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Copyright: *Rogers v. Koons*: Artistic Appropriation and the Fair Use Defense

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I. Introduction

The goal of federal copyright legislation[1] is to guarantee protection of valuable property rights to the artist or author who creates an original work, in order to encourage such creativity.[2] At the same time, the notion of a "fair" use of copyrighted material has developed in order to allow artists to appropriate elements of earlier works in the creation of new and valid artistic creations without being liable for infringement of copyright.[3] To determine whether an appropriation is fair, courts have traditionally conducted a balancing process which considers not only the nature of each work, but the effect of the appropriation on the original work. However, copyright infringement cases involving works of visual art are rare, and consequently, this balancing test has seldom been applied in the modern visual art context. Nonetheless, image appropriation has played an important role in the development of modern art and art criticism.

Rogers v. Koons[4] serves as an example of the difficulties inherent in such an analysis. Part II of this note examines the facts and holdings in both the district court and the Second Circuit opinions. Part III traces the development of federal copyright protection and the fair use defense, with particular emphasis on the relationship between parody and fair use. Part IV looks at how the notion of fair use has been applied to the visual arts in previous cases. Part V examines the important role which image appropriation has played in modern and postmodern art. Part VI discusses three scholars who have suggested different tests to be applied when considering fair use in the visual arts, with an analysis of whether these approaches are in fact significantly different from the already existing fair use test. Finally, part VII analyzes the Second Circuit's application of the fair use test, with a discussion of how the test should have been applied in order to better reconcile the interests of the original artist with those of the image appropriator.

II. Rogers v. Koons: The Facts and Holdings

In 1980, professional photographer Art Rogers was commissioned to photograph Jim and Mary Scanlon, who posed sitting on a bench with a litter of eight newborn German Shepherd puppies in their arms. The Scanlons purchased prints of the black and white photograph for $200, but Rogers retained the negatives. In addition,

This note was awarded first place in the University of Oklahoma judging of the Nathan Burkan Memorial Competition for papers on copyright law topics — *Ed.*

1. 17 U.S.C. §§ 101-810 (1988 & Supp. III 1991).
2. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107-08 (1990).
3. *Id.*
4. 751 F. Supp. 474 (S.D.N.Y. 1990), *modified*, 777 F. Supp. 1 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

Rogers published a reproduction of this portrait in his photography column in a local newspaper, exhibited the photograph, entitled "Puppies," in an exhibition at the San Francisco Museum of Art in 1982, and licensed the image to the Museum Graphics company. Museum Graphics then produced and distributed commercial postcards bearing the image beginning in 1984. Rogers also sold a print of the photograph to a private collector and licensed the image for use in an anthology. Eventually, Rogers intended to use "Puppies" as part of a later hand-tinted series of his photographs.[5]

Jeff Koons, the defendant, a former commodities futures broker and successful artist and sculptor represented by the Sonnabend Gallery in New York,[6] purchased a copy of the "Puppies" postcard in 1987. Koons gave the postcard to one of the woodworking artisans at the Demetz Studio in Ortessi, Italy, and instructed him to reproduce the image in a three-dimensional and multicolored painted wood sculpture. Koons communicated extensively with the studio and instructed the artisans to fashion the sculpture "just like the photo,"[7] but also told them to paint the puppies various shades of blue, unlike the black and white photograph.

In November 1988, Koons exhibited 20 sculptural works at the gallery in what he called his "Banality Show," which featured images designed to provide a critique of the "conspicuous consumption, greed and self indulgence" of modern consumer society.[8] Included by Koons as one of the images was the polychromed wood sculpture "String of Puppies" which was based on Rogers' photograph. Following the show, Koons sold an edition of three reproductions of his sculpture, two for $125,000 each and one for $117,000.

Rogers first learned of Koons' sculpture when a photograph of "String of Puppies" was reproduced in a newspaper article about an exhibition at the Los Angeles Museum of Art. He registered his photograph with the United States Copyright Office,[9] and filed a copyright infringement action against both Koons and the Sonnabend Gallery.[10] seeking $367,000 as damages calculated from the profits generated by the sale of the three sculptures. On July 5, 1990, both sides moved for summary judgment.[11]

5. *Id.* at 476.

6. No stranger to controversy, Koons' most interesting foray into the public eye occurred when his "Made in Heaven" exhibition featured giant silkscreen photographs of the artist and his wife nude and making love in a variety of enthusiastic and acrobatic poses. Mrs. Koons, also no shrinking violet, is the former Italian parliamentarian and pornographic film star La Cicciolina (which translates as "the dumpling" or "little pinchable one"). For examples of work from this exhibition, see Tony Parsons, *Art forum*, ARENA, Autumn 1992, at 88-94.

7. *Koons*, 751 F. Supp. at 476 (quoting Koons Deposition at exhibit 15, *Koons*).

8. *Id.* (quoting Defendants' Main Brief at 6, *Koons*).

9. Registration #VA 352/001 (effective July 6, 1989), showing first publication in the United States of November 20, 1980. *Koons*, 751 F. Supp. at 476.

10. Rogers v. Koons, No. 89 Civ. 6707 (CSH) (S.D.N.Y. filed Oct. 11, 1989).

11. Although Rogers had sued on an unfair competition cause of action as well as copyright infringement, he only sought summary judgment as to the copyright infringement claim. Koons and the Sonnabend Gallery sought to dismiss all counts. Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992).

The district court held that the sculpture was an infringing, unauthorized derivative work based on Rogers' photograph, thus disregarding Koons' assertion that he had only made use of noncopyrightable elements of the photograph.[12] The court determined that Koons was not entitled to the fair use defense to copyright infringement by employing the standard four factors as set forth in section 107 of the Copyright Act of 1976:[13] (1) the purpose and character of the unauthorized use; (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.[14]

The court held that Koons' use of the photograph did not substantially criticize or comment on the photograph,[15] was primarily of a commercial nature,[16] had taken the entire image of the photo,[17] and had undermined potential new uses for Rogers' photograph.[18] However, the court determined that Koons should be given the opportunity to prove deductible expenses at trial in order to reduce his liability for damages. Additionally, the court granted summary judgment for Sonnabend Gallery on the basis that the gallery could not be shown to have been liable for damages as a contributory infringer.[19]

The United States Court of Appeals for the Second Circuit affirmed the trial court.[20] The opinion addressed the fair use analysis in more detail than did the district court,[21] discussing at length the question of whether Koons' sculpture could be considered a parody or satire of Rogers' photograph, which would entitle Koons to more latitude within the fair use defense.[22] The court acknowledged the existence of a school of modern or postmodern American artists who seek to comment on the relation between mass production of consumer commodities and the deterioration and fragmentation of society, and who choose to do so by incorporating within their work appropriated images from the world of consumer goods.[23]

12. *Koons*, 751 F. Supp. at 477.

13. 17 U.S.C. §§ 101-810 (1988 & Supp. III 1991).

14. *Koons*, 751 F. Supp. at 479. These four elements of the fair use defense, discussed at length below, are delineated at 17 U.S.C. § 107.

15. *Koons*, 751 F. Supp. at 479.

16. *Id.*

17. *Id.* at 480.

18. *Id.*

19. *Id.* at 481. A contributory infringer is defined as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another . . . ." Gershwin Publishing Corp. v. Columbia Artists Management, 443 F.2d 1159, 1162 (2d Cir. 1971). However, after re-argument, the court concluded that the gallery was liable as a direct infringer because it realized 50% of the profits from the sculpture and was directly infringing as a seller even if unaware that the sculpture infringed on a valid copyright. Rogers v. Koons, 777 F. Supp. 1 (S.D.N.Y. 1991).

20. Rogers v. Koons, 960 F.2d 301, 302 (2d Cir. 1992).

21. *Id.* at 309-13.

22. *Id.* at 309. The court specifically said that the parody defense would allow Koons to have copied more extensively from the copyrighted work, in order to make reference to the work he sought to parody. *Id.* at 310.

23. *Id.* at 310.

Nonetheless, after examining the four parts of the fair use defense, the Second Circuit concluded that Koons' use was unfair because his appropriation of the photograph was "piracy rather than parody."[24] As far as the court was concerned, Koons merely produced his sculpture as "high-priced art."[25] The court then remanded the case to the district court on the issue of damages, suggesting that a reasonable license fee for the use of the photograph would be the best measure of the market injury sustained by Rogers as a result of the infringing use.[26]

After applying the four fair use factors, both the district court and the Second Circuit determined that Koons was not entitled to the fair use defense. Critics of the decisions have suggested that the courts were offended and enraged by Koons' arrogant attitude and assertions regarding his ability to appropriate the images of another artist to serve the parodic and critical ends of his own art.[27] However, there is another possible explanation: the lack of case law examining copyright infringement and fair use through criticism or parody in the context of modern art forms suggests not only that this is a calculus without much guiding precedent, but also that courts may not be familiar with many of the crucial factors which determine how the four-factor test should be applied in the modern art context. An examination of the goals which are served by governmental recognition of a property interest in copyright, as well as the equally valid interests served by the creation of a fair use defense for criticism and parody, show the tensions inherent in this case.

