

3-2021

APPROPRIATIVE FAIR USE: A SUGGESTED APPROACH

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Recommended Citation

Nathan D. Clark, *APPROPRIATIVE FAIR USE: A SUGGESTED APPROACH*, 99 Neb. L. Rev. 697 (2020)

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Nathan D. Clark*

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TABLE OF CONTENTS

I. Introduction	697
II. The Fair Use Doctrine and <i>Campbell</i>	699
III. Appropriative Use in Art History	704
A. Appropriation as a Strategy in Art History	704
B. The Necessity of Borrowing for Appropriative Use	707
IV. What Is Appropriation Art and What Is It Entitled to Take? A Viewer-Based Approach	709
A. Which Works May Claim Appropriative Fair Use?	711
B. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole	713
V. A Summary of Appropriative Fair Use and Its Limitation by the Section 107 Factors	715
A. The Purpose and Character of the Use	716
B. The Nature of the Copyrighted Work	716
C. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work	717
VI. The Fair Use Doctrine, Parody, and Appropriation Art	718
A. <i>Rogers v. Koons</i>	718
B. <i>Blanch v. Koons</i>	720
C. <i>Cariou v. Prince</i>	721
VII. Application of the Appropriative Fair Use Defense	724
VIII. Conclusion	726

I. INTRODUCTION

Commentators have pointed out that the notion of authorship enshrined in copyright law is at odds with the prevalence of copying in contemporary art.¹ Copyright law envisions a creator who beholds an

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1. See, e.g., Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 563 (2016) (“[T]he transformative inquiry asks precisely the wrong questions about contemporary art. It requires courts to search for ‘meaning’ and ‘message’ when

idea, purposes its expression, and fixes it in a work. While this approximation of the creative process may, on the whole, advance the Copyright Act's purpose of incentivizing the progression of the arts, it also vastly simplifies that process. Special consideration should be given to modes of artistic production that this model fails to capture to ensure copyright law does not fail to reap its value in social benefit and artistic progress. Congress and the courts have given such consideration through the fair use affirmative defense.² This Article addresses the application of that defense to a vein of contemporary art which makes it a point to take and re-present preexisting works—appropriation art.

A number of scholars have addressed the manner in which appropriation art should be evaluated under the fair use defense and, in particular, how a court is to ascertain whether a piece of appropriation art is “transformative,” a central component of the fair use inquiry. Given the many valuable insights already presented on how fair use could be remade or conceptualized in view of artistic practice, this Article seeks merely to suggest an approach that advocates and judges could realistically put into practice.³ The components of this approach are: (1) a threshold inquiry into whether the work in question is appropriation art, in which event it is transformative as a matter of law and entitled to a categorical approach of the fair use inquiry; and (2) a determination of how much of the borrowed work the defendant is entitled to use under a three-tiered approach.

Part II sets forth the fair use doctrine and its application to parody under *Campbell v. Acuff-Rose Music, Inc.* Part III argues that appropriation art as an artistic strategy (for want of a better term, “appropriative use”) should be viewed as a distinct category of art subject to

one goal of so much current art is to throw the idea of stable meaning into play. It requires courts to ask if that message is ‘new’ when so much contemporary art rejects the goal of newness, using copying as a primary building block of creativity.” (citation omitted)); Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 450 (2008) (“Although in some tension with the notion of the Romantic author at the center of U.S. copyright law who creates ‘original’ works, the borrower-as-creator has been a constant presence in intellectual creation, both as a matter of historical description and as a central figure in copyright law fair use commentary.” (citation omitted)); H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV. J.L. & TECH. 335, 337 (2011) (“[Arguing] for an expansion of fair use based on social semiotic theory, rather than on theories of authorship or rights of autonomy of subsequent authors.”).

2. See, e.g., 17 U.S.C. § 107 (2018) (listing criticism, comment, news reporting, teaching, scholarship, and research as examples of fair uses); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
3. For an example of a suggested method employing no less than seven separate tests to capture categories of appropriation art entitled to fair use, see Eric D. Gorman, Comment, *Appropriate Testing & Resolution: How to Determine Whether Appropriation Art Is Transformative “Fair Use” or Merely an Unauthorized Derivative?*, 43 ST. MARY’S L.J. 289 (2012).

a tailored application of the fair use defense, much like parody.⁴ Specifically, this Part argues that appropriative use is sufficiently embedded in historical practice that it should, like parody, be viewed as transformative per se and socially beneficial. In addition, like parody, it should be viewed as possessing a valid claim to the need for unauthorized copying that frees it from having to “justif[y] . . . the very act of borrowing.”⁵ Part IV builds on Professor Laura Heymann’s viewer-based approach to transformative use to suggest a method for determining whether a particular use is appropriative and how much of the borrowed work may presumptively be copied. Part V summarizes the suggested approach for appropriative fair use and evaluates how it may be limited by other case-specific factors. Part VI surveys recent case law to demonstrate why this approach is preferable to the current situation. Finally, Part VII applies this suggested framework for appropriative use to the work of appropriation artist Richard Prince.

II. THE FAIR USE DOCTRINE AND *CAMPBELL*

From the earliest days of copyright protection, courts have recognized that there are instances in which the denial of unauthorized copying may inhibit desirable activities. Thus, under the Statute of Anne, English courts allowed unauthorized reproduction of copyrighted works in abridgments.⁶ This recognition has developed into a judicially created exception to copyright protection, dating back in American law to Justice Story⁷ and now codified in Section 107 of the Copyright Act of 1976⁸: the fair use doctrine. Section 107 demon-

4. This is not the first publication to suggest a fair use analysis for appropriation art that borrows from parody. See E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1518 (1993) (“Just as a specialized branch of fair use has evolved to handle the unique concerns raised by parodies, a fair use standard that adequately addresses the issues inherent in the appropriation of images is possible.”).

5. *Campbell*, 510 U.S. at 581.

6. *Id.* at 576.

7. See *Emerson v. Davies*, 8 F. Cas. 615, 618–19 (D. Mass. 1845); *Folsom v. Marsh*, 9 F. Cas. 342, 345, 348 (D. Mass. 1841); *Gray v. Russell*, 10 F. Cas. 1035, 1038 (D. Mass. 1839).

8. That section provides:

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

strates the legislative intent that courts continue to develop fair use through common law,⁹ adapting the doctrine as necessary to preserve the “Progress of . . . useful Arts.”¹⁰ Section 107 also sets out a nonexclusive, four-factor test to assist courts in determining whether a use is fair: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the reproduced portion of the borrowed work; and (4) the effect of the borrowing on the market for the borrowed work.¹¹

Historically, courts have considered the fourth factor “the single most important element of fair use.”¹² In *Campbell v. Acuff-Rose Music, Inc.*,¹³ however, the Supreme Court greatly expanded the significance of the first factor by asking whether the work in question was transformative:

The central purpose of [the first factor] investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” 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. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.¹⁴

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

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

17 U.S.C. § 107 (2018).

9. “Congress meant § 107 ‘to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way’ and intended that courts continue the common-law tradition of fair use adjudication.” *Campbell*, 510 U.S. at 577 (quoting H.R. REP. NO. 94-1476, at 66 (1976); S. REP. NO. 94-473, at 62 (1975)).
10. U.S. CONST. art. I, § 8, cl. 8.
11. 17 U.S.C. § 107.
12. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).
13. *Campbell*, 510 U.S. 569.
14. *Id.* at 579 (footnote omitted) (citations omitted) (first quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345, 348 (D. Mass. 1841); then quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)). Judge Leval described transformative use this way:

If . . . the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Id. at 1111.

In other words, the Court recognized that the use of preexisting works in a manner that creates new artistic expression through the “transformation” of the earlier work is of a kind that copyright law has an interest in preserving, and so is one to which the fair use defense should be available.¹⁵ Additionally, the transformative quality of a use acts as a sliding scale, giving the court guidance as to what extent other factors must support the finding of the use as fair.¹⁶

Campbell is also significant as the first Supreme Court opinion to deal squarely with parody under the fair use defense.¹⁷ The dispute centered on the hip-hop group 2 Live Crew’s parodic take on Roy Orbison and William Dees’s hit *Oh, Pretty Woman*.¹⁸ In holding unambiguously that 2 Live Crew’s parody was fair use, the Court stated that “parody has an obvious claim to transformative value” and “can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”¹⁹ It concluded that parody, as a category, is eligible for fair use.²⁰

Giving parody a *per se* claim to transformative value begs the question of which works are to be given that designation. On this point, the Court wrote:

For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to

15. *Campbell*, 510 U.S. at 579.

16. *Id.*

17. *Id.*

18. *Id.* at 572–73.

19. *Id.* at 579.

20. This language, like *Campbell*’s shift in emphasis from the fourth to the first fair use factor, presents a move away from an economic rationale for fair use protection—i.e., the unavailability of licensing as an alternative to unauthorized copying—and instead focuses on the social benefit parody provides. This is a break from those who distinguish parody from other uses by the likelihood that the targets of parodies would be unwilling to license their work to prospective lampooners. As pointed out in William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 21–22 (2000), this unwillingness increases transaction costs, which increase with parody, and further may prevent Coasian bargaining between the copyright holder and the prospective parodist. See also Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 72 (1992) (“Only if the parodist is seeking to ridicule the original work is a market transaction infeasible and an involuntary taking therefore justifiable . . .”). *Campbell* did find this aspect of parody relevant under the fourth factor, observing that targets of parody are not likely to license their works to be targeted, which “removes such uses from the very notion of a potential licensing market.” 510 U.S. at 592.

make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.²¹

Restated, satire does not target a particular work, but rather, targets some set of prevailing traits of society, so it could achieve its objectives without borrowing the copyrighted expression of another.²² Because such borrowing is not necessary for a work to be satire, it must be separately justified. In determining whether 2 Live Crew's cover was in fact parody, rather than satire, the Court stated that "[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived."²³ Once the Court detected such a "parodic element," it stated that a further assessment should be made of whether that element "is slight or great" in order to determine whether, under the third factor, the extent of copying is small or extensive in relation.²⁴

In discussing the third fair use factor, which evaluates how much of the borrowed work has been copied, *Campbell* noted that "the extent of permissible copying varies with the purpose and character of the use."²⁵ Looking to the "persuasiveness of a parodist's justification for the particular copying done,"²⁶ the Court adopted the "conjure up" test:

Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.²⁷

21. *Campbell*, 510 U.S. at 580–81 (footnote omitted) (citation omitted).

22. *Id.* at 581 n.15.

23. *Id.* at 582.

24. *Id.* at 582 n.16.

25. *Id.* at 586–87.

26. *Id.* at 586.

27. *Id.* at 588 (citation omitted). The Supreme Court here followed earlier cases that indicated the amount needed to conjure up the original was a floor rather than a ceiling. *See, e.g.*, *Fisher v. Dees*, 794 F.2d 432, 438–39 (9th Cir. 1986); *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) ("A parody is entitled at least to 'conjure up' the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."); *Columbia Pictures Corp. v. Nat'l Broad. Co.*, 137 F. Supp. 348, 354 (S.D. Cal. 1955). This is how the Second Circuit has continued to describe the test. *See Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) ("[T]he law does not require that the secondary artist may take no more than is neces-

Parody is the act of critically aping a particular work, and such mimicry would not be possible if the parody could not reproduce some aspects of its target.²⁸

Under *Campbell*, then, for a parodic work to claim that its unauthorized use of another copyrighted work is a fair use, it must first meet some threshold showing that it does indeed contain a parodic element.²⁹ Once that showing is made, the defendant no longer needs to make a case-specific justification for the need to make use of the borrowed work. Rather, the justification is already provided by virtue of it being parody. The parodist is then permitted to copy enough to conjure up the target work. Beyond this, some justification must be made, taking into consideration whether the extent of use is great or small in relation to the magnitude of the parodic element.³⁰

This Article argues that appropriation art should also be viewed as subject to a tailored application of the fair use defense and that *Campbell*'s approach to parody under the fair use inquiry provides a workable roadmap for that application.³¹ As the next Part explains, appropriation for artistic purposes, like parody, has an "obvious" claim to transformative value. Also, like parody, appropriation art must, by definition, quote an earlier work and so should be entitled to some degree of borrowing. Part IV will explore how this inquiry could be molded to the particular features of appropriative use.

sary. . . . The secondary use 'must be [permitted] to "conjure up" *at least* enough of the original' to fulfill its transformative purpose." (quoting *Campbell*, 510 U.S. at 588). Subsequent circuit opinions sometimes describe the "conjure up" idea differently as a limit. *See, e.g., Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002) ("[T]he parodist *must not take more from the original than is necessary* to conjure it up and thus make clear to the audience that his work is indeed a parody." (emphasis added)); *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997) ("This court has adopted the 'conjure up' test where the parodist is permitted a fair use of a copyrighted work *if it takes no more than is necessary* to 'recall' or 'conjure up' the object of his parody." (emphasis added)).

28. *See Campbell*, 510 U.S. at 588 (citations omitted).

29. *Id.* at 581.

30. *Id.* at 587–89.

31. *See* Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433 (2008), for an argument that the fair use inquiry should be tailored to the various factual contexts in which it arises. *See also* E. Kenly Ames, *supra* note 4, at 1475–76 (arguing that since "art created from existing imagery" is a "form of criticism and comment," it should be protected by copyright under the fair use defense, "modified to take account of the unique constraints and attributes of the visual arts . . .").

III. APPROPRIATIVE USE IN ART HISTORY

Appropriation art takes as its dominant and defining strategy the intentional use of preexisting works.³² Although the moniker may be relatively new, the strategy is not. The history and social benefit of appropriation in the arts are manifest and widespread. Mediums from literature (T.S. Eliot's *The Waste Land* and James Joyce's *Ulysses*) to music (most major twentieth-century American styles from jazz and blues to rock and hip hop) and the visual arts, owe their development and, in some cases, existence to the use of borrowed expression in collage.³³ This is not to say that all unauthorized use is therefore socially beneficial. But, the recognition of the positive effect appropriation has on society applies with special force to the pointed, strategic use of appropriation as the defining element of an artistic practice. Appropriation art is such a practice and one whose influence on the progress of the arts can be traced back to at least the mid-nineteenth century.

A. Appropriation as a Strategy in Art History

Édouard Manet's 1863 painting *Olympia*,³⁴ displayed at the Salon in Paris in 1865, is widely described as among the first and most important "modern" paintings.³⁵ Its modernity stems from its critical posture, which itself stems from its quotation of another work.³⁶ The painting is essentially a reproduction of Titian's 1538 painting *Venus of Urbino*,³⁷ which is itself a reproduction of Giorgione's *Sleeping Venus* of 1508–1510.³⁸ But the inviting, graceful figure of the earlier work is replaced in *Olympia* with the defiant gaze and guarded posture of a Parisian prostitute.

32. The Museum of Modern Art defines appropriation in the visual arts as "the intentional borrowing, copying, and alteration of preexisting images, objects, and ideas." *Glossary of Art Terms*, MoMA LEARNING, https://www.moma.org/learn/_learning/glossary [https://perma.unl.edu/9A5B-6KCT] (last visited Aug. 12, 2020).

33. See, e.g., Kembrew McLeod & Rudolf Kuenzli, *I Collage, Therefore I Am*, in CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW 1, 1 (Kembrew McLeod & Rudolf Kuenzli eds., 2011).

34. See *infra* Appendix.

35. H.H. ARNASON, *HISTORY OF MODERN ART: PAINTING, SCULPTURE, ARCHITECTURE* 26 (rev. & enlarged ed. 1977); ALAN BOWNESS, *MODERN EUROPEAN ART* 15–16 (1977).

36. ARNASON, *supra* note 35, at 26. Reproducing earlier works and recasting them in a modern setting was a favorite tactic of Manet's. Compare Manet's *Le Déjeuner sur l'herbe* (1863), with Marcantonio Raimondi's *The Judgment of Paris* (1520), and Giorgione's *The Pastoral Concert* (1510); also compare Manet's *The Execution of the Emperor Maximilian* (1867), with Francisco Goya's *The Third of May, 1808* (1814).

37. See *infra* Appendix.

38. See *infra* Appendix.

The effect of the painting is to evoke a set of ideas through pointed use of the earlier piece. Titian's *Venus of Urbino* expresses the idea of beauty and grace personified in the form of the female nude—the sensuous *Venus Naturalis*.³⁹ Manet, however, recontextualizes this idea, transforming it into a prevailing notion of art to be held up to the light and examined. One might remark that Manet did not *need* to quote Titian's work specifically. He could have evoked those ideas by use of a generic image of a classical female nude. But, of course, it is the viewer's familiarity with Titian's work that gives *Olympia* conceptual bite, and it is Titian's authoritative reputation that lends the reference authenticity and impact. The viewer is supposed to be shocked by the substitution, and it is the desecration of something the viewer knows specifically that gives the painting its effect.

This practice of pointed borrowing was developed by Marcel Duchamp, most famously in his 1917 work *Fountain*,⁴⁰ which consists solely of a porcelain urinal signed by the artist under the pseudonym R. Mutt. The use of the urinal—a “readymade”—challenges the viewer to explore questions about the relationship between an artist and his work, and the artist's role in society. The urinal—an ostensibly unlovely, masculine, mass-produced object—operates as a bundle of ideas upended by the conspicuous signature (is it a piece of art?), the placement of the urinal on its back (giving it a decidedly feminine aspect), and the presence of such an object in an art gallery (not so unlovely after all?). In particular, *Fountain* emphasizes the transformative effect context can have on a piece. As with *Olympia*, Duchamp's use of readymades depends upon the associations the viewer has with the object. *Fountain* has itself been borrowed as conceptual raw material in Sherrie Levine's *Fountain (After Duchamp: 1)*.⁴¹

Appropriation of forms and images appears too in the Pop Art movement of the mid-twentieth century. Among the most well-known examples is Andy Warhol's repeated use of an image of Marilyn Monroe in *Marilyn Diptych*.⁴² Making ample appropriative use of a film still of Monroe, *Marilyn Diptych* takes the work not to reuse it on its own terms but as the locus of a complicated interrelation of ideas—fame, sex, idolatry, consumerism, the ubiquity of images—presented in a diptych, the familiar format of religious, devotional art. The haunting specter of the repeated, identical faces diminishing with each iteration creates meaning not attributable to the source work. Claes Oldenburg's transformation of the mundane into a “modern Co-

39. KENNETH CLARK, *THE NUDE: A STUDY IN IDEAL FORM* 124–30 (1956).

40. *See infra* Appendix.

