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Fair Use and Appropriation Art

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(d) 0.5% for the portion of the sale from €350,000.01 to €500,000;

(e) 0.25% for the portion of the sale price exceeding €500,000.[67]

In 2013, Société des Auteurs Dans les Arts Graphiques et Plastiques (ADAGP), the French collecting society for visual artists, distributed royalties to 1840 artists and their estates—44% were living artists.[68] The French law extends the resale royalty to seventy years after the artist's death.[69] ADAGP collected over €12.5 million in resale royalties: €8.3 million from sales in France and the rest from foreign markets.[70]

It is time for the United States to join the community of nations on this issue. American artists, too, and their families and estates, should be able to enjoy the legacies of resale royalties.

[67] 2001 Council Directive, *supra* note 60, at 35.

[68] E-mail from Fabienne Gonzalez, Société des Auteurs Dans les Arts Graphiques et Plastiques, to author (January 15, 2015, 13:42 CST) (on file with author).

[69] *See* Council Directive 93/98, art. 1, § 1, 1993 O.J. (L 290) (EC), *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1416675593286&uri=CELEX:31993L0098.

[70] E-mail from Fabienne Gonzalez, Société des Auteurs Dans les Arts Graphiques et Plastiques, to author (January 15, 2015, 13:42 CST) (on file with author).

FAIR USE AND APPROPRIATION ART

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I. INTRODUCTION

In 1997, I wrote an article[1] on the treatment of appropriation artists[2] under the Copyright Act of 1976 (the Act).[3] The thrust of the article was that copyright law was suppressing appropriation art.[4] This was happening because the Act did not recognize the circumstances of the late twentieth century, when a significant chunk of the aesthetic vocabulary of the day was privately owned.[5] Many artists were targeting popular culture, but that was becoming difficult to do when most of that culture was owned by litigious cultural landlords who stood ready to bring copyright infringement actions against anyone using their "property." The article predicted that appropriation artists would "abandon their art" if some solution was not devised.[6] The article provided one such solution[7] in the form of a narrowly tailored copyright privilege extending to the creation of "works of visual art" as defined in the Copyright Act—works of painting or sculpture that are created in single copies or editions of not more than 200.[8]

My earlier article was written seventeen years ago. In this article, I will revisit the circumstances of

[1] Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249 (1997).

[2] "Appropriation in art and art history refers to the practice of artists using pre-existing objects or images in their art with little transformation of the original." *Appropriation*, TATE, http://www.tate.org.uk/learn/online-resources/glossary/a/appropriation (last visited Nov. 2, 2014).

[3] *See* Act for the General Revision of the Copyright Law (Copyright Act of 1976), ch. 17, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

[4] Schaumann, *supra* note 1, at 249–51.

[5] *Id.* at 252–54.

[6] *Id.* at 273.

[7] *See id.* at 274–80.

[8] 17 U.S.C. § 101 (defining "work of visual art").

appropriation subject artists to see how the law has evolved and whether they are freer to create than they were in the late 1990s. In particular, although the Supreme Court in 1994 clearly sent a signal that "transformation" of the copied work would be important in fair use cases,[9] this idea had not been applied to appropriation art cases. How, then, has "transformation" affected appropriation art? Does appropriation art still pose a challenge to copyright law?

Although I will build on my earlier article, I will not assume familiarity with it. This article stands on its own. Whereas *An Artist's Privilege* investigated a number of different alternatives to the treatment of appropriation art under the Copyright Act, the current article looks only at the changes in the fair use doctrine and discusses whether those changes would suffice to make a privilege like the one suggested in the earlier article unnecessary.

Part I provides some background regarding aesthetic vocabulary in the arts, and traces the use of appropriated images in the twentieth- and twenty-first centuries. Part II discusses the general application of copyright law to appropriation art. Part III examines the current status of the fair use cases that address appropriation art and concludes that the fair use results are better than before, largely because of the ascendancy of "transformativeness" as an important fair use factor. It also concludes, however, that fair use remains insufficient to protect appropriation art. Finally, Part IV re-proposes a solution—an exception to copyright, limited to fine art—grounded in the public benefit of dissemination of knowledge and the lack of damage to the original author's economic interest resulting from appropriation art.

[9] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994).

II. AESTHETIC VOCABULARY

Aesthetic vocabulary changes with the times. Voluptuous female nudes are no longer a common subject of painters; neither are religious allegories. Art today is more openly critical of the culture in which it arises, and it does so in many cases by referring explicitly to that culture. This section will briefly review the history of appropriation as an artistic technique.[10] The art historian will no doubt see this as woefully inadequate, but for legal purposes it will suffice.

Beginning in the early twentieth century, artists began to take objects from their surroundings for incorporation into works of art, for example the collages of Picasso and Braques.[11] These collages were followed by the use of industrially-manufactured objects that were complete, stood alone, and were identified as art. Marcel Duchamp's "ready-mades" famously included a piece titled "Fountain," consisting of a men's urinal atop a pedestal, signed "R. Mutt 1917."[12]

The use of objects from the environment was continued by the Surrealists. Meret Oppenheim's *Object* is a cup, saucer, and spoon—covered in the fur of a

[10] A similarly brief exposition of this subject can be found on the Tate Gallery web site. TATE, *supra* note 2.

[11] Both artists were responsible for introducing collages, or *papiers collés*, into fine art in 1912. Pablo Picasso used newspaper clippings to create forms. See, for example, *Bottle of Vieux Marc, Glass, Guitar, and Newspaper*, which may be viewed at Tate online. Pablo Picasso, *Bottle of Vieux Marc, Glass, Guitar, and Newspaper*, TATE, http://www.tate.org.uk/art/artworks/picasso-bottle-of-vieux-marc-glass-guitar-and-newspaper-t00414 (last visited Nov. 2, 2014).