III. Background

A. Rationale for Protection of Intellectual Property Interest in Copyright

The original grant of constitutional authority to Congress to legislate in the area of copyright is found in Article I, Section 8.[28] The basic rationale for this protection is plain in the granting document itself: it is assumed that artistic production will be stimulated by federal legislation which not only recognizes original authorship in a writing or work of art, but also grants to the author the exclusive right to the economic value of that work. In addition to financially rewarding and encouraging the artist, this protection creates an incentive for

24. *Id.* at 311.

25. *Id.* at 312.

26. *Id.* at 313. The Second Circuit also recognized that, should Rogers instead continue to seek damages based on the infringing profits, Koons should be able to show those elements of profit attributable to factors other than the copyrighted work, such as Koons' own popularity or notoriety, pursuant to 17 U.S.C.A. § 504(b). *Id.* (citing 17 U.S.C.A. § 504(b) (West 1977)).

27. For example, see Martha Buskirk, *Appropriation under the Gun*, ART IN AMERICA, June 1992, at 37, referring to Judge Cardemone "castigating Koons for his wilful and egregious behavior" when writing his district court opinion.

28. The section allows legislation "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors, the exclusive right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8.

investment and patronage of artists and writers.[29] The underlying assumption is that creation of art is a valuable endeavor and, therefore, the law should "afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world."[30]

B. Applicable Federal Copyright Legislation

Title 17 of the United States Code contains the Copyright Act of 1976.[31] Section 102 of the Act specifies that copyright protection subsists in "original works of authorship fixed in any tangible means of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."[32] The Act also specifies that works of authorship include pictorial, graphic, and sculptural works."[33] In addition, photographs have also long been held to be copyrightable works.[34] However, the Act does not extend copyright protection to any underlying idea or concept that may be embodied in such a work.[35] Instead, what is protected is the form or expression used by the author or artist to communicate that idea.[36]

Under section 106 of the Act, ownership of a valid copyright in a work of art confers a bundle of rights upon an artist. These rights include the exclusive right to reproduce the copyrighted work, to prepare derivative works based upon the copyrighted work, to sell copies of the work to the public, and to publicly display the work.[37] Recent amendments to the Act also grant the visual artist a bundle of "moral rights," including the right to claim authorship of the work, to prevent the use of his or her name as the author of any work of art which he or she did not create, and the right to prevent any intentional distortion, mutilation, or modification of the work which would be prejudicial to his or her honor or reputation.[38]

All of these rights are conferred upon the artist or author in an attempt to reward and encourage artistic and creative activity. However, copyright law recognizes that the original artist is not entitled to an absolute monopoly on the use of his art, because of the chilling effect such exclusive rights would have upon future artists

29. *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES, pt. 1, at 1 (3d ed. 1990).

30. Mazer v. Stein, 347 U.S. 201, 219 (1954) (quoting Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 36 (1939)).

31. 17 U.S.C. §§ 101-810 (1988 & Supp. III 1991).

32. *Id.* § 102.

33. *Id.* § 102(a)(5).

34. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).

35. 17 U.S.C. § 102(b) (1988 & Supp. III 1991).

36. *Mazer*, 347 U.S. at 217. However, this idea-expression dichotomy can become difficult in application to many modern art forms such as Josef Albers' geometric abstractions, where the idea behind the work is in fact identical to the color and shape depicted (because Albers work was based on scientific color theory). *See* Patricia Kreig, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1570 (1984).

37. 17 U.S.C. § 106 (1988 & Supp. III 1991).

38. *Id.* § 106A(a). For works created on or after the effective date of these amendments, these rights extend for the life of the artist under section 106A(d).

who wish to explore similar themes or forms, or who wish to comment upon the validity or import of other artists' work. In particular, the fair use doctrine has evolved precisely because the law also respects and wishes to reward these countervailing interests.

C. Development of the Fair Use Doctrine

The notion that some "fair" use of the work of another artist or author should be tolerated can be found as early as 1841 in *Folsom v. Marsh*,[39] a case which involved an anthology of the writings of George Washington. In *Folsom*, Justice Story suggested that courts should examine the circumstances surrounding the use of an artist's work, including the nature of both works and the potential effect which the second use will have on the market for the original.[40] This interest in examining the circumstances surrounding the use in order to determine whether the later use should be punished can be justified by the fact that all intellectual and artistic efforts are, to some degree, derivative from earlier work in that they build upon the ideas of earlier authors and artists.

To a certain extent, the distinction between the ideas behind the work (which are not copyrightable) and the formal expression of those ideas by the artist (which is copyrightable) provides some reassurance to an artist who senses that his options have been narrowed, not expanded, by artists who have gone before him. However, the fair use doctrine is especially necessary for the visual artist because of the limited nature of the forms and colors which he uses to build his works, or for the critic or parodist who must, of necessity, appropriate portions of the work of another in order to "conjure it up" for the audience.[41] Clearly, the fair use doctrine is an equitable device which allows courts to avoid the strict common law concepts of property rights when "application . . . would stifle the very creativity which that law is designed to foster."[42]

D. The Statutory Fair Use Test

The doctrine that certain, otherwise infringing, uses of copyrighted materials should be excused is codified in section 107 of the Copyright Act.[43] This section specifically enumerates certain uses which shall not be considered infringements upon copyright, including criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.[44] In addition, the

39. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), *cited in* Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 n.5 (1990).

40. *Folsom*, 9 F. Cas. at 348.

41. For a discussion of the "conjure up" test, see Berlin v. E.C. Publications, 329 F.2d 541 (2d Cir. 1964)

42. Rogers v. Koons 751 F. Supp. 474, 479 (S.D.N.Y. 1990), *modified*, 777 F. Supp. 1 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992) (quoting Iowa State University Research Found. v. American Broadcasting Companies, 621 F.2d 57, 60 (2d Cir. 1980)).

43. 17 U.S.C. § 107 (1988 & Supp. III 1991).

44. *Id.*

statute sets forth a non-exhaustive list of the factors to be considered in determining whether the use of a work is a fair use, including:

> (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.[45]

These four factors, therefore, require the court not only to consider the particular nature of both the copyrighted work and the potential infringing work, but also the economic situation in which the use occurred and the possible economic ramifications for both parties. In this sense, the statutory test clearly reflects the economic basis for much of intellectual property law as well as the basic concerns of equity and fairness.[46] However, the balance among the four factors is frequently quite different from case to case.

E. Harper & Row, Publishers v. Nation Enterprises: The Statutory Fair Use Calculus in Action

In March 1979, the *Nation* magazine received a copy of the unpublished manuscript of *A Time to Heal: The Autobiography of Gerald R. Ford* from an undisclosed source. The magazine published an article which contained excerpts from the unpublished manuscript in a piece entitled "The Ford Memoirs — Behind the Nixon Pardon." The *Nation* article anticipated (and therefore stole the thunder from) an article which *Time* magazine had planned to publish, for which *Time* had agreed to purchase excerpts from the manuscript. Consequently, *Time* cancelled the agreement to purchase those excerpts from Harper and Row, who held the copyrights to the manuscript. Harper and Row then sued the *Nation* for copyright infringement. The Second Circuit reversed a district court finding of infringement,[47] holding that the *Nation* was entitled to a fair use of the copyrighted excerpts.[48] On appeal, the Supreme Court reversed.[49]

According to the Court, the purpose of the *Nation*'s use of the excerpts was news reporting, which falls within the nonexclusive list of potential fair uses in section 107.[50] Nonetheless, this conclusion did not end the inquiry. The court observed that the legislative history of the Copyright Act indicates inclusion of a type of use on the list does not eliminate the need to consider each case in light of the four

45. *Id.*

46. For a discussion of the economic efficiency of the fair use treatment of parody, see Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79 (1991).

