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I'll Be Your Mirror — Contemporary Art and the Role of Style in Copyright Infringement Analysis

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"I'LL BE YOUR MIRROR"[1] – CONTEMPORARY ART AND THE ROLE OF STYLE IN COPYRIGHT INFRINGEMENT ANALYSIS

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> We must expect great innovations to transform the entire technique of the arts, thereby affecting artistic invention itself and perhaps even bringing about an amazing change in our very notion of art.[2]
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> - Paul Valéry, "La Conquete de l'ubiquite"

I. INTRODUCTION

Works of visual art created in the modern era enter into what German theorist Walter Benjamin calls the "Age of Mechanical Reproduction." In this context, Valéry's *great innovations* refer to the ability to produce multiple copies of a single painting or sculpture. Here, the meaning of a work of art and its social, cultural, and economic reception assumes an existence that is no longer only contingent upon the original or authentic work.[3] As such, the copy embodies the possibility of experiencing the work in different ways, in a multitude of places, and at any time.[4] This change in the circumstance under which art is created and experienced results in the increasing irrelevance of the original. What was previously considered the "aura"[5] of authenticity, once experienced only through the

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[1] The Velvet Underground & Nico, *I'll Be Your Mirror* (Verve/Andy Warhol 1967) (L.P. recording).

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[2] Paul Valéry, *The Conquest of Ubiquity*, in *Aesthetics* 225, 225 (Jackson Mathews, ed., Ralph Manheim trans., Bollingen Series XLV vol. 13, Pantheon Books 1964).

[3] Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *Illuminations* 219 (Hannah Arendt ed., Harry Zohn trans., Harcourt, Brace & World, Inc. 1968). "The presence of the original is the prerequisite to the concept of authenticity." *Id.* at 222.

[4] "By making many reproductions it substitutes a plurality of copies for a unique existence. And in permitting the reproduction to meet the beholder or listener in his own particular situation, it reactivates the object reproduced." *Id.* at 223.

[5] Benjamin defines "aura" as the power of authenticity emanating from the unique presence of the original object and its "historical testimony," that is, its existence as a historical object. *Id.* at 223-25.

original object, is demystified – diminished by technological innovation.[6] Benjamin's prescient statement, "that which withers in the age of mechanical reproduction is the aura of the work of art,"[7] describes a paradigm shift in the way we perceive ourselves and the world around us.

Although the original work of art has lost the primacy it held before the advent of modernity, it still retains value assigned by critics, the public, and the market. It is also protected physically in galleries, museums, and public and private spaces, and perhaps most importantly, by the law. The Copyright Act of 1976 ("Act") applies to "original works . . . fixed in any tangible medium of expression" and works of visual art.[8] As legislation concerning intellectual property, these laws seek to protect and regulate the ownership, integrity, and use of the original work of art. This comment will examine the tension between copyright protection of reproduction and distribution rights and contemporary works of art in claims of infringement. Moreover, it will examine the role of the copy in the broader, cultural and legal contexts. The ubiquity of the copy in contemporary American society and the corresponding cultural devaluation of the original, informs this larger context. It is through copies that a work of art is made available to new and multiple audiences, interpretations, and meanings. Today, more than ever before, technology enables the viewer to act as a participant in forming and attributing meaning to a work of art. In this way, a work exists through its public, indeed democratic, reception. Anyone may be complicit in determining not only the meaning, but also the value of a work in the economic market and in the critical marketplace of ideas.

Art that appropriates content ("appropriation art") from other works and sources of visual culture renders inadequate current interpretations of copyright law in its exclusion of alternate meanings in the act of copying. Contemporary artists such as Jeff Koons, Mike Bidlo, and David Salle create works that are not exact copies of works by other artists, but are skillful appropriations of the subject matter and individual styles of their models. Others such as Barbara Kruger, Cindy Sherman, and Sherry Levine create similar work through the medium of photography, using a range of images from popular cinema to advertising as models for appropriation. Taking the notion of appropriation art to an extreme, New York artist Eric Doeringer paints and sells works that mimic the paintings of other well-known contemporary artists. In 1992, the Second Circuit Court of Appeals held in *Rogers v. Koons*[9] that copying in appropriation art constituted infringement and failed fair use criteria.[10] This comment argues that *Rogers* was wrongly decided. Moreover, relying on the proposition that owners of

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[6] "[M]echanical reproduction emancipates the work of art from its parasitical dependence on ritual. To an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility." *Id.* at 226.
[7] *Id.* at 223.
[8] 17 U.S.C. § 102(a) (2000).
[9] 960 F.2d 301 (2d Cir. 1992); *see infra* § III, especially §§ III(A)(2) and III(B)(1).
[10] *Id.* at 308.

copied originals hold valid, registered copyrights, this comment further examines the interpretive problems that appropriation art presents to the finder of fact. At the heart of this inquiry is the issue of whether the unauthorized appropriation of another artist's *style* constitutes copyright infringement or a legitimate act of copying. Within the scope of copyright law and its application to art, the problem is rooted in the notion of style and whether an artist's style is an idea that exists separately from its expression. This comment argues that appropriation art, although an example of "substantially similar" copying, is not derivative work and would prevail against a claim of infringement. By proving an affirmative defense of fair use, such copying would not be considered infringing, but as functioning to comment on or critique social, cultural, economic, and political elements in contemporary American culture. In this context, copying as artistic appropriation represents a cultural interchange that furthers the Constitutional aim of copyright protection – "to promote the progress of . . . useful Arts."[11]

Section II will begin with a brief description of the elements of copyright infringement, substantial similarity, and the notion of originality as it relates to derivative works. This section ends by providing a critical art historical framework for the nexus between appropriation and style in contemporary art. Section III discusses the way style functions in the infringement analysis. This section then examines the ways courts apply the idea/expression dichotomy to visual art. Subsequently, the analysis addresses the issue of style as a function of originality in the infringement analysis. Finally, Section III focuses on fair use with regard to appropriation art. Although not parody, such work is an example of cultural interchange – representing an area of specialized theory that should remain safe from judicial determinations of value or meaning. Section IV concludes by asserting that works of art that constitute a form of copying cannot be considered as infringing upon copyright in the original work. Moreover, the conclusion asserts that the fair use standard must be applied in a more flexible manner so that the Constitutional purpose behind copyright law meets changed notions of art and its technological circumstances.

II. BACKGROUND

To better understand the application of copyright law with respect to contemporary art, it is necessary to outline the elements of copyright infringement. Subsequently, this section examines theories of artistic style, the cultural impact of post-structuralist theory, and appropriation in contemporary art.

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[11] U.S. Const. art. I, § 8, cl. 8 (hereinafter referred to as the "Intellectual Property Clause").

A. *Elements of Copyright Infringement*

The first Copyright Act of 1790 was passed pursuant to the Constitutional provision granting Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[12] In keeping with its purpose to give authors power over their works for a specific period of time, copyright law has evolved to accommodate two centuries of technological and cultural change.[13] In its current statutory code, the Act protects "original works of authorship fixed in any tangible medium of expression."[14]

Pursuant to § 102(a)(5) of the Act, "pictorial, graphic, and sculptural works"[15] comprise one category that is subject to copyright protection. The scope of protection grants exclusive rights in an author's artistic creations, including the right to "reproduce the copyrighted work in copies, . . . prepare derivative works based upon the copyrighted work, . . . distribute copies . . . of the copyrighted work to the public, . . . [and] display the copyrighted work publicly."[16] In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[17] the Supreme Court's requirements to prove a claim for infringement of an owner's copyright consisted of showing valid ownership of the copyright and "copying of constituent elements of the work that are original."[18] Ownership, for the purpose of an infringement claim, subsists in

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[12] *Id.*

[13] Julie E. Cohen, Lydia Pallas Loren, Ruth Gana Okediji, Maureen A. O'Rourke, *Copyright in a Global Information Economy* 31 (Aspen L. & Bus. 2002).

> The first Copyright Act, enacted in 1790, extended copyright protection to authors of maps, charts, and books. Over the next century, Congress gradually expanded the list to include engravings, etchings, and prints (1802); musical compositions (1831); dramatic compositions (1856); photographs and negatives (1865); and paintings, drawings, chromolithographs, statuary, and 'models or designs intended to be perfected as works of the fine arts' (1870).

Id. The 1909 Copyright Act included photographs, prints and pictorial illustrations, periodicals (including newspapers), lectures, sermons, and "all the writings of an author." *Id*. Later additions included "motion pictures other than photoplays (1912)" and "sound recordings (1971)." *Id*.

[14] 17 U.S.C. § 102.

[15] *Id.* 17 U.S.C. § 101 (2000) states:

> 'pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

[16] 17 U.S.C. § 106(1)-(3),(5) (2000).

[17] 499 U.S. 340 (1991).

[18] *Id.* at 361. This infringement standard is known as the "Feist Test."

the owner's valid "registration of the copyright claim."[19] The defendant's copying must be unauthorized for proof of infringement; however, the substance and nature of such copying has remained a considerably abstract and problematic element that defies exact definition.[20]

The second prong in the *Feist* standard for infringement, that there be unauthorized copying, has been interpreted in two distinct ways by the "two major copyright courts – the Second and Ninth Circuits."[21] The Second Circuit held that unauthorized copying is illegal when "the copying amounts to an 'improper' or 'unlawful' appropriation."[22] What constitutes such appropriation? The Second Circuit requires that "a substantial similarity exist[] between the defendant's work and the protectible elements of plaintiff's."[23] Thus, the allegedly infringing material must be derived from the plaintiff's copyright protected work and must be an unauthorized appropriation. The Ninth Circuit's interpretation of the *Feist* test requires "circumstantial evidence of access and substantial similarity of both the general ideas and expression between the copyrighted work and the allegedly infringing work."[24] Here, the plaintiff must prove access to the copyrighted material and that the alleged infringing material is substantially similar to the protected work. The distinction between "derivation and improper appropriation . . . is conspicuously absent in the Ninth Circuit's test."[25]

Absent the derivation requirement of the Second Circuit, the Ninth Circuit's test, after proving ownership of a valid copyright, consists solely of a finding of *substantial similarity*. The Ninth Circuit's inquiry into substantial similarity consists of a subjective and an objective test.[26] For the Second Circuit, substantial similarity means "the defendant appropriated the plaintiff's particular means of expressing an idea, not merely that he expressed the same idea."[27] In light of these circuit approaches, findings of infringement turn on the court's determination of which elements of a work constitute infringing material, and how they are made manifest in a defendant's work. What is clear is that infringing material be an original fixed expression because "[i]n no case does copyright protection for an original work of authorship extend to any idea."[28]

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[19] 17 U.S.C. § 411(b) (2000).
[20] Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* vol. 4, § 13.03 (Matthew Bender & Co. 2004).
[21] Douglas Y'Barbo, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 J. Intell. Prop. L. 285 (1999).
[22] *Castle Rock Ent., Inc. v. Carol Publg. Group, Inc.*, 150 F.3d 132, 137 (2d Cir. 1998) (quoting *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-40 (2d Cir. 1992)).
[23] *Fisher Price, Inc. v. Well-Made Toy Mfg. Corp.*, 25 F.3d 119, 122-23 (2d Cir. 1994).
[24] *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994) (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992)).
[25] Y'Barbo, *supra* n. 21, at 292.
[26] *See infra* § II(A)(1).
[27] *Fisher-Price, Inc.*, 25 F.3d at 123.
[28] 17 U.S.C. § 102(b).

1. Substantial Similarity

Today, it is generally accepted that although a defendant's copying need not be exact, a finding of substantial similarity "is an essential element of actionable copying."[29] While courts have developed various tests for determinations of substantial similarity in copying that is allegedly infringing, there are two basic forms of similarity that should be addressed prior to inquiries of substantiality. Nimmer distinguishes between "comprehensive nonliteral similarity and fragmented literal similarity."[30] Nonliteral similarity refers to a work that, while not sharing identical formal elements (e.g. text or pictorial form), duplicates "the fundamental essence or structure"[31] of copyright protected material. An exact copy of an entire work would be an example of comprehensive literal similarity. But replication of portions of a copyright protected work may be more difficult to ascertain, leading to the problem of fragmented literal similarity. Both types of substantial similarity have their analytical difficulties and their respective tests.

In cases involving comprehensive nonliteral similarity, analysis of infringement involves the challenge of distinguishing elements of expression from ideas. As protection is afforded only to "the expression of the idea – not the idea itself,"[32] there is a considerable degree of abstraction involved in the deconstruction of any specific work to isolate expression from idea. This continuum concerning the realization of idea into fixed expression is referred to as the "idea/expression dichotomy."[33] Nimmer asserts that although courts have found substantial similarity "where the common pattern consisted of little more than a basic idea,"[34] theoretically, elements of "format, theme, style, or setting"[35] are considered ideas and therefore not protected by copyright.[36] Nevertheless, as the analysis below shows, the idea/expression dichotomy presents different analytical challenges from one medium of expression to another.

Where there is a situation involving fragmented literal similarity, the problem of substantial similarity involves determining what amount of material representing literal copying is sufficient to be considered substantial and thus, infringing. There is no standard measure as to what amount of material is or is not permissible.[37] The issue is "whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work – not whether such material constitutes a substantial portion of

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[29] Nimmer & Nimmer, *supra* n. 20, at § 13.03(A).
[30] *Id*.
[31] *Id*. at § 13.03(A)(1).
[32] *Mazer v. Stein*, 347 U.S. 201, 217 (1954).
[33] Cohen et al., *supra* n. 13, at 90.
[34] Nimmer & Nimmer, *supra* n. 20, at § 13.03(B)(2)(a).
[35] *Id.*
[36] *Id.*
[37] *Id*. at § 13.03(A)(2).

defendant's work." [38] Furthermore, quantitative analysis alone cannot determine the importance of a portion's meaning or value to the work. Consequently, qualitative judgments also inform the analysis of substantial similarity concerning the fragmented literal appropriation of protected material.[39]

a. Tests for Substantial Similarity

Courts have developed a number of tests to determine whether allegedly infringing material satisfies the substantial similarity requirement. There are approximately five such tests (and a number of variations) used, sometimes in combination, by courts analyzing infringement claims. One of the earliest, the "abstractions test," [40] addressed the threshold problem of isolating idea from expression prior to analysis of substantial similarity.[41] Judge Learned Hand's abstractions test, developed in *Nichols v. Universal Pictures Corp.*,[42] compares "the similarities between the two works as a 'series of abstractions' of increasing generality."[43] Like the abstractions test, the "patterns test" [44] examines the "'pattern' of the work . . . the sequence of events, and the development of the interplay of the characters."[45] Both the abstractions and patterns tests offer useful approaches to analyzing potentially infringing works, but neither test clarifies what level of similarity must exist before judging two works as substantially similar.

In *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, [46] the Ninth Circuit employed the "extrinsic-intrinsic test," [47] examining the similarity of general ideas and specific expressions between two works.[48] The first step is the extrinsic part of the test that compares the general ideas of the two works through "specific criteria which can be listed and analyzed."[49] The second step in the *Krofft* analysis, the intrinsic test, considers the similarity between forms of expression and relies on the "response of the ordinary reasonable person."[50] The intrinsic, or subjective, portion of the test is a layer of scrutiny applied at the end of a court's analysis. This is also called the "audience test"[51] and considers whether a representative of the work's intended audience would view the works in

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[38] *Id*.
[39] *Id*.
[40] Jarrod M. Mohler, Student Author, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. Cin. L. Rev. 971, 980 (2000).
[41] *Id.*
[42] 45 F.2d 119 (2d Cir. 1930).
[43] Jay Dratler, Jr., *Intellectual Property Law: Commercial, Creative, and Industrial Property* vol. 1, § 5.01(2)(c) (L. J. Press 1995).
[44] Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 513-14 (1945).
[45] *Id.*
[46] 562 F.2d 1157 (9th Cir. 1977).
[47] *Id.* at 1165 n. 7.
[48] Nimmer & Nimmer, *supra* n. 20, at § 13.03(A)(1)(c).
[49] *Krofft*, 562 F.2d at 1164.
[50] *Id*.
[51] Y'Barbo, *supra* n. 21, at 297.

question as similar.[52]

The *Krofft* decision uses the phrase "total concept and feel,"[53] describing the similarity between the copyrighted work and the alleged infringing material.[54] The "total concept and feel" of a work considers the idea of the work and its formal elements as a whole.[55] The inclusion of concepts in determinations of substantial similarity is problematic because it involves a comparison of ideas not protected by copyright.[56] In this context, "'total concept and feel' should not be viewed as a *sine qua non* for infringement – similarity that is otherwise actionable cannot be rendered defensible simply because of a different 'concept and feel.'"[57]

An allegedly infringing work may have copied both protected and unprotected elements from the copyright owner's work. In determinations of substantial similarity, there is inconsistency among courts as to whether or not to include unprotected elements in their analysis. For example, taking a total concept and feel approach, a court will necessarily include unprotected elements. This analysis is problematic because elements not protected under copyright cannot be misappropriated. Therefore, they cannot contribute to the overall claim of infringement. The problem of including *concepts* in the total concept and feel approach to infringement is also compounded by its potential inclusion of expression that is unprotected and therefore lawful.

2. The Derivative Work and Originality

The ability to authorize and "prepare derivative works"[58] is one of the exclusive rights granted to a copyright holder by the Act. The term "derivative work" applies to a work that is "based upon one or more preexisting works . . . in which a work may be recast, transformed, or adapted."[59] This definition is broad enough to encompass "work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship."[60] The right to derivative works is a result of the economic rationale behind copyright law. For Goldstein, "[d]erivative rights affect the level of investment in copyrighted works by enabling the copyright owner to proportion its investment to the level of expected returns from all markets, not just the

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[52] "Two works are substantially similar where 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal [of the two works] as the same.'" *Castle Rock*, 150 F.3d at 139 (quoting *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir. 1992)).
[53] 562 F.2d at 1167 (quoting *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970)).
[54] *Id.*
[55] *Id.* at 1164.
[56] Nimmer & Nimmer, *supra* n.20, at § 13.03(A)(1)(c).
[57] *Id*.
[58] 17 U.S.C. § 106(2).
[59] *Id.* at § 101 (providing examples of "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, [or] condensation.").
[60] *Id*.

market in which the work first appears."[61]

To establish a derivative work, the requirements of transformation and originality combine to create a new work eligible for copyright protection. Copyright protection is the same for the categories of works enumerated in § 102 as it is for various types of derivative works.[62] Those portions of a derivative work that use preexisting material unlawfully (i.e. without authorization) are not protected by copyright.[63] According to the House Report for the Act, infringement of the right to prepare derivative works occurs when the infringing work "incorporate[s] a portion of the copyrighted work in some form"[64] without authorization of the copyright owner.[65] Moreover, protection in derivative works "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work."[66]

Originality, as a requirement for copyright protection, has been interpreted by the courts in two ways. In its 1903 decision, *Bleistein v. Donaldson Lithographing Co.*,[67] the Supreme Court presented the concept of originality as a creative impulse that "always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."[68] Thus, under the *Bleistein* standard, originality subsists in the unique, personal contribution of the author. The standard articulated in *Feist* requires *de minimis* proof that the "work was independently created by the author"[69] and that the "requisite level of creativity is extremely low."[70] The *Feist* standard emphasizes creativity, however slight, over the unique. A finding of originality in a derivative work turns on the extent and the method by which an author has "recast, transformed, or adapted"[71] a preexisting work. The analysis below shows that opinions concerning appropriation art favor the economic rationale behind a derivative work without distinguishing between a derivative copy and an appropriation that represents an independent, original work of art.

B. *Style, Post-Structuralist Theory, and Appropriation in Contemporary Art*

1. Changing Notions of "Style" in Art History

Artists such as Sherry Levine, Mike Bidlo, Jeff Koons, and Larry

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[61] Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copy. Socy. 209, 227 (1983).
[62] 17 U.S.C. § 103(a) (2000).
[63] *Id*.
[64] H.R. Rpt. 94-1476 , at 62 (Sept. 3, 1976).
[65] *Id.*
[66] 17 U.S.C. § 103(b).
[67] 188 U.S. 239 (1903).
[68] *Id.* at 250.
[69] 499 U.S. at 345.
[70] *Id.*
[71] 17 U.S.C. § 101.

Rivers, sometimes referred to as "appropriationist artists," copy and manipulate the pictorial imagery of other artists and sources of visual culture. Such artists belong to a pattern of artistic production involving models, copying, and transformation that represent a pervasive practice throughout the history of art.[72] In this historical context, copying and visual appropriation is often integral to the development of what art historians and theorists such as Heinrich Wölfflin[73] and Ernst Gombrich[74] define as artistic style. Understanding the role of artistic appropriation and its relation to copyright law begins with a discussion of the notion of style in contemporary art.

Categorization according to style and the use of stylistic analysis are the primary art historical methods in identifying the time, place of production, and author of a work of art. Style refers to both the conceptual category to which an object belongs and to the technique used in its production.[75] Thus, style functions as a mode of classifying visual forms and as a means of authenticating the individual work of art. In its latter role, style is inherently linked to connoisseurship and valuation. For Gombrich,

> The distinctive character of styles clearly rests on the adoption of certain conventions which are learned and absorbed by those who carry on the tradition. . . . While certain of these features are easily recognizable (e.g., the Gothic pointed arch, the cubist facet, Wagnerian chromaticism), others are more elusive, since they are found to consist not in the presence of individual, specifiable elements but in the regular occurrence of certain clusters of

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[72] Certain artistic traditions such as Chinese landscape painting have developed according to an established practice of emulating the works and styles of prior masters in order to achieve one's own individual style. Sherman E. Lee, *A History of Far Eastern Art* 463 (Naomi Noble Richard ed., Prentice-Hall, Inc. 1994). Other traditions such as Renaissance painting or Gothic religious sculpture are based on the repetition of and improvisation on established iconographic models. H. W. Janson, *A Basic History of Art* 118-250 (Prentice-Hall, Inc. 1971). Thus, the copying of style is, to a great extent, a part of all art production in that the artist is aware of and refers to a visual culture in varying degrees.

[73] Heinrich Wölfflin (1864-1945) was one of the most influential art historians of the 19th and 20th centuries, teaching history and art history at universities in Basle, Munich, Berlin, and Zurich. Wölfflin's chief articulation of the notion of style is his assertion of five visual concepts that form the analytical tools determining the phases of early, classic, and baroque Renaissance art in Italy. Eric Fernie, *Art History and its Methods: A Critical Anthology* 127 (Phaidon Press Ltd. 1998). *See e.g.* Heinrich Wölfflin, *Principles of Art History: The Problem of the Development of Style in Later Art* (M. D. Hottinger trans., 6th ed., Dover Publications, Inc. 1950).

[74] Ernst Gombrich was "Director and Professor of History of the Classical Tradition at the Warburg Institute, University of London, 1959-76, and Slade Professor at both Oxford and Cambridge." *The Art of Art History: A Critical Anthology* 574 (Donald Preziosi ed., Oxford U. Press 1998). *See e.g.* E. H. Gombrich, Philip Maurice Deneke Lecture, *In Search of Cultural History* (Lady Margaret Hall, Oxford, Nov. 19, 1967) (reprinted in E. H. Gombrich, *Ideals and Idols: Essays on Values in History and in Art* 24 (Phaidon Press Ltd. 1979)). In this essay, Gombrich distinguishes between the stylistic "period," a Hegelian collective event in which individuals are subordinated, and stylistic "movement" which is the product of individuals and their varied intentions. *Id.*

[75] According to the Oxford Dictionary, "style" is defined as "1) a manner of doing something . . . a way of painting . . . 2) a distinctive appearance, typically determined by the principles according to which something is designed." *The Oxford American College Dictionary* 1370 (Christine A. Lindberg, ed., G. P. Putnam's Sons 2002).

features and in the exclusion of certain elements.[76]

Despite its established use as an instrument of art historical analysis and interpretation, the notion of style and its importance has changed dramatically since the 1970's. Today, style is highly problematic when used in reference to contemporary works of art.

In his essay on the "Modern, Postmodem, and Contemporary," Arthur Danto asserts that whereas modern art "had a stylistic meaning *and* a temporal meaning"[77] (i.e. the product of *Modernism*), contemporary art does not.[78] Contemporary art, while chronologically following post-modernism, leaves the viewer with "the sense that we have no identifiable style, that there is nothing that does not fit."[79] Indeed, it is this "lack of a stylistic unity, or at least the kind of stylistic unity which can be elevated into a criterion and used as a basis for developing a recognitional capacity."[80] As such, art after the twentieth century period of modernism is what Danto refers to as "*post-historical*."[81] Danto means it is art freed from a historical context and its classifications of style and meaning; it is the product of contemporary circumstance and creative processes where "anything ever done could be done today."[82] Danto offers the example of a contemporary artist who, by appropriating the corpus of Piero della Francesca, copies the Renaissance painter, but whose copies cannot be considered as belonging to the same style.[83] Piero della Francesca belongs to a stylistic tradition rooted in Renaissance humanism, Albertian perspective, and papal patronage, whereas the contemporary artist who appropriates his work belongs to our world. His contemporary counterpart, the appropriating painter, produces work in a context where elements belonging to past styles may be used free from their underlying principles and contexts.

In one sense, Danto's post-historical phase is art "after the end of art [history]."[84] Citing the 1960's as the last period of identifiable styles, Danto states "it gradually became clear, first through the *nouveaux realistes* and pop, that there was no special way works of art had to look in contrast to what I have designated 'mere real things.' . . . It meant that as far as appearances were concerned, anything could be a work of art."[85] Danto suggests that the meaning of contemporary art, inasmuch as its intentions are conceptual, is based on philosophical considerations rather than on the

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[76] E. H. Gombrich, *Style*, in *The Art of Art History: A Critical Anthology*, supra n. 74, at 162.
[77] Arthur C. Danto, *After the End of Art: Contemporary Art and the Pale of History* 11 (Princeton U. Press 1997).
[78] *Id.*
[79] *Id*. at 12.
[80] *Id*.
[81] *Id.*
[82] *Id.*
[83] *Id*.
[84] *Id*. at 13.
[85] *Id*.

formal, pictorial criteria of style. In other words, contemporary art represents a mode of production that is beyond style. Stated differently, it is art that functions beyond representation, and whose meaning is no longer derived from what its style or appearance may represent historically.

While the concept of style follows an evolution that may be traced through art history and semiotic theory, this guiding logic exists outside the scope of judicial determinations. Courts are inconsistent and arbitrary in their perception of style and its role in copyright infringement.[86] In discussions of style involving copyright infringement claims, this comment will use the term as it applies to an individual artist's formal pictorial characteristics. In this sense, *style* refers to the artist's idiom or formal language that may be perceived (in the work) as a result of individual practices of production.

2. Post-Structuralist Theory and Appropriation in Contemporary Art

How does artistic appropriation function in the field of contemporary art? Appropriation, plagiarism, copying, replication, and mimetic transfer are terms qualifying ways that art functions in a post-structuralist context. In this sense, painting, as a visual language, communicates through signs and their meanings. A painted image may be read as a sign defined by its difference from other signifiers. Post-structuralists, such as Roland Barthes, Michel Foucault, and Jacques Derrida, use semiotics as a starting point to consider the meaning of a work which is derived through deconstructing the work, or by tracking the signifiers.[87] In this process, meaning is not determined by the author, who has *disappeared* into the text because of the infinite referrals of signifiers, but by the reader. Thus, Foucault and Barthes assert that understanding a text (or a work of art) begins with the "death" of the author.[88] In art history, post-structuralist theory challenges the assumptions of creativity and the importance of the individual artist as an author. With the *death* of the author, the multiple and often contradictory meanings of a work are revealed or re-invented through

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[86] *See infra* § III.

[87] *See e.g.* Jacques Derrida, *Writing and Difference* (Alan Bass trans., U. of Chicago Press 1978); Roland Barthes, *The Death of the Author*, in *Image, Music, Text* 142 (Stephen Heath trans., Hill and Wang 1977); Michel Foucault, *The Archaeology of Knowledge* (R. D. Laing ed., A. M. Sheridan Smith trans., Pantheon Books 1972).

[88] Michel Foucault, *What is an Author?*, in *The Foucault Reader* 101, 102, 104 (Paul Rabinow ed., Pantheon Books 1984)).

> Today's writing has freed itself from the dimension of expression. Referring only to itself, but without being restricted to the confines of its interiority, writing is identified with its own unfolded exteriority. This means that it is an interplay of signs arranged less according to its signified content than according to the very nature of the signifier. . . . Consequently, it is not enough to declare that we should do without the writer (the author) and study the work itself. The word *work* and the unity that it designates are probably as problematic as the status of the author's individuality.

Id.

the *deconstruction* of the work, making the very notion of what is *original* to the work problematic.

Through its specific form of copying, appropriation art embodies a challenge to notions of style, authorship, and authenticity. The complete or partial appropriation of prior artistic material in post-industrial times begins with the origins of Modernism and Edouard Manet's controversial work "Olympia," a portrait of a prostitute posed in the manner of the Renaissance painter Titian's famous portrait of the Roman goddess of love, "Venus of Urbino."[89] Later appropriations by artists such as Pablo Picasso, George Braque, and Marcel Duchamp relied upon the use of the "ready-made object" as a compositional component in collage, painting, and sculpture.[90] More recently, Pop artists such as Andy Warhol,[91] Larry Rivers,[92] and Robert Rauschenburg[93] employed reproductions of a single commercial or art historical image as the basis for certain works.

The working methods of artists who appropriate imagery vary from one individual to the next. For example, Eric Doeringer scans and isolates the main compositional element in a painting and then assembles it against a painted background.[94] The surface of his painting is then brushed with clear acrylic gel to give the impression of a painted surface.[95] Other images by Doeringer that are based on works of other artists are created through digital manipulation on the computer and then transferred onto canvas.[96] Such works "copy the look of the originals."[97] Similarly, works based on photographs are digital manipulations by Doeringer attempting to capture the look of another artist's work.[98] Mike Bidlo creates full-scale replicas (paintings and found object assemblages) by such famous artists as Picasso, Leger, Duchamp, and Man Ray,[99] signed with his own name with titles such as *Not Picasso*. Artists such as Bidlo, Doeringer, Levine, and Koons do not obscure the origins of their appropriated elements. In fact, the identification of appropriated material is often important to the interpretation of the work in that it evokes meanings and associations which the viewer brings to the work.

Regarding the economic and legal framework created by copyright law, it is significant that much contemporary art, whether painting, sculpture, installation, or audiovisual media, relies on appropriation of other work to varying degrees. Such appropriation, while not always of the type

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[89] H. H. Arnason, *History of Modern Art* 32 (3d ed., Prentice-Hall, Inc. 1986).
[90] *Id.* at 229, 302.
[91] *Id.* at 460 (Andy Warhol's painting *Marilyn Monroe*).
[92] *Id.* at 453 (Larry Rivers' painting *Dutch Masters and Cigars III*).
[93] *Id.* at 462 (Robert Rauschenberg's painting *Estate*).
[94] E-mail interview with Eric Doeringer, artist (Feb. 11, 2005).
[95] *Id.*
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] Interview by Francis Naumann with Mike Bidlo, artist, http://www.paolocurti.com/bidlo/bidlobook.htm (accessed Sept. 15, 2005).

implicated in what courts might consider substantially similar, uses existent and sometimes copyright protected imagery drawn from contemporary visual culture. Their use of preexisting works, appropriation art, and much contemporary art in general, challenges the tenet that "[t]he *sine qua non* of copyright is originality."[100] Reference to other works may be viewed as part of a creative response to the global lexicon of images. This visual culture is a source of representation by contemporary artists and may be termed as the "period eye," [101] a phrase referring to particular ways of seeing and representing linked to one's physical and temporal context. As distinguished from visual style, the period eye refers to a "culture's cognitive style," [102] the way we engage in "visual experience and disposition."[103] In this context, all artists, regardless of the extent or nature of appropriation in their work, participate in the generation of contemporary visual culture through the production and exhibition of their work.

III. ANALYSIS

In its application to appropriation art, the substantial similarity test further confuses the already vague analytical boundaries of idea and expression in copyright law. As works of art, appropriations stand on their own as independent expressions presented to the viewer for interpretation. Like all works of art, appropriation is a representation in that it reflects or stands in for an artist's intentions, ideas, or impulses. By extension, the work also re-presents the concerns, aims, and values of a people, culture, and time. Works of appropriation art are no less representations than other categories of art in that they too embody the object(s) of an artist's pleasures and pains, whims or concems. This analysis considers how courts have dealt with appropriation art in cases of copyright infringement.

The first part of the analysis discusses the notion of an artist's style as it informs the copy and its relation to the idea/expression delineation in the infringement analysis. This section examines the characterization of style in the analysis of infringement, and the ways in which courts consider the formal components of a work as either idea or expression. The second part of the analysis focuses on the role of style and its relation to originality as an element in claims of infringement. The final section considers judicial interpretations of the fair use standard as a defense in infringement cases involving artistic appropriation. This section addresses the elements of comment, criticism, and parody and their application under fair use.

A. *Style and the Idea/Expression Dichotomy in Copyright Infringement*

Visual art functions through the expression of line, form, texture, and color. In turn, this formal expression is read by the viewer. Thus, a work of art is interpreted through its presence as a physical representation

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[100] *Feist*, 499 U.S. at 345.
[101] Michael Baxandall, *The Limewood Sculptors of Renaissance Germany* 143 (Yale U. Press 1980).
[102] *Id.*
[103] *Id.*

through its formal elements (e.g. color, line, form, and texture). As stated in § 102(b) of the Act, expression is protected by copyright. Thus, the question of whether a work of art infringes turns on whether its expression is substantially similar to that of a copyright protected work. In the context of infringement analysis, an artist's style is problematic when distinguishing the expression or style of a work from the idea or impulse it represents. The late critic Susan Sontag asserts that one cannot speak of style versus content because "[t]o speak of style is one way of speaking about the totality of a work of art."[104] For example, a painting of water lilies by Monet may be considered as part idea or content (water lilies) and part expression (the impressionistic appearance of Monet's painting). Yet to speak of *Monet's* water lilies evokes an image of water lilies that exists only by way of Monet's style, that is, his impressionism. For Monet, this impressionism, the notion that the visual world exists as light and color, is an idea expressed in an image of water lilies. Thus, according to Sontag, "[i]n art, 'content' is, as it were, the pretext, the goal, the lure which engages consciousness in essentially formal processes of transformation."[105] The formal transformation is the process of artistic representation. Thus, the subject of water lilies is neither expression nor idea alone, but a site of representation where choices are realized as an image on canvas. Yet theoretically, under copyright law, a copy of the water lily as *content* is not infringing so long as it is not expressed through Monet's impressionist style. This part of the analysis will examine the ways in which courts have addressed the problem of style in terms of the idea/expression dichotomy. The first section considers judicial approaches to the notion of style in copyright infringement analysis. The second section discusses the ways in which courts consider formal elements in terms of the idea/expression paradigm in copyright law.

1. Approaches to Style in the Infringement Analysis

Given that representation is central to art production, it is useful to examine the role of representation as artistic style in claims of copyright infringement. One of the earliest and most formative discourses on art articulates the notion of mimesis, or art that is an "imitation of reality."[106] For Plato, artistic creation is likened to when "you take a mirror and turn it round to all sides. You will soon make a sun and stars, the earth, yourself, and other living creatures, manufactured articles and plants, and everything."[107] The act of mimetic creation or imitation, what is referred to as naturalistic representation, is a form of copying. Mimesis also informs appropriation art which constitutes one of the most conscious and direct

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[104] Susan Sontag, *On Style*, in *Against Interpretation* 15, 17 (Farrar, Straus & Giroux 1966).
[105] *Id.* at 25.
[106] Susan Sontag, *Against Interpretation*, in *Against Interpretation*, *supra* n. 104, at 3.
[107] Plato, *The Republic of Plato* 370 (A. D. Lindsay trans., E.P. Dutton & Co., Inc. 1957). Plato asserts that art, as a form of imitation of the phenomenal world, is less than real in the sense that the phenomenal world itself is an imitation of a world of pure Forms. *Id. See also* Plato's "Theory of Forms" developed in his *Phaedo* and in *The Republic of Plato*.

references to an individual's visual culture.[108] But such works of art function in ways other than simply as imitative reflection or secondary representation. A work of appropriation art is also an object (albeit a copy) that is complete and distinct from other objects. Copyright law seeks to protect this singular, authentic aspect of artwork with regard to the original, but it often does so at the expense of the representational function of the work that appropriates, thereby imposing legal limits on the scope of contemporary art.[109]

Two judicial opinions that articulate the boundaries regarding style and its role in infringement analysis are *Steinberg v. Columbia Pictures Industries, Inc.*[110] and *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc*.[111] Taken together, both cases describe distinctions between stylistic elements that courts characterize as either objective or subjective in their appearance. The privileging of one type of style over another in determinations of infringement reveals a concession to the analytical judicial process that both serves and undercuts the purpose of copyright. In its former effect, it protects the interests of the owner of the original work. In its latter effect, such thinking fails to embrace alternate modes of artistic practice that take as their subject the very notions of art, originality, value, and meaning. The infringement analysis as applied to works of visual art considers stylistic elements copied from the original work as objective (non-infringing) versus subjective (infringing).

In *Franklin Mint Corp.*, the court held that defendant's painting, "The Cardinal," infringed plaintiff's copyright in an earlier work by the same artist entitled "Cardinals on Apple Blossom."[112] The court found the later painting of cardinals did not infringe upon the earlier work, holding that "while the ideas are similar, the expressions are not,"[113] and the differences between the works are "sufficient to establish a diversity of expression rather than only an echo."[114] While acknowledging expert testimony "to support and refute substantial similarity,"[115] the court's rationale relied upon its characterization of the artist's style in relation to the subject matter.

The works in *Franklin Mint Corp.* are representations of cardinals in a style that is referred to in art history as "naturalism," a term used to describe the striking realism, or resemblance to nature, in works of Renaissance painters such as Caravaggio.[116] Naturalism is generally defined

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[108] *See supra* § II(B).
[109] This limitation assumes that contemporary art requires an audience and that findings of infringement will ultimately have a chilling effect on artists. This will prevent the exhibition of certain works of art, thus removing them from any audience or critical reception.
[110] 663 F. Supp. 706 (S.D.N.Y. 1987).
[111] 575 F.2d 62 (3d Cir. 1978).
[112] *Id.* at 63.
[113] *Id.* at 67.
[114] *Id.*
[115] *Id.* at 66.
[116] Janson, *supra* n. 72, at 241.

as a style of visual or literary representation "based on the accurate depiction of detail."[117] But for the artist, naturalism is as contrived a representational method as any other in that "an understanding of the visible world always involves the use of conventions . . . in the case of the rendering of one image in the medium of another."[118] Pictorial conventions such as the Albertian perspective, a Renaissance system of ordering forms on a two-dimensional surface to create the illusion of depth,[119] are employed in the service of naturalism in art. The Third Circuit Court of Appeals did not take into account the stylistic component to naturalism in its rationale. For the court, naturalism as a realistic or scientific mode of representation is not considered in stylistic terms, but as a baseline visual schematic that is not as "expressive" of an artist's subjectivity.[120] On the other hand, the naturalistic depiction of a cardinal intended to approximate a life-like appearance is a representation no more "realistic" and imparting no greater sense of life, movement, or spatial existence than an Impressionist or a Chinese ink painting is capable of achieving.

The *Franklin Mint Corp.* decision is significant because it relies upon degrees of naturalism (or conversely abstraction) as a measure of proof regarding unauthorized copying. This method recalls the "abstractions test" of Judge Hand.[121] Proof of access to a work becomes irrelevant under this analytical approach. Regardless of whether the copier has directly appropriated or independently created his image, the style of the work under the Third Circuit's approach diminishes or, at the very least, mitigates the importance of substantial similarity. In its statement that copyright is weak in images where "the expression and the subject matter converge,"[122] the court equates naturalism as a style with the objective apprehension of content.[123] The court asserts that:

> [I]n the world of fine art, the ease with which a copyright may be delineated may depend on the artist's style. A painter like Monet when dwelling upon impressions created by light on the facade of the Rouen Cathedral is apt to create a work which can make infringement attempts difficult. On the other hand, an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who

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[117] *The Oxford American College Dictionary*, *supra* n. 75, at 902.
[118] Fernie, *supra* n. 73, at 358. "The point is well illustrated by the story of the Japanese artist who, on first seeing a perspectival drawing representing a cube, concluded that they made oddly-shaped boxes in the West." *Id.*
[119] Janson, *supra* n. 72, at 179.
[120] *Franklin Mint Corp.*, 575 F.2d at 65. Citing Monet's style, the court states that "in the impressionist's work the lay observer will be able to differentiate more readily between the reality of subject matter and subjective effect of the artist's work." *Id.*
[121] *Nichols*, 45 F.2d at 119.
[122] *Franklin Mint Corp.*, 575 F.2d at 65.
[123] *Id.*

uses the same subject matter and the same technique.[124]

This construct stresses the subjectivity or idiosyncrasy of artistic style as a quality that extends in a continuum of abstraction from some archetypal representation of photographic accuracy. The court's conception of images as signs that correspond to ideas expressed in language represents a tidy solution to the problem of delineating where idea and expression diverge. In this context, the idea of a "cat" presumably corresponds to a photographic image of the judge's domestic pet.[125] But this raises further complications insofar as everyone is familiar with a cat or a tree, those subjects are only broad categorical delineations within which there exist innumerable differentiations.

The court addresses the problem of formal variation by relying on expert testimony about the cardinal artist's naturalism as belonging to "conventions in ornithological art which tend to limit novelty in depictions of the birds."[126] These conventions constitute a particular representational style where "minute attention to detail of plumage and other physical characteristics is required and the stance of the birds must be anatomically correct."[127] In such terms, the expert testimony also describes pictorial naturalism itself. Do the paintings of America's most famous ornithologist, John James Audubon, conform to such conventions? Most likely they do, but it is also apparent that Audubon's style, though accurate in its physical depictions, also employed dramatic and emotional effects in the attitudes and activities of his feathered subjects.[128] From his own writings, it is immediately clear that Audubon "viewed birds in terms of human characteristics."[129] The cardinals painted for the parties in *Franklin Mint Corp*. were not intended for ornithological guides, but for the collectibles market. As such, their representation is no more "scientific" or objective than other paintings of cardinals and is not subject to any "limitations imposed upon the artist by convention,"[130] other than those of the intended art market. In its suggestion of some shared objective notion of a cardinal as evidence of a weak copyright, the court in *Franklin Mint Corp.* held that naturalism as a style at issue in this case is not protected by copyright.[131]

Finding evidence of substantial similarity, the *Franklin Mint Corp.*

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[124] *Id.*
[125] *See infra* § III(A)(2). Ironically, this notion of "cat" is as banal as that of Koons's puppies discussed below.
[126] *Franklin Mint Corp.*, 575 F.2d at 66.
[127] *Id.*
[128] Edward Rothstein, *A Rare Sighting of Audubon Prepares to Take Flight*, N.Y. Times E1 (March 17, 2005). The writer refers to examples of "domestic dramas" and "moral lessons" in Audubon bird paintings. *Id.*
[129] *Id.* "His blue jays, for example, the birds brutally smash the shells of stolen eggs; one stretches his beak to catch the dripping yellow fluid. It is difficult to imagine, Audubon wrote, that 'selfishness, duplicity, and malice should form the moral accompaniments of so much physical perfection.'" *Id.*
[130] *Franklin Mint Corp.*, 575 F.2d at 65.
[131] *Id.* at 66.

court does not consider any fair use defense, but agrees with the defendant's assertion that the cardinals represent "variations on a theme."[132] Apart from the reversal in the male and female birds' positions and some minor variations in plumage, the paintings are essentially alike. Having gone to considerable lengths in arguing the weak level of copyright protection for the pictorial style and subject at issue, the court equates "variation on a theme"[133] with the possible expressions of an idea.[134] This conclusion runs contrary to its assertion that such paintings belong to a single conventional style, thus limiting the expression to a single naturalistic depiction of the bird.

The *Franklin Mint Corp.* opinion asserts both evidence of substantial similarity and an unwillingness to lend copyright protection to style. The consideration of style in relation to the subject of a work is also present in *Esquire, Inc. v. Varga Enterprises, Inc.*,[135] decided 30 years before. In *Esquire, Inc.*, the opinion could have ended with its finding that pictorial differences between the alleged copies and their original models proved insufficient substantial similarity.[136] Instead, the court addressed the artist's style in relation to his subject (the calendar girl) because of the overwhelming stylistic similarity in all of the artist's work.[137] In considering artistic style, the court asserts that "no single item of distinction would, in itself, render a particular painting free of infringement."[138] The analysis in *Esquire, Inc.* involved "over one hundred paintings by defendant . . . [suggesting] that all his future drawings will bear some similarity to his previous work . . . . He has a certain type of art in his mind and consequently, that is all he is able to express."[139] Yet the same could be said of any artist who works in the same stylistic idiom identified with a particular pictorial treatment, use of color, form, or subject matter.

Contrary to the *Franklin Mint Corp.*'s holding on similarity of style as non-infringement, the Second Circuit Court of Appeals found a defendant's movie poster was infringing because it was substantially similar to a plaintiff's magazine cover illustration.[140] In *Steinberg*, the original illustration at issue was a *myopic* rendering of the world from the point of view of a resident New Yorker. The court describes the image as "a bird's eye view across a portion of the western edge of Manhattan, past the Hudson River and a telescoped version of the rest of the United States and the Pacific Ocean, to a red strip of horizon, beneath which are three flat land

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] 81 F. Supp. 306 (N.D. Ill. 1948) (holding that the artist's paintings, though based on his own earlier work, were not substantially similar and did not infringe owner's copyright in that prior work).
[136] *Id.* at 308-09.
[137] *Id.* at 307-08.
[138] *Id.* at 309.
[139] *Id.* at 307-08.
[140] *Steinberg*, 663 F. Supp. at 716.

masses labeled China, Japan and Russia."[141] The portion depicting Manhattan is a relatively detailed rendering in "[t]he whimsical, sketchy *style* and spiky lettering . . . recognizable as Steinberg's."[142] Comparing the two works, the court states that "one can see the striking stylistic relationship between the posters, and since style is one ingredient of 'expression,' this relationship is significant."[143]

Finding infringement, *Steinberg* established copyright protection not only for the plaintiff's cover illustration of the March 29, 1976 issue of *The New Yorker*, but also to his style. The whimsical, sketchy treatment of forms cited as one of Steinberg's *hallmarks* is but one of a number of pictorial elements mentioned by the court that constitute the Steinberg style. Other elements of the artist's work include shapes, "configurations of various edifices . . . ornaments, facades and details of Steinberg's buildings."[144] These aspects of Steinberg's image, appearing simultaneously in combination with each other, coalesce into Steinberg's distinct style – a Steinberg image of the city. In its most telling assertion, the court stated the "strongest similarity"[145] between the two works is the artists' choice of "vantage point that looks directly down a wide two-way cross street that intersects two avenues."[146] This type of perspective represents both an idea about how one perceives the city and an expression of depth. As such, the court considered this aerial viewpoint as the single compositional trait that, apart from the sketchy rendering, is unmistakably Steinberg's. While there are many examples of images depicting a mapped city as viewed from a position above the earth, this view of the city is Steinberg's.

The similarities between Steinberg's cover and the infringing poster include both style and subject matter, in that both works depict cities and the surrounding earth through a "parochial" point of view.[147] Yet there are significant differences of style and content between the works. The court acknowledges that, unlike the singular style of Steinberg's cover illustration, the defendant's poster:

> is executed in a blend of styles: the three characters, whose likenesses were copied from a photograph, have realistic faces and somewhat sketchy clothing, and the city blocks are drawn in a fairly detailed but sketchy style. The lettering on the drawing is spiky, in block-printed handwritten capital letters substantially identical to plaintiff's, while the printed texts at the top and bottom of the poster are in the typeface commonly associated with *The*

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[141] *Id.* at 710.
[142] *Id.* (emphasis added).
[143] *Id.* at 712 .
[144] *Id.* at 713.
[145] *Id.* at 712.
[146] *Id.*
[147] *Id.* at 714.

New Yorker magazine.[148]

Despite these differences, the court's decision focused on Steinberg's style despite the fact that, as pictorial subjects, one city is New York and the other is unmistakably Moscow. In holding the depiction of Moscow infringed upon Steinberg's image of New York, the court viewed the infringing matter as one of style between two inexact, yet similar *looking* works of art. In *Steinberg*, substantial similarity and infringement rested on the similarity of style.

Style may be understood as the sum of artistic decisions involved in the creation of a work of art. An artist's individual style encompasses both his conception of a subject and its expression, in that the former can only be understood as the latter. A cardinal, for the purposes of the Franklin Mint Corp.'s retail market in prints, is painted to look a *certain* way just as Saul Steinberg paints his own representation of New York City for *The New Yorker* magazine – both images are grounded in the artists' respective intentions. Nevertheless, one court seizes on the perceived objectivity of style at issue in *Franklin Mint Corp.*, whereas another bases its decision on the perceived subjectivity of the style at issue in *Steinberg.* The different holdings arise out of judicial determinations that certain styles should be granted more protection and others deserve less. While such rationale is not exactly fair in its application to artists and their works, courts appear to rely on such reasoning as an expedient approach to the role of substantial similarity in the infringement analysis. Style, as a function of artistic production, is intrinsically subjective in that it consists of conventions of representation far more complex and subjective than image-making as a physiological function of vision. When one considers that the prevailing engagement in twentieth century art has been with the abstraction of forms, to speak of objectivity in art becomes absurd. Figurative art, that is work resembling something else, is no less subjective than abstract art, for both represent specific intentions through particular conventions.

The role of style in infringement cases involving art represents a concession to copyright law at the expense of artistic license. Protection granted to "subjective" styles (those more obviously depicting degrees of abstraction) furthers the Constitutional aim of promoting progress. Such protection ensures the preservation of a plurality of art forms and aesthetic theories, thereby upholding Justice Holmes's notion of a marketplace of ideas.[149] On the other hand, the privileging of one perceived category of style over another places a legal limitation on an artist's ability to create according to his individual intentions and to address subjects of his choosing.

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[148] *Id.* at 710-11.

[149] *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (stating that "the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market.")

This kind of limitation may chill expression, thereby diminishing the diversity of forms. Analysis of the *Rogers* decision below reveals how such limitations are contrary to copyright's purpose by substituting economic interests over artistic and intellectual diversity.

2. Judicial Interpretation of the Idea/Expression Dichotomy in Visual Art

Under the Act, infringement analysis requires that courts separate the idea of a work from its expression to distinguish content that is protected.[150] As a corollary of substantial similarity, the idea/expression dichotomy is a vague analytical instrument. The distinction involves the notion that an idea exists in the public domain, whereas its expression connotes that which is "fixed in any tangible medium."[151] As determined in the preceding discussion of *Franklin Mint Corp.*, the issue applied to the visual arts is whether the idea or theme underlying a work of art is expressed in an objective or subjective way. Yet, this distinction relies on judicial interpretations of the meaning or content of a work of art and ultimately its value in cultural and economic terms. According to the *Franklin Mint Corp.* court, artistic subjectivity establishes originality or novelty and is therefore consistent with the objects of copyright protection (i.e. "original work[s] of authorship").[152] In contrast, objectivity arises when the subject or idea of a work determines its expression and is therefore not as deserving of protection.

Relying on this framework of style, courts must first define the underlying idea of a work of art. This is a considerable task, and one that is itself a subjective exercise given the range of interpretive possibilities that each work of art presents. Are courts equipped to contend with the economic, social, cultural, and historical contexts involved in constructing the meaning or *idea* that a work represents? Moreover, can the court, by stepping into the shoes of art-historians, curators, and connoisseurs, act as an arbiter of culture and determine whether a work is a legitimate expression of a particular idea? This section examines the process and consequences of judicial interpretation involving the idea/expression dichotomy as it applies to works of art. The analysis focuses on one of a number of infringement claims brought against Jeff Koons, a controversial appropriation artist who rose to fame in the 1980s.

The Ninth Circuit Court of Appeals offers a relatively straightforward illustration in applying the idea/expression dichotomy in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*.[153] The court held that the copyright in the plaintiff's jeweled bee pin was not infringed by a nearly exact copy because both were "lifelike representations of a natural

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[150] 17 U.S.C. § 102(b).
[151] *Id.* at § 102 (a).
[152] *Id.* at § 102 (b).
[153] 446 F.2d 738 (9th Cir. 1971).

creature."[154] Initially, the court's rationale that the expression of the jeweled setting was a "function of the size and form of the bee pin and the size of the jewels used,"[155] appears sound. To the Ninth Circuit, the representation or expression of a jeweled bee suggests an inevitable arrangement of gems, colors, and proportions. But it is reductive speculation to conclude that the idea behind the work was simply a bee, and that *bee*, as a concept, entails few representational alternatives. The choice of jewels, their forms and arrangement, reflect a subtle process – a conceptual realization that is ignored by the court. The artist or craftsman has not created any bee, but a specific bee, represented in an individual style despite its general resemblance to the insect.

The Second Circuit's decision in *Rogers* presents a more complex and problematic application of the idea/expression dichotomy. In *Rogers*, the court found the defendant artist's appropriation of a commercial notecard image as the basis for three wood polychrome sculptures was an infringement of the plaintiff's copyright.[156] The court rejected Koons's fair use defense that his sculpture, "String of Puppies," was a parody of the plaintiff's work.[157] "String of Puppies" was displayed as part of the artist's exhibition entitled "Banality Show" at Manhattan's Sonnabend Gallery in 1988.[158] The court recognized Koons's rationale for choosing the notecard image, stating:

> Koons saw certain criteria in the notecard that he thought made it a workable source. He believed it to be typical, commonplace and familiar. The notecard was also similar to other images of people holding animals that Koons had collected. Thus, he viewed the picture as part of the mass culture – "resting in the collective sub-consciousness of people regardless of whether the card had actually ever been seen by such people."[159]

For display in *Banality Show*, Koons seized upon the image because it embodied what he considered qualities of cuteness, banality, and kitsch. Thus, the *criteria* mentioned by the court are qualities embodied by the image's style. For Koons, the content of the image, a couple holding several puppies,[160] constitutes much of its stylistic appeal. In other words, it is impossible to speak of the image as an expression of kitsch or banality without referring to its content.

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[154] *Id.* at 741.
[155] *Id.* at 740.
[156] 960 F.2d at 308.
[157] *Id.* at 309-12.
[158] *Id.* at 304.
[159] *Id.* at 305.
[160] *Id.*

The notecard's capacity to convey qualities sought by Koons was so potent that "Koons stressed that he wanted 'Puppies' copied faithfully in the sculpture."[161] Yet the court did not view the copying as an aesthetic or artistic choice, but as "much more than would have been necessary even if the sculpture had been a parody of plaintiff's work."[162] Temporarily setting aside the issue of parody, here the court inserts its own opinion of what amount should or should not be copied. Thus, the issue of infringement in this case is complicated not only by the court's interpretation of Koons's copying, but also by its assertion of an artistic value judgment. It is likely that the "essence of Rogers' photograph was copied nearly *in toto*"[163] in order to meet the stylistic intentions of the artist's work.[164] Nevertheless, the court found that the expression of the original, "as caught in the placement, in the particular light, and in the expressions of the subjects,"[165] had been impermissibly copied.[166] The court asserted that "the idea of a couple with eight small puppies seated on a bench"[167] is not protected.[168] But it was the specificity of the image that provided the subject for Koons, not some abstract notion involving a couple holding puppies. This specificity exists through the stylistic conventions of specific lighting, attitudes, and expressions that form the image. In other words, the expression of the postcard is a significant component of the idea or theme behind Koons's appropriation.

The assertion that it is the expression "of a couple with eight small puppies seated on a bench that is protected," [169] is an inaccurate oversimplification of the idea expressed by "String of Puppies."[170] The court does not recognize that there could be a number of ideas or themes that inform a work of art. It is not simply the subject of representation that is the idea expressed in a painting or sculpture. Rather, it is a matter of interpretation beginning with an inquiry into the choice of subject, the method of representation, and the context of display that determine the idea(s) informing a work. Thus, with regard to two separate works of art, it is possible to have a shared representation that is an expression of very different ideas, as is the case in *Rogers.* This is especially true for appropriation art that, as *another* presentation or reconsideration of the original, re-contextualizes and brings renewed scrutiny to a preexisting work. In other words, it is the artist's intention that one views a work that is a copy, including its copied content, in a new light. As discussed below, the notion of reconsideration plays a significant role in a fair use defense for

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[161] *Id*.
[162] *Id.* at 311.
[163] *Id.*
[164] *Id.*
[165] *Id.* at 308.
[166] *Id.*
[167] *Id.*
[168] *Id*.
[169] *Id.*
[170] *Id.*

infringement claims involving appropriation art.

A recent Fifth Circuit decision, *Peel & Company, Inc. v. The Rug Market*,[171] is an opinion where the appropriation of style weighed in favor of finding infringement of the plaintiff's copyright. The claim in *Peel & Company, Inc.* involved plaintiff's copyright of a "Directoire" carpet named after the "early Eighteenth Century French historical period that inspired the rug's pattern."[172] The plaintiff raised genuine issues of material fact regarding access to its design (as opposed to independent creation) and the degree of substantial similarity between the two carpets.[173] The district court finding in favor of the defendant was reversed and remanded.[174] Regarding the question of substantial similarity in *Peel & Company, Inc.*, the court established which elements of the "Directoire" design were "unique and therefore protectible by copyright."[175] This finding of fact relied on the plaintiff's testimony that it alone employed those elements in its version of "Directoire."[176]

In *Peel & Company, Inc.*, the claim of infringement concerned the rug's design or style. The court faced the problem of separating the idea of the "Directoire" from its design when there were clear stylistic distinctions in the defendant's version ("Tessoro").[177] Whereas the district court found the rugs dissimilar enough to find for the defendant,[178] the Fifth Circuit disagreed. The appellate opinion predicted that an ordinary observer in the audience test would find the rugs satisfied the substantial similarity test.[179] According to the court, different observers "could differ as to whether these two rugs are probatively similar."[180] Nevertheless, a layperson "could find the appearance of the two rugs similar enough to support a conclusion of copying."[181] Application of the idea/expression analysis would ask whether the parties' rugs were expressions of two different ideas (non-infringing), or whether a single idea was expressed in a substantially similar manner (infringing). In remanding the case for a jury verdict using the audience test,[182] the court avoids this seemingly impossible task. To engage in such

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[171] 238 F.3d 391 (5th Cir. 2001).
[172] *Id.* at 393. The "Directoire" pattern "features two rows of panels, each of which is decorated with a central floral design and trompe l'oeil triangular shading intended to suggest a coffered ceiling. The Directoire also features laurel garlands, punctuated by rosettes, surrounding each panel, and an outer border of repeated squares." *Id.*
[173] *Id.* at 398.
[174] *Id.* at 399.
[175] *Id.* at 398.
[176] "Although other Directoire-style rugs exist, Peel claims that it alone incorporates the trompe l'oeil triangular shading and square-patterned border into its design." *Id.* at 393.
[177] *Id.* at 397.
[178] *Id.* The district court "acknowledged that 'these two rugs at first glance do have a certain similarity to each other,' but held that 'no reasonable person would mistake these two rugs as being the same. The two rugs quite obviously do not have the same aesthetic appeal.'" *Id.*
[179] *Id.* at 398. Under the ordinary observer or audience test "a layman must detect piracy" independent of any outside analysis. *Id.*
[180] *Id.* at 397.
[181] *Id.*
[182] *Id.* at 399.

an inquiry would entail further speculation and subjective reasoning, much like the subjective artistic judgments of intention and meaning evident in the *Rogers* case. Only here, the discussion would involve the meaning or idea behind a rug instead of a sculpture.

It is clear that with regard to works of visual art, application of the idea/expression dichotomy is an unreliable measure for determinations of substantial similarity and infringement. The use of this standard must involve some account of the artist's intentions behind the work of art; otherwise, courts will continue to exercise their own artistic judgments asserting individual taste as a basis for their opinions. A defendant artist's intentions can be raised in the assertion of fair use as a defense to infringement claims, and it is in this context that such infringement claims should be decided.

B. *Style as a Function of Originality in Copyright Infringement Analysis*

The notion of style applied to infringement claims involving works of art is linked to a problem of originality in authorship. The Act protects "art reproductions"[183] under the category of pictorial works. But courts also require that "the reproduction must contain 'an original contribution not present in the underlying work of art' and be 'more than a mere copy.'"[184] An original contribution is only apparent as an expression of either an idea or some intent on the part of the author. In this context, an artist's stylistic contribution to an original work then transforms it into a secondary, but also copyrightable work of art. Thus, the standard for originality is attached to the notion of substantial similarity in that a work may constitute a copy in an analysis for infringement, but also represent an independent work on its own stylistic terms. To understand the implications of this apparent contradiction, it is helpful to consider the ways in which style operates as a function of originality within the infringement analysis.

In *L. Batlin & Son, Inc.*, the Second Circuit found defendant's toy copy of a cast-iron bank (in the public domain) was not sufficiently original to warrant copyright protection.[185] To be copyrightable, the work in question "must be original, that is, the author's tangible expression of his ideas."[186] In this case, minor variations in the bank were deemed the result of creating a plastic toy from an original cast-iron object, and this functionality was not considered the author's own expression.[187] The court's approach focused on the process of creation over the stylistic expression of the work. In *L. Batlin & Sons, Inc.*, originality is founded on artistic intention that serves "the public interest in promoting progress in the

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[183] 17 U.S.C. § 101-102.
[184] *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976).
[185] *Id.* at 492.
[186] *Id.* (quoting *Mazer*, 347 U.S. at 214).
[187] *Id.*

arts."[188] The opinion subsequently refers to the originality, hence right to protection, in works of art based on "quite ordinary mass-produced items."[189] Here, the court extends the scope of what constitutes art beyond what is traditionally considered fine art (as wholly original) to works that encompass more prosaic aspects of contemporary visual culture (works of mechanical reproduction). The holding suggests the distinction that copies of works in the public domain may be considered independent works of art, whereas copies of protected works are not. This distinction is problematic because the court's notion of original art is predicated upon what is and is not permissible under copyright law.

Although *L. Batlin & Sons, Inc.* concerned copyright of a copy based on a work in the public domain, the court's originality standard nevertheless recognized that style is an integral function of originality. Variation resulting from the production of a work, but not from a decision based on stylistic or aesthetic considerations, was not deemed sufficiently original. In an earlier decision, *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*,[190] the Second Circuit considered the issue of originality as both a function of production and of stylistic intention.[191] *Alfred Bell & Co.* considered whether a plaintiff's mezzotint art reproductions of paintings were original works of art infringed by a defendant's copying.[192] The court held that the mezzotint works were original works of art protected by copyright and that defendant's copying constituted infringement.[193] As "translations, or other versions of works in the public domain,"[194] the prints were protected "even if their substantial departures from the paintings were inadvertent."[195] The prints' originality lay in the fact they were "not intended to, and did not, imitate the paintings they reproduced."[196] The creation of the prints through engraving represented a process of image translation, which resulted in pictorial effects different from those in the original painted models. The prints appropriated prior images as the basis for new works of art. The determination of their status as original works of art turned on their stylistic originality. Yet, the prints in *Alfred Bell & Co.* were based on paintings in the public domain, which remains a significant factor in the determination of their status as original art in the infringement analysis.[197]

Alva Studios, Inc. v. Winninger[198] also considered the originality of

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[188] *Id.*
[189] *Id.*
[190] 191 F.2d 99 (2d Cir. 1951).
[191] *Id.*
[192] *Id.* at 104.
[193] *Id.* at 104-05.
[194] *Id.* at 104.
[195] *Id.* at 105.
[196] *Id.*
[197] *See also infra* § III(C).
[198] 177 F. Supp. 265 (S.D.N.Y. 1959).

a work based on art in the public domain.[199] Here, the Southern District Court of New York upheld a plaintiff's claim of infringement against a defendant who copied plaintiff's plaster replicas of Auguste Rodin's "Hand of God."[200] The plaintiff's replicas were created in collaboration with and pursuant to the authority of museums that own the original works of sculpture.[201] The plaintiff's copying of the sculpture was held to be original and thus protected by copyright, because it was an exact copy of the Rodin sculpture.[202] The court resolved the tension of coinciding similarity and originality by focusing on the process of replication and the reduction in scale.[203] The replica was original because "great skill and originality is called for when one seeks to produce a scale reduction of a great work with exactitude."[204] As in *Alfred Bell & Co.*, the combination of production and style (here, the exactness) lent the work originality. Yet the court's holding contradicts its own rule that "to be entitled to copyright, the work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another."[205] The very act of copying to achieve the degree of exactness in the plaintiff's work requires that an artist engage in direct copying. The plaintiff's work was meant to imitate every formal subtlety in Rodin's sculpture; otherwise, the plaintiff would not have been granted the authorization to create the replica.

Although not appropriation art, the plaintiff's copy in *Alva Studios, Inc.* finds its source in a prior work of art, albeit one that is in the public domain. As the discussion below asserts, when art is based on work that is protected, courts have less difficulty in determining a lack of originality in the copy. This is significant because it is a work's originality that not only determines its right to protection, but also its identity as a distinct work of art. What is relevant to the aforementioned decision regarding style and originality is the degree to which individual judicial determinations of artistic value or merit intrude upon determinations of original works of art. *Alva Studios, Inc.* and *Alfred Bell & Co.* are cases that consider style as a function of originality in opposing ways. In the former case, imitation of Rodin is the crucial factor in determining originality. Whereas in the latter case, it is the prints' lack of imitation and intent to copy that proves the absence of originality. As discussed below, in cases of appropriation art, a finding of intent to imitate is the death knell for a defendant's assertion of fair use.

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[199] *Id.*
[200] *Id.* at 266-68.
[201] *Id.* at 266.
[202] *Id.* at 267.
[203] *Id.*
[204] *Id.*
[205] *Id.*

C. *Appropriation Art and Fair Use*

Not all copying of visual imagery constitutes appropriation art. Sometimes an image does not serve an artistic function, but a purely commercial one. The artistic or commercial purpose (or intention) of a work is considered under the defense of "fair use."[206] After probative or substantial similarity has been established, a determination of whether copying is legitimate or infringing usually turns on fair use analysis. The Second Circuit's opinion in *Rogers* is the most significant decision involving fair use and appropriation art. The opinion reflects both a lack of understanding and sensitivity toward artistic intentions, and a misreading of the statutory guidelines used to analyze the fair use defense. *Rogers* is also a precedent that has since been decisive in two other appropriation art cases involving the same artist, Jeff Koons. In this context, it has effectively removed fair use as a defense in cases involving appropriation art. In the face of evolving theories concerning art, history, and language – significant branches of the western intellectual tradition – the *Rogers* holding represents an apparently fixed anachronism in its application of copyright law. This section examines the interpretive mistakes involving fair use and appropriation art in the Koons cases, and why such fair use defenses have failed to persuade.

Fair use is one of the most common and most controversial limitations upon the exclusive rights of copyright owners. Codified in § 107 of the Act, fair use allows copying "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[207] Thus, a defendant must argue that the use of copyrighted material corresponds to one of the statutory purposes considered exempt from the reach of copyright protection. In analyzing whether a defendant's use is fair, courts look to four non-exclusive factors suggested by the Act:

> (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;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.[208]

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[206] 17 U.S.C. § 107 (2005).

[207] *Id.*

[208] *Id*.

With regard to works of art, "purpose and character" is further analyzed according to whether the work merely replaces the original, or whether it transforms the original by "altering the first with new expression, meaning, or message." [209] Factors one and four are especially influential in determining fair use as they involve the protection of an artist's creative and financial interests. In appropriation art cases, the *amount and substantiality* of use is more likely to weigh against the defendant because of the extent of copying involved.

In *Rogers*, defendant Koons argued that the purpose and character of his use was parody.[210] The *Rogers* opinion appears two years before the Supreme Court decided, for the first time, a case on the issue of parody as fair use in *Campbell*.[211] In *Campbell*, the Court characterized parody as able to "provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[212] Moreover, "[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, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[213] An essential element of parody for the Court 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."[214]

This requirement of comment on the original arises in *Rogers* and ostensibly forms the basis for the Second Circuit's dismissal of Koons's fair use defense.[215] Koons stated his work was both parody and satire "of society at large,"[216] based on social criticism of "the mass production of commodities and media images [that] has caused a deterioration in the quality of society."[217] The court reasoned "that even given that 'String of Puppies' is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph 'Puppies' itself."[218] The requirement that the work parody the original was qualified as doing so "at least in part"[219] by the Supreme Court, but was found to be totally absent in *Rogers.* It is significant that the Second Circuit found no comment upon the original notecard, when it seems reasonable to view every copy as implicating its original on some level. The *Rogers* court argued that the *intention* of the work did not involve the notecard and that it was necessary that:

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[209] *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994) (holding that defendant's rap song copying lyrical phrases from copyright protected ballad constituted fair use as parody and that commercial nature of use is not presumptively unfair).
[210] 960 F.2d at 309.
[211] 510 U.S. at 579.
[212] *Id.*
[213] *Id.* at 580-81.
[214] *Id.* at 580.
[215] 960 F.2d at 310.
[216] *Id.* at 309.
[217] *Id.*
[218] *Id.* at 310.
[219] *Campbell*, 510 U.S. at 580.

> [T]he audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.[220]

How can a visual artist express *acknowledgement* of an original work's existence in his appropriation? It would appear impossible to do so without actually pasting an explanatory note upon or next to the work, like the wall texts one finds beside works in museums. Moreover, by requiring either an expression of acknowledgement or that the original be *publicly known*, the court has placed an inconceivable limitation on artistic expression that raises questions of constitutionality under the First Amendment.

The opinion in *United Feature Syndicate v. Koons*[221] follows the same approach to parody as *Rogers*, finding that the work in question was not "a comment, criticism, or parody directed, in any way, at 'Odie',"[222] the original work. The work at issue in *United Feature Syndicate* was a porcelain sculpture that included a figure of a dog, "Odie," a copyright protected character from "Garfield" comics.[223] In this case, Koons featured the character alongside the figure of a boy in a sculptural group entitled "Wild Boy and Puppy."[224] Despite its incorporation in a larger work of art, and in a different context, the court granted summary judgment in favor of the plaintiff.[225] That same year, the court once again ruled against Koons in *Campbell v. Koons*,[226] a similar suit involving the appropriation of a photographic image as the basis of a sculpture.[227]

Both the Southern District Court of New York and the Second Circuit Court of Appeals decided cases against Koons on the grounds that his assertion of parody as fair use did not apply. But there are statements in these opinions that not only involve judicial interpretations of aesthetics and artistic integrity, but that also suggest an unflattering view of Koons, his art, and the commercialism of the gallery system. References to the artist's prior work as "mutual funds salesman, a registered commodities salesman and broker, and a commodities futures broker,"[228] and his "profit-making motives"[229] are cynical references to the artist's character and his motives.[230]

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[220] 960 F.2d at 310.
[221] 817 F. Supp. 370 (S.D.N.Y. 1993).
[222] *Id.* at 384 (finding porcelain sculpture was not a parody of copyright protected image pursuant to *Rogers v. Koons*).
[223] *Id.* at 372-73.
[224] *Id.* at 373.
[225] *Id.* at 385.
[226] 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. 1993).
[227] *Id.*
[228] *Rogers*, 960 F.2d at 304.
[229] *Id.* at 310.

The court even selects an article (out of a number of reviews) in which, "[a] New York Times critic complained that 'Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd.[']"[231] It is significant that the Koons cases were decided in the early 1990s after the period of high prices that works by many contemporary New York artists commanded. The historical context is worth mentioning here. In New York during the late 1980s, a sub-culture that revolved around the excesses of Wall Street financiers arose, dubbed the "Nouvelle Society,"[232] epitomizing opulence and naked materialism. The New York art scene, the *center* of the contemporary art world, was not unaffected by the conspicuous consumption of the times. In this context, Jeff Koons was considered one of the *enfants terribles* of the Manhattan gallery scene.[233]

Although the prices for Koons's works shocked many a decade ago and continue to do so today, the *value* of the work is, to a considerable extent, determined by the market and demand. Given the court's unmasked distaste for his artistic endeavors, it is probable that had Koons argued comment or criticism as the basis of his fair use defense, the court would have ruled no differently. Yet, the defenses of parody, comment, and criticism are all appropriate fair use defenses in these cases. Appropriation art functions in all of these ways because it sets up an original work or a style and its associations for interpretation as fine art (high culture). The prices for Koons's porcelain, wood, and metal sculptures[234] play on notions of value, materialism, social conventions, history, and the very notion of what constitutes art. A decade after the courts' skeptical pronouncements upon his work, Koons is viewed as "reviving exhausted motifs and outmoded objets d'art mediums, like glazed ceramic and polychrome carved wood. . . . [A]t his best, his work is a kind of kitsch rescue mission that resuscitates clichés of both image and craft."[235] That Koons had skilled artisans transform snapshots of everyday kitsch into expensive sculpture for

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[230] The Second Circuit also discussed infringing profits in the Rogers cases stating, "Koons' wilful [sic] and egregious behavior, we think Rogers may be a good candidate for enhanced statutory damages pursuant to 17 U.S.C. § 504(c)(2)." *Id.* at 313.

[231] *Id.* at 304.

[232] Georgia Dullea, *A Decade Ends, And the Nouvelles Of New York Are Not Invited*, N.Y. Times 6 (Dec. 31, 1989).

> [T]here appeared on the New York social scene the first glints of the gilded era of the 80's. This was a lavish spectacle of wealth and the props of wealth fueled by the sort of fast money from Wall Street that made the word millionaire obsolete. . . . The ubiquitous billionaires and their followers had no official name until the second half of the 80's when John Fairchild, looking up from a table at Le Cirque, christened them Nouvelle Society.

Id.

[233] Tracey Lawson, *Positioned for Peace*, The Scotsman 7 (The Scotsman Publications Ltd. October 9, 2002).

[234] "String of Puppies" sold at over $100,000. *Rogers*, 960 F.2d at 304. "Wild Boy and Puppy" sold at $125,000. *United Feature Syndicate*, 817 F. Supp. at 373.

[235] Roberta Smith, *A Garden of Floral Images by Two Masters of Pop*, N.Y. Times 43 (December 13, 2002).

his *Banality Show* may be interpreted as a glorification of the banal as symptomatic of the crass commercialism and decadence in urban American culture of the period. In this context, the work represents a commodity to be regarded as a fetish object.[236] His distanced manufacturing and reproduction of the work reflects a direct challenge to notions of authorship and autonomy common to the work of other Pop artists such as Warhol and Johns.

Inconsistent standards for parody, criticism, or comment in fair use analysis concerning art are apparent in comparing opinions from the Southern District Court of New York. In 1990, just three years prior to its decisions in the Koons cases (*United Feature Syndicate* and *Campbell*), the court required a different standard be met concerning the fair use defense. In *Wojnarowicz v. American Family Association*,[237] the court dismissed plaintiff's claims for copyright infringement, finding fair use in the defendant's reproduction of plaintiff's photographic art.[238] The *Wojnarowicz* opinion examined the defendant's use of plaintiff's photos in a fund-raising pamphlet distributed to Congressmen, Christian leaders, and media venues in a campaign against "the subsidization of 'offensive' and 'blasphemous' art by the National Endowment for the Arts."[239] Under the first prong of fair use analysis, the court found "addressing the controversial issue of federal funding of contemporary art,"[240] as comment or criticism pursuant to the statutory requirement.[241] Fair use of art in the Koons cases required that the original art be the subject of parody so the audience is aware of the distinct expression of the original work forming the basis of use.[242] It was sufficient that the object of fair use in *Wojnarowicz* was the issue of subsidization of work such as the plaintiff's, unlike in the Koons cases where it was the artist's work itself that was the court's required object of comment.

Although the district court in the two Koons cases followed the Second Circuit's reasoning in *Rogers*, the shifting standard for analysis reveals two very different understandings of a crucial element in the fair use standard. The *Wojnarowicz* holding makes sense in that the criticism was aimed at the federal funding of art such as the type created by the plaintiff. Thus, the work itself, as an example of obscenity, plays an illustrative role in the criticism of federal funding. Yet, the same court in *United Feature Syndicate* and *Campbell* refused to interpret Koons's sculptures in a consistent manner as an artistic comment on a subject illustrated or even embodied by the plaintiff's original work. Extending the parody standard that a copy take as its object or at least acknowledge the original, it would

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[236] Isabelle Graw, *Jeff Koons – Deutsche Guggenheim Exhibition*, ArtForum (Jan. 2001).
[237] 745 F. Supp. 130 (S.D.N.Y. 1990).
[238] *Id.* at 149.
[239] *Id.* at 133.
[240] *Id.* at 143.
[241] *Id.*
[242] *Rogers*, 960 F.2d at 310.

be difficult to imagine the fair use statute similarly restricts the objects of "news reporting, teaching . . . scholarship, or research"[243] to the work that is being copied. Indeed, these other circumstances of fair use may, like art, seize upon an expression as an instrument for instruction or comment on a completely different subject. Simply stated, a kindergarten teacher uses apples in an exercise about addition or subtraction; however, the apples themselves are not the objects of that lesson. Why should it be unlawful for works of appropriation art to comment on subjects other than the originals they copy? Ultimately, contemporary works such as Koons's sculpture or the use of photographs in the *Wojnarowicz* pamphlet speak to us as art or invective about our society, culture, and values, *through* the use of an original, underlying work.

IV. CONCLUSION

The imprecise application of substantial similarity and the idea/expression dichotomy is the result of problematic interpretations of style and meaning in copyright cases involving contemporary art. Accepting style as expression, courts determine unlawful copying by relying on stylistic distinctions along a representational spectrum that ranges from naturalism to abstraction. This analysis induces judgments upon the value of a work of art in aesthetic, cultural, and economic terms. Yet, within the frameworks of art history and post-structuralism – theory that helps shape meaning and representational intent in contemporary art – such judicial interpretations are constructs that have little to do with the meaning or function of a work of art. Instead, they represent concessions to the economic, rather than Constitutional, aims of copyright law. Privileging specific types of style over others imposes a legal limitation on an artist's ability to create according to his individual intent and to address subjects of his choosing. The objects of artistic attention are no longer only traditional genres such as landscape, portraiture, or history; instead, they embrace other expressions of contemporary visual culture, conceptual conceits, and notions of display, reception, and cultural commodification.

The conflict between goals of contemporary art as cultural phenomena and those of copyright law as a legal framework have not been adequately resolved by the courts. In *Rogers v. Koons*, this tension results in a holding that, at the very least, chills the production and reception of certain kinds of art. Substituting economic interests over artistic and intellectual diversity diminishes the marketplace of ideas and damages the cultural, intellectual, and political diversity of America. Judicial resistance to the function of appropriation art in re-considering the roles or associations an object has in contemporary society inevitably results in failed fair use defenses. Contemporary art that re-contextualizes and brings renewed consideration to a preexisting work offers alternative perspectives or challenges the various forces and identities that shape our lives. To deny an

[243] 17 U.S.C. § 107.

artist's intention that the viewer perceive a subject in a new light is to deny that particular reading of the subject.

In claims of infringement, it is important that courts re-evaluate their analysis of fair use defense involving comment, criticism, or parody. This task requires a better understanding of both the cultural and economic contexts in which the reception of a work of art takes place. In an increasingly commercialized world, it is important to understand art as both a cultural and an economic commodity. The economic value of a work of art is, to a great extent, distinct from its materiality (i.e. its expression or medium), but is the product of many factors determining its market value. It is equally, if not more important that cultural and economic value arise out of what meaning a work of art conveys or what function it serves, rather than its stylistic expression or decorative existence. Ultimately, courts must better understand the critical nature of appropriation art (and contemporary art generally), and apply a new standard of fair use tailored to cases involving contemporary art. As § 107 of the Act does not provide an exclusive list of factors in fair use determinations, a more nuanced interpretation in its application to contemporary art remains a hopeful possibility.

Visual art has never been tied only to the empirical physicality of the world or its representation of that world. It has and continues to operate on a conceptual level that supersedes its forms and expressions. In this context, copyright infringement analysis must take into account the function of visual art as a means of cultural interchange engaging in criticism, comment, or parody under the statutory codification of fair use. This notion of interchange would recognize the roles a work of art plays as both cultural and economic artifact, and as contributing to a larger critical discourse at the heart of the fair use limitation. Thus, the first question courts must ask is why the original work has been appropriated and whether the appropriation is artistic in nature. It may or may not be relevant to the function of a work of visual art whether it clearly identifies a prior, original form. Nevertheless, it is not reasonable to expect an audience to recognize or identify the underlying form. The notion of cultural interchange in art implies that the precursor (original) is irrelevant in that it inevitably exists in various states no longer tied to its original context.

In the age of mechanical reproduction, the original is just another copy existing simultaneously among a plurality of its own presence and meaning. Although not always part of the public domain defined by copyright law, the original work is part of a broader visual culture – at once the repository and source of artistic intent. As appropriation art, the transformed original participates in a critical discourse framed by this broader visual culture, a culture increasingly marked by the presence of the copy regardless of whether courts recognize it as such. As new perceptions continue to emerge about the ways art, style, and representational intent operate, courts must incorporate an awareness of this shifting context into their infringement analysis. Greater flexibility in the application of fair use

is required if contemporary art is to evolve as an expression of culture and not merely as a commodity under the rubric of copyright law.