[12] Shelley Esaak, *Special Exhibition Gallery: Dada at MoMA—New York*, ABOUT EDUCATION (2014), *available at* http://arthistory.about.com/od/dada/ig/DadaatMoMANewYork/dada_newyork_07.htm (last visited Nov. 2, 2014)(showing an original photograph of the work taken by Alfred Stieglitz).

Chinese gazelle.[13] Soon, however, artists began to appropriate the works of other artists as subject matter, rather than pre-existing utilitarian objects. In 1938, Joseph Cornell—who had become infatuated with the actress Rose Hobart—purchased a print of the B-movie *East of Borneo* featuring the actress, removed all the sections of the film in which she did not appear, and projected what was left at silent-film speed through a blue-tinted lens with a new soundtrack from a record album he had purchased. He called this work *Rose Hobart*.[14]

Twenty years later, more film works were appropriated. The year 1958 saw two works that consisted of appropriated images: *A Movie*, by Bruce Connor,[15] and the film *Cowboy and Indian*, by Raphael Montanez Ortiz.[16] Connor's film used found footage and pre-recorded sounds to present a meditation on sex, war, and the nature of the film medium.[17] Ortiz cut apart footage from a Western film, threw the cut-up pieces in a bag, and then randomly pulled out pieces of

[13] An image of this work, and its gallery label text, are available at the Museum of Modern Art website. Meret Oppenheim, *Object*, MUSEUM OF MODERN ART, http://www.moma.org/collection/object.php?object_id=80997 (last visited Nov. 2, 2014).

[14] Vivian Sobchak, Nostalgia for a Digital Object: Regrets on the Quickening of QuickTime, Nordicom Review 29, 37 (2004), available at http://www.nordicom.gu.se/sites/default/files/kapitel-pdf/134_029-038.pdf. The film Rose Hobart is available on YouTube. Joseph Cornell, Rose Hobart, YouTube (July 15, 2012) https://www.youtube.com/watch?v=pQxtZlQlTDA.

[15] David Conner Haney, *Documentary, Postmodernism, and La Mémoire des anges*, OFFSCREEN (July 2011) http://offscreen.com/view/documentary_postmodernism.

[16] Rocío Aranda-Alvarado, *Unmaking: The Work of Raphael Montañez Ortiz*, JERSEY CITY MUSEUM, (Feb.-Aug. 2007), http://centropr.hunter.cuny.edu/sites/default/files/Interview%20with%20Ortiz.pdf.

[17] Haney, *supra* note 15.

the film and spliced the parts together to create a new work.[18]

In the 1960s, the Pop Art movement began to appropriate images from popular culture. Roy Lichtenstein's *Look Mickey*,[19] painted in 1961, takes an image from a Little Golden Book featuring Donald Duck.[20] Later, Lichtenstein painted images in his comic-book style based on paintings by Picasso.[21] Picasso, too, appropriated: in 1957, he painted his *Las Meninas* series—a suite of fifty-eight paintings reinterpreting *Las Meninas* by Diego Velazquez.[22]

The 1960s also brought Pop Art icon Andy Warhol, whose silkscreened images of flowers on the walls of Leo Castelli's gallery generated what might be the first

[18] Aranda-Alvarado, *supra* note 16, at 33.

[19] An image of the painting appears at the National Gallery of Art website. Roy Lichtenstein, *Look Mickey,* NATIONAL GALLERY OF ART, http://www.nga.gov/content/ngaweb/Collection/art-object-page.71479.html (last visited Nov. 3, 2014).

[20] An image of the painting may be viewed in the public domain. CARL BUETTNER, DONALD DUCK LOST AND FOUND (1960), *available at* http://www.nga.gov/content/dam/ngaweb/Education/learning-resources/an-eye-for-art/AnEyeforArt-RoyLichtenstein.pdf.

[21] An image of one of the paintings may be viewed at Christie's website. Roy Lichtenstein, *Woman with Flowered Hat*, CHRISTIE'S http://www.christies.com/lotfinder/paintings/roy-lichtenstein-woman-with-flowered-hat-5684070-details.aspx (last visited Nov. 3, 2014). This painting sold for more than $56 million at Christie's in May 2013. The Picasso original, which sold for more than $95 million in 2006, can be viewed on Wikipedia. Pablo Picasso, *Dora Maar au Chat*, WIKIPEDIA, http://en.wikipedia.org/wiki/Dora_Maar_au_Chat (last visited Nov. 3, 2014).

[22] These paintings may be viewed at BCN.CAT, http://www.bcn.cat/museupicasso/swf/en/lacoleccio/meninas/meninas.html (last visited Nov. 3, 2014); Diego Velazquez, *Las Meninas-Picasso*, LAS MENINAS, http://www.velazquezlasmeninas.com/las-meninas-picasso.html (last visited Nov. 3, 2014).

lawsuit based on artistic appropriation.[23] Even Roy Lichtenstein's appropriation of Disney characters, noted above, did not provoke a lawsuit. The case against Warhol was settled out of court, with Warhol agreeing to a royalty for future uses of Caulfield's work.[24] Warhol also gave Caulfield two of the silkscreened flower pieces.[25]

At the same time, Elaine Sturtevant was copying the works of other artists, meticulously reproducing the technique and results obtained by others. It is frequently difficult to spot a Sturtevant; her works are superb repetitions of the works of others.[26] When questioned intensively about his own technique, Warhol reportedly said, "I don't know. Ask Elaine."[27] Sturtevant herself summed up her purpose by saying, "I create vertigo."[28] Although she was creating since the

[23] Warhol was sued by Patricia Caulfield, whose copyrighted photograph of four poppies Warhol found in an issue of Modern Photography. Warhol enlarged the image and had it professionally silk-screened onto canvases that were then painted in bright, often unrealistic colors by Warhol's friends and associates at his studio, "the Factory." The resulting series of approximately 1,000 works, entitled Flowers, were shown in the Leo Castelli gallery and eventually licensed as posters. Caulfield discovered Warhol's unauthorized use when she came across the posters in a New York City bookstore. One of Warhol's biographers claims that Caulfield was not concerned about the infringement to her work, but rather that she "had been prompted to sue him when she heard that Andy was 'rich.'" Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 225–26 (2007).