41. SAM HUNTER & JOHN JACOBUS, *MODERN ART* 416 (3d ed. 1992); *see infra* Appendix.

42. *See infra* Appendix.

lossus of Rhodes” in *Clothespin*,⁴³ presents yet another tack Pop Art has taken in its appropriative course.⁴⁴

Appropriative use often results from the artist’s desire to comment directly on art history itself, as in *Olympia* and *Fountain (After Duchamp:1)*. A similar use can be seen in Norman Rockwell’s 1961 painting *The Connoisseur*,⁴⁵ which makes use of the telltale style of the famous abstract expressionist Jackson Pollock. More recently, new generations of artists have continued to develop this vein of artistic practice. A notable example is Yasumasa Morimura, who has made a career of substituting figures from well-known pieces with his own visage, perhaps his most famous work being an appropriation of *Olympia* in *Portrait (Futago)*.⁴⁶

What these works share is an artistic stratagem with a well-established pedigree: the borrowing of an earlier work or object as a component—possibly the only component—of the new work.⁴⁷ *Olympia*, which dates back 150 years, and arguably even Titian’s appropriation of Giorgione’s *Sleeping Venus*, which dates back nearly 480 years,⁴⁸ fit within the appropriation art movement as described by the Second Circuit: “This tradition defines its efforts as follows: when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place.”⁴⁹ Like parody, appropriative use, through its method, creates new meaning from old and so “can provide social benefit.”⁵⁰ As a distinct and recognizable

43. See *infra* Appendix.

44. See ROBERT HUGHES, *THE SHOCK OF THE NEW* 359 (1980) (“What could be more ordinary than a clothes-pin?”). It is the viewer’s connection with Oldenburg’s portrayal of everyday objects as ordinary and unremarkable that gives their metamorphosis into a “modern Colossus of Rhodes” artistic efficacy. *Id.* For a discussion of the implication of borrowing objects protected by trademark, such as Andy Warhol’s famous image of the Campbell’s soup can, see John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 113–17 (1988).

45. See *infra* Appendix.

46. See *infra* Appendix. “Futago” is Japanese for “twin.”

47. See generally Darren Hudson Hick, *Appropriation and Transformation*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1155, 1190–91 (2013) (proposing fair use protection to identical copies of preexisting works where the new copy is used to express a different idea than that expressed in the preexisting work, but to deny the newer work copyright protection as original expression).

48. Justice Story may have placed the practice back further yet:

Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.

Emerson v. Davies, 8 F. Cas. 615, 619 (D. Mass. 1845).

49. Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992).

50. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

strain of artistic endeavor that offers the social benefit the I.P. Clause protects, and as one that depends on borrowing for its existence, appropriation too should be viewed as a mode of artistic expression that is inherently transformative and entitled to have the first fair use factor under Section 107 weigh in its favor.

B. The Necessity of Borrowing for Appropriative Use

In *Campbell*, the Supreme Court described the transformative nature of parody, which, “[l]ike less ostensibly humorous forms of criticism, . . . can provide social benefit, by shedding light on an earlier work, and, in the process, creat[e] a new one.”⁵¹ Furthermore, “[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination.”⁵² This, of course, is far from recognizing that parody is per se fair use, or even presumptively fair use.⁵³ What this does recognize, however, is that under the first Section 107 factor, parody, which “has an obvious claim to transformative value,” *must* make some use of the target work in order to exist as a mode of artistic expression.⁵⁴

As with *Campbell*’s treatment of parody, appropriative use should also be given the benefit of being free from the need to justify the act of borrowing. Before explaining this position, an initial clarification: the first factor under Section 107 references both the *purpose* and the *character* of the use.⁵⁵ While parody is thought of, and distinguished from other kinds of work such as satire, by its purpose—that is, whether the artist intends to comment or criticize upon a particular work or something else—appropriation in the arts may be better thought of as a use of a particular character. As illustrated by the examples of works above, appropriation can be deployed to any number of ends: subversion, celebration, investigation, criticism, or play.

What distinguishes these works, rather than a common purpose, is a characteristic method that lays legitimate claim to a need to borrow.⁵⁶ That claim arises from the conceptual efficiency and impact

51. *Id.*

52. *Id.* at 580–81.

53. *Id.* at 581.

54. *Id.* at 579. Of course, “parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the relevant ends of . . . copyright law.” *Id.* at 581.

55. 17 U.S.C. § 107 (2018).

56. It is true that very often appropriation works are described, as *Blanch* described *Niagara*, as satirical. *Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006) (“‘Niagara’ . . . may be better characterized . . . as satire . . .”). Perhaps it could be argued that appropriation art is better regarded as a subset of satire, but, although such a description may often (but not always) be accurate, satire cannot be said to be a defining aspect of appropriation art. Artist Sheppard Fairey’s *Hope* poster of then-presidential candidate Barack Obama may well fall within

achieved by the appropriative use. Rather than merely use the expression of the borrowed work “to get attention or to avoid the drudgery in working up something fresh,”⁵⁷ appropriation art uses the borrowed expression as the language of collective experience and culture which serves as shorthand for a set of complex and interrelated ideas. The reuse, modification, or recontextualization of the borrowed work creates new meaning, representing ideas not expressed in the original work. The ideas evoked by appropriative use come both intrinsically from within the borrowed piece *and* extrinsically from the cultural and critical context in which it is situated. Such extrinsic meaning might include the viewer’s reading of and association with the borrowed work; the social and historical context of the borrowed work; the artist’s overall use of the borrowed work in the piece;⁵⁸ the extent to which the borrowed work may function as a symbol, very often of some prevailing social norm or institution; and the placement of the work into the particular context in which it is displayed.

Thus, appropriative use relies on the viewers’ familiarity with the borrowed work—either their specific knowledge of the work itself or their familiarity with the complex intersection of ideas evoked by the work. *Olympia*, for example, may be said to challenge the Parisian Salon, and it does so by using appropriation in a manner that depends on the viewer’s preexisting knowledge of Titian’s work and its accompanying bundle of associations. The fair-skinned, reposed figure elicits for the viewer ideas of classical beauty, but upon noticing the true identity of the figure, the expressed idea transforms into a hegemony of status and taste.

Duchamp’s *Fountain*, Warhol’s *Marilyn Diptych*, or Claes Oldenburg’s *Clothespin* use familiar forms to invoke the visual *lingua franca* of modern twentieth-century life. In this sense, the borrowed works are a reference for the viewer—forms and aesthetics that are a “fact” of everyday living. This is precisely the sense in which appropriation artist Jeff Koons described his use of a borrowed image in *Blanch v. Koons*. The artist was sued for infringement of an advertisement photograph from *Allure* magazine of a woman’s lower legs and sandaled feet, which he incorporated into a collage titled *Niagara*.⁵⁹ Koons stated:

the ambit of appropriative use as described in this paper, but it would be difficult to describe Fairey’s use of the image in that piece as satirical.

57. *Campbell*, 510 U.S. at 580.

58. As Justice Story put it in *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841): “In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy”

59. *See infra* Appendix.

The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication. Images almost identical to them can be found in almost any glossy magazine, as well as in other media. To me, the legs depicted in the Allure photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular.⁶⁰

Perhaps Koons might have created his own set of photographed legs and feet. To this he responds: “By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to.”⁶¹

To require Koons to accomplish these effects—creating multiple layers of complex ideas, associations, or immediately graspable facts of everyday life in a world replete with images and consumption—without using forms familiar to the viewer as a means of efficiency and impact (as a shorthand that allows the artist to evoke particular concepts in the mind of the viewer), would be like requiring a book reviewer to critique a novel without quoting its text. It could, technically, be attempted, but the result would effectively eviscerate the impact of the new work so as to nullify its contribution to the progress of the arts. Furthermore, the question of how effectively an artist could communicate the idea without appropriation openly invites judges into a quagmire of subjectivity and taste that is the provenance of the artist.⁶² As discussed below, accepting the need for appropriative use shifts the inquiry away from the taste of the judge.

IV. WHAT IS APPROPRIATION ART AND WHAT IS IT ENTITLED TO TAKE? A VIEWER-BASED APPROACH

If copyright law were to consider appropriation art categorically entitled to claim transformative use, and some amount of unjustified borrowing may be attendant to that claim, then at least two inquiries will preoccupy litigants and courts: (1) what art comes within the appropriation category, and (2) how much unjustified borrowing may it claim? In a 2008 law review article, Professor Laura Heymann suggested a viewer-centric approach to the transformativeness inquiry which creates a useful model for providing evidentiary sources to answer both of these questions.⁶³ She suggested an inquiry that hews closer to the meaning of “transformative” laid out in Judge Leval’s

60. *Blanch*, 467 F.3d at 255.

61. *Id.*

62. For a discussion of the pitfalls of judicial bias in making aesthetic judgments, see Liz McKenzie, Comment, *Drawing Lines: Addressing Cognitive Bias in Art Appropriation Cases*, 20 UCLA ENT. L. REV. 83 (2013).

