substantially impaired the market for Rogers' photo, not whether there was a market for Koons' own work. This is an important consideration, particularly when the pervasive rationale underlying the grant of copyright is that it provides authors with an economic incentive to create.<sup>266</sup>

One of the problems in analyzing the fourth factor is deciding the parameters of the relevant market.<sup>267</sup> On the one

---

<sup>262</sup> See Olsson, *supra* note 59, at 1500 ("the romantic notion of an artist creating merely to create rather than to generate profits is a deeply held belief"). *But see* Lacey *supra* note 7, at 1574 (while there are many reasons why artists create, monetary gain is not the primary reason). See generally Peter Jaszi, *On the Author Effect: Contemporary Copyright & Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992) (discussing the problems of romanticizing authorship).

<sup>263</sup> See Boggs, *supra* note 75, at 889 (author noting that as an artist, he becomes captivated by images which are impossible to escape); Lacey, *supra* note 7, at 1574 (commenting that artists need to write or paint because creating is an integral part of their personality).

<sup>264</sup> *Koons*, 960 F.2d at 312 (finding that there is "nothing in the record to support the view that Koons produced [the sculpture] for anything other than sale as high-priced art"); see also Jaszi, *supra* note 262, at 308 (noting that Koons's "worldliness in money matters does not weigh in his favor").

<sup>265</sup> See Robert J. Kapelke, Comment, *Piracy or Parody: Never the Twain*, 38 COLO. L. REV. 550, 568 (1966) (noting that using commercial intent as indicator of unfair use was unrealistic).

<sup>266</sup> See generally *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (Court states that the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that the encouragement of individual effort for personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts"). *But see* Marcus, *supra* note 101, at 300 (discussing theory that the purpose of copyright is an inducement to get artists to give their work to society as a gift).

<sup>267</sup> See William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 687 (1993) (observing that analysis of the fourth factor "raises difficult issues of theory and proof," such as the definition of the market, the types of harm to the work that should

hand, the market definition must be broad enough to cover the uses enumerated in the Copyright Act.<sup>268</sup> On the other hand, the market must be narrowed so that it does not catch every possible use and render the fair use provisions inoperative.<sup>269</sup> In *Koons*, the court defined the relevant potential market to include Rogers' prerogative to sell the rights in his photograph to another artist who then could produce a sculpture based on the photograph.<sup>270</sup> Koons's sculpture, the court found, impaired the market for Rogers' photograph because its existence either precluded or substantially reduced the possibility that Rogers would be able to sell those rights.<sup>271</sup>

The court based its findings of market impairment upon an inappropriate analogy.<sup>272</sup> The court analogized the *Koons* case to one involving an unauthorized movie adaptation of a book, which would be unfair use because of its effect upon the author's potential to sell the adaptation rights.<sup>273</sup> The court was correct to assume that a book and its movie adaptation were competitive in the same or similar market. However, analogizing between the Koons sculpture and the Rogers photograph was inapt on two grounds. First, the expressive intent of the two works were not identical and, second, the photo-

be considered, and the allocation of the burdens of proof and production).

<sup>268</sup> *Id.*; 17 U.S.C. § 106(1)-(5) (1988) provides a copyright owner with the exclusive right to do or authorize the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106(1)-(5) (1988).

<sup>269</sup> See Patry & Perlmutter, *supra* note 267, at 688 (where authors remark that too broad an interpretation of the market would always lead to a determination against fair use).

<sup>270</sup> See *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 365 (1992).