[24] *Id.* at 226.

[25] *Id.*

[26] *See* Andrew Russeth, *Sturtevant, Uncompromising Progenitor of Appropriation Art, Has Died*, N. Y. OBSERVER (May 7, 2014, 9:43 PM), http://observer.com/2014/05/sturtevant-uncompromising-progenitor-of-appropriation-has-died/.

[27] Margalit Fox, *Elaine Sturtevant, Who Borrowed Others' Work Artfully, Is Dead at 89*, N.Y. TIMES, May 16, 2014, *available at* http://www.nytimes.com/2014/05/17/arts/design/elaine-sturtevant-appropriation-artist-is-dead-at-89.html.

[28] *Id.*

1960s, Sturtevant, unlike Warhol, was not sued for copying others' works, although she reportedly annoyed Claes Oldenburg severely when she copied his *Store*.[29]

By 1975, Richard Prince was re-photographing images taken from cigarette advertisements, [30] the beginning of a career of appropriation that by 2012 had extended to a complete appropriation of the novel *The Catcher in the Rye*, identical in every way to the original first edition, except that the author's name had been changed from J.D. Salinger to Richard Prince.[31] Along the way, Prince created the works shown in his *Canal Zone* exhibition, which prompted a lawsuit from photographer Patrick Cariou, thirty-five of whose photographs were used in Prince's exhibition.[32]

The 1980s saw the adoption of the term "appropriation art" in the art world.[33] Sherrie Levine photographed the work of other photographers (while

[29] Christopher Bagley, *Sturtevant: Repeat Offender*, W (May 8, 2014, 8:12 PM), http://www.wmagazine.com/people/2014/05/sturtevant-moma-retrospective/photos/.

[30] One example from 1989 can be seen at the Metropolitan Museum of Art. THOMAS P. CAMPBELL, THE METROPOLITAN MUSEUM ART GUIDE 448 (Michael Sittenfeld & Robert Weisberg ed., 2012), *available at* http://books.google.com/books?id=3C4AFXFLmZEC (last visited Nov. 2, 2014); Richard Prince, *Untitled (Cowboy)*, METMUSEUM, http://www.metmuseum.org/toah/works-of-art/2000.272 (last visited Nov. 2, 2014).

[31] Kenneth Goldsmith, *Richard Prince's Latest Act of Appropriation: The Catcher in the Rye*, POETRY FOUNDATION (Apr. 19, 2012), http://www.poetryfoundation.org/harriet/2012/04/richard-princes-latest-act-of-appropriation-the-catcher-in-the-rye/.

[32] *See* Cariou v. Prince, 714 F.3d 694, 698 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618, (2013).

[33] *See* TATE, *supra* note 2; Sven Lütticken, *The Feathers of the Eagle*, 36 NEW LEFT REV. 109, 109 (2005), *available at* http://dspace.ubvu.vu.nl/bitstream/handle/1871/21431/182536.pdf?sequence=2.

scrupulously identifying the originals and distinguishing them from her own work).[34] Jeff Koons took images from popular culture, recreating them in sculpture, painting, and collage. [35] He was sued for copyright infringement three times in the late 1980s, and lost each case. [36] In 2006, Koons finally won a case, based on his "transformation" of the appropriated work.[37]

The foregoing short history demonstrates that the practice of appropriating objects and images from the world surrounding the artist has a distinguished and lengthy pedigree. So common is appropriation in the art world that a 2010 exhibition at the New Museum in New York, entitled *Free*, was built "partly around the very idea of the borrowing culture." [38] Nevertheless, beginning in 1965 with the lawsuit against Andy Warhol,[39] copyright infringement cases against artists who reuse images have proliferated.

[34] *See* Schaumann, *supra* note 1, at 250; *see also* John Carlin, *Culture Vultures: Artistic Appropriate and Intellectual Property Law Review*, 13 COLUM.-VLA J.L. & ARTS 103, 103–04 (1988); Gerald Marzorati, *Art in the (Re)making*, ARTNEWS, May 1986, at 90, 97. "Copying such images, whether or not for artistic purposes, is likely to result in litigation." Schaumann, *supra* note 1, at 254; *see, e.g.*, Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y 1993); Campbell v. Koons, No. 91 Civ. 6055(RO), 1993 WL 97381, at *1 (S.D.N.Y. Apr. 1, 1993).

[35] *See* Schaumann, *supra* note 1, at 251; *Rogers*, 960 F.2d at 304–306.

[36] *See, e.g.*, *Rogers*, 960 F.2d at 301; *United Feature Syndicate, Inc*, 817 F. Supp. at 370; *Campbell*, 1993 WL 97381, at *1.

[37] Blanch v. Koons, 467 F.3d 244, 246 (2d Cir. 2006) (affirming the district court's grant of summary judgment to the defendants on the ground that Koons's appropriation of Blanch's photograph was fair use).

[38] Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES, Jan. 1, 2012, at AR1, *available at* http://www.nytimes.com/2012/01/01/arts/design/richard-prince-lawsuit-focuses-on-limits-of-appropriation.html?pagewanted=all.

[39] *See supra* notes 23–25.