47. Harper & Row, Publishers v. Nation Enters., 557 F. Supp. 1067 (S.D.N.Y. 1983).

48. Harper & Row, Publishers v. Nation Enters., 723 F.2d 195 (2d Cir. 1983).

49. Harper & Row, Publishers v. Nation Enters., 471 U.S. 539 (1985).

50. *Id.* at 572.

factor test.[51] Next, the Court noted the fact that the use was for commercial (as opposed to nonprofit) purposes, strongly indicative of unfair use.[52] The Court stressed that the "crux" of the profit/nonprofit distinction is not whether the use is solely for financial gain, but whether the user will in fact profit from his use of a copyrighted image without paying the copyright owner for that privilege.[53] Moreover, the Court pointed out that the *Nation* had deliberately worked from a manuscript which it knew had been stolen and that the whole purpose of working from a stolen manuscript was to "scoop" the publication in *Time*.[54] This lack of good faith provided further indication that the purpose of the use was not a "fair" one.[55]

Regarding the nature of the copyrighted work, the Court acknowledged that the law generally recognizes a greater need to disseminate factual works, such as news reporting, than works of fantasy or fiction.[56] However, the Court found that the *Nation* had gone beyond mere isolated phrases of hard news content to excerpt the author's subjective descriptions of people and events.[57] More significant was the fact that the copyrighted material was unpublished at the time the unauthorized use occurred.[58] The Court concentrated on this fact, stressing that the author's right to control the first publication of his work outweighs a potential fair use prior to that date.[59]

In considering the amount and substantiality of the portion used, the Court acknowledged that the Copyright Act compares the amount of the appropriated portion in relation to the copyrighted work as a whole.[60] However, the Court examined the "substantiality" in both a quantitative and a qualitative sense, recognizing the district court's finding that although what was taken was insubstantial when compared to the work as a whole,[61] it was "essentially the heart of the book."[62] Furthermore, the Court pointed out the key role which the expressive excerpts played in the infringing work, saying that the article used the quoted excerpts as its "dramatic focal points."[63]

Finally, the Court considered the effect of the *Nation* article on the market for the copyrighted material, declaring that this fourth factor is clearly the most important

51. *Id.* at 561 (referring to H.R. Rep. No. 83, 90th Cong., 1st Sess. 37 (1967)).
52. *Id.* at 562.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 563.
57. *Id.*
58. *Id.* at 564.
59. *Id.*
60. *Id.*
61. *Id.* The Court noted that the words taken from the unpublished manuscript constituted at least 13% of the infringing article. *Id.* at 565-66.
62. *Id.* at 565 (quoting Harper & Row, Publishers v. Nation Enters., 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)).
63. *Id.* at 566.

factor in any assessment of fair use.[64] In this particular case, damage to the market was proven by the cancellation of the $12,500 contract with *Time* magazine after the unauthorized early publication.[65] However, the Court pointed out that a plaintiff need not show actual damage in order to prevail on this fourth factor.[66] Rather, there need only be proof that if the use became widespread, it would adversely affect the potential market for the copyrighted work,[67] adding that this calculus must also consider the potential market for derivative works as well.[68] In this case, the Court determined that the infringing use not only competed directly with the original in the market for prepublication excerpts, but also in the market for first serialization rights in general.[69]

What emerges from *Harper & Row* is a gestalt of how the four-part fair use test is to be applied: even if the purpose and character of the use is specifically listed in section 107, the four factors must still weigh in favor of the use in order to find it fair. A commercial use is almost presumptively unfair regardless of any additional noncommercial functions. A work of fiction or fantasy is less likely to be considered eligible for a fair use defense than a factual work. In addition, the use of a copyrighted and unpublished work is assumed to violate a basic right of the first author to determine how and when the work is published. Third, in analyzing the amount of the copyrighted material used, the court must consider the use both qualitatively and quantitatively, and must consider the role which the copyrighted material plays in each work. Finally, analysis of the effect on the market must include effect on an expansive "potential" market for the copyrighted work, including any possible market for derivative works. The facts in *Harper & Row* were especially damning for the notion of a fair use because of the defendant's obvious attempt to scoop the copyright owner. However, the four-part test has been applied somewhat differently in cases where the later use occurred after the copyright owner chose to publish the work and the later use sought to parody that work.

64. *Id.* The Court added that economists have suggested that fair use should only be considered when there is no appreciable market for the copyrighted work because a fair use "disrupts the copyright market without a commensurate public benefit." *Id.* at 566 n.9.

65. *Id.* at 567.

66. *Id.*

67. *Id.* at 568 (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 451 (1984)).

68. *Id.* Derivative works are defined in 17 U.S.C. § 101 as:

> work(s) based upon one or more preexisting works, such as a 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 modifications which, as a whole, represent an original work of authorship. . . .

17 U.S.C. § 101 (1988 & Supp. III 1991).

69. 471 U.S. 539, 568-69 (1985).

F. Fair Use in a Parody Context

The United States Court of Appeals for the Sixth Circuit recently considered and rejected a fair use defense of parody in *Acuff-Rose v. Campbell*,[70] where the popular and controversial rap music group 2 Live Crew recorded a profane parody of the Roy Orbison hit "Pretty Woman," the copyright to which is owned by Acuff-Rose. The court first observed that parody and satire are considered to be valid subjects for the fair use analysis (as a practical extension of criticism and comment which are included on the list of terms suggested by section 107),[71] and accepted the premise that use was intended to be a parody.[72]

The court first determined that the 2 Live Crew recording was produced primarily for commercial purposes and therefore was presumptively unfair.[73] The band then had to rebut this presumption of unfair use by showing that the parody did not diminish the economic value of the original.[74] Because 2 Live Crew was not able to produce evidence to prove this, the first prong of the test weighed against a finding of fair use.[75] The court then summarily dispensed with the "nature of the copyrighted work" prong of the test[76] by pointing out that creative works are afforded greater protection from the fair use determination than are works of fact.[77]

Next, the Sixth Circuit examined the third part of the test, which considers "the amount and substantiality of the portion used."[78] They noted that an alleged parody is entitled to more leniency regarding the amount and substantiality of the taking, provided that the parodist takes no more than what is needed to "conjure up" the object of his satire.[79] The court observed that a de minimis use by definition fails to conjure up the original and therefore is not an infringement, but more substantial uses become less convincingly fair as a direct result of the amount of material taken.[80] Here, however, it was determined that the taking was both qualitatively and quantitatively substantial in that the band not only copied the meter and rhythm of the Orbison recording, but also sampled the five note signature figure of the song and repeated it eight times.[81] As for the effect on the market, the court again held that because the infringing work was "blatantly commercial," a finding of future harm to the copyrighted work would be presumed.[82]

70. 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3667 (U.S. Mar. 29, 1993).
71. *Id.* at 1435.
72. *Id.*
73. *Id.* at 1436.
74. *Id.* at 1437.
75. *Id.*
76. 17 U.S.C. § 107(2) (1988 & Supp. III 1991).
77. *Campbell*, 972 F.2d at 1437.
78. 17 U.S.C. § 107(3) (1988 & Supp. III 1991).
79. *Campbell*, 972 F.2d at 1437-38.
80. *Id.*
81. *Id.* "Sampling" is a process of digitally recording sounds and storing them on computer chips or software, with the goal of reproducing them as motifs in musical or rhythmic compositions. FRANCIS RUMSEY, TAPELESS SOUND RECORDING (1990).
82. *Campbell*, 972 F.2d at 1437-38.

Although the Sixth Circuit seemed to be willing to grant that a parody could constitute a fair use, the opinion in *Acuff-Rose* makes it clear that commercial uses of any sort will have an uphill fight to establish that the market for the copyrighted work has not been adversely affected. The court appeared to consider the commercial nature of the infringing recording when considering each prong of the four-part test, engrafting the profit motive onto each factor. Therefore, the court used it to tip the scales away from a finding of fair use each time. In fact, the only parodic use that the court would be willing to consider fair is one "at a private gathering on a not-for-profit basis."[83]

Notwithstanding the Sixth Circuit's narrow view of parodic fair use, parody seems to have been an accepted form of published intellectual endeavor since at least as early as Chaucer's *Canterbury Tales*.[84] Even modern courts such as the Sixth Circuit in *Acuff-Rose* concede that the parodist is entitled to borrow from the object sought to be parodied. While the preceding examples of the fair use test give an indication of how the balance is analyzed for written copyrighted material, the appropriation of material from visual works may require a variation on this calculus. To better understand the decision in *Rogers v. Koons*, it is helpful to explore cases which have examined copyright infringement and the parody defense in the visual arts to determine how the four-part test is balanced when the artist and parodist borrows visual material in order to make his statement.

IV. Application of the Fair Use Analysis to the Appropriation of Visual Images

A. Early Photographic Image Appropriation

Copyright infringement of a photographic image is by no means a new subject for the law. As early as 1914, in *Gross v. Seligman*,[85] the Second Circuit held that an artist who posed a nude model for a photograph entitled "Grace of Youth," and subsequently sold his rights to that work, could not two years later place the same model in the same pose and recreate the original photograph with only minimal changes without infringing upon the copyright.[86] Although the second work was not identical to the first, because the model was now smiling and holding a cherry stem between her teeth, the court held that these differences were not sufficient to protect the artist from liability, declaring that "the exercise of artistic talent, which made the first photographic picture the subject of copyright, has been used not to produce another picture, but to duplicate the original."[87]

Interestingly enough, the *Gross* court seemed not to notice or care that the slight changes created a very different tableau, one of sexuality in contrast to the idyllic innocence of the earlier photograph, which suggests that the artist deliberately

83. *Id.*

84. For a survey of parody in literature, see PARODIES: AN ANTHOLOGY FROM CHAUCER TO BEERBOHM — AND AFTER (Dwight Macdonald ed., 1960).

85. 212 F. 930 (2d Cir. 1914).

86. *Id.* at 930-31.

87. *Id.* at 931.

sought to lampoon or parody the first work. This difference is further enhanced by the fact that the artist entitled the second photograph "Cherry Ripe," an obvious reference to the emerging sexuality of his model in contrast to the earlier photograph. The Second Circuit ignored this possibility, however, and therefore the opinion makes no reference to anything resembling a "conjure up" test, or any other test for parodic use.

B. Parody and Appropriation of Animated Characters

In *Walt Disney Productions v. Air Pirates*[88] the Ninth Circuit considered a parody defense asserted by defendants who prepared two "underground" magazines featuring characters which were markedly similar to copyrighted Disney characters. As opposed to the lighthearted themes depicted in Disney comics, the "Air Pirates" characters took drugs and engaged in other counterculture activities, including promiscuous behavior.[89] At the district court level, Disney was able to obtain not only a preliminary injunction against publication of the offending comics, but also prevailed on summary judgment as to infringement and a denial of fair use.[90]

The Ninth Circuit held that the substantiality of the taking from the copyrighted characters exceeded any license which might ordinarily be afforded a parodist under a "conjure up" test in that the defendants copied not only the physical characteristics of the Disney characters, but elements of personality and patterns of speech as well.[91] The court rejected the defendants' assertion that parody is most effective when the material appears to be the original at first glance but later turns out to be something entirely different. In rejecting that argument, the court stated that parodists were not entitled to take whatever was necessary to make the "best parody," but merely enough to make the audience aware of what is being satirized.[92]

The court held that the defendants had exceeded that limit, stressing that excessive copying precludes fair use.[93] Therefore, the *Air Pirates* court did not even reach the four-factor test, because a threshold finding of excessive copying was dispositive even in a parody context.

C. Image Appropriation and Fair Use for "Public Issues"

However, not all courts have limited the verbatim use of visual imagery for purposes of comment or criticism. In the recent case of *Wojnarowicz v. American Family Association*,[94] a multimedia artist sued a not-for-profit corporation for copyright infringement for the publication of a pamphlet which contained

88. 581 F.2d 751 (9th Cir. 1978).

89. *See* Note, *Parody, Copyrights and the First Amendment*, 10 U.S.F. L. REV. 564 (1976).

90. 345 F. Supp. 108 (N.D. Cal. 1972).

91. *Air Pirates*, 581 F.2d at 757, 758.

92. *Id.* at 758.

93. *Id.* Specifically, the court said: "While other factors in the fair use calculus may not be sufficient by themselves to preclude the fair use defense, this and other courts have accepted the traditional American rule that excessive copying precludes fair use." *Id.*

94. 745 F. Supp. 130 (S.D.N.Y. 1990).

photocopies of the artist's copyrighted works. The pamphlet, titled *Your Tax Dollars Helped Pay For These Works of Art*, was mailed to homes throughout the United States as part of a national campaign to stop the National Endowment for the Arts from funding sexually controversial art.[95]

The district court examined the alleged infringement through application of the section 107 four-part test, apparently satisfied that there was not sufficient verbatim copying or taking to preclude fair use despite the fact that one of the plaintiff's photographs was reproduced in its entirety.[96] In examining the purpose and character of the use, the court pointed out that criticism and comment are the uses most commonly recognized in connection with the fair use defense.[97] The court also noted that because the pamphlet was addressing a controversial issue, it was entitled to greater protection because discussion of federal funding "must remain open to vigorous challenge" and that artists must be willing to accept the right of citizens to challenge such funding.[98] Furthermore, the court disregarded the fact that the pamphlet had an overtly commercial purpose[99] and declared that the dominant objective of the pamphlet was to oppose federal funding of "pornography," which outweighed an incidental fund-raising purpose.[100]

In examining the nature of the copyrighted work, the court concluded that although the plaintiff's work had been published and was therefore entitled to less protection according to *Harper & Row*, it was a creative work entitled to greater protection than a work of pure fact.[101] Therefore, this second factor weighed in favor of the plaintiff. In its analysis of the third factor, the volume of the taking, the court found that because only small parts of many of the plaintiff's works were included in the pamphlet, the taking was not quantitatively substantial.[102] Despite the plaintiff's claim that the quality of the taking was heightened by the defendant's misrepresentation of his work through selections which distorted the content, the court held that this factor also weighed in favor of the defendant.[103]

It is in the analysis of the fourth factor of the test, the effect on the market for the copyrighted work, that the court finds the greatest protection for the appropriation of images for the purpose of criticism or comment. Although the plaintiff argued that his artistic reputation had been disparaged and the value of his works had been harmed by the attacks, the court found that he could not even show a

95. Plaintiff Wojnarowicz's work is directed at raising public awareness of the effect of the AIDS virus on the gay community, and often contains sexuality explicit imagery.

96. *Wojnarowicz*, 745 F. Supp. at 144-45. The court instead pointed out that each image reproduced in the pamphlet "comprises a very small excised portion of the original work of art from which it is drawn." *Id.* at 145 n.11.

97. *Id.* at 145 (citing 3 NIMMER ON COPYRIGHT § 13.05(B), at 13-90.1 (1989)).

98. *Id.*

99. *Id.* The pamphlet was used as part of a campaign which raised $5.2 million dollars to combat "offensive" and "blasphemous" art in 1989. *Id.* at 133.

100. *Id.* at 144.

101. *Id.*

102. *Id.* at 145.

103. *Id.*

likelihood of future harm from the infringement.[104] Furthermore, the court held that the fair use doctrine will not protect a copyrighted work from even ruinous attacks in the form of criticism or comment which decreases demand for the copyrighted work because such infringing uses are not directly competing in the art marketplace.[105]

It appears from *Gross*, *Air Pirates* and *Wojnarowicz* that the appropriation of visual images is much more likely to be considered a fair use if it can be classified as criticism or comment, rather than mere parody. However, there may be an additional dynamic at work here: it appears that uses which arouse the "disapproval" of a court are less likely to enjoy the privilege of a fair use defense. This is not to say that a court necessarily follows any particular political or artistic agenda in crafting a fair use decision, but rather a court has more sympathy for an infringing use which it can readily understand. Part of this may simply lie in the equitable nature of the fair use calculus,[106] but part of it may also result from a court's lack of sophistication in questions of criticism, comment, and parody in the fine arts.

The important point remains, however, that appropriation of images has played an important role in the development of twentieth-century visual art. Furthermore, this appropriation has often been a productive one, both in terms of the creative production of new art forms and images, and as criticism and comment on the position of art in society and the dynamics of the art marketplace.

V. The Role of Image Appropriation in Modern Art

Artists have often used the work of others as models for their own work, as a source of both forms and ideas. It was traditional, in fact, for the nineteenth-century artist studying in Paris or London to paint from plaster casts of sculpture from Greek and Roman temples in order to learn how to portray the human form.[107] However, many modern artists have carried the notion of formal inspiration a step further to include images from earlier works as major elements within their own work.[108] Instead of being criticized as derivative or actionable, however, such uses have often eventually been accepted by artists and art historians alike as important contributions to the development of modern art.

The use of appropriated materials in the cubist collages of Pablo Picasso and Georges Braque, the "readymades" of Marcel Duchamp, the pop art of Andy Warhol, Robert Rauschenberg and Jasper Johns, and the postmodern appropriation of photographs by Sherrie Levine, are all examples of art which have directly

104. *Id.* In fact, the district court seemed persuaded by the defendant's argument that notoriety from inclusion in the pamphlet would actually benefit the plaintiff, although the opinion indicated that "Plaintiff's "fifteen minutes of fame" may not translate into commercial success." *Id.*

105. *Id.*

106. The *Wojnarowicz* court suggested that the copyright owner was less entitled to protection from fair use of his images because he had accepted public funds to support his artwork. *Id.* at 146.

107. Even modern artists such as Picasso studied from plaster casts. *See* WILLIAM RUBIN, PABLO PICASSO: A RETROSPECTIVE 20 (1920).

108. John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law* 13 COLUM.-VLA J.L. & ARTS 103, 108 (1988).

incorporated the images of other artists in order to create new work. In each case, the artist was using the appropriated image not only as a formal device for compositional purposes, but also as a referent in order to comment or criticize and move beyond the earlier work, a purpose specifically approved in copyright law.[109] An examination of these works in light of the fair use calculus shows them to be legitimate and fair, artistic appropriations.

A. Collage as Fair Use

Both Pablo Picasso and Georges Braque began pasting scraps of paper and fabric onto the surfaces of their paintings around 1910.[110] Both artists were trying to develop a new way of depicting three-dimensional space on a two-dimensional canvas, and they discovered that scraps of recognizable fabric or newsprint applied to the surface called attention to the flatness and immediacy of the surface of the painting.[111] Use of such materials therefore visually separated that surface from any painted illusions of space elsewhere on the canvas and brought a sense of depth to an abstract painting style which seemed trapped on a two-dimensional surface.[112]

Although Picasso initially used hand-lettering to call attention to the surface of the canvas, Picasso began to make extensive use of pages from newspapers and folios of sheet music in 1912 and 1913.[113] In this way, he was clearly using copyrightable material to enhance his own artistic creation — not merely copying from plaster casts, but actually incorporating the physical objects into his work — to make a statement which not only pointed out the physicality of the painted surface, but called into question the act of creating illusionistic space.[114] Therefore, the collage serves as a scholarly comment or criticism of the practice of making art, while creating a work of art from the interaction between the painted and pasted forms borrowed from the world of real objects. This symbiosis creates a new object which gains its vitality from this interaction, as one author has suggested:

> [T]he gathering together which collage is about becomes abstract and assumes the mantle of art only when token signs of art are added to the mix; i.e., only when it is aestheticized by being "treated" (shall we say "purified"?) with the residue from a convention of art, traces that once signaled a full-fledged act of artistic creation. The artistic fragments

109. 17 U.S.C. § 107 (1988 & Supp. III 1991).