<sup>271</sup> *Id.*

<sup>272</sup> See *id.*

<sup>273</sup> *Id.*

graph and sculpture were not competing in the same market. A better argument would have been one which the court had mentioned only cursorily—the effect that photographs or note cards depicting the Koons's sculpture would have on the market for Rogers' photograph and note cards.<sup>274</sup>

Arguably a movie adaptation would depict the book's content and expression with relative accuracy. Koons, however, objected to the contention that his sculpture emitted the same tone or feeling as the Rogers photograph. In the photograph, warm and fuzzy (if not furry) feelings are extolled, while in the sculpture these sentiments are ridiculed as the continued effects of standardized "Hailmark" imagery.<sup>275</sup> The emotions emitted in the former are not generated in the latter. By the same token, acquisition of a sculpture will not satisfy someone who wishes to mail a note to a friend or to frame a photograph. Accordingly, it is unlikely that the same persons who would buy the photograph would buy the sculpture as a substitute for the photograph or note card, even if the prices were not "bettered by a thousand to one."<sup>276</sup>

Furthermore, the court failed to consider either the sophistication of the buyer or the nature of the market in its analysis of the Koons sculpture's market effect. While an inquiry of this type is typically found within the ambit of trademark law,<sup>277</sup> it is not inapposite here,<sup>278</sup> particularly when a Museum Graphics card can be purchased in any airport or card shop for relatively little money. In contrast, buying a sculpture involves

---

<sup>274</sup> *Id.*

<sup>275</sup> See *supra* note 249 and accompanying text for comments of Rogers and Koons regarding their intent in expressing the scene of the couple and their puppies.

<sup>276</sup> See *Koons*, 960 F.2d 303.

<sup>277</sup> See generally *Homeowners Group, Inc. v. Home Mktg Specialists, Inc.*, 931 F.2d 1100 (6th Cir. 1991) ("when services are expensive or unusual, the buyer can be expected to exercise greater care in her purchases"); *Plus Products v. Plus Discount Foods, Inc.*, 722 F.2d 999 (2d Cir. 1983) (buyer sophistication is an important consideration to weigh in evaluating likelihood of confusion); *Girl Scouts of The United States of Am. v. Bantam Doubleday Dell Publishing Group, Inc.*, 808 F. Supp. 1112, 1129 (S.D.N.Y. 1992) (the value of an article may influence the sophistication and awareness of buyers which in turn may influence the degree of confusion as to origin).

<sup>278</sup> See generally Michelle Brownlee, Note, *Safeguarding Style: What Protection is Afforded Visual Artists By the Copyright and Trademark Laws?*, 93 COLO. L. REV. 1157, 1173 (discussing application of trademark law principles, such as consumer confusion in visual art cases).

a major investment of capital.<sup>279</sup> A better approach would have been an analysis of the market effect that considered not the profit Koons realized, but the sophistication of the buyer(s), the differences in the market and the effect of possible note card production by Koons. This would have produced a more evenhanded and balanced accounting of the fourth factor.

### C. *Problems with the Second Circuit's Decision*

Precedent is only a good thing if it is still able to accommodate the reality of the changing paradigm.<sup>280</sup>

Time works changes, brings into being new conditions and purposes. Therefore a principle to be vital must be of wider application than the mischief which gave it birth.<sup>281</sup>

When Art Rogers won his case against Koons, he felt a mixture of relief and vindication.<sup>282</sup> The court, after all, had agreed with him that "photographers [had] a right to protect their material."<sup>283</sup> Yet the irony of the *Koons* decision is that Rogers, or others like him, could find himself "hoist by his own petard."<sup>284</sup> The *Koons* decision seemingly precludes a photographer from taking an unauthorized photograph of a statue and commercially benefitting from this work. For example, when Koons's *New Work: A New Generation* exhibit, which included the *String of Puppies* sculpture, toured the San Francisco area, photographers sympathetic to Rogers' claims filled the museum and took pictures of Koons's work.<sup>285</sup> One of the photographers refused to sign the museum release, which stated that the pictures would be used for educational purpos-

---

<sup>279</sup> See Greenberg, *supra* note 72, at 32 (noting that it was "farfetched" to imagine that Koons's high-priced art could affect the market for works sold in gift shops); Brownlee, *supra* note 277, at 1174 ("fine art is rarely bought and sold under circumstances in which consumer confusion is likely to play a role since buyers are generally aware of what they are buying").

<sup>280</sup> Boggs, *supra* note 75.

<sup>281</sup> *Weems v. United States*, 217 U.S. 349, 373 (1910).