III. COPYRIGHT LAW AND APPROPRIATION ART

It is the nature of appropriation art that the subject matter is copied.[40] When that subject matter is a copyrighted work, the artist commits at least one infringement under the Copyright Act, and likely more.[41] This is not something exclusive to the 1976 Act, as the (pre-1976) lawsuit against Andy Warhol noted above makes clear. However, after the Act became effective on January 1, 1978, a new copyright regime took hold. The 1976 Act attempted, as nearly as possible, to fully allocate the right to engage in *every feasible use of a copyrighted work* to the owner.[42] Under this scheme, exceptions were narrowly drawn to serve the interests of existing users.[43] There were few gray areas, and the only way in which a user might legally use a copyrighted work without permission was under the fair use doctrine, codified for the first time in section 107 of the new Act.[44]

Just a few years after the new Act became effective, artists were continuing and extending the tradition of copying from pre-existing works. By the 1980s, the term "appropriation art" came into use and while the art was visually similar to the earlier varieties of copied art, the context and culture were different. The innocence and playfulness of the earlier copying seemed no longer to exist: appropriation art had become edgy, self-

[40] TATE, *supra* note 2.

[41] At a minimum, they violate the Act's prohibition against unlawful copying. 17 U.S.C. § 106(1). In addition, many appropriation art cases include the use of a work as part of the later artist's work, as well as the public display of the work, implicating 17 U.S.C. §§ 106(2) and 106(5). *See generally* Schaumann, *supra* note 1, at 254–56 nn.19–24.

[42] *See* JESSICA LITMAN, DIGITAL COPYRIGHT 37 (Prometheus Books, 2006).

[43] Id.

[44] 17 U.S.C. § 107.

conscious, and it seemed (sometimes, at least) knowingly to infringe copyright. Consider the Jeff Koons's 1988 *Banality* show: the title of the show identifies the subjects as banal, which is to say, lacking utterly in originality. Copyright, of course, protects only original works of authorship. Yet, the artist's copies of the banal works of others were held to infringe copyright.[45] Koons's infringing works were different from Roy Lichtenstein's *Look Mickey*, which retains a genuine innocence despite copying Disney characters. When Koons copied cartoon characters, they were implicated in sexual activities.[46] The controversy this generated was hardly accidental: Koons's *Made In Heaven* show, following immediately in the footsteps of the *Banality* show, contained many works that graphically depict Koons and his then-wife, porn star Ilona Staller, having sex.[47]

Sherrie Levine was another conspicuously transgressive artist who became known in the 1980s. Her 1980 show, *After Walker Evans*, featured works she created by re-photographing catalog images out of a Walker Evans exhibition catalog. She exhibited these photographs as her own art.[48] While Jeff Koons was

[45] *See* Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 379 (S.D.N.Y. 1993); Campbell v. Koons, 91 CIV. 6055 (RO), 1993 WL 97381 (S.D.N.Y., Apr. 1, 1993).

[46] See, for example, the artist's description of his work entitled "Pink Panther," as quoted in a 1992 Taschen Books retrospective of Koons's work: "Pink Panther is about masturbation." ECKHARD SCHNEIDER ET AL., JEFF KOONS 113 (Angelika Muthesius ed.) (1992).

[47] *See id.* at 124–61; *see also* Tom Leonard, *Porn star La Cicciolina sues ex-husband Jeff Koons for child support*, THE TELEGRAPH, Mar. 27, 2008 *available at* http://www.telegraph.co.uk/news/uknews/1583034/Porn-star-La-Cicciolina-sues-ex-husband-Jeff-Koons-for-child-support.html. Although the *Made in Heaven* works were controversial, they were not alleged to appropriate from other images or to infringe copyright.

[48] *See Biography: Sherry Levine*, ARTNET, http://www.artnet.com/artists/sherrie-levine/biography (last visited Oct. 28,

sued several times, Levine was merely threatened with a lawsuit. Eventually, the Walker Evans estate simply bought Levine's works and declined to exhibit them.[49]

When I wrote my 1997 article, Koons and Levine were the two artists I chose to represent appropriation art. Since then, however, appropriation has become more, not less, common. Many other artists are copying in order to make their artistic statements. The Wikipedia entry for "appropriation art" includes a list of "notable" artists using appropriation techniques; the list contains a hundred names.[50]

The fact that there are a hundred or more artists who practice appropriation can mean different things to different readers. Some might take it as a sign that copyright law is irrelevant to the actions of artists, who don't care about copyright if their chosen means of expressions leads them toward infringement. Others might say the fact that only a hundred artists have been brave enough to face litigation (out of all the artists in the world) is evidence that copyright has chilled artistic expression.

2014). However, the title of the show indicates the provenance of the images. Her practice of signifying appropriated subjects by using the word "After" in the title has continued throughout her career. Some of her other artworks based on appropriation include *After Miro*; *Equivalents: After Stieglitz 1-18*; *After August Sander*; and others. *See Artworks: Sherry Levine*, ARTNET, (last visited Nov. 1, 2014). Levine's work questions traditional concepts of originality: where is originality, in a photograph (by Levine) of a photograph (by the catalog photographer) of a photograph of people posing (by Walker Evans)? In other words, each of the photographers created an image of something that already existed, either in nature or in someone else's photograph. Why are some of these images "original" and others not?

[49] See id.

[50] *Appropriation (art)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Appropriation (art) (last visited Nov. 1, 2014).

While the actions of artists may be ambiguous, the purpose of copyright is not. It is stated in the Constitution: "To promote the progress of Science . . . ."[51] The term "Progress of Science" is used in its eighteenth-century sense, meaning the dissemination or spread of knowledge.[52] Copyright accomplishes this purpose "by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . ."[53] Restated, then, copyright exists to further the dissemination of knowledge, and it does so by providing authors with exclusive rights in their original works of authorship. Note, however, that the primary purpose (to disseminate knowledge) can easily be at odds with the secondary purpose (to secure rights to authors). The conflict arises because securing rights to authors limits dissemination; the requirement of obtaining (and often paying for) the right to do something with the author's work implies that such rights will be exercised less often than if no permission or payment were required.

In the absence of any provision expressly exempting art from copyright law, how is the tension between the primary and secondary purposes of copyright to be resolved in the case of appropriation art? The usual crucible in which such outcomes are forged is litigation under the fair use doctrine. In a fair use case, a user asserts the right to use a work without seeking

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[51] U.S. CONST. art. I, § 8, cl. 8.

[52] *See, e.g.*, Golan v. Holder, 132 S. Ct. 873, 888 (2012) ("The 'Progress of Science,'petitioners acknowledge, refers broadly to 'the creation and spread of knowledge and learning.'"); *see also* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (citing Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992)), *aff'd*, 60 F.3d 913 (C.A.2 1994) ("Accordingly, 'copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . . The profit motive is the engine that ensures the progress of science.'").

[53] U.S. CONST. art. I, § 8, cl. 8.

permission or paying a fee; the copyright owner claims that such a use is infringement. The user's case asserts the primacy of the dissemination of knowledge or the "Progress of Science," while the copyright owner emphasizes the "exclusive Rights" granted by copyright. Fair use cases determine, on the facts before the court, which purpose shall prevail.

Fair use is thus a potentially powerful antidote to the rights that belong to the copyright owner. Fair use is appropriation artists' best hope for escaping liability. It is no surprise, then, that most of the scholarly discussion over the application of copyright law to appropriation art has focused on the application of the fair use doctrine. Indeed, of the various approaches that might be used, fair use is the only one that has been applied by courts.[54]

The next part of this article will consider the rise of transformativeness in the law of fair use to see if the trend in the cases since 1997 is less oppressive to art than it was previously. If so, then perhaps the difficulties besetting appropriation artists have been mitigated.

IV. FAIR USE AND APPROPRIATION ART

The law of fair use was first codified in the United States when the Copyright Act of 1976 was passed. Section 107 lays out the defense:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by

[54] My 1997 article described some other possibilities, some of which had been suggested by contemporary commentators, including compulsory license and the unlikely expedient of abandoning copyright altogether. *See* Schaumann, *supra* note 1, at 271–75.

> 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 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.[55]

Although the four factors listed are non-exclusive, each must be included in the fair use analysis.[56] In the case law interpreting section 107, two factors stand out as the most important: the purpose and character of the use (factor one),[57] and the market impact of the use on

[55] Copyright Act of 1976, ch. 17, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

[56] *Id.* ("[T]he factors to be considered *shall include* . . . .") (emphasis added). In other words, consideration of the factors stated in section 107 is mandatory ("shall"); also, the factors are non-exclusive ("include").

[57] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589 (1994); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 496 (1984) (Blackmun, J., dissenting); *see also* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 68 (Columbia University Press 1967); Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

the market for the copied work (factor four).[58] A heavy market impact (for example, the defendant selling her works in direct competition with the plaintiff) tends to weigh against fair use; light or no impact, in favor of fair use.[59]

A. Purpose and Character of the Use

The first of the key factors—the "purpose and character" of the use—has evolved over the Act's first thirty-six years.[60] The Act states that in determining "purpose and character," a court must address "whether such use is of a commercial nature or is for nonprofit educational purposes."[61] Predictably, then, the early cases focused on whether the use was commercial or not.[62]

But the purpose and character of the use can obviously be more complicated than simply whether the use is commercial or not. In 1990, then-District Judge Pierre N. Leval wrote an article in the Harvard Law Review that dynamited the notion that the purpose

[58] *See, e.g.*, *Campbell v. Acuff-Rose*, 510 U.S. at 590–94; Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) ("This . . . factor is undoubtedly the single most important element of fair use."); Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1997); Leval, *supra* note 57.

[59] Harper & Row Publishers, Inc., 471 U.S. at 603.

[60] *See* An Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976). The Copyright Act of 1976 became effective in 1978, 36 years before this article was written. *See* 17 U.S.C.A. § 107(1) (West, Westlaw through 2014).

[61] 17 U.S.C.A. § 107(1).

[62] *See Harper & Row Publishers., Inc.*, 471 U.S. at 562 ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."); *Sony Corp*., 464 U.S. at 451 ("[E]very commercial use . . . is presumptively . . . unfair"). Ten years after *Sony*, however, the Court in *Campbell v. Acuff-Rose* noted that "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness." 510 U.S. at 584.

and character of the use was mostly about commerciality.[63] Leval's seminal article argued instead that analysis of the purpose and character of the use should focus on whether the use was transformative. By transforming the prior work, the later artist adds something creative, which justifies the copying.[64]

Judge Leval's article laid the foundation for the analysis of transformation in fair use. But it was the Supreme Court's explicit approval in *Campbell*[65] that transformed Leval's idea into law.[66] The *Campbell* court described the purpose of analysis under the first fair use factor as determining "whether the new work merely 'supersede[s] the objects' of the original creation,"[67] or whether the use "adds something new, with a different purpose or different character, altering the first with new expression, meaning, or message . . . in other words, whether and to what extent the new work is 'transformative.'"[68] After *Campbell*, transformation was at the heart of fair use.

How does a court determine whether a use is transformative? One obvious approach is to assess the changes made to the original work by the secondary

[63] Leval, *supra* note 57, at 1116 n.53 (citing 17 U.S.C. § 107(1) (1982))("The interpretation of the first factor is complicated by the mention in the statute of a distinction based on 'whether such use is of a commercial nature or is for nonprofit educational purposes.' One should not exaggerate the importance of this distinction.").

[64] *See id.* at 1111.

[65] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994) ("I believe the answer to the question of justification [of fair use] turns primarily on whether, and to what extent, the challenged use is transformative. The use must be product and must employ the quoted matter in a different manner or for a different purpose from the original.").

[66] *Id.* at 579.

[67] *Id.* (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)).