63. Heymann, *supra* note 1

seminal article,⁶⁴ which focuses on the addition of meaning rather than of material.

Heymann points out that when the Court adopted the test in *Campbell*, it spoke in terms of added material, rather than added meaning.⁶⁵ The Court's focus on material alteration seems to be an arbitrary distinction, serving only to give courts some objective indicia of transformativeness. Courts, by their own admission, should not be in the position to make aesthetic judgments about artwork.⁶⁶ This functional limitation, however, is in tension with the courts' role in determining whether a use is transformative. Perhaps it is in recognition of this conflict that courts seek to ease their discomfort by pointing to telltale signs of transformativeness: the artists' intended (or at least stated) purpose; the amount of new material added; the presence of a "message";⁶⁷ and the court's ad hoc determination of whether an alternate method existed.

Professor Heymann addresses these shortcomings of the transformative inquiry by building on the idea in Roland Barthes's influential piece *The Death of the Author*: "[A] text 'is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation,' all centering on the reader, who is 'simply that someone who holds together in a single field all the traces by which the written text is constituted.'"⁶⁸ Although the language of the Copyright Act is tethered to the long-outmoded "ideal of the Romantic author as the source of creative production,"⁶⁹ the transformativeness inquiry need not, and should not, be so limited. Following Barthes's lead, Professor Heymann proposes looking to the viewer, rather than the artist, to determine how much interpretive, rather

64. See Leval, *supra* note 14.

65. *Id.* at 452; see *supra* note 1 and accompanying text.

66. "As Justice Holmes explained, 'it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582–83 (1994) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)).

67. It is particularly unfortunate that an artist's admission that his use does not contain a "message" may be considered a damning statement. See, e.g., *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2013). The jesting, playful nature of postmodern art, in particular, is antithetical to a posited "message," and it seems more than a little old-fashioned, even atavistic, for courts to continue to seek one out as evidence of new expression. Moreover, this puts artists in the conflicted position of protecting their liability in a manner at odds with their artistic practice.

68. Heymann, *supra* note 1, at 446 (quoting Roland Barthes, *The Death of the Author*, in *IMAGE, MUSIC, TEXT* 142 (Stephen Heath trans., 1977)).

69. *Id.* at 453.

than purposive, distance a use has achieved.⁷⁰ Furthermore, this approach recognizes that all uses are transformative to one extent or another.⁷¹ Thus, in gauging the interpretive distance achieved, the court should not be asking whether the distance is sufficient for a finding of transformativeness. Rather, it should regard any interpretive shift as necessarily transformative and apply that quantum to the sliding scale of import lent to other factors such as commercial nature, amount borrowed, and market impact.⁷²

Just who are these viewers to be consulted in making this finding? Heymann refers to them as “discursive communities” surrounding a work.⁷³ In particular, she points to the existence of a separate discursive community as an indication of the likelihood the work has enough interpretive distance—is transformative “enough”—to weigh in favor of fair use under the first factor.⁷⁴ This community would be those who discuss the work or the artist’s oeuvre.⁷⁵ Sources of evidence under this approach would include: critical reception of the work; discussion of the work by members of the surrounding artistic community; expert testimony; statements by the author not motivated by litigation; and even the courts themselves when stepping in as a “reasonable reader” when other forms of evidence are not available.⁷⁶

A. Which Works May Claim Appropriative Fair Use?

The threshold question for a tailored application of fair use to appropriation art is which works may be afforded the benefit of being deemed appropriation art by the courts? In the context of parody, this question has turned on a reasonableness standard.⁷⁷ The Second Circuit, in assessing whether a piece of appropriation art was sufficiently transformative to be entitled to the fair use defense, adopted a standard similarly based on a reasonable observer.⁷⁸ Although reference to a reasonable observer may direct the judge to disregard her per-

70. *Id.* at 453–57. For debate on this “anti-intentionalist” shift away from the stated intentions of the artist and toward the audience, in addition to Professor Heymann’s article, *supra* note 1, see Adler, *supra* note 1, at 584–616; Monika Isia Jasiewicz, Note, “A Dangerous Undertaking”: *The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases*, 26 *YALE J.L. & HUMAN.* 143 (2014); Ben Picozzi, Note, *What’s Wrong with Intentionalism? Transformative Use, Copyright Law, and Authorship*, 126 *YALE L.J.* 1408 (2017).

71. Heymann, *supra* note 1, at 455.

72. *Id.* at 455–56.

73. *Id.* at 455–57.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) (“The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.”).

78. *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013).

sonal taste, the question of just how such an observer may perceive a work seems little more than guesswork. Artists may find it in their interest to label their works as appropriation art, even when it would not be an accurate description; courts must be wary of after-the-fact explanations of purpose artists give to help their litigation prospects.

Two elements of Professor Heymann's approach—the shift toward the viewer in determining transformation in meaning and the recognition of discursive communities as a source of viewer interpretation—provide a useful and effective basis for the determination of whether a particular use should fall into the category of “appropriation art.”⁷⁹

This shift from the artist to the viewer in determining interpretive distance comports well with the tradition of appropriative use, which emphatically recognizes the centrality of the viewer—the “interpreter” whose expectations may be thwarted or whose associations may be the artist's conceptual medium. It also gives the courts an evidentiary source less susceptible to bias, as viewers would not have an interest in the litigation. Furthermore, because it is the viewers' interpretation that appropriation artists manipulate, those viewers are a natural source for determining whether the artist was engaged in an appropriative use or was merely too lazy to come up with their own expression. Finally, this allows the court to wash its hands of the fuzzy business of making this determination for itself, setting it to the familiar task of weighing evidence, including expert testimony.

By looking to discursive communities, the courts can search for more reliable indicia than, for example, the artist's stated purpose. Instead courts can look to whether a work is considered by viewers to be appropriation art. Such indicia might include whether the work is surrounded by critical commentary speaking of the art as appropriative; whether the artist herself is generally regarded by the discursive community as an appropriation artist; and whether the artist places her work—both the work in question and other similar works by the artist—in galleries or other locations consistent with it being appropriation art i.e., whether the “gatekeepers” of the discursive community behave toward the work in a manner consistent with its claim to being appropriation art. If the discursive community supports a finding that the work is appropriation art, this means that the borrowing work should be transformative as a matter of law.

By granting that all appropriation art is transformative per se and has a claim to some use of its appropriated work, the courts would shift their focus from defendants' after-the-fact and interested insistence on the transformative virtues of their work to the legitimacy of the defendants' claims that they make appropriation art. The benefit of this shift is that while the former leaves judges potentially subject

79. Heymann, *supra* note 1, at 466.

to their own perception of indicia of transformativeness and the self-interested statements of the artist, the latter approach leaves open the possibility of a greater array of objective evidentiary sources. In determining whether a piece of art is appropriation art, the court can and should look to the community of artists, viewers, and critics surrounding both the particular work and the artist's overall career. While their views may not be any less subjective than the judge's, the risk of personal idiosyncrasies skewing the result is spread over a larger number of uninterested observers who may have greater familiarity with the works at issue.

B. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

Just as parody is granted a certain amount of justification-free borrowing because of its need to conjure up the target work, use of an appropriative character also must evoke enough of the borrowed piece to achieve its effect. However, because appropriative use is more correctly described as a characteristic use, rather than purposive, the ad hoc determination in each case ought to take account of the particular effect the appropriative use achieves. That is, the simple "conjure up" formula for parody does not translate well to the myriad uses toward which appropriative use may be put. Here again, Professor Heymann's turn toward the perspective of the audience provides a useful starting point. Appropriative use relies on the viewer's response to the referenced work, and at least enough of the borrowed work must be used to permit this process to occur. This Article suggests a three-tier approach based on the connection between the viewer and the appropriated work, where each tier represents an appropriative use for which a greater or lesser extent of borrowing is presumptively needed.

The first tier would allow for the greatest extent of borrowing where the target work is being used because viewers recognize the *work itself*. For example, Morimura's works are exclusively verbatim reproductions of famous pieces of art with pointed substitutions. *Portrait (Futago)* achieves its expression by the substitution of Morimura for the female figure in *Olympia*, the cartoon-cat cutout, the male servant, the deliberative grip by the right hand, the golden-crane-strewn coverlet, and the use of photography.⁸⁰ Similarly, Levine's *Fountain (After Duchamp)* makes use of Duchamp's *Fountain* with the substitution of the porcelain finish with bronze, reminiscent of Duchamp's contemporary Constantin Brâncuși, and the removal of Duchamp's brazen, pseudonymous signature.⁸¹ Because each alteration to the original in these pieces is considered intentional, the use of anything

80. See *infra* Appendix.

81. See *infra* Appendix.

less than the entire piece would impede the appropriative use. Viewers may take the absence of any part of the appropriated work as meaningful. This use may still be limited to some extent by the risk of market substitution by the appropriating work, but in this instance the argument for appropriating the entire work waxes to its strongest position in relation to that risk.

The second tier would encompass works that borrow not for the viewer's familiarity with the work itself but for some potent, specific cultural icon or symbol with which the viewer is familiar. For example, the viewer of *Marilyn Diptych* may not be specifically aware of the exact film still Warhol appropriated from, but the image is of a kind—the aforementioned “fact” of life in contemporary America—that evokes associations the artist may want to explore.⁸² Koons's use of the sandaled feet in *Niagara* is similarly used to evoke a particular association of prosaic consumerism.⁸³ Here, where the use of the earlier work draws less on the viewer's particular familiarity with the specific work and more on the associations it evokes, the argument for use of the entire piece is weaker. The artist ought to be able to borrow at least enough expression that the viewer can recognize the cultural symbol, but, as with parody, “[o]nce enough has been taken to assure identification,”⁸⁴ the extent of further borrowing allowed may be more greatly constrained by countervailing factors.

The third tier would encompass uses that do not rely on the viewer's recognition of the specific work or of a cultural icon or symbol and its related associations. An example of such a third-tier use is Richard Prince's work, *Graduation*, discussed in more detail in Part VI.⁸⁵ The use of the borrowed work in *Graduation* does not appear to center on the viewer's knowledge of the particular piece or even the viewer's specific associations with Rastafarianism.⁸⁶ Prince's own testimony refers to a desire to make pieces that are “fantastic,” “absolutely hip,” and “post-apocalyptic.”⁸⁷ In this situation, the artist may simply be using the borrowed work to evoke a nonspecific, broad quality—a mood or an air. Here, the work should not be presumptively

82. See *infra* Appendix.

83. When discussing his appropriation of a postcard of puppies for a sculpture, Koons “viewed the picture as part of mass culture—‘resting in the collective sub-consciousness of people regardless of whether the card had actually ever been seen by such people.’” *Rogers v. Koons*, 960 F.2d 301, 305 (2d Cir. 1992); see *infra* Appendix.

84. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

85. See *infra* Appendix.

86. This could be contested. Prince himself described the image as part of an effort “to create beautiful artworks which related to musical themes and to a post-apocalyptic screenplay he was writing which featured a reggae band.” *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

87. *Cariou*, 714 F.3d at 707.

allowed to use a certain amount of an earlier work. Instead, the entire extent of borrowing should turn on a typical analysis: the risk of market substitution, commerciality, and other factors considered in relation to the degree to which the new work transforms the old.⁸⁸ This is because the conceptual efficiency of appropriation seems absent in this circumstance. Titian's *Venus of Urbino* or Marilyn Monroe's visage conjure up a universe of interrelated concepts grounded in history and society and have no comparably impactful substitutes. Prince's use of *Yes Rasta* as a sort of set design, by contrast, lacks this constraint; it is not difficult to imagine practical alternatives open to the artist, such as creating a similar effect himself or choosing from an array of similar images to license. Here, the risk that the artist "avoided the drudgery in working up something fresh" appears most salient and so the limiting effect of other factors should loom largest.

V. A SUMMARY OF APPROPRIATIVE FAIR USE AND ITS LIMITATION BY THE SECTION 107 FACTORS

The specialized appropriative fair use inquiry as set forth in this Article would begin with a threshold inquiry into whether it ought to be applied to the work in question. The defendant would, at the outset, have the burden of presenting evidence that the work is appropriation art. Rather than use *Campbell's* reasonableness test for parody or *Cariou's* reasonable observer test for appropriative transformation,⁸⁹ the defendant would instead be required to make an evidentiary showing that the work is considered appropriation art by discursive communities. If the art in question, or the artist herself, does not have a surrounding discursive community, expert testimony may be used to plug the gap. If the defendant is successful in meeting this threshold showing, the work will be considered transformative.

Additionally, the work may be entitled to a certain amount of use of the borrowed work as a floor.⁹⁰ In the case of appropriation art that presents an earlier work which the viewer is presumed to know, this entitlement extends to the entire work. Where instead the work appropriates a cultural symbol or icon that generates associated ideas in the viewer, the "conjure up" analog is most apt. More use beyond that necessary to conjure up the symbol or icon must be justified under the specific facts of the case. Finally, when the work appropriates in such a way as to supply an effect on the viewer that is vague and not tied to the earlier work itself or an identifiable symbol or icon known to the

88. This does not mean that Prince loses, but simply that his required showing for the fair use defense is greater.

89. See *supra* notes 66–67 and accompanying text.

90. See *supra* note 27 (discussing whether the conjure-up test is a floor or a ceiling).

viewer, the artist must justify any extent of borrowing as they would in a normal third-factor fair use inquiry.

Beyond these specialized aspects of an appropriative fair use inquiry, the court will of course have to apply the other statutory factors under Section 107. Here too, the courts' treatment of parody under the other factors can provide guidance on how those factors would apply to appropriation art. That is, appropriative use should "work its way through the relevant factors, and be judged case by case, in light of the ends of copyright law."⁹¹

A. The Purpose and Character of the Use

As already described, appropriation art should be seen, like parody, as eligible for fair use protection because of its transformative nature and its benefit to society. Additionally, it should be seen as providing its own justification for the act of borrowing. This is not to say, however, that all appropriative uses are equally transformative, and, under the viewer-based approach advocated by Professor Heymann, the court should still engage in some analysis as to the interpretive distance achieved by the use. The greater the distance, under *Campbell*, the less heavily other considerations should weigh.

Courts have treated the commercial nature of a use as weighing against a finding of fairness under the first factor. *Campbell* eliminated this as a categorical presumption, noting that "[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107."⁹² This argument applies equally to appropriation art. Artists must sell their work to engage in their profession, and so a presumption against fair use because the work is being sold would essentially eliminate all appropriation art from eligibility for fair use. Nonetheless, the extent to which the work is created purely as a commercial venture, as opposed to furthering the arts through exhibition and participation in discursive communities, may weigh against a finding of appropriative fair use.

B. The Nature of the Copyrighted Work

This factor has been given force by the courts through recognition of creative works thought to be "closer to the core of intended copyright protection," the borrowing of which is less likely to be found a fair use.⁹³ *Campbell* noted, however, that the fact that a copied work is "within the core of copyright's protective purposes" is not "ever likely to help much in separating the fair use sheep from the infring-

91. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

92. *Id.* at 584.

93. *Id.* at 586.

ing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”⁹⁴

As illustrated by the pieces described above, appropriation art rarely, if ever, makes use of factual works to achieve its effects. The ideas and associations evoked by appropriative use are intimately connected to the cultural artifacts created and perpetuated by the creative arts. The images that mediate the conception and propagation of ideas in the collective consciousness—the field in which appropriation art primarily operates—are nearly exclusively created and known i.e., published. This factor, therefore, would be of little use in the typical case of appropriative fair use.

C. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work

The effect of the use on the market of the borrowed work has often, though not uniformly, been described as the most important of the Section 107 factors.⁹⁵ The relevance of this factor lies in the following generally accepted distinction:

[C]opying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use.⁹⁶

This general distinction ties in with the third factor’s treatment of parody and explains why parody is allowed at least enough borrowing to conjure up the target work:

The distinction is implicit in the proposition . . . that the parodist must not take more from the original than is necessary to conjure it up and thus make clear to the audience that his work is indeed a parody. If he takes much more, he may begin to attract the audience *away* from the work parodied . . . by providing a substitute for it.⁹⁷

Thus, the risk of market substitution takes on greater import once the amount of expression the parody needs to make use of has been taken.

Unlike parody, however, the amount necessary to borrow for an appropriative use must be seen as case-specific for the particular purpose to which that use is put—here it should be viewed in the three-tier framework discussed above. As with Morimura’s work,⁹⁸ sometimes the appropriative use must borrow the entire work. While this would weigh against a finding of fair use by increasing the risk of substitution, Morimura’s claim to a need to borrow the entire work should take primacy. In the second tier, the risk of substitution should not

94. *Id.*

95. *See, e.g.*, *Harper & Row Publishers, Inc. v. Nat’l Enters.*, 471 U.S. 539, 566 (1985) (“This last factor is undoubtedly the single most important element of fair use.”).

96. *Ty, Inc. v. Publ’ns Int’l. Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) (citation omitted).

97. *Id.* at 518 (emphasis added).

98. *See supra* text accompanying notes 80–81.

begin to weigh against a fair use finding until enough has been taken for the viewer to recognize the cultural icon or symbol, and, even then, the transformativeness of the work may counteract such a risk. With works that borrow for nonspecific associations, such as *Graduation*, the extent of borrowing must be justified and weighed against that risk as a whole.

In addition, the nature of the art market must be taken into account. The value of art to many collectors is largely the result of the artist who created it. It defies belief to say that *Portrait (Futago)* would ever be seen by viewers or purchasers as a substitute for *Olympia*.⁹⁹ The market for each of these works is filled with purchasers—art collectors—who know what they are looking at. The differences between the two works are enormous in terms of the paintings themselves, the “period” they represent, and the critiques they make. The particular market at issue would need to be evaluated in each case.

VI. THE FAIR USE DOCTRINE, PARODY, AND APPROPRIATION ART

The appropriative fair use framework set forth in this Article would give courts some guidance in applying the fair use defense to appropriation art while limiting their need to wander into the realm of aesthetic judgments. As the series of cases described below illustrates, this is an improvement over the current state of fair use law.

A. *Rogers v. Koons*

The first set of cases to apply the fair use inquiry to appropriation art was a trilogy of pre-*Campbell* copyright infringement suits leveled against sculptor Jeff Koons in the early 1990s following an exhibition of his works.¹⁰⁰ Titled “The Banality Show,” the exhibit featured caricatured sculptures of figures, some exact copies of copyrighted works.¹⁰¹ The most notable of the three cases, *Rogers v. Koons*, arose from Koons’s sculpture titled *String of Puppies*, a reproduction of Rogers’s photograph of a smiling, seated couple embracing a gaggle of

99. See *infra* Appendix.

100. See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). The U.S. District Court for the Southern District of New York followed the Second Circuit’s lead in two subsequent decisions. *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993), centered on Koons’s reproduction, in sculptural form, of Odie the dog from the Garfield comic strip. The issue of a sculptural reproduction of a copyrighted image—this time a depiction of some children pushing a large hog—arose again in *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).

101. *Rogers*, 960 F.2d at 304–05.

German Shepard puppies.¹⁰² The Second Circuit affirmed the trial court's finding of liability against Koons.¹⁰³

Rogers highlights the need for a specialized category of fair use for appropriation apart from parody. Koons did make an effort to explain the vein of artistic practice he was a part of. As the court explained:

We must analyze therefore whether “String of Puppies” is properly considered a comment on or criticism of the photograph “Puppies.” Koons argues that his sculpture is a satire or parody of society at large. He insists that “String of Puppies” is a fair social criticism and asserts to support that proposition that he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it. These themes, Koons states, draw upon the artistic movements of Cubism and Dadaism, with particular influence attributed to Marcel Duchamp, who in 1913 became the first to incorporate manufactured objects (readymades) into a work of art, directly influencing Koons’ work and the work of other contemporary American artists. We accept this definition of the objective of this group of American artists.¹⁰⁴

The court, unsurprisingly, found this description of Koons’s art as outside the scope of parody.¹⁰⁵

It observed that “the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.”¹⁰⁶ It concluded that “[i]f an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer’s claim to a higher or different artistic use—without insuring public awareness of the original work—there would be no practicable boundary to the fair use defense.”¹⁰⁷ Parody, by contrast, makes “the audience . . . aware that underlying the parody there is an original and separate expression.”¹⁰⁸ Finding it “difficult to discern any parody of the photograph ‘Puppies’ itself,”¹⁰⁹ the court denied Koons the “more extensive use of the copied work [which] is ordinarily allowed” in parody.¹¹⁰

Rogers demonstrates that the categories of parody and satire are poor substitutes for appropriation as an artistic stratagem. Its justification for use lies not in the need to conjure up the borrowed work to comment upon it but to use the borrowed works as a conceptual medium, a stand-in for a locus of ideas. Neither is appropriation, by defi-

102. *Id.* at 305; *see infra* Appendix.

103. *Rogers*, 960 F.2d at 314.

104. *Id.* at 309.

105. *Id.* at 310.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

dition, a satirical critique of society at large; it can be put to myriad purposes. What does limit this category is not its purpose but its status as appropriation art. This is a subset of creative expression certainly narrower than the boundless expanse of fair use claimants *Rogers* envisioned. In particular, the use of discursive communities to limit appropriative fair use to appropriation artists should go some way in alleviating that concern.

Finally, the concern that the use should make the audience aware of the existence of an underlying expression is addressed by the three-tiered approach. The top two tiers focus on appropriative uses that make use of the viewer's *preexisting* familiarity with the borrowed expression. The third tier, in which the viewer's familiarity is not assumed, deprives the appropriator of any favorable presumption under the third fair use factor.

B. *Blanch v. Koons*

Apparently unthwarted, Koons was back in the courtroom defending his unauthorized use of a copyrighted photograph in *Blanch v. Koons*.¹¹¹ Koons used a photograph of a woman's sandaled feet from a magazine advertisement in a collage titled *Niagara*.¹¹² Being post-*Campbell*, the Second Circuit found there was enough aesthetic alteration to the borrowed photograph for *Niagara* to be transformative.¹¹³ It based this finding on Koons's professed purpose to use the photograph "as fodder for his commentary on the social and aesthetic consequences of mass media."¹¹⁴ This purpose was "sharply different from Blanch's goals in creating [the photograph]" and thus transformative.¹¹⁵ The court also found the use was "*substantially* transformative," minimizing the relevance of the work's commercial nature.¹¹⁶ Because the court regarded Koons's use as satirical (as opposed to parody), it sought out an independent justification under *Campbell*—what it called a "genuine creative rationale"—for *Niagara's* appropriative use.¹¹⁷ It found justification in Koons's own description of his need to use the photograph: that it is "typical of a certain style of mass communication" and it conveys that style with "authenticity or veracity."¹¹⁸ This time Koons's fair use defense succeeded.¹¹⁹

111. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

112. *See infra* Appendix.

113. *Blanch*, 467 F.3d at 251–53.

114. *Id.* at 253.

115. *Id.* at 252.

116. *Id.* at 254 (emphasis added) (internal quotation marks omitted) (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 478 (2d Cir. 2004)).

117. *Id.* at 255.

118. *Id.*

119. *Id.* at 259.

In considering Koons's justification for borrowing in *Blanch*, the court was careful to state that "[i]t is not . . . our job to judge the merits of 'Niagara,' or of Koons's approach to art," and it eschewed reliance "on our own poorly honed artistic sensibilities."¹²⁰ Nevertheless, the court noted that its exclusive reliance on Koons's own (and by this point well-trained) testimony "ease[d] our analysis in this case."¹²¹ It described Koons's "clear conception of his reasons for using 'Silk Sandals,' and his ability to articulate those reasons."¹²² One wonders whether the court would have navigated its evaluation of Koons's justification in the same way in a case where that justification was contested. Indeed, when reading the courts' tone in *Rogers* and *Blanch*, one gets the distinct impression that the analysis of the artist's justification for borrowing turns as much on its receptiveness to Koons's methodology as it does on the artist's testimony. Courts would be better served, as suggested here, by focusing more on weighing evidence of viewer impressions and less on their own determinations of artistic justifications.

This concern is underscored by the *Blanch* court's fixation, taken from *Campbell*, on Koons's "purpose" or "objective."¹²³ This is no doubt how *Campbell* and Justice Story have described the kind of transformative expression that entitles new work to copyright protection even when making use of another work. But the ultimate goal of copyright is to protect expression and transformations in meaning, or as articulated by Judge Leval, "new insights or understandings."¹²⁴ As discussed earlier,¹²⁵ the notion of message or concrete objectives is one rejected by many contemporary artists. Nothing in Section 107 or fair use common law mandates a focus on purpose or objective over the simple question of whether there is a distinct, new, non-derivative expression. Again, a focus on audience perception and interpretive distance could shed more light on this inquiry, as could a shift to analyzing the work's character as appropriation art.

C. *Cariou v. Prince*

These difficulties in applying a normal fair use analysis to appropriation art—an inevitable reliance on the court's own aesthetic judgment and an ill-fitting focus on concepts rejected by some

120. *Id.* at 255.

121. *Id.* at 255 n.6.

122. *Id.* at 255 n.5.

123. *Id.* at 252 ("[Koons's] purposes in using Blanch's image are sharply different from Blanch's goal in creating it."); *id.* at 253 (evaluating Koons's "stated objective" and "distinct creative or communicative objectives").

124. *See supra* note 14 and accompanying text.

125. *See supra* note 1 and accompanying text.

appropriation artists—are apparent in *Cariou v. Prince*.¹²⁶ In *Cariou*, noted appropriation artist Richard Prince made use of a number of photographs by Patrick Cariou in a series of collages.¹²⁷ Twenty-five of Prince's pieces, including *James Brown Disco Ball*, used only small portions—the heads or bodies of figures—from Cariou's *Yes Rasta* photograph series.¹²⁸ A few pieces, such as *Graduation*, however, borrowed entire works.¹²⁹ The district court ruled the works infringed on Cariou's copyrights.¹³⁰ The Second Circuit reversed this ruling, holding that the twenty-five collaged pieces were entitled to fair use protection as a matter of law, and remanded the case for consideration of the remaining five pieces that borrowed entire works.¹³¹

The case's progression from the lower court to the Second Circuit shows the sort of push and pull of aesthetic judgments by courts that this Article's suggested approach is meant to avoid. Whereas the district court—which found Prince's work was not transformative—concluded Prince's "purpose in using Cariou's Rastafarian portraits was the same as Cariou's original purpose in taking them,"¹³² the Second Circuit found sufficient aesthetic differences to conclude the twenty-five collaged pieces were transformative as a matter of law:

These twenty-five of Prince's artworks manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative. Cariou's black-and-white photographs were printed in a 9 1/2" x 12" book. Prince has created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.¹³³

Whatever insights such ad hoc critiques of artwork provide, they are a capricious basis for a legal standard.¹³⁴

The Second Circuit did attempt to shift away from an intentionalist approach in stating: "What is critical is how the work in question appears to the reasonable observer, not simply what an artist might

126. *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 571 U.S. 1018 (2013).

127. *Id.* at 707.

128. *Id.* at 700; *see infra* Appendix.

129. *Cariou*, 714 F.3d at 701; *see infra* Appendix.

130. *Cariou v. Prince*, 784 F. Supp. 2d 337, 353–54 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2013).

131. *Cariou*, 714 F.3d at 712.

132. *Cariou*, 784 F. Supp. 2d at 349.

133. *Cariou*, 714 F.3d at 706.

134. *See id.* at 713 (Wallace, J., dissenting) (criticizing majority's view that "all the Court needs to do here to determine transformativeness is view the original work and the secondary work and, apparently, employ its own artistic judgment").

say about a particular piece or body of work.”¹³⁵ Also positive was the court’s move away from the misguided insistence that appropriative use must be pigeonholed into the “commentary” requirement of parody or satire: “Prince’s work could be transformative even without commenting on Cariou’s work or on culture, and even without Prince’s stated intention to do so.”¹³⁶

Where the court fell short, however, was (1) in using its own judgment as to what a “reasonable” observer of art might perceive, and (2) in remaining bound to aesthetic difference as a criterion of transformativeness. This, incidentally, is the same approach taken in a more recent case involving, once again, Prince’s appropriation of an image of a Rastafarian.¹³⁷ On Prince’s motion to dismiss, the court found:

Viewing Graham’s *Rastafarian Smoking a Joint* and Prince’s *Untitled* side-by-side, it is evident that Prince’s work does *not* belong to a class of secondary works that are so aesthetically different from the originals that they can pass the Second Circuit’s “reasonable viewer” test as a matter of law. *Untitled* is certainly no more transformative than the five works in *Cariou* that the Court of Appeals remanded to the district court. The Court of Appeals recognized that the moods and expressions evoked by those five remanded artworks did differ from those of Cariou’s original work, but nonetheless concluded that those five works were simply too “similar in key aesthetic ways” to the originals to be transformative as a matter of law.¹³⁸

Rogers, Blanch, and *Cariou* raise concerns for advocates of appropriation artists. First, the Supreme Court’s adoption of the transformative fair use test emphasizes transformation by aesthetic alteration or addition of material and deemphasizes the transformative effect of context.¹³⁹ Context is an essential component of the appropriative strategy as used by artists.¹⁴⁰ Consider Sherry Levine’s series, *After Walker Evans*, in which she did no more than “photograph[] reproduc-

135. *Id.* at 707 (majority opinion).

136. *Id.*

137. *Graham v. Prince*, 265 F. Supp. 3d 366 (S.D.N.Y. 2017); *see infra* Appendix.

138. *Graham*, 265 F. Supp. 3d at 380–81 (citation omitted) (quoting *Cariou*, 714 F.3d at 711).

139. Where Judge Leval asks whether the new work “adds value,” Leval, *supra* note 14, at 1111, *Campbell* asks whether it “adds something new,” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Although this may be a slight distinction, it does seem to shift the emphasis toward material alteration. *See* Heymann, *supra* note 1, at 452 (“This language represents a subtle shift, to be sure, but one that—at least on its face—seems to encourage courts to focus on whether the second artist had added material to the first work to the exclusion of consideration of whether the artist has recontextualized the copyrighted work.”).

140. *See supra* section II.A. How transformative such a shift in context may appear to *Cariou*’s reasonable observer is not clear, but to the extent the reasonable observer is in fact the judge, there is further cause for concern that recontextualization as an artistic strategy may be stifled.

tions of Depression-era photographs by Walker Evans.”¹⁴¹ That series became a “landmark of postmodernism, both praised and attacked as a feminist hijacking of patriarchal authority, a critique of the commodification of art, and an elegy on the death of modernism.”¹⁴² How could a focus on aesthetic difference possibly account for an important work such as this? The little guidance under *Campbell* on how the court can ascertain transformation in expression or meaning leaves the court to go off little more than its own judgment, as seen in *Blanch* and *Cariou*.

Second, the appropriation artist not engaged in parody is burdened with the need to justify the act of borrowing, which raises at least two concerns. First, the court must rely to some degree on the artist’s own self-interested description of the purpose of their work, often by deposition after the litigation has already begun. Second, appropriation as an artistic strategy has a claim to the need for unauthorized use and for the need to be preserved as a socially beneficial artistic practice. Like parody, it should be freed, when appropriate, from the requirement of providing a separate necessity-of-use justification.

The appropriative fair use approach proposed by this Article makes two shifts that can arguably give courts a flexible standard they can adapt to each case while freeing them from assessing whether the defendant has added “enough meaning.” First, rather than the question of whether a piece of appropriative art adds enough material or alters the meaning enough to be transformative, the courts need only assess whether—according to critics, galleries, and other discursive communities—the piece is appropriation art. This not only has the benefit of being a standard with objective evidentiary sources, but it also recognizes that alteration in meaning may involve little or no addition of material. Second, the shift to a tiered approach—based on the viewer’s familiarity with the earlier work or its associations—in evaluating the third factor gives some objective criteria and ascertainable landmarks for the court to use, a manner of evaluation more familiar to judges than art criticism.

VII. APPLICATION OF THE APPROPRIATIVE FAIR USE DEFENSE

Richard Prince’s work provides a basis for hypothetical application of this proposed framework. Prince’s oeuvre runs the gamut of appropriative purposes. Comparing *Graduation* to his *Untitled (de Kooning)*,¹⁴³ *Untitled (Cowboy)*,¹⁴⁴ and *Washington Nurse*¹⁴⁵ pieces,

141. See *After Walker Evans: 4*, THE MET, <https://www.metmuseum.org/art/collection/267214> [https://perma.unl.edu/6VXB-YUNG] (last visited Aug. 5, 2020).

142. *Id.*

143. See *infra* Appendix.

144. See *infra* Appendix.

highlights the suggested framework's ability to be tailored to various situations while minimizing subjective inquiry. All four pieces would be eligible to claim a right to appropriative fair use given Richard Prince's indisputable and long-established critical reception as an appropriation artist.

Untitled (de Kooning) and *Untitled (Cowboy)* have the strongest claims to appropriative fair use. The de Kooning pieces are examples of works that would fall in the first tier. They are comprised of works by Willem de Kooning over which Prince has either drawn or pasted additional elements such as torsos or legs. Works such as these are meant to "embrace and critique a quintessentially American sensibility" as works of both "homage and desecration."¹⁴⁶ The piece relies on the viewer's recognition of de Kooning's famous figures, and the extent of Prince's use appears tailored to this recognition. The risk of market substitution might be present here—both works appeal to the same audiences and compete for space in the same kinds of galleries. However, Prince's claim to the amount of use needed is at its strongest here.

Untitled (Cowboy) typifies second-tier use. It appropriates a potent and clearly recognizable figure on the order of Marilyn Monroe—the Marlboro Man—and so his borrowing is justified to the extent necessary to achieve that cultural shorthand for an American notion of masculinity. Again, the amount appropriated seems proportional to this purpose. The viewer needs to see the iconic Marlboro Man to recognize the cultural reference, and that figure is often depicted as surrounded by landscape, as is Prince's figure. The risk of substitution for cigarette advertisements—that cigarette advertisement purchasers would purchase Prince's work instead or that Marlboro is likely to exploit the derivative market of its advertisements being displayed as works of fine art—seems more than a stretch.

Washington Nurse presents a closer case, lying somewhere near the boundary between the second and third tier. There is no recognizable work—most viewers are probably not familiar with the campy 1967 novel—and no specific cultural icon, other than the general type of a nurse. The pulp-fiction figure of the nurse does, however, evoke a set of viewer associations—a presentation of femininity and intrigue familiar to most. The extent of borrowing is not substantial, much of the original cover is painted over and obscured. There may be a de-

145. See *infra* Appendix.

146. See Evelyne Politanoff, *Richard Prince's de Kooning Paintings at Gagosian Gallery Paris*, DAILY BEAST (Mar. 28, 2011), <http://www.thedailybeast.com/articles/2011/03/28/richard-princes-de-kooning-paintings-at-gagosian-gallery-paris.html> [<https://perma.unl.edu/V7EU-V35D>]; *Richard Prince: Spiritual America*, GUGGENHEIM (June 4, 2007), <http://www.guggenheim.org/teaching-materials/richard-prince-spiritual-america>.

mand for this kind of mid-twentieth century paperback artwork, and this would weigh against fair use to the extent this demand may be exploited in fine art galleries. The claim to the use is weaker here than in the two examples above, but it seems likely that the application of other factors would militate for a finding of fair use.

In *Graduation* and *James Brown Disco Ball*, however, the case for appropriative use is least compelling. Cariou's photographs are likely not recognized by the viewer as specific, known works. Nor are the figures in the work recognizable and potent cultural symbols. Thus, while Prince may have a justification for use by virtue of his appropriative stratagem, the other factors are at their most limiting under this tier. Still, *James Brown Disco Ball* took relatively little of Cariou's work, and that which was taken was substantially transformed through over painting and juxtaposition with other bits of collage. Because of the degree of change, the interpretive distance between the two, as judged by discursive communities, would likely be large and the risk of substitution minimal. Cariou's photographs center on Rastafarians in classical poses surrounded by their environs a la Edward Curtis. Prince's *James Brown Disco Ball* bears practically no resemblance to this sort of composition and so evidence of a risk for substitution seems small.