<sup>282</sup> See Jesse Hamlin, *Something Else*, S.F. CHRON., Apr. 14, 1992, at E2 (where Rogers, commenting on the Second Circuit decision, said, "I feel vindicated").

<sup>283</sup> Liz Lufkin, *Puppy Plagiarism in the Art World*, S.F. CHRON., Jan. 18, 1990, at B3 (quoting Art Rogers).

<sup>284</sup> See WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 4 ("For 'tis the sport to have the engineer Hoist with his own petard.").

<sup>285</sup> See Liz Lufkin, *New Protest Over Puppies*, S.F. CHRON., Apr. 4, 1990, at E1.

es only and would not be sold.<sup>286</sup> Had he developed these photographs and sold them to the media, for example, he might suddenly find himself on the opposite side, claiming that his photograph was a “fair use” of and commentary upon the sculpture. Based on the *Koons* decision, the court would not find such a use “fair” because the “taking” of Koons’s work in its entirety by the photographer was an infringement of Koons’s copyrighted sculptures and a deprivation of Koons’s potential to profit from photographs derivative of his work.<sup>287</sup>

Such a photographer would presumably wish to make the argument that his use was a fair one—his objective in taking and displaying the photograph was to make a commentary upon or criticism of Koons’s art of Appropriation.<sup>288</sup> Even if the photographer’s claims that the photo criticizes Koons’s art were accepted by the court, the commercial benefits realized by the photographer’s own “appropriation” would likely weigh against a finding of fair use.<sup>289</sup> Furthermore, the court would likely find that the use was qualitatively and quantitatively substantial because the photograph incorporated the totality of the sculpture; a photograph of the sculpture, whatever its intrinsic artistic elements, would contain the “essence” of the artistic expression and ideas of the sculpture.<sup>290</sup> Finally, when considering the impact of the photograph on the market for Koons’s works, the court could decide that the photo diminished Koons’s abilities to utilize his full range of market rights effectively, particularly if the photo was used as the basis of a note card that disseminated Koons’s work to the public in a fashion contrary to Koons’s desires.

---

<sup>286</sup> *Id.*

<sup>287</sup> In fact, the district court in *Rogers* acknowledged as much when it noted that an unauthorized photograph of a copyrighted statue was an infringement. See *Rogers v Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990).

<sup>288</sup> See Lufkin, *supra* note 284, at E1. The underlying rationale behind the “shootout” at the San Francisco Museum of Modern Art was to criticize Koons’s appropriation of Rogers’ photograph.

<sup>289</sup> This would be particularly true given the wording of the Museum’s release.

<sup>290</sup> See *Bracken v. Rosenthal*, 151 F. 136, 137 (N.D. Ill. 1907) (determining the issue of copyright infringement of a sculpture by a photograph, court remarked that “[t]he question is not whether the photograph contains artistic elements of its own but whether it also contains any of the artistic ideas and conceptions expressed in the statuary”).



## CONCLUSION

Although the parameters of fair use have been adequate in circumscribing the boundaries of use in a literary sense,<sup>291</sup> the doctrine is too narrowly drawn with respect to the visual arts. To return to our hypothetical artist, "Wilma,"<sup>292</sup> busily making a collage of Koons's works, to comment upon the status of art and the artist in society, we find an artist in jeopardy. Her use of the photographs of his work in her own, even though they are grouped differently, will not be considered fair even if the *Koons* precedent is strictly applied.<sup>293</sup> The same problem exists for a photographer who takes a picture of a copyrighted statue<sup>294</sup> or of a photograph.<sup>295</sup> In either instance the photographer has appropriated the entirety of the object. Even if the work is seen as a valid comment or criticism on Koons's work and the world view that motivates it, the court in all probability would find that her use was more substantial than required to make the comment or criticism intended.<sup>296</sup> In works of this nature, however, entire images are generally used and necessary in order to engage effectively in the intended commentary.<sup>297</sup> The substantiality of use criterion effectively operates to curtail an entire genre of artistic criticism and commentary. Thus, it does not work well when it

---

<sup>291</sup> See Krieg, *supra* note 84, at 1565 (noting that the doctrine of fair use "fails to provide meaningful standards governing the use of visual, rather than written, material").