110. The exact date of the first cubist collage, as well as which artist created it, is not certain. Picasso and Braque shared a studio at the time, and both artists left their work unsigned and undated during this period. *See* CLEMENT GREENBERG, ART AND CULTURE 70 (1961); *see also* PICASSO AND BRAQUE: A SYMPOSIUM (Lynn Zelevansky ed., 1992).

111. GREENBERG, *supra* note 110, at 71.

112. Greenberg has suggested that both painters were torn between this two-dimensionality as being inherent in the medium, and the possibility of an illusionist depiction of space, saying that "Painting had to spell out, rather than pretend to deny, the physical fact that it was flat, even though at the same time it had to overcome this proclaimed flatness as an aesthetic fact and continue to report nature." *Id.*

113. For examples of this use, see RUBIN, *supra* note 107, at 164-65.

114. Donald B. Kuspit, *Collage: The Organizing Principle of Art, in* COLLAGE: CRITICAL VIEWS, at 40 (Katherine Hoffman ed., 1989).

> refine the life fragments, giving them appeal to a more contemplative level of consciousness than is customary in everyday life, making them safely formal and aesthetically significant.[115]

Because the object which is incorporated by the collagist undergoes a transformation as it appears in the work of art, the strength of the collage does not result solely from an appropriation or plagiarism of the incorporated image, but rather from the intention and vision of the collagist. One commentator has, therefore, suggested that collage artists should be afforded a greater latitude for the good faith appropriation of copyrightable material, stressing that even the incorporation of a copyrighted image such as a photograph within a collage will not actually serve to impair the market for the incorporated work because the collage is a "different expressive identity."[116] This is particularly convincing when the collagist seeks to develop social, political, or art-critical commentary within the work, because of the express language in the Copyright Act which affords greater latitude to these purposes.[117]

B. Duchamp's "Readymades": Appropriation as Creative Act

Another artist who appropriated images from both the art and the non-art world in order to make art objects was Marcel Duchamp. One of his more notorious appropriations of imagery was a work entitled "L.H.O.O.Q.," which consisted of a reproduction of Leonardo da Vinci's "Mona Lisa" with a moustache added to the face.[118] Although his own physical contribution to the work of art was minimal,[119] the fact that he was defacing a work of art which was synonymous with the concept of a "masterpiece" in the mind of the public, coupled with the overt sexuality of the title,[120] created an entirely new work of art. By doing this, Duchamp not only called into question the process by which a work of art becomes canonized in the public eye, but he also made a work of art which explicitly referred to the act of copying.[121]

Duchamp's appropriation of the image therefore served an important and influential critical function by commenting on the mechanisms of the art world and the public perception of art, including a portrayal of the artist as copier. His use of the "Mona Lisa" as an image differs from the collagist's use of pieces of newsprint or photographs being compared with one another. Although "L.H.O.O.Q." is a collage because it combines three very disparate elements (the reproduction of the

115. *Id.*

116. Sonya Del Peral, *Using Copyrighted Visual Works in Collage: A Fair Use Analysis*, 54 ALB. L. REV. 141, 163 (1989).

117. *See* 42 U.S.C. § 107 (1988).

118. *See* Del Peral, *supra* note 116, at 165.

119. Modern copyright cases have rejected a "sweat of the brow" theory of copyright, at least concerning compilations of information in telephone directories. *See* Key Publications v. Chinatown Today Publishing Enters., 945 F.2d 509, 515 (2d Cir. 1991).

120. In French, "L.H.O.O.Q." serves as a homonym for "she is hot down there" or "she has a hot bottom." *See* Carlin, *supra* note 107, at 109.

121. *Id.*

painting, the moustache, and the title), Duchamp took the entire image of the painting to make his statement. In this sense, his taking was unquestionably substantial both in quality and in quantity and is less fair when measured by the fair use test. However, unlike Picasso's collages, Duchamp clearly uses the borrowed image for comment and parody.

Duchamp went even further in his appropriation of images with his "readymades," which were commercial objects such as snow shovels or bottle racks that he would exhibit as sculpture under his own name.[122] By using these objects and claiming them as his own art, Duchamp was commenting on the commercialization and commodification of art, seeking to create art objects which would have no resale value.[123] His point was that the object was commonplace, but it became art as the artist selected it and exhibited it in the gallery space.[124] Perhaps the most controversial of these choices came when Duchamp unsuccessfully attempted to exhibit a urinal as sculpture in the 1917 exhibition of the Society of Independent Artists, arguing that "[t]he only works of art that America has given are her plumbing and her bridges."[125]

Duchamp's use of appropriated images in both "L.H.O.O.Q" and the "readymades" was clearly an attempt to criticize or parody the mechanisms of the art world while asserting the primacy of the artist's vision as the essence of artistic creation. However, his use of the image, notwithstanding his goals of criticism and parody, seems less defensible than that of the collagist because of the substantiality of the taking and the minimal amount which he contributed beyond the act of artistic choice. In this sense Duchamp anticipates Koons' work by seventy years.

C. Pop Art and the Appropriation of Commercial Imagery

Another example of artistic appropriation of images can be seen in the work of such pop artists as Andy Warhol, Jasper Johns, and Robert Rauschenberg. These artists enthusiastically included imagery from popular culture such as commercial trademarks and publicity photographs of movie stars, partly in a reaction to the "high art" drama of the abstract expressionists, who had immediately preceded them in the New York art world.[126]

Warhol imitated the commercial world not only by appropriating the designs and trademarks of popular products such as Campbell's soup cans and Brillo boxes,[127] but by using the same mass-production technology which created those products to duplicate and disseminate his art as a mass-produced product.[128] Warhol appropriated and duplicated a wide variety of images, from publicity photographs of Marilyn

122. CALVIN TOMPKINS, THE BRIDE AND THE BACHELORS 39-40 (1978).
123. *Id.*
124. *Id.*
125. *Id.* at 41.
126. GREGORY BATTCOCK, THE NEW ART 22 (1973).
127. *See* LUCY R. LIPPARD, POP ART 93, 100 (1966).
128. BATTCOCK, *supra* note 126, at 24.

Monroe to news photographs of Jacqueline Kennedy at the funeral of her husband, always portrayed in the same reserved and impersonal Warhol style.[129]

In maintaining this emotional distance from the subjects of his work, Warhol showed that because these images are so often reproduced in the media, we as viewers are desensitized to the drama actually portrayed in the image.[130] Warhol, therefore, required a recognizable image in order to make his artistic comment in the same way that Duchamp required the "Mona Lisa." Taking a less recognizable image, one not already widely known to the public, would destroy this effect.

Another important pop artist who has appropriated images for his own work is Jasper Johns. His use of common symbols such as the American flag, a target, or a map of the United states as the underlying design for his otherwise abstract paintings trades on the accessibility of the familiar symbol in the same way that Warhol relied on our familiarity with commercial images.[131] But these images are largely in the public domain, as opposed to Warhol's overt appropriation of material protected by trademark or copyright law.[132]

Johns' use of the familiar image was quite different from Warhol's work, however. Johns used a very expressive painting style to call attention to the hand of the artist in the creative act, in a sense combining the cool, detached image of pop art, the drama of abstract expressionist brushwork, and the assemblage of the collage.[133] Although his appropriation of images was designed to play on common associations with highly charged symbols like the flag, Johns was not really attempting any criticism or comment of the art world. Instead, he was seeking to direct the attention of the viewer to the physical quality of the paint and the brushstrokes. His use of appropriation is, therefore, less like Duchamp and more like Picasso. Nevertheless, these appropriated images served an important artistic function for Johns.

A third artist associated with pop art who has made extensive use of appropriated imagery is Robert Rauschenberg. His sculpture and painting has often included whole objects borrowed from another context, such as Coke bottles, electric fans, and stuffed hunting trophies.[134] As Rauschenberg himself has said, he is trying to make art "in the gap between art and life,"[135] by creating assemblages which consist of objects from everyday life arranged in an evocative manner to create an artistic statement.[136] Rauschenberg sometimes combines commercial images like the Coke bottle with generic but symbolic elements like wings, to make sculpture which transcends the mere commerciality of the appropriated image.[137]

129. LIPPARD, *supra* note 127, at 99.

130. *Id.*

131. *Id.* at 70.

132. Carlin, *supra* note 107, at 110. However, as Carlin points out, Johns also appropriated commercial images as well, such as his Ballantine Ale cans. *Id.* at 110 n.23.

133. LIPPARD, *supra* note 127, at 70.

134. Carlin, *supra* note 107, at 110 n.24.

135. *Id.* at 110 n.23.

136. *Id.*

137. *Id.* at 110 nn.24-25.

One of Rauschenberg's most interesting appropriations occurred when he acquired a drawing from Willem de Kooning,[138] painstakingly erased the drawing, and exhibited the smudged paper as "Erased de Kooning by Robert Rauschenberg."[139] In so doing, Rauschenberg attempted to show that each artist must make his art in the shadow of, and even in spite of, the art which has gone before him. In this way, Rauschenberg was appropriating an image by destroying it, both physically and symbolically. The image which he appropriated was not merely an element of, but actually a prerequisite for, his work.

Rauschenberg has also included silkscreen reproductions of photographs by other artists in his paintings.[140] In one instance, Rauschenberg was sued by a photographer for using one of his images in a print.[141] However, he was able to bargain for the right to continue to use the image by giving the photographer a copy of the print and three thousand dollars, as well as giving the photographer credit in the title of the work.[142] Although Rauschenberg initially asserted that his use of the photograph would be protected on both fair use and First Amendment grounds,[143] he agreed to settle out of court to avoid the expense of litigation.[144]

Like Picasso and Duchamp, the pop artists found that appropriated images served to enliven the composition of their work in a formal sense. At the same time, they often appropriated these images in order to make a critical statement which depended on the recognized commercial image. Warhol, Johns, and Rauschenberg all found that the world of visual images, including photographs protected by intellectual property law, were necessary to make their art. This growing tradition of image appropriation has found contemporary expression in the postmodern work of Sherrie Levine and Richard Prince.

D. Postmodern Appropriation of Images

In the late 1970s two photographers, Richard Prince and Sherrie Levine, began to rephotograph existing photos by other artists and exhibit them as their own.[145] Their work called into question the process by which an original work of art is created, suggesting that the artist's vision in selecting an image to photograph was sufficient to make the re-creation of that image an original artistic vision.[146] Although Prince and Levine were both using similar processes, they were working toward different goals. An examination of their work shows how two contemporary

138. De Kooning was one of the most successful artists of the abstract expressionist movement. *See* EDWARD LUCIE-SMITH, LATE MODERN 48 (1975).

139. TOMPKINS, *supra* note 122, at 210-11.

140. Carlin, *supra* note 107, at 127.

141. *Id.*

142. *Id.*

143. Gay Morris, *When Artists Use Photographs: Is it Fair Use, Legitimate Transformation or Rip-off?*, ART NEWS, Jan. 1981, at 102-06.

144. *Id.* at 104. Rauschenberg is not the only Pop artist to be threatened with a lawsuit by a photographer. As Morris points out in this article, Warhol settled with Patricia Caulfield in 1970 by giving her two paintings from a series based on her photographs. *Id.*

145. Gerald Marzorati, *Art in the (Re)Making*, ARTNEWS, May 1992, at 91, 96.

146. *Id.*

artists, whose preoccupation with criticism of the mechanisms of the art world has been referred to as "postmodernism,"[147] have expanded the tradition of artistic appropriation.

Prince began rephotographing and exhibiting magazine advertisements in 1979.[148] He explained that the initial impetus for rephotographing the work of other artists was that he did not like his own work and felt that taking someone else's work "was a logical alternative."[149] He saw the camera as "a pair of electronic scissors" with which he tried to make his photographs look as much like the photograph which he was reproducing as possible.[150] Certainly, Prince is reminiscent of Duchamp's "readymades" in this bold assertion of artistic choice without any apparent comment or parody intended or asserted.

Although Sherrie Levine was inspired by Prince's rephotography, she was motivated by feminist as well as personal artistic concerns.[151] By rephotographing the work of famous male photographers from the past, such as Eliot Porter and Edward Weston, Levine attempted to break into what she described as "an oedipal relationship artists have with artists of the past."[152] However, Levine was threatened with a lawsuit by Weston's estate when she rephotographed a gallery poster of a Weston nude portrait of his son.[153] Levine then began to rephotograph works by Walker Evans, whose works were originally produced under the federal government's Works Progress Administration (WPA) and consequently posed no copyright problems.[154] By entitling this series of work "After Walker Evans,"[155] Levine not only used the word "after" to symbolize an homage or challenge to the first artist of the image, but she also called attention to the fact that she was "after" him in a chronological sense. Because this lack of priority in time necessarily excluded her as an artist from being the original photographer of these images, she sought to claim them as her own through the act of appropriation.

An interesting aspect of Levine's work is that, although her appropriations have been embraced by postmodern critics as a negation of the artwork as a commodity,[156] Levine believed that her most important work contribution was as a feminist who attempted to reclaim part of the art tradition for women artists.[157] Therefore,

147. As a critical and artistic movement, postmodernism seeks to expose the myths and biases of the modern "avant-garde" model of artistic progress and art history. *See* DONALD KUSPIT, THE NEW SUBJECTIVISM: ART IN THE 1980'S 531-37 (1988).

148. Marzorati, *supra* note 145, at 96.

149. David Robbins, *Richard Prince: An Interview with David Robbins*, APERTURE 6, 9-10 (Fall 1985).

150. *Id.* at 10.

151. Marzorati, *supra* note 145, at 97.

152. *Id.*

153. *Id.*

154. *Id.*

155. Carlin, *supra* note 107, at 138.

156. Marzorati, *supra* note 145, at 97; *see also* ROSALIND E. KRAUSS, THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 168-70 (1985).

157. Marzorati, *supra* note 145, at 97.

her use of the appropriated image serves as a comment or criticism on at least two levels: artist as appropriator and woman as appropriator.

The many modern artists discussed in this section who have appropriated images from other sources and incorporated them into their work have done so for essentially three reasons. First, the introduction of appropriated image has served a compositional function in Picasso's collages, in order to call attention to the surface of the canvas and aid in the depiction of three-dimensional space. Second, the use of images from the real world, including commercial trademarks and photographs with which the viewer is already familiar, has served to bring a new colloquial subject matter into art, and to criticize notions of a distinction between "high" and "low" art. Finally, the act of appropriation serves as a criticism of the concept of art as property and product.

While it is obvious that there is a tradition of image appropriation in modern and postmodern art, it is not necessarily clear that this is a tradition embraced by the fair use test of copyright law. Although postmodern artists like Koons are working within an accepted art tradition, Koons' appropriation clearly did not pass muster under the fair use test employed by the Second Circuit.[158] Nonetheless, it seems logical that the fair use test needs to be applied to the world of modern art and image appropriation in order to protect the rights of image makers while still accommodating the legitimate practices and demands of the modern artist.

VI. Fair Use for the Visual Artist

Three recent writers have criticized the fair use test as applied to the visual arts, arguing that the four-part test has not been applied in a manner which takes into account legitimate concerns of the visual artist and the artistic need to appropriate visual forms. The first approach argues that appropriation is an important part of contemporary art which is being needlessly limited by inflexible application of the fair use test.[159] This commentator suggests that the correct test examines whether the appropriating artist is willfully interfering with the commercial interests of the first artist.[160] A second approach asks whether the user of the image is an "intended beneficiary" of the fair use section of the copyright clause and examines whether the appropriating use is sufficiently profitable to the user to require compensation to the copyright owner for that use.[161] A third author points out that appropriated images must be available to the modern artist as a nature to be copied

158. Rogers v. Koons, 751 F. Supp. 474 (S.D.N.Y. 1990), *modified*, 777 F. Supp. 1 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

159. Carlin, *supra* note 107, at 103.

160. *Id.*

161. Sigmund Timberg, *A Modernized Fair Use Code for Visual, Auditory, and Audiovisual Copyrights: Economic Context, Legal Issues, and the Laocoon Shortfall*, *in* FAIR USE AND FREE INQUIRY 311 (John Shelton Lawrence & Bernard Timberg eds., 1980).

in the same way that artists of the past were free to depict their noncopyrighted natural landscape.[162]

A. The "Willful Interference" Standard

Commentator John Carlin begins with the assumption that appropriation of images is an important part of the work of valid contemporary artists and that such appropriation should be granted a reasonable fair use privilege.[163] According to Carlin, the court must first examine the reason for the appropriation in order to distinguish the legitimate artist from a user who merely seeks to reproduce for the mass market.[164] However, as Carlin suggests, the intent to make money from the use is not alone determinative.[165] Instead, the concern is whether the user of the image intends to interfere with the commercial interests of the copyright holder.[166]

The second part of this test is to examine the image being copied to determine if the image is part of a "shared cultural vocabulary" or can be identified as the unique creation of the copyright owner.[167] If the image is found to be part of the common fund of images, the user is afforded the right to appropriate it for a limited artistic use, but presumably not for a mass reproduction.[168] If the image is considered the unique creation of the copyright holder, however, the user should be able to negotiate for a limited use of the image unless the copyright holder is currently working and exhibiting his art.[169]

Carlin also suggests a "model agreement" to be negotiated between the copyright owner and the image user in cases of large multiple editions of work which incorporates the image.[170] This agreement would not only serve to avoid litigation, but also would be useful for negotiating royalty payments connected with other merchandising of the image in connection with the use.[171] However, Carlin points out that such an agreement should be voluntary between the two parties and should not be required in the event of a very limited fair use.[172]

162. Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, OCTOBER, Spring 1992, at 83.