[68] *Id.* (citing Leval, *supra* note 57, at 1111).

user.[69] But courts have also considered the context in which the original work appears in the secondary work.[70] More broadly, the "composition, presentation, scale, color palette, and media" of the secondary work, as well as its "expressive nature"[71] (compared with the original) could be seen as transformative.

Most broadly, each author's purpose in creating work is important to determining transformation, and thus, fair use.[72] Even if the second work is not transformative, the use may be fair if the author's purpose is transformative. Thus, the creation of images much smaller than the originals ("thumbnails") used for internet navigation, but not otherwise transformative, has been found to be a fair use of the original works.[73]

Transformation has also influenced the way in which courts approach other aspects of the defendant's use. For example, transformation can mitigate the negative impact of a commercial use.[74] On the other hand, lack of transformation may have the opposite effect, increasing the weight given to such evidence.[75]

[69] *E.g.*, Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006); Kienitz v. Sconnie Nation LLC, 965 F. Supp. 2d 1042, 1051 (W.D. Wis. 2013), *aff'd on other grounds*, 766 F.3d 756 (7th Cir. 2014).

[70] Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 801 (9th Cir. 2003).

[71] Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013), cert. denied, 134 S. Ct. 618, (2013).

[72] *Blanch* , 467 F.3d at 253; Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 706 (2d Cir. 2006); Warner Bros. v. RDR Books, 575 F. Supp. 513, 539 (S.D.N.Y. 2008).

[73] *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003).

[74] *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1271 (11th Cir. 2001).

[75] *See* On Davis v. The Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001).

Important as it is, however, transformation has not superseded the other fair use factors.[76] It is just one aspect, albeit the most important aspect, of the first factor (the "purpose and character of the use").[77] The "purpose and character of the use" also depends on whether the use is commercial or for nonprofit educational purposes, in bad faith, or parody.[78] Parody holds a privileged status among kinds of use because permission to create parodies is rarely given, and they are frequently created for profit, hence commercial.[79] Before the rise of transformativeness, defendants often claimed that their work was a parody in an attempt to escape sanctions in a copyright case.[80] Thus, in the first infringement lawsuits against Jeff Koons, which took place before transformation was widely acknowledged as an important element, Koons claimed that his work was parody, as that was the clearest route to winning a fair use case for the defendant.[81] For Koons, the parody

[76] *See id.* at 174 (2d Cir. 2001) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) (internal quotation marks omitted) ("Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.").

[77] *See id.* (quoting 17 U.S.C. § 107(1)) ("The heart of the fair use inquiry is into the first specified statutory factor identified as 'the purpose and character of the use.'").

[78] Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992).

[79] *See Campbell v. Acuff-Rose*, 510 U.S. at 596–600 (Kennedy, J., concurring). Justice Kennedy's concurrence in the opinion emphasized that a legitimate parody must target or comment on the original work, using humor. *Id.* at 597. It is not enough that the work use the original to comment on things other than the original, for example society at large or the genre of art to which the original belongs. *Id.* at 599. Kennedy characterized such broader works as "satire," rather than "parody," and found them less deserving of fair use because the need to copy is less than it is when creating a parody. *Id.* at 597.

[80] *See, e.g.*, Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980).

[81] *See generally* Rogers v. Koons, 751 F. Supp. 474 (1990).

defense was conspicuously unsuccessful.[82] Nevertheless, parody is still mentioned in appropriation art cases, usually in conjunction with transformation.[83]

B. Nature of the Copyrighted Work

The second factor under section 107 is the nature of the copyrighted (that is, the copied)[84] work.[85] Courts generally consider whether the copied work is a work of imagination or the arts (which cuts against fair use), or whether it is more fact-based (which tends to cut in favor of fair use).[86] Imaginative and artistic works are closer to the core of intended copyright protection than fact-based works, with the consequence that fair use is more difficult to establish when the former works are copied.[87]

Many works of appropriation art copy expressive works, which are close to the core of copyright protection. We might expect that courts would weigh that factor against fair use in appropriation art cases, and so they did, before *Campbell*.[88] As transformation has become a crucial concept in fair use, however, the

[82] *See Rogers*, 960 F.2d at 310; United Feature Syndicate, Inc. v. Koons, 817 F.Supp. 370, 379 (S.D.N.Y. 1993); Campbell v. Koons, 91 CIV. 6055 (RO)), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).

[83] This was the case in *Campbell v. Acuff-Rose*. 510 U.S. at 599; *see also* Mattel Inc. v. Walking Mountain Productions, 353 F.3d 792, 803 (9th Cir. 2003); Kienitz v. Sconnie Nation LLC, 965 F. Supp. 2d 1042, 1052 (W.D. Wis. 2013), *aff'd*, 766 F.3d 756 (7th Cir. 2014).

[84] The Act uses the term "the copyrighted work" to refer to the work from which the user copied. The work to which the user copied is simply referred to as the "use." If the use is fair, then both works are copyrighted.

[85] 17 U.S.C. § 107(2) (2012).

[86] See, e.g., Campbell v. Acuff-Rose, 510 U.S. 569.

[87] *Id.* at 586 (Souter, J., majority opinion). The distinction is of less use in a parody case, as parodies seem inevitably to "copy publicly known, expressive works." *Id*.