<sup>292</sup> See *supra* INTRODUCTION for a description of Wilma's work.

<sup>293</sup> See Krieg, *supra* note 84, at 1573 (commenting that appropriated images used in montage are "necessarily identical" to those images in the copied work, and are thus unlikely to be protected under the fair use doctrine.)

<sup>294</sup> See *Bracken*, 151 F. at 137 (finding that "to hold that a piece of statuary may be infringed by a picture of the statuary seems in every way in accord with the reason and spirit of the law").

<sup>295</sup> See Olsson, *supra* note 59, at 1519-20 (analyzing a hypothetical claim of copyright infringement brought by Walker Evans against Sherrie Levine).

<sup>296</sup> See *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1991) ("even where there is criticism, there are limitations on what constitutes fair use"), *cert. denied*, 113 S. Ct. 365 (1992). *But see* Susan Lineham Faaland, Comment, *Parody and Fair Use: The Critical Question*, 57 WASH. L. REV. 163, 187 (1981) (contending that verbatim copying can result in valid criticism).

<sup>297</sup> See Olsson, *supra* note 59, at 1519 (in determining if appropriated work qualifies for fair use, author remarks that such an analysis is problematic in that an artist may need to quote the "essence" of a photograph in order to refer to it properly).

determines that an appropriation of a protected work of art is not "fair."<sup>298</sup>

In *Koons*, the Second Circuit could have fashioned a new line of inquiry that acknowledges the problems for visual artists working within the postmodernist genre. Rather than base a decision regarding substantiality of use solely upon the "qualitative" aspects of the appropriation, it might have also asked whether the use, in relation to the copyrighted work, transformed the finished product into something creative and original.<sup>299</sup> In this way, the user's creative instincts are allowed free rein without their form of criticism and commentary being unnecessarily "chilled." Instead, however, the Second Circuit imposed new burdens upon visual artists. Thus, the artist must not only be attentive to how much is being quoted, but she must also pay attention to what is quoted.<sup>300</sup> The requirements set forth by the court unnecessarily infringe upon Wilma's—or any artist's—freedoms to choose her subjects and her mode of expression.

The Second Circuit in *Koons* missed an excellent opportunity to make the fair use doctrine more conducive to contemporary realities, and more responsive to the problems resulting from an increasingly technological and visual age.<sup>301</sup> Rather than take the bold initiative and expand fair use, the court settled for the conservative path of least resistance and, therefore, will continue to struggle with the inadequacies of the fair use doctrine well into the twenty-first century.<sup>302</sup>

---

<sup>298</sup> See Timberg, *supra* note 58, at 313 (deciding that the "substantiality of use" criterion of fair use appears unsuited for visual arts).

<sup>299</sup> See generally Abramson, *supra* note 31, at 158 (arguing that a creative product that employs "verbatim" a copyrighted work should not automatically be precluded from a finding of fair use, if the use was part of an original work).

<sup>300</sup> See *Koons*, 960 F.2d at 311 (finding that Koons went beyond the factual subject matter of the photograph).

<sup>301</sup> See Daniel Grant, *Computer Copycats Blur Rights*, CHRISTIAN SCI. MON., Oct. 3, 1991, at 12 (artist whose work had been appropriated complained that "technological changes have been so rapid that the law strains to deal with them"); Rick G. Morris, *Use of Copyrighted Images in Academic Scholarship and Creative Work: The Problems of New Technologies and a Proposed "Scholarly License,"* 33 IDEA, J.L. & TECH. 123, 151 (1993) (noting that the inflexibility of present copyright laws in the face of a rapidly changing technology leads to the chilling of speech, scholarship and art).

<sup>302</sup> See Jon O. Newman, *Not the End of History: The Second Circuit Struggles With Fair Use*, 37 J. COPYRIGHT SOC'Y 12 (1989) (containing Judge Newman's discussion of two fair use cases).