Graduation appropriated the borrowed work, with the thick layers of jungle in the background and the long dreadlocks of the figure, to create association in furtherance of Prince's purposed moods and themes. Again the other factors loom larger. Here, the entire piece is appropriated and the associations Prince achieves may not justify the extent of borrowing. Perhaps it could be argued that the amount of jungle-strewn space surrounding the figure in Cariou's work was necessary to appropriate in full to achieve the desired mood, but the minimally-altered nature of the borrowing and the lack contextual shift weighs against this argument. This indicates that perhaps the interpretive distance achieved by the appropriation in this piece would be small, but viewers of the entire show might view the context of its exhibition as substantially transformative. Perhaps most condemning, the risk of substitution is great here both because the appropriated work is one that is also displayed in galleries and because so much of it is borrowed in the new work. Specifically, Prince's work may usurp the derivative market of Cariou's exhibition in fine art galleries.

VIII. CONCLUSION

The fair use inquiry has expanded in recent decades, and some may view its current breadth as too great. It could be that adoption of the transformative use test has given courts too much license, or that this has been a way of pushing back against the expansion of copyright enforcement and the extension of the copyright period. Irrespec-

tive of these trends, certain types of uses must be viewed as vital to the progress of the arts and as deserving of special consideration. Some opinions and commentators speak of appropriation in the arts as a recent, postmodern sleight-of-hand that is little more than piracy. But the fact is that it has a centrality and importance to the progress of the arts every bit as legitimate as criticism, education, parody, satire, and other uses thought to be within the ambit of fair use eligibility.

In recognizing this, the courts could both preserve appropriation art and eliminate their indulgence in aesthetic judgment by recognizing appropriation art's categorical claim to transformativeness and the need for some use of earlier works. By shifting the inquiry to whether a piece of art is appropriation art, the court could rely on a viewer-oriented approach, putting it in more familiar territory. Furthermore, by recognizing three tiers of appropriative purpose in appropriation art—evocation of the viewer's (1) knowledge of a particular work; (2) knowledge of a recognizable, potent cultural symbol; and (3) nonspecific associations—the court can again engage in an application of the third fair use factor that is more analytically rigorous than the current case law provides. Whether this approach would be effective or would create more problems than it solves would need to be determined in the crucible of case law, but the current situation appears dissatisfying to many.

APPENDIX



Art Rogers, *Puppies*, 1980



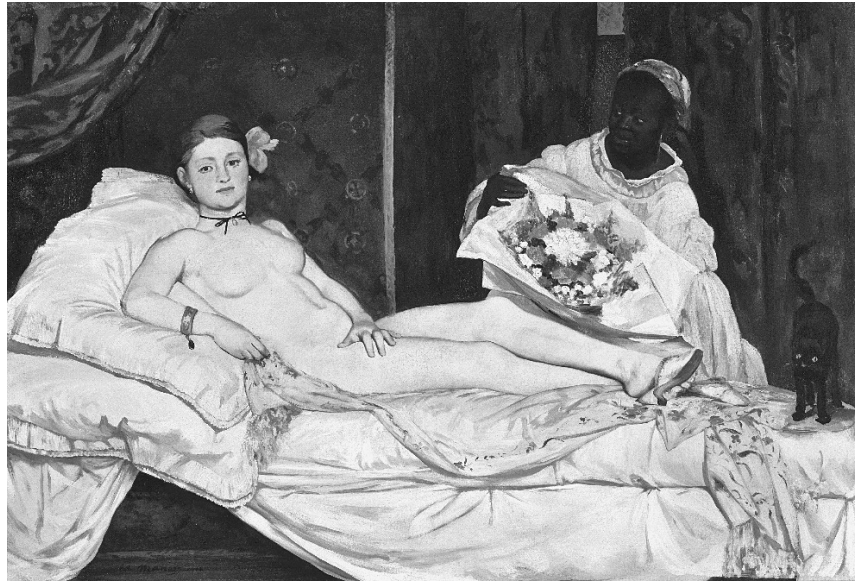
Jeff Koons, *String of Puppies*, 1988



Andrea Blanch, *Silk Sandals*, 2000



Jeff Koons, *Niagara*, 2000



Édouard Manet, *Olympia*, 1863



Titian, *Venus of Urbino*, 1538



Giorgione, *Sleeping Venus*, 1508–1510



Marcel Duchamp, *Fountain*, 1917



Sherry Levine, *Fountain (After Duchamp: 1)*, 1981

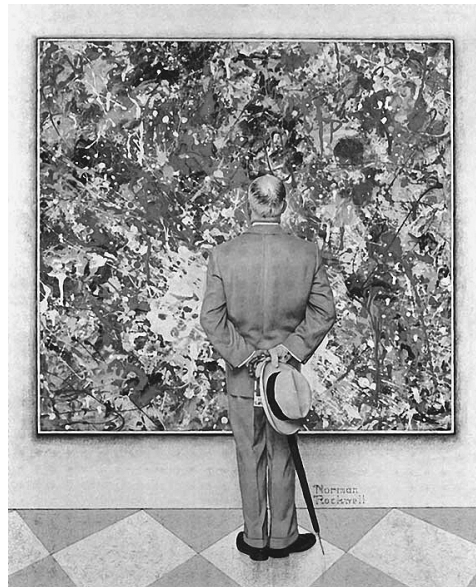
2021] APPROPRIATIVE FAIR USE: SUGGESTED APPROACH 731



Andy Warhol, *Marilyn Diptych*, 1962



Claes Oldenburg, *Clothespin*, 1976

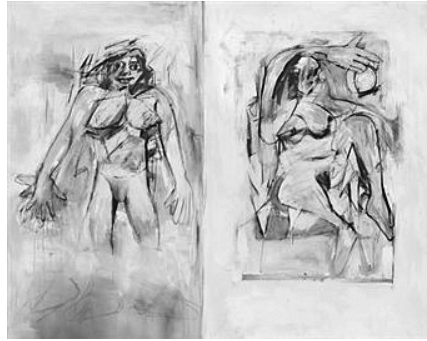


Norman Rockwell, *The Connoisseur*, 1961



Yasumasa Morimura, *Portrait (Futago)*, 1988

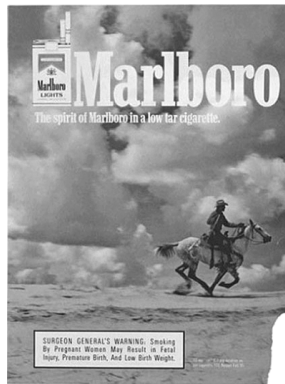
2021] APPROPRIATIVE FAIR USE: SUGGESTED APPROACH 733



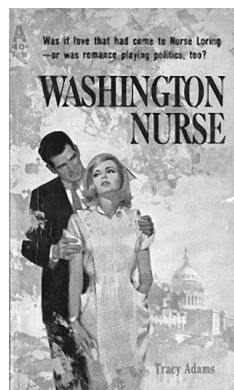
Richard Prince, *Untitled (de Kooning)*, 2006



Willem de Kooning, *Woman and Bicycle*, 1952-53



Richard Prince, *Untitled (Cowboy)*, 1989



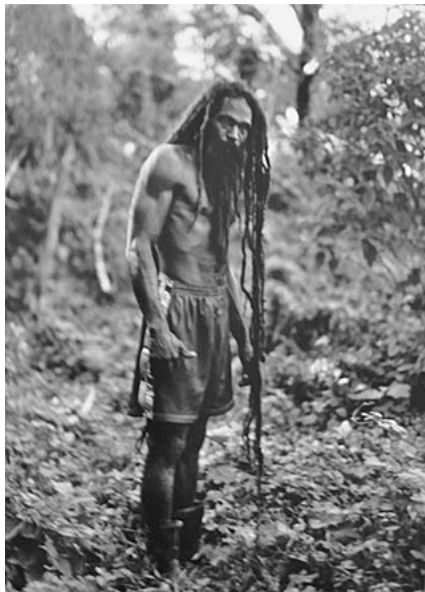
Tracy Adams, *Washington Nurse*, 1963



Richard Prince, *Washington Nurse*, 2002



Richard Prince, *James Brown Disco Ball*, 2008



Patrick Cariou, Photograph from *Yes Rasta*, 2000



Richard Prince, *Graduation*, 2008

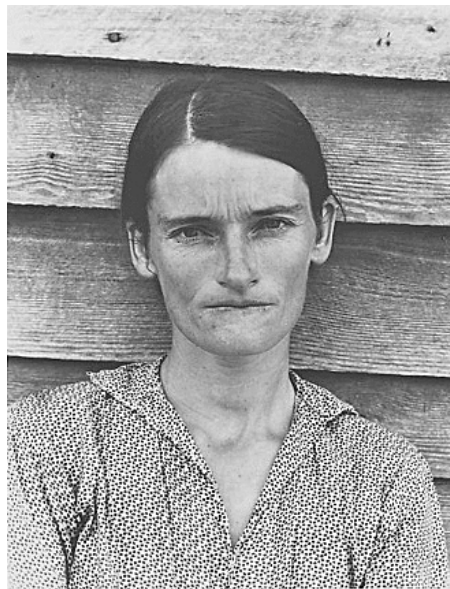
2021] APPROPRIATIVE FAIR USE: SUGGESTED APPROACH 735



Donald Graham, *Rastafarian Smoking a Joint*, 1996



Richard Prince, *Untitled*, 2014



Sherry Levine, *After Walker Evans: 4*, 1981