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Is There Such a Thing as Postmodern Copyright?

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I. INTRODUCTION

Back in 1992, artist/entrepreneur Jeff Koons suffered a humiliating setback when the United States Court of Appeals for the Second Circuit repudiated the suggestion that his reuse of objects from public culture might constitute a "fair use" defense to a copyright infringement claim.[1] Fourteen years later, in a case that again involved a photographer's claim of copyright infringement, Koons triumphed in the same judicial forum.[2] What had changed? This Article explores, in particular, one among a variety of alternative explanations: Koons may have caught the very leading edge of a profound wave of change in the social and cultural

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1. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
2. Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

conceptualization of copyright law—specifically, the emergence of an understanding that is at least incipiently "postmodern" in nature.[3]

It would be a dangerous undertaking for one trained only in the law to venture a definition of a term as protean as "postmodernism."[4] Nevertheless, I suggest below that several related elements, characteristic of what might be termed a postmodern cultural attitude, are beginning to seep into copyright theory and jurisprudence:

- Rejection of claims based on "authority" and "expertise," including claims relating to interpretation;
- Suspicion of "grand narratives" designed to justify eternal verities;
- Skepticism about hierarchical claims about art and culture, especially those couched in terms of distinctions between "high" and "low," coupled with a preference for ironic juxtaposition of unlike materials;
- Turning away from values of stability toward an embrace of flux and change;
- Recognition that discussions of information access and regulation are inherently and profoundly political in nature.

II. COPYRIGHT LAW AND CULTURE

Law has always lagged in its assimilation of new theories and their associated rhetorics. It would be news if a close reading of some recent copyright decisions revealed an emergent postmodern take on copyright. To be clear, the contention here is *not* that today's jurists are literally disciples of Lyotard (any more than judges of previous generations pronounced themselves devotees of Fichte or Wordsworth); rather than being self-conscious trend followers, lawyers and judges who work on copyright are participants in a larger cultural conversation, and what they derive from it ends up influencing copyright discourse in various ways—for good and ill.[5]

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3. It may be of note that Koons was claimed early as an icon of postmodern art practice. According to Colin Trodd, it was widely believed that his early work "was part of a postmodern engagement with the role of culture within post-industrial society, an economic order where leisure and consumption became processes of great symbolic and material importance." THE ROUTLEDGE COMPANION TO POSTMODERNISM 252 (Stuart Sim ed., Routledge 2d ed. 2005) (1998).

4. *Id.* at xii; Gary Aylesworth, *Postmodernism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 30, 2008), http://plato.stanford.edu/entries/postmodernism.

5. Felix Guattari, a severe neo-Marxist critic who dismisses postmodernism as "no philosophy at all," is quoted as characterizing it instead as "just something in the air." *See* THE ROUTLEDGE COMPANION TO POSTMODERNISM, *supra* note 3, at 18.

A. *Authorship and Modernism*

Before proceeding further, here is a brief recap of the story so far, starting with the self-evident observation that there was no such thing as premodern copyright on a systemic level. The institution of copyright and its basic conceptual structures are preeminently "modern," in a historical/chronological sense. Although this body of legal rules certainly has a rich prehistory, the institutions and mechanisms that regulated information production before 1710 (patronage, printing patents, and so forth) were rooted in understandings of social life that assumed the primacy and stability of hierarchical authority and (accordingly) did not reflect the emergence of "possessive individualism"[6] and, with it, modernity. The conceptual move that gave us copyright as we know it was the introduction of the rights-bearing individual into the scheme of the law. An obvious marker for this development was the somewhat mysterious appearance of the "author" as the entity in whom rights initially vested under the Statute of Anne.[7] The emergent figure of the Romantic author-genius rapidly took over a dominant role in thought and discussion about copyright law in Great Britain and on the continent—and, ultimately, beyond Europe as well.[8]

If the rise of the authorship concept is historically and chronologically linked to the emergence of modernity, its durability has been attributed, at least in part, to a subsequent and mutually supportive encounter with literary and artistic Modernism. In the Romantic era, one of the specific roles assigned to creative and scientific genius was the work of imposing a comprehensible pattern on the evidence of experience, once religion (and other traditional sources of authority) could no longer be depended upon for this purpose.[9] In the later nineteenth and twentieth centuries, Modernism tightened culture's embrace of individual self-consciousness as a source of stable meaning in a world destabilized by migration, global war, new science and technology, among other disruptions.