163. Carlin, *supra* note 107, at 138.

164. *Id.* at 139.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* This would presumably eliminate the danger of direct competition between the two artists. *Id.*

170. *Id.* at 141-43. Carlin suggests that the licensing agreement, which features an agreed-upon royalty rate, is to be used in instances where the appropriated image is used in relatively large multiple editions or in cases of ancillary merchandising of artworks. On the other hand, Carlin suggests a one-time payment is more appropriate for limited reproduction and exhibition rights. *Id.*

171. *Id.*

172. *Id.*

B. The "Intended Beneficiary" Approach

Bernard Timberg's approach attempts to forge a fair use test which not only furthers the original goals of copyright law, defined by Timberg as encouraging and financially rewarding copyright creators,[173] but also seeks to promote the First Amendment goal of the free dissemination of ideas and images in society.[174] This approach differs from the statutory fair use test[175] in two respects. First, it separates the question of whether an infringing use should be enjoined from the question of whether the appropriating user should be forced to pay the copyright owner for the use of his image.[176] Second, it determines the question of whether compensation is owed by considering whether the appropriating use will affect the potential market for the copyrighted work and by whether the user is likely to realize a substantial profit from that use.[177]

Like Carlin, this theory assumes that a user should not be categorically enjoined simply on the basis of appropriation. Therefore, it recognizes the important artistic and critical contributions which can be achieved through appropriation of images in the visual arts. What is perhaps most innovative, however, is the common sense approach to compensation of the copyright owner: the appropriating use must simply pay for any damage which is done to the value of (or market for) the original work, as a royalty based on the profits which arise from the new use. Unfortunately, this approach relies on negotiated industry-wide determinations of the correct rate of compensation,[178] which may not be easily determined in the contemporary art gallery market.

C. The "Image Deregulation" Approach

Martha Buskirk, in her critique of the fair use calculus, suggests that there is a danger in copyright and trademark law which is overly protective of images.[179] Buskirk points out that the institutions of the art world, the gallery system in particular, tend to treat the field of potentially successful artistic achievement as a finite system and to assign particular artists to particular niches in this system.[180] Therefore, the art world acts as an informal unwritten copyright law to assure that no two successful artists work the same artistic territory or use the same themes or images.[181]

With this system of "image commodification" already in place, an artist who is also faced with copyright liability for the valid appropriation of images in his work

173. Timberg, *supra* note 161, at 325.
174. *Id.*
175. 17 U.S.C. § 107 (1988 & Supp. III 1991).
176. Timberg, *supra* note 161, at 325.
177. *Id.*
178. *Id.* at 329.
179. Buskirk, *supra* note 162, at 109.
180. *Id.* at 107.
181. *Id.*

may face an insurmountable barrier.[182] The artist who incorporates mass-media images may in fact be prevented from exploiting his own contribution to the art world, a productive artistic contribution in fact, because he would then be competing on the same market as the products from which he appropriated some of his imagery.[183] According to Buskirk, the legal inaccessibility of commonplace images is placing valid artistic and critical statements off-limits, and is frustrating the goals of the Copyright Clause.[184]

This approach points to the weakness of the fourth "market effect" prong of the fair use test. It shows that an artist can be legally foreclosed from using certain images because an appropriated use is presumed to cause harm to the market for the original work so long as both are considered works of art. Furthermore, it does so regardless of whether the two works actually stand in competition with one another. For example, it is unlikely that Duchamp's "L.H.O.O.Q." had any effect whatsoever on the value of the "Mona Lisa" because the market for conceptual and critical art is simply not the same as the market for old masterpieces. In this way, Buskirk suggests that any realistic fair use calculus must come to terms with the realities of the art market.

Timburg, Carlin, and Buskirk all agree that the fair use calculus currently in place does not allow adequate latitude for the limited appropriation of images to make artistic and critical statements.[185] This attitude is based on the knowledge that appropriation of images has often served a valuable artistic and critical function in the history of art, regardless of whether such appropriations have come in the form of homage, parody, or attack. But the fact that section 107 of the Copyright Act allows for an equitable assessment of the appropriation, through the four-factor test, shows that the mechanisms are already in place to accommodate reasonable appropriation.

All three authors are also willing to condition the amount of fair use granted to the appropriating artist, depending on the amount of material used and the type of use which is made of the image. Certainly, any standard for what can be taken as a fair use must allow for different types of appropriation, depending on the material taken and the use to which that material is put. An appropriation in the form of tribute or homage, for example, detracts little from the original work. A parodic or critical work may hold the original work up as an object of ridicule, but this may, nonetheless, not be an unfair use because an artist takes the risk of such criticism by putting his work before the public.

Criticism and parody, however, imply an acknowledgment by the appropriating artist that the original artist initially created the image. By contrast, an appropriation which merely takes an image does not acknowledge the presence of the original artist and is much more likely to be unfair. This implies that the intent of the

182. *Id.*

183. *Id.* at 108.

184. *Id.* at 84.

185. *See* Carlin, *supra* note 107, at 108; Timberg, *supra* note 161, at 336-37; Buskirk, *supra* note 162, at 106-09.

appropriating artist must be considered in the fair use test. But this balancing is also already provided for in section 107 by the suggested categories of potential fair uses, and once again it seems clear that what is lacking is an enlightened court which will set a realistic and workable standard for fair appropriation.

Finally, the concern with mass production of appropriated images stems primarily from the likelihood of an adverse effect on the market for the copyrighted work. Although both Timberg and Carlin have suggested that licensing and royalty arrangements are the best way to deal with this factor, the fact remains that any court which examines market effect must first realistically determine whether or not the appropriating work is actually competing with the original work. If it is not, the second work should not be presumed unfair merely because it is produced commercially. Once again, what this requires is not so much a revision of the fair use test, but a realistic application of the factors in section 107. Although questions of art-market competition and valuations are no doubt complicated for courts to deal with, these issues can probably be realistically assessed through the use of expert witnesses.[186]

In sum, few of the concerns expressed by Timberg, Carlin, and Buskirk are overlooked in the statutory fair use test as presently included in the Copyright Act.[187] Therefore, it is possible that the statute as presently drafted could accommodate the needs of the contemporary appropriating artist, provided that courts are willing to recognize that an appropriating use of an image can serve valid artistic and critical functions in the art world. The next section will more closely examine the statutory test as applied by the Second Circuit in *Rogers v. Koons*[188] to determine whether the test as applied could accommodate some valid appropriating uses, and whether Koons' use of Rogers' photograph could ever pass as fair, even under a more generous fair use analysis.

VII. Fair Use as Applied in Rogers v. Koons

In applying the fair use analysis, the Second Circuit initially recognized the statutory language that indicates criticism and comment are uses specifically entitled to the fair use defense.[189] Furthermore, the court recognized that because the district court had reached a finding of no fair use pursuant to a grant of summary judgment,[190] such relief may only be awarded when there is no genuine issue of fact present regarding the lack of fair use.[191] Therefore, the Second Circuit reanalyzed each of the four fair use factors individually.[192] However, after this

186. Certainly, questions of art valuation are commonly settled through the testimony of experts. *See In re* Rothko, 372 N.E.2d 291 (N.Y. App. 1977).

187. 17 U.S.C. § 107(1)-(4) (1988 & Supp. III 1991).

188. 751 F. Supp. 474 (S.D.N.Y. 1990), *modified*, 777 F. Supp. 1 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

189. *Koons*, 960 F.2d at 308.

190. 751 F. Supp. 474 (S.D.N.Y. 1990), *modified*, 777 F. Supp. 1 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

191. *Koons*, 960 F.2d at 309.

192. *Id.* at 309-12.

analysis, the court found that the particular facts in this case did not justify a finding of fair use.[193] As an examination of the Second Circuit's application of the fair use test will show, because the court was entirely unconvinced that Koons was making any important artistic or critical statement, his use could not be considered a fair one.[194]

A. The Purpose and Character of the Use

The court first accepted that Koons was entitled to a greater latitude in his appropriation of images if his sculpture was in fact parody or satire.[195] However, the court noted that Koons claimed that his work was intended as a parody or satire of society at large, designed to comment on the deterioration of society as a result of the mass production of commodities and banal imagery, such as Rogers' photograph.[196] The court accepted this as a possible definition of Koons' goals in appropriating the image, but held that the goal of the sculpture as parody must be to lampoon the image appropriated in order for the use to be a fair one.[197] Because Koons sought to defend his use as a criticism or comment on society in general, he was entitled to no particular latitude to use Rogers' relatively unknown image.[198] Instead, the court found that the use was not a parody but was instead made in bad faith and primarily for profit.[199]

What the *Koons* court did not seem to consider, however, is the possibility that Koons was intending the image to parody both the specific photograph and the general societal effect of such banal images. If this was indeed the case, Koons should have been entitled to the greater latitude afforded to the parodist. Further, it is possible that Koons' audience, as an art-buying and art-viewing public, would in fact have been aware of Rogers' photograph, either through the 1982 exhibition or as a result of the commercial distribution of the postcard. If that is the case, then the appropriation of the image may well have served as a dual parody. These are questions which have to be developed as facts, and which may suggest that summary judgment is not the correct disposition of the question.

B. The Nature of the Copyrighted Work

The Second Circuit dispensed with this element of the fair use test in a summary fashion, noting that because the copied work was creative instead of factual in nature, the scope of the fair use privilege is interpreted more narrowly.[200] Furthermore, the court stressed that because Rogers makes his living as a

193. *Id.*

194. *Id.* at 312.

195. *Id.* at 309.

196. *Id.*

197. *Id.* at 310.

198. *Id.* The court acknowledged that the relative obscurity of Rogers' image would not necessarily destroy the parodic effect if Koons had credited Rogers as the maker of the image. *Id.*

199. *Id.*

200. *Id.* at 310 (citing *New Era Publications, Int'l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir.), *cert denied*, 111 S. Ct. 297 (1990)).

photographer and depends upon his products to make a living, this also works against Koons' right to the fair use defense.

However, this approach seems to preclude a fair use defense for the visual artist because it is difficult to determine what aspects of a work of visual art would be considered factual rather than creative. In addition, the Second Circuit seems to suggest that Koons would be entitled to greater latitude in his appropriation if Rogers had a good income from other sources, and merely produced his photographs for fun. The court instead seems to be using this factor as another opportunity to scold Koons for his arrogance and cavalier attitude toward appropriation, rather than examining the nature of his defense.

C. The Amount and Substantiality of the Work Used

In examining this factor, the court first distinguished between an appropriation which is unacceptable because it exceeds the quantity of the original work which can be fairly taken, and an appropriation which is excessive because it qualitatively exceeds the limits, by wholly copying the "essence" of the original work.[201] The court held that Koons had taken more of the image than would have even been necessary to parody Rogers' photograph (had his sculpture been intended as a parody of that particular work), and that he took the expression of the photograph by "incorporat[ing] the very essence of the work created by Rogers."[202]

But the Second Circuit does not really determine exactly how a visual artist could appropriate an image without exceeding the qualitative limit. It is difficult to imagine how an artist can appropriate the image without also using the essence or expression of that image. Nonetheless, the court provides no guidance on this question. It is significant in this regard that Koons used colors on his sculpture, as opposed to Rogers' black-and-white photograph, and that he greatly exaggerated the button-like shapes of the puppies' noses.[203] Surely this difference makes for a somewhat different expression in the sculpture, making it much less a portrait and much more a comic. If the effect has in fact been significantly changed, it is not necessarily fair to say that Koons has qualitatively "taken" the essence of Rogers' photograph. Furthermore, in discussing the quantitative nature of Koons' appropriation, the court was unable to draw any clear lines as to what amount of appropriation would be permissible, but merely reiterated that Koons had exceeded that amount.[204]

D. The Effect of the Use on the Market Value of the Original

In examining the market effect factor, the Second Circuit stressed that its earlier conclusion that Koons' appropriation was primarily for profit was the key to

201. *Id.* at 311.

202. *Id.* The court went on to say that "no reasonable jury could conclude that Koons did not exceed a permissible level of copying under the fair use doctrine." *Id.*

203. *See* Buskirk, *supra* note 162, at 37.

204. *Koons*, 960 F.2d at 311.

analyzing the effect on the market for the original work.[205] While conceding that a use need not be prohibited if ho harm to the market for the original can be shown, the court was willing to presume the likelihood of future harm because it held that Koons' appropriation was intended for commercial gain.[206] The court indicated that this harm to Rogers was likely to occur if another sculptor wished to obtain a license from Rogers to prepare a derivative work from his image, but decided not to do so because of Koons' work,[207] or if Koons began to sell photographic postcards of his sculpture, which could directly compete with Rogers' image in the marketplace.[208]

As with the analysis of the nature of the copyrighted work and the amount and substantiality of the work used, the Second Circuit's finding that Koons was seeking to make his art for commercial reasons effectively foreclosed any chance of a finding of fair use. Once again, this places the appropriating artist in an unfair position: any work of art which uses an image and is produced for the art market is seen as directly competing with the original work, with a presumption of harm. It may not have been realistic to make such a presumption in this case, for example, because the market for highly conceptual and parodic work like Koons' is simply not the same as the market for photographic portraiture or postcards. Furthermore, the market for Koons' work may be as much the result of his flamboyant personality as the art which he produces. Therefore, collectors may have purchased Koons' "Puppies" for reasons which have nothing to do with Rogers' photograph. If that is the case, no sales were lost to Rogers.

Another problem with the Second Circuit's analysis of the market effect of Koons' appropriation is that Koons may have in fact helped Rogers to sell copies of his photograph as a result of the publicity surrounding the lawsuit.[209] If this is considered a part of the market effect of the appropriation, it would probably be considered evidence that Koons did not really do as much damage as Rogers has alleged. However, the Second Circuit seems to have treated this as merely a part of the calculation of damages, rather than as part of the fair use analysis.

In summary, the Second Circuit's application of the four-factor fair use test not only found Koons' appropriation to be unfair, but it also suggests that few artistic image appropriations will be found to be fair. At the same time, however, the court offers little guidance to artists. First, the court was clearly skeptical of Koons' postmodern critical goals, declaring that any comment or parody must be directed solely toward the appropriated image. Next, the court implied that works of original art are entitled to greater protection from appropriation because of their creative nature. Third, the court was unwilling to try and define the permissible limits of

205. *Id.* at 312.

206. *Id.*

207. A derivative work is defined by the copyright act as "a work based upon one or more preexisting works" including an art reproduction. 17 U.S.C. § 101 (1988 & Supp. III 1991).

208. *Koons*, 960 F.2d at 312.

209. In fact, a group of photographs which included two Rogers prints (one of them of his "puppies") sold at auction at Christies October 13, 1992, sale for $990. Barbara Hoffman, *Supreme Court Nixes Koons Appeal*, ART IN AMERICA, Dec. 1992, at 25-26.

quantitative appropriation, relying instead on the belief that Koons had taken the "essence" or "heart" of Rogers' photograph. Fourth, by assuming that each sale of Koons' work represented one sale lost to Rogers, the court took a very narrow view of the art market when it examined the potential market effect of Koons' appropriation. Finally, throughout the analysis, the Second Circuit stressed that because Koons was working as a commercial artist and producing his appropriated images for the art market, his use could not possibly be a fair one.

Instead, the Second Circuit should have recognized that appropriation of images has been an important part of artistic, parodic, and critical comment throughout the history of modern and postmodern art, and that such appropriations serve to comment on not only the appropriated image, but all art as well. The court should have also acknowledged that it is ineffective to make such an appropriation without capturing the heart of the original work, and that this does not necessarily make the use unfair. Finally, the court should have realistically examined the dynamics of the art market to see if Koons actually had any negative effect on sales of Rogers' photograph. If not, that fact should have been considered in the application of the fair use test, and not merely in a later calculation of damages. All of these facts could have easily been considered under the four-part fair use test as it is currently written in section 107 of the Copyright Act.

VIII. Conclusion

The four-part fair use test for copyright infringement, set forth in section 107 of the Copyright Act, attempts to reconcile the competing interests of the copyright owner and those who wish to use copyrighted material for their own creative purposes. Parody, criticism, and comment are among the purposes which are listed as potentially fair appropriations of copyrighted material, provided that the appropriating use of the material satisfies each prong of the four-factor test. Although courts have often used this balance in cases involving written material, the fair use test has rarely been applied to appropriation in the visual arts. However, the appropriation of images has played an important role in the development of modern and postmodern art.

Rogers v. Koons presented a unique opportunity for the courts to apply the fair use test to a postmodern parodic appropriation of visual images. Unfortunately, both the district court and the Second Circuit not only failed to adequately consider the legitimate role of image appropriation in the history of art, but also failed to address the realities of the art marketplace. Although writers have offered several ways to adjust the criteria for the fair use test in order to make it more easily applicable to visual art, the fact remains that the four-factor test set forth in section 107 is sufficiently flexible to accommodate the needs of both the original artist and the appropriating artist who wishes to utilize an image to make his own unique critical statement.

Rogers v. Koons is an interesting case because Koons' flamboyant personality and controversial art generated a great deal of publicity and directed the attention of the art public toward the question of fair use. At the same time, the facts of the case made it unlikely that a court would find that no infringement had occurred. Because

the Supreme Court recently declined to review the case,[210] the Second Circuit's analysis unfortunately stands as the model for fair use analysis in the visual arts.

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210. Koons v. Rogers, 113 S. Ct. 365 (1992).