[88] *See* Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992); United Feature Syndicate, Inc. v. Koons 817 F. Supp. 370, 380 (S.D.N.Y. 1993).

significance of the second factor—the nature of the copyrighted work—seemed to decline. The Second Circuit has held that when the use is transformative, the second factor will not be given much weight.[89] The Ninth Circuit has taken this a step further and held that "the more transformative the new work, the less will be the significance of other factors."[90] The Second Circuit's recent appropriation art case, *Cariou v. Prince*, is in accord.[91]

C. Amount and Substantiality of the Portion Used

The third statutory fair use factor—the amount and substantiality of the portion used in relation to the copyrighted work as a whole—disfavors extensive copying and favors uses that appropriate relatively little from their sources. No court has ever attempted a bright-line rule about how much can be taken. It is clear, though, that "how much" depends on "what for"—that is, how much may be taken depends on the use to be made of the materials (which is factor one).[92] The artist is not limited to taking only what is necessary.[93] The Supreme Court has found that copying an entire work was fair use when the use consisted of videotaping broadcast television programs for home, non-

[89] Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013); On Davis v. The Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001) (finding that even under the best of circumstances, the second factor was "rarely determinative.").

[90] Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013) (quoting *Campbell v. Acuff-Rose*, 510 U.S. at 579); *see also Campbell v. Acuff-Rose*, 510 U.S. at 586 (A similar de-emphasis of this factor has happened in parody cases, in which the second factor is not weighed heavily because "parodies almost invariably copy publicly known, expressive works.").

[91] 714 F.3d 694, 708 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) (quoting *Campbell v. Acuff-Rose*, 510 U.S. at 579).

[92] See Campbell v. Acuff-Rose, 510 U.S. at 589.

[93] *Id.* at 588.

commercial use,[94] but all other things being equal, the more that is copied, the less likely a finding of fair use.[95]

Like the other factors, the third factor seems to have diminished in importance with the ascendancy of "transformation" in fair use analysis.[96] The inquiry regarding "transformation" may have completely subsumed this factor, much as it appears to have subsumed the second factor. That is, if the use is highly transformative, the fact that a lot was copied from the original work will not deter a finding of fair use; in fact, sufficient transformation has led some courts to conclude that this factor weighed in favor of fair use—even when the whole underlying work has been copied.[97]

D. Effect of the Use Upon the Potential Market

In 1985, the Supreme Court stated that this factor was "undoubtedly the single most important element of fair use."[98] It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the

[94] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 496 (1984).

[95] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985); On Davis v. The Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001); Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 381 (S.D.N.Y. 1993). *But see* Blanch v. Koons, 467 F.3d 244, 246, 259 (2d Cir. 2006) (copying entire work does not rule out fair use).

[96] The Second and Ninth Circuits have said the importance of the other factors declines when transformation is found. See *supra* text accompanying notes 86-93.

[97] Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006); Mattell, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

[98] Harper & Row Publishers, Inc.., 471 U.S. at 566.

defendant . . . would result in a substantially adverse impact on the potential market" for the original.[99] The kind of market harm cognizable under this factor is the harm caused by the new work's substitution for the old work in the market.[100] It is not the *suppression* of demand for the original work that matters, it is *usurpation* of the demand for the original work.[101]

Impact on the market for derivative works may also be considered. Courts have not been very consistent in the analysis of derivative works in this regard.[102] Some courts, taking their cue from the cases before them, simply state that it is obviously possible that someone else might seek to do the very thing done by the defendant but in exchange for payment of a license fee.[103] This kind of judicial speculation inevitably leads to the conclusion that the fourth factor cuts against fair use—one can always imagine the defendant paying for her use. However, when there is evidence of a market for derivative works—similar to the one created by the defendant—and that market would be adversely affected if the derivative use were to become widespread, then a market impact can be shown.[104]

[99] Campbell v. Acuff-Rose, 510 U.S. 569, 590 (1994) (quoting 3 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT §13.05 (1993)).

[100] *Id.* at 570–71.

[101] *Id.* (finding that most parodies easily pass muster because it is a rare parody that can substitute for the original in the marketplace). *But see* Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956) (stating a concern that a parody of the movie *Gas Light* might adversely impact the market for the movie—although this case preceded the 1976 Act, and therefore did not consider the factors provided therein).

[102] 1 Howard B. Abrams, The Law of Copyright § 5:171 (2014).

[103] *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 312 (2d Cir. 1992).

[104] *Compare* United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993) (market for sculptures in the shape of a cartoon dog plausible) *with* Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003) (market for "adult-oriented artistic photographs of Barbie" doll not plausible).

In today's market for appropriation art, impact on the plaintiff's market is usually negligible. Although one could always speculate that a third party might offer a fee in exchange for the right to create a derivative work like the defendant's, in the absence of such a market or plans to create such a market, a court should ignore such speculation. Moreover, as a practical matter, the plaintiff's and the defendant's works are often not sold in the same market.[105] Hence, the defendant's work cannot substitute for the plaintiff's. When the audiences, the purchasers, and the prices are different for the two works, it is unlikely that there would be a market impact on the plaintiff.[106] But, because one can imagine copying that does not match this description, analysis of the market impact of the copying continues to be important in appropriation art cases.[107]

V. MODEST PROPOSAL

The fair use landscape has been transformed by transformation. The rise of transformation analysis, based on Judge Leval's article, is nothing short of remarkable. It has affected fair use in nearly every context in which fair use can be found.[108] When

[105] *See e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[106] *See* Cariou v. Prince, 714 F.3d 694, 708–09 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

[107] For example, someone might copy a piece of popular, mass-produced art, and sell a large number of copies at about the same price as the original. In such a case, the fact that the copies might be called "art" should not shield the user from a claim of infringement. The appropriation art cases to date, however, involve what we might think of as "gallery art" and do not involve mass production of copies.

[108] Not every fair use case addresses transformation. A study of fair use judicial opinions up to 2005 found that, after *Campbell*, more than 41% of district court opinions, and nearly 19% of circuit court opinions, did not mention transformation. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 604–05 (2008). Nearly 37% of the 68 post-*Campbell* opinions finding fair use did not mention transformation. *See id.* at 605. The analyzed cases are current only through 2005, however, and it is possible that the cases since then have increasingly taken up the idea of transformation.

transformation is found, the outcome is nearly always a finding of fair use.[109]

We would expect, then, that appropriation art has benefited from the addition of transformation to the fair use analysis. Indeed, it has: the appropriation art cases won by the defendant (i.e., the artist) since *Campbell* were won because of the defendant's "transformation" of the underlying work.[110] That must be seen as progress: Pre-*Campbell*, no appropriation artist had won a case, while post-*Campbell* there have to date been three wins for appropriation art.[111]

Even with transformation, however, fair use is no panacea for appropriation artists. To be sure, most appropriation art strives to be transformative. It seeks to evoke a different response in the viewer than did the original. But, judges can be unpredictable; they might not find the work to be transformative, or even insert some other limit—for example that the degree of copying exceeded the judge's notion of what is necessary for the artist's purpose, even if the use is transformative.[112]

[109] *See* Beebe, *supra* note 108, at 606.

[110] *See Cariou*, 714 F.3d at 710; Blanch v. Koons, 467 F.3d 244, 253, 256–57, 259 (2d Cir. 2006); *Mattel*, 353 F.3d at 806, 811.

[111] *See, e.g.*, *Cariou*, 714 F.3d 694; *Blanch*, 467 F.3d 244; *Mattel*, 353 F.3d 792.

[112] *E.g.*, Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008) ("A finding of verbatim copying in excess of what is reasonably necessary diminishes a finding of a transformative use."). The idea that a judge, lacking any training, experience, or other qualification, would second-guess what was "necessary" to achieve the artist's purpose is dismaying, and disregards Justice Holmes' famous admonishment that "[i]t

Worse yet for the artist, fair use is an affirmative defense,[113] which can be established only by litigating the question of infringement. It is usually litigated after the plaintiff has made at least a prima facie case of infringement because if infringement cannot be established, there is no need for an affirmative defense.[114] From an academic perspective, this may seem to pose no problem. After all, judicial opinions are an important component of the law that we study. But, a practitioner should immediately see the problem: copyright litigation is expensive.[115] Telling artists that they have the right to make fair use of others' works as long as they are willing to litigate the matter is telling them that they have all the rights they can afford to buy. To allocate the right to create art according to the financial resources of the artist is extravagantly protective of existing work at the expense of new work.

The public interest, too, is damaged by applying copyright law to suppress appropriation art.[116] Copyright's primary purpose is to increase access to copyrighted works.[117] Secondarily, it creates incentives for authors to create.[118] If an author's incentives are not damaged by a use, then, all other things being equal, copyright should not prohibit the use.[119] Yet, the

would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[113] 17 U.S.C. § 107 (2012).

[114] *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[115] Professor Litman refers to it as "hideously expensive." JESSICA LITMAN, DIGITAL COPYRIGHT 183 (Prometheus Books 2001).

[116] *See* Schaumann, *supra* note 1, at 263–65.

[117] *Id.* at 263.

[118] *Id*. at 260.

[119] *Id.* at 264

mechanism for balancing those interests, fair use, is so costly that for artists it is inadequate.

A solution exists that would allow a court to limit the damage to the public interest without damaging the authors' incentive. It is both workable and practical. Of course, it would be opposed, but even the opponents would find it hard to argue that it would cause harm.[120]

Courts could accomplish this by recognizing that a use that fits the definition of a "work of visual art," as defined in the Copyright Act,[121] is highly likely to be a fair use. The court would evaluate transformativeness, but also should look at harm to the market. In this regard, it is hard to imagine a work of visual art

[120] One fear might be that such a proposal could lead to an industry of so-called "artists" making "appropriation art" based on high-value existing works, selling the copies as if they were the originals. In other words, favoring appropriation art might promote widespread art fraud. But, the art world is already familiar with the problem of fraud, and it is a criminal matter. Any connection between copyright rules and art fraud is pure speculation. For their part, copyright owners might prefer that all uses of their works, whether harmful or not, be left to their discretion. But the question is not which rule copyright owners would favor; rather, it is which rule is most in the public interest.

[121] A "work of visual art" is (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. A work of visual art does not include—(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title. 17 U.S.C. § 101 (2012).

harming the market for more commercialized works because "works of visual art" can exist only in two hundred or fewer copies, signed and consecutively numbered. The market for such works is relatively small, and it consists of purchasers who are generally sophisticated and knowledgeable about what they are purchasing. Buyers in this market are familiar with the practice of selling copies of works; they are called "reproductions." There are generally at least two differences between a reproduction and a work of appropriation art: First, appropriation art itself is attributed to an artist, different from the artist who created the original work, whereas reproductions are uncredited. Second, the intention of the appropriation artist is different from that of the creator of the original work, while reproductions seek to simulate the presence of the original work. Attribution is enough to take care of most of the potential problems that copying might create. For example, Sherri Levine's photographs of photographs taken by Edward Weston would not compete in the art market with the Weston originals: Levine's practice of naming those works *After Edward Weston* and signing her works would take care of that.

VI. CONCLUSION

Appropriation art is a legitimate and long-standing art form practiced by many twentieth- and twenty-first century artists. Copyright law, which is intended to promote access to creative works, has struggled to come to grips with appropriation art because this kind of art uses preexisting works as its subject material; it comments on culture using the icons of culture. Because appropriation art copies without the permission of the copyright holder, copyright law tends to sweep it into the category of infringement. However, unlike most copying, appropriation art does not raise

the problems of unauthorized exploitation and usurpation of the market for the original.

A relatively easy solution is available. Courts should recognize the legitimacy of appropriation art as an artistic practice and take account of the lack of danger to existing art markets posed by appropriation artists, as long as the copying takes the form of a "work of visual art" as defined in the Copyright Act. The common characteristics of such works, described in this definition, are enough to assure that no significant harm can result from the practice. That lack of harm together with the primary purpose of copyright—to increase access to creative works—are enough to suggest that appropriation artists should win all or nearly all the infringement cases brought against them.