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6. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: FROM HOBBES TO LOCKE 1-3, 270-71 (1962).

7. RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695-1775), at 9-10 (2004); Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).

8. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of 'Authorship,'* 1991 DUKE L.J. 455, 459.

9. *See* RICHARD HOLMES, THE AGE OF WONDER, at xv-xvii (2008). Holmes draws out the connections between the Romantic sensibility in nineteenth-century literature, and the ethos of a new science, based on the systematizing "genius" of figures like Herschel and Davy, that emerged during the same period. *See generally id.* at 163-210, 337-81.

Foucault observed that authorship is a structure that works to discipline and limit the meaning of particular texts and discourses.[10] Under conditions of Modernism, the author's function increasingly served to hold together the elements of an entire information environment that threatened to fall disastrously apart.[11] Critical consumers of culture celebrated individual painters and writers for their ability to communicate a coherent understanding of otherwise incoherent happenings.[12] Some sense of this is captured in T.S. Eliot's famous *Dial* review of Joyce's *Ulysses*—one giant of Modernism commenting (perhaps somewhat self-reflexively) on another—praising Joyce's "method" (that is, his personal take on Greek mythology) because it had the effect of "controlling, of ordering, of giving a shape and a significance to the immense panorama of futility and anarchy which is contemporary history."[13]

This extreme valorization of the individual point of view, associated with both Romanticism and Modernism, helped to further shape a set of legal attitudes about literary and artistic property. Most specifically, it contributed to the development of a theme in copyright discourse that associates the assignment of rights in works not with political choice, but

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10. *See* MICHEL FOUCAULT, *What Is an Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE 113-38 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977).

11. Not only is the "author" a structure well suited to the concerns and premises of Modernism, but the same assumptions and preoccupations also are reflected in copyright's own concept of the integrated "work" as a stable object of protection that reflects authorial sensibility. *See id.* Because the original is an object that enjoys authority derived from its maker, it can stand on its own. By contrast, as Walter Benjamin observes, "what withers in the age of the technological reproducibility of the work of art is the latter's aura." WALTER BENJAMIN, THE WORK OF ART IN THE AGE OF ITS TECHNOLOGICAL REPRODUCIBILITY, AND OTHER WRITINGS ON MEDIA 22 (Michael Wm. Jennings et al. eds., Edmund Jephcott et al., trans., 2008). Specifically, the work's stability is threatened by new modes of cultural production:

> Thus, the distinction between author and public is about to lose its axiomatic character. The difference becomes functional; it may vary from case to case. At any moment, the reader is ready to become a writer. As an expert—which he has had to become in any case in a highly specialized work process, even if only in some minor capacity—the reader gains access to authorship. Work itself is given a voice. And the ability to describe a job in words now forms part of the expertise needed to carry it out. Literary competence is no longer founded on specialized higher education but on polytechnic training, and thus is common property.

Id. at 33-34.

12. T.S. Eliot, *Ulysses, Order and Myth*, 75 THE DIAL 480-83 (1923), *reprinted in* JAMES JOYCE: THE CRITICAL HERITAGE 268-71 (Robert Deming ed., 1970). Paul K. Saint-Amour points out that Joyce himself was less than consistent on this point, "oscillat[ing] between embracing collective authorship and wrapping himself in the mystique and privileges of the individual genius." THE COPYRIGHTS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION 159 (2003).

13. JOYCE, *supra* note 12, at 270.

with a preexistent (and therefore invariable) set of natural rights enjoyed by entitled authors to whom publishers and other "intermediaries" have successfully assimilated themselves, often to the exclusion of the interests of the consuming public.[14] In effect, belief in the claims of authorship emerged as the grand narrative that justifies and explains this branch of intellectual property law.

B. Postmodern Copyright?

If copyright theory and doctrine grew up in conversation with a particular world view, then the proposition that legal understandings of copyright could change as that dominant vision is displaced should not be particularly controversial. But it may prove to be, nonetheless, precisely because its underlying premise has yet to achieve general acceptance. The general notion that law is derivative of cultural attitudes is not revolutionary in itself. Many would accept that our notions of crime are rooted in religious and ethical beliefs or that the emergence of human rights law was abetted by the ethos of post-WWII decolonialization. But among intellectual property scholars, there has been some resistance to claims of cultural influence in the copyright field—at least in the United States. This is traceable, I think, to a collective, proudly disillusioned position that copyright, unlike other bodies of law, is really all about the money; that IP law is simply a machine to generate innovation through economic incentives; and that lawyers are merely engineers called on occasionally to tweak or tinker with the mechanism.[15] Such scholars celebrate when (from their perspectives) the machine works well, and they lament when it runs poorly—but it's all just gears and switches either way. To some extent this economic/mechanistic perspective on copyright may have been overtaken by recent events. More and more, scholars are paying attention to the roles that rhetorics (whether of "authorship" or "piracy" or even "property" itself) have played in forming legal discourse—and therefore, law itself.[16] Certainly,

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14. This argument is developed in Martha Woodmansee, *Genius and the Copyright*, 17 EIGHTEENTH-CENTURY STUD. 425 (1988), *reprinted in* THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS 49-55 (1994); Jaszi, *supra* note 8, at 455 (discussing the concept of authorship).

15. *See, e.g.*, Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 894-904 (1997) ("[Romantic authorship does not] tell us very much at either a theoretical or a predictive level about intellectual property law . . . ."). Lemley proposes as an alternative that the ills of the field are the result of an inappropriate application of Chicago School law-and-economics movement theory to mental productions. *Id.* at 897-98.

16. *See* Woodmansee, *supra* note 14, at 42-47; Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, *in* 6 NEW DIRECTIONS IN COPYRIGHT LAW 3 (Fiona Macmillan ed., 2008); Hughes, Justin, *Notes on the Origin of Intellectual Property: Revised Conclusions*

the "copyright wars" of the 1990s have given us new reason to appreciate how effectively the emotive tropes of individualism can be mustered in support of particular policy objectives. After all, the present account of "postmodern copyright" may find favor where the original "critique of authorship" did not.

III. *ROGERS V. KOONS*

In any event, the objective here is not to refight old battles, but rather to suggest that, once again, copyright law has struck up a conversation with the general culture and that there are signs that this new discursive connection may prove consequential. And that brings the focus back to Jeff Koons, his art, and his litigations—beginning with *Rogers v. Koons*, about which I first wrote seventeen years ago[17]—a decision that tells the story of an image's rise from humble beginnings as a homely semiposed photo of a couple and their dogs to its apotheosis as a monumental and somewhat disquieting larger-than-life sculpture, included (along with other monumentalized kitsch) in Jeff Koons's highly successful "Banality Show."[18] In what follows, I will offer a modest revision of my previous take on that fascinating case. Back in 1992, my commentary on the Second Circuit decision emphasized the importance of the case as it demonstrated persistence of "Romantic" authorship—the influential conceptualization of the deserving creator of culture as an inspired original genius entitled not only to ownership of, but also to a broad scope of protection over, his or her productions.[19]

I argued then that Jeff Koons lost on his fair use defense in large part because he failed, or refused, to conform to the stereotype of the serious, dedicated creator around which our copyright law increasingly came to be organized from the early nineteenth century on.[20] By contrast, artist-photographer Art Rogers, who was bracketed with Ansel Adams by Second Circuit Court of Appeals Judge Cardamone, was portrayed as a complete artist who "makes his living by creating, exhibiting, publishing[,] and otherwise making use of his rights in his . . . works."[21] Conversely, Koons came off as a money-mad opportunist (with a

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and New Sources (Benjamin N. Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 265, 2009), *available at* http://ssrn.com/abstract=1432860.

17. Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 28, 41-48 (Martha Woodmansee & Peter Jaszi eds., 1994).

18. *Id.*

19. *Id.* at 42-44.

20. Rogers v. Koons, 960 F.2d 301, 303-04 (2d Cir. 1992).

21. *Id.* at 304.

background in commodities trading, no less) who did not even personally execute the projects he conceived.[22] Technically, the argument was framed as a case about the applicability of "parody" fair use, but in fact, I argued then, something rather different was going on.[23] The judge left no doubt about how he viewed the defendant's moral and aesthetic fitness:

> The copying was so deliberate as to suggest that the defendants [Koons and his dealer] resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of piracy.[24]

In other words, Koons was not qualified to invoke a defense that was, at its base, rooted in a twist on Romantic authorship.

Looking back, it seems possible that something more (or, at least, slightly different) may have been at work as well, and that the opinion also could be understood as evidence of the persistent influence of Modernist thought on copyright law of the late twentieth century. Art Rogers is a recognizable modern maker with a gift for creating real art from common materials.[25] By contrast, according to Judge Cardamone, all the earmarks of Modernist high culture—the seriousness, the integrative stance, the suspension of temporal morality—were conspicuously absent from Koons's insouciant and even trivial "performance" in "String of Puppies": Jeff Koons was not just a nonauthor, the court's opinion suggests, but a "bad boy" disgrace to Modernist values and attitudes—although, we suspect, one who is (or was) proud of that stance.[26]

In arriving at his characterization of Koons, Judge Cardamone relied on a *New York Times* article by Michael Brenson.[27] The pertinent part of that article declared that

> [Koons's] art is largely strategic. Images have been appropriated from photographs of popular culture and collaged together into spanking new commodities. They were made collectively, even anonymously, by workshops in northern Italy. What seems to matter is not the originality of the artist, but rather images that belong to an entire culture and that everyone in that culture can use.[28]

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22. *Id.* at 303-04.
23. Jaszi, *supra* note 17, at 44-48.
24. *Rogers*, 960 F.2d at 303.
25. *See id.* at 304.
26. *See id.* at 311.
27. Michael Brenson, *Greed Plus Glitz, with a Dollop of Innocence*, N.Y. TIMES, Dec. 18, 1988, Gallery View § 2, at 41; *see also* Jaszi, *supra* note 17, at 43 n.50.
28. Brenson, *supra* note 27, § 2, at 41.

Clearly, this view of the source material is not shared by the judge![29]

But that was then, and this is now. In this moment, postmodern sensibility is no longer the special province of cultural critics, if it ever was. Instead, it is being enacted (often in ways enabled through new technology) by way of the hacker ethic; hip-hop, remix culture, and other forms of bricolage; and the DIY movement, to mention only a few examples. This outlook is so pervasive that it would be surprising if it had no implications for legal thinking about information regulation. When this Article returns to the Jeff Koons story, it will be to suggest that seventeen years later, copyright discourse has begun to reflect, however tentatively, an attitude of postmodernism.

To be clear, the suggestion is that attitudes have begun to change in the last several decades; it is *not* that some aspects of postmodernism have been anticipated in classic twentieth-century copyright doctrine, although this may well be the case. In Justice Holmes' famous 1903 dictum in *Bleistein v. Donaldson Lithographing Co.*, he pointedly declined to discriminate between conventional fine art and the very mundane advertising posters involved in that litigation, which can be understood as a gesture of premature postmodernism.[30] Jane Gaines and Brad Sherman, respectively, are right to note that copyright can be a "great cultural leveler," and that it "refuse[s] to distinguish works of high and low authorship."[31] Generally speaking, however, copyright has held tightly onto other kinds of Modernist hierarchies—especially the scale along which more and less "original" artistic productions are valued.[32] Conventionally, copyright law has given a special place of pride to work that originates from either the fertile mind of its maker or as a result of that mind's interaction with the raw materials of nature.[33] The result, of course, is that merely "derivative" works—those that take preexisting culture for their material—have been systematically undervalued in the

29. *See Rogers*, 960 F.2d at 309-11.

30. 188 U.S. 239, 251 (1903) ("[T]he act however construed, does not mean that ordinary posters are not good enough to be considered within its scope."); *see* Diane Leenheer Zimmerman, *The Story of* Bleistein v. Donaldson Lithographing Company*: Originality as a Vehicle for Copyright Inclusivity, in* INTELLECTUAL PROPERTY STORIES 77-108 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2005).

31. JANE GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE AND THE LAW 64 (1991); Brad Sherman, *Appropriating the Postmodern: Copyright and the Challenge of the New*, 4 SOC. LEGAL STUD. 31, 56-57 (1995). The further implications of postmodernism for copyright (and IP in general) were memorably foreseen in Rosemary J. Coombe, *Objects of and Subjects of Property: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991), and Margaret Chon, *Postmodern "Progress": Considering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

32. *See* Jaszi, *supra* note 8, at 460-64.

33. *Id.*

copyright scheme. This attitude, of course, is on prominent display in *Rogers*.[34] Koons's defensive arguments fail, at least in part, because the culturally referential nature of his sculpture contrasts unfavorably with the straightforward artistry of Rogers' photo.[35] Whatever the postmodern potential of copyright may have been, the case demonstrates how far the copyright system was, in the early 1990s, from its realization.

IV. *BLANCH V. KOONS*

In 2006, however, the Second Circuit Court of Appeals decided *Blanch v. Koons*, which concerned the artist's incorporation of a portion of an image known as "Silk Sandals," which had earned the fashion photographer/plaintiff a $750 commissioning fee, into "Niagara," a Koons painting in the widely exhibited $2 million, seven-painting "Easyfun-Ethereal" series.[36] Once again, Koons's defense was fair use, but this time it received a far more respectful treatment. The real indicator of change, however, is found in the specific language employed by the court on its way to a finding that the use was "transformative" in that it added value to and fundamentally repurposed the original photograph.[37] On his way to a conclusion, Judge Sack noted: "The question is whether Koons had a genuine creative rationale for borrowing Blanch's image, rather than using it merely 'to get attention or to avoid the drudgery in working up something fresh.'"[38] The court continued (with considerable deference) by noting Koons's own explanation of why he used Blanch's image:

> Although the legs in the Allure Magazine photograph ["Silk Sandals"] might seem prosaic, I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself. The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication. Images almost identical to them can be found in almost any glossy magazine, as well as in other media. To me, the legs depicted in the Allure photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular. By using a fragment of the Allure photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in Allure Magazine. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference

34. *Rogers*, 960 F.2d at 312.
35. *See id.* at 309-11.
36. Blanch v. Koons, 467 F.3d 244, 247-49 (2d Cir. 2006).
37. *See id.*
38. *Id.* at 255.

between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to.[39]

This self-justificatory statement may or may not make sense as an explanation of why "Niagara" is a critical commentary on popular media culture. Ultimately, however, its coherence may not matter. What clearly does matter is that Judge Sacks takes Koons's self-expressed claims as an interpreter and repurposer of existing content very seriously—so much so that he is willing to agree that "these are not anyone's legs in particular," but limbs available for appropriation by someone with a new angle. He concludes, with a bow to *Bleistein*:

> Although it seems clear enough to us that Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography, we need not depend on our own poorly honed artistic sensibilities. . . . We conclude that Koons thus established a "justif[ication for] the very act of [his] borrowing." Whether or not Koons could have created "Niagara" without reference to "Silk Sandals," we have been given no reason to question his statement that the use of an existing image advanced his artistic purposes.[40]

V. TELLING A TALE OF TWO KOONS—ROMANTIC AUTHORSHIP REDUX OR THE RISE OF "TRANSFORMATIVENESS" OR . . . ?

Clearly, Judge Sacks was prepared to cut Jeff Koons a good deal of slack.[41] So what explains this reasoning and result? What changed over the years from *Rogers* to *Blanch*? Several explanations suggest themselves.

By far the least interesting is that Jeff Koons has not actually escaped the grid of Modernist author-based copyright reasoning at all, but (always an accomplished self-publicist) has merely succeeded in slotting himself more firmly into it. In other words, the decision represents the persistence of Romantic authorship rather than hinting at its senescence. Back in *Rogers*, Koons was a "player," not an author.[42] Now, he's claimed that privileged status with work in the collection of the Metropolitan and a solo(!) exhibition in the summer of 2008 at the Palace of Versailles.[43] Koons has become fully credentialed as a creative genius,

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39. *Id.*
40. *Id.* (internal citation omitted).
41. *See id.*
42. Rogers v. Koons, 960 F.2d 301, 307-10 (2d Cir. 1992).
43. *See* Jeff Koons Versailles, www.jeffkoonsversailles.com/en/ (last visited Oct. 20, 2009). In announcing this coup, Koons sounds at least somewhat authorial: "It is an honor to represent contemporary culture within the walls of the Palace of Versailles." *Id.* For the controversy surrounding the exhibit, see also Kitsch Trumps Baroque: Koons' Versailles Show

and (with this understanding) that makes all the difference. The fatal shortcoming of this explanation is that it does not account satisfactorily for much of the opinion's actual rhetoric. In fact, the court of appeals' opinion hardly discussed "authorship" and "originality."[44] It certainly does not suggest that fair use analysis is just a matter of weighing competing authorship claims.[45]

The most technical explanation focuses strictly on shifts in copyright doctrine during the period between the two lawsuits. When *Rogers* was decided, the transformativeness-based approach to fair use analysis was still a personal project of Judge Pierre Leval and not yet the law of the Second Circuit or the land.[46] Today, transformativeness figures as a kind of metaconsideration arching over fair use analysis. The determination of whether a use is transformative or not strongly inflects (if not dictates) the outcome of at least three, if not all four, of the statutory factors to which section 107 of the Copyright Act directs judicial attention.[47] It was born in the context of Factor One (the nature of the use) but has its most dramatic implications for Factor Four (the effect on the market), with courts (up to and including the United States Supreme Court) suggesting that copyright owners are not entitled to expect licensing revenues from "transformative markets."[48] However, the rise of transformativeness is far from being a self-explanatory or an autonomous phenomenon. It does not so much explain as it correlates with the court's approach in *Blanch*.[49] Or, to state the matter differently, both the hegemony exercised by this legal standard in general and the

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Ruffles Feathers in France (Sept. 10, 2008), www.spiegel.de/international/europe/0,1518,577388,00.html.

44. *See generally Blanch*, 467 F.3d 244.

45. In the *Blanch* district court opinion, the judge actually seemed to take a similar approach, dismissing the "Silk Sandals" photo as (interestingly) "banal rather than creative." Blanch v. Koons, 396 F. Supp. 2d 476, 481-82 (S.D.N.Y. 2005). But the Second Circuit firmly rejects this qualitative "comparative" technique. *See Blanch*, 467 F.3d at 247-48 (respectfully describing Andrea Blanch and her work).

46. The transformativeness-based approach was introduced by Judge Pierre N. Leval in *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111-17 (1990). Since that time, it has evolved into the generally accepted meta-criterion in fair use analysis. *But see* Mitch Tuchman, *Judge Leval's Transformation Standard: Can It Really Distinguish Foul from Fair?*, 51 J. COPYRIGHT SOC'Y 101 (2003). For the evolution of the standard since 1990, see Peter Jaszi, *Copyright, Fair Use and Motion Pictures*, 2007 UTAH L. REV. 715, 718-22 (evolution of the standard since 1990); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (systematic analysis of fair use as applied in a wide range of contexts).

47. Jaszi, *supra* note 46, at 720, 725; 17 U.S.C.A. § 107 (2009).

48. Jaszi, *supra* note 46, at 722 (quoting Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605, 614-15 (2d Cir. 2006)).

49. *See Blanch*, 467 F.3d at 251-53.

mode of its application to Jeff Koons in particular may reflect similar shifts in the cultural positioning of copyright.[50]

VI. POSTMODERN COPYRIGHT

A. The Second Circuit the Second Time Around

And that brings the argument to what may be the most interesting explanation of the Second Circuit's revised take on Jeff Koons: that the rhetorical structure of the *Blanch* opinion represents a significant move away from the Modernist author-worship, and an early signal of a perceptible shift in how courts will increasingly understand the relationship between author and work in years to come.[51] It represents, in fact, a rejection of the grand narrative of authorship and "author-ity," in favor of an approach that distributes attention and concern across the full range of participants in the processes of cultural production and consumption.[52] As such, it may signal a general loosening of authors' and owners' authority over, by now, not quite so auratic works, allowing greater space for the free play of meaning on the part of audience members and follow-up users who bring new interpretations.[53] If so, this is a change of potentially profound importance, undermining the stability of the two concepts at the heart of modern copyright.[54]

Viewed in this way, the *Blanch* decision suggests that as old attitudes have been displaced or supplemented by new ones in the domain of culture, law is (however belatedly) beginning to follow suit. Specifically, law may be absorbing an attitude of skepticism about fixed identity and stable point of view—recognizing what has been clear for some time in arts practice and aesthetic theory: that much like the natural world, constructed culture is fair game for reinterpretation as

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50. See the interesting discussion in Laura Heymann's *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J. L. & ARTS 445, 460-62 (2008) (contrasting *Rogers* and *Blanch* and suggesting that courts might determine whether a claimed fair use is transformative by considering whether the defendant's work engages with a different discursive community from the plaintiff's work). Professor Heymann's prescription for the improvement of transformativeness analysis is that courts take into greater account the insights of reader-response criticism; she finds in *Blanch* (and other cases cited in her footnote 90) an indication that such a refined approach may already be at work. *Id.*

51. *See generally Blanch*, 467 F.3d 244.

52. *Id.*

53. *Id.*

54. For some of the difficulties attending the concept of the "work," see Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993).

"fact[s] in the world," to quote Jeff Koons once again.[55] If so, as Laura Heymann has suggested, these developments will be consequential in the law of fair use.[56] Among other things, how they play out will profoundly influence the copyright position of the growing community of fan fictioneers, vidders, remixers and mash-up artists who are currently running afoul of the on-line content platforms' take-down policies.[57]

B. Another Swallow: Sony Corp. of America v. Universal Studios, Inc.

Obviously, it is risky to take one decision (or even a group of related decisions concerning a topic such as fair use in appropriation art) as markers for a trend in copyright thinking. Fortunately, the evidence of Blanch is not uncorrupted. Consider, for example, recent developments in the law regulating the liability of technology providers, beginning with the Supreme Court's 1984 decision in *Sony Corp. of America v. Universal Studios, Inc.*, which embodies a skeptical attitude toward claims of authority that impinge on audience choice.[58] There, the Court ruled that home recording and "time shifting" of television programming constituted "fair use"—and went on to immunize technology providers from liability for supplying the necessary VCR equipment.[59] It reasoned:

> The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. . . . Copying a news broadcast may have a stronger claim to fair use than copying a motion picture. And, of course, not all uses are fungible. . . . A teacher who copies to prepare lecture notes is clearly productive. But so is a teacher who copies for the sake of broadening his personal understanding of his specialty. Or a legislator who copies for the sake of broadening her understanding of what her constituents are watching; or a constituent who copies a news program to help make a decision on how to vote.
>
> Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an

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55. *Blanch*, 467 F.3d at 255. An extended critique of the *Rogers* decision as failing to recognize the nature of "postmodern" appropriation art can be found in Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 23-33 (1992).

56. Greenberg, *supra* note 55, at 33; Heymann, *supra* note 50, at 460-62.

57. For a description of these issues, see Elec. Frontier Found., Fair Use Principles for User Generated Video Content, http://www.eff.org/issues/ip-and-free-speech/fair-use-principles-usergen (last visited Oct. 12, 2009); Ctr. for Soc. Media, Code of Best Practices for Fair Use in OnLine Video (May 2009), http://www.centerforsocialmedia.org/resources/publications/fair_use_in_online_video.

58. 464 U.S. 417, 454-55, 464 (1984).

59. *Id.* at 453-56.

> example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying. In a hospital setting, using a VTR to enable a patient to see programs he would otherwise miss has no productive purpose other than contributing to the psychological well-being of the patient. Virtually any time-shifting that increases viewer access to television programming may result in a comparable benefit.[60]

In other words, the decision puts the controls, so to speak, in the hands of the end-user, a gesture of empowerment made in defiance of the received "grand narrative" of copyright law that concentrates authority in the copyright owner. The Supreme Court's discussion, quoted above, makes it clear that its analysis is driven by an understanding that its decision is a necessary intervention into the politics of authority over information—an essentially postmodern stance.[61]

VII. *CARTOON NETWORK LP V. CSC HOLDINGS INC.*

More recently, the Second Circuit decided *Cartoon Network LP v. CSC Holdings, Inc.*, a case that determined whether a cable system's operation of a virtual digital video recorder (RS-DVR) on behalf of its subscribers involved various violations of copyrights in broadcast content.[62] At first blush, this is hardly promising material for a close reading aimed at detecting a possible shift in underlying assumptions about the nature of copyright. Certainly, it is a highly technical decision, addressing (1) whether buffer copies are infringing reproductions, (2) whether transmission of those copies to users at a time of their choosing constituted "public performance," and (3) whether the company has legal responsibility for longer-enduring "playback" copies made on

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60. *Id.* at 454-55. *Sony* displayed a streak of postmodernist self-consciousness in both its substantive analysis and in the technique of that decision—relying as it did on statutory bricolage to introduce the patent concept of "staple item of commerce" into copyright. *See also* Heymann, *supra* note 50, at 457 (concluding that under the proposed refinement of transformativeness analysis, time-shifting might not qualify although it might be considered fair use on other grounds).

61. *See Sony*, 464 U.S. at 455-56.

62. 536 F.3d 121 (2d Cir. 2008). Copyright owners receive extra revenue when their content is accessed through cable systems' "on demand" features but not in cases of viewer-initiated time-shifting. *Id.* at 124. Interestingly, the parties undertook not to contest the issues of whether the cable system's activities could give rise to "secondary" (contributory or vicarious) liability, and whether the "fair use" defense was available. *Id.* Instead, by agreement, the focus was placed on whether any activities might constitute direct infringement (as, for example, by reproduction) on the cable system's part. *Id.* On June 29, 2009, after a failed effort by copyright owners to persuade the new Solicitor General to weigh in, the Supreme Court declined to hear a further appeal, and the courts of appeals' analyses are now settled. CNN, Inc. v. CSC Holdings, Inc., 129 S. Ct. 2890 (2009).

its own servers.[63] But in setting aside the district court's conclusions on each of these issues, the Second Circuit ran a gauntlet of seemingly applicable precedents, driven forward by its apparent awareness of what amounts to core postmodern themes or concerns.[64]

For example, the panel of judges disposed of the public performance issue by noting that each performance served by the cable system to subscribers was made by means of a separate copy—finding significance in the fact that each subscriber's experience of the recorded work was both formally and substantively distinct from those of others.[65] And in addressing the question of responsibility for the making of the playback copy, the court opined:

> In most copyright disputes, the allegedly infringing act and the identity of the infringer are never in doubt. These cases turn on whether the conduct in question does, in fact, infringe the plaintiff's copyright. In this case, however, the core of the dispute is over *the authorship of the infringing conduct.*[66]

The court concluded:

> In the case of a VCR, it seems clear-and we know of no case holding otherwise-that the operator of the VCR, the person who actually presses the button to make the recording, supplies the necessary element of volition, not the person who manufactures, maintains, or, if distinct from the operator, owns the machine. We do not believe that an RS-DVR customer is sufficiently distinguishable from a VCR user to impose liability as a direct infringer on a different party for copies that are made automatically upon that customer's command.[67]

With this new variation on the theme of "authorship," directed not to the works involved but to the challenged "conduct," the Second Circuit reenacted the rationale of the Supreme Court's 1984 *Sony* decision, with its emphasis on safeguarding private choices about information consumption.[68]

The *Cartoon Network* decision has been, to say the least, controversial. In particular, critics alleged, with some justification, that in arriving at its result, the Second Circuit took liberties with statutory concepts such as the requirement that an infringing copy must exist for

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63. *Cartoon Network*, 536 F.3d at 129-30.
64. *Id.* at 134-40.
65. *Id.* at 137-39.
66. *Id.* at 130 (emphasis added).
67. *Id.* at 131.
68. *Id.* at 132-33; *see also* Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 437-42 (1984).

"more than transitory duration."[69] Noting that there are no applicable precedents to guide a determination of how stable a copy must be in order to infringe, the court continues:

> No bit of data remains in any buffer for more than a fleeting 1.2 seconds.... [E]ach bit of data here is rapidly and automatically overwritten as soon as it is processed. While our inquiry is necessarily fact-specific, and other factors not present here may alter the duration analysis significantly, these facts strongly suggest that the works in this case are embodied in the buffer for only a "transitory" period, thus failing the duration requirement.[70]

The liberatory effect of this analysis is considerable. And reasonable as it may sound, it represents no small exercise of creativity on the part of the court. The quoted language clearly suggests the possibility that there exists a range of short-lived information phenomena (some trivial and others significant) that fall outside the scope of copyright regulation. In particular, data flows may escape the web of copyright—an outcome that is reflects a postmodern appreciation and understanding of the instability and contingency of information objects.

VIII. CONCLUSION

Both the method and the outcome of *Cartoon Network* were highly controversial.[71] But the decision seems here to stay. What it, and the

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69. Oliver A. Taillieu, *Cartoon Network v. CSC Holdings*: Remote DVR Does Not Violate Copyright Protections Afforded to Television Program Copyright Holders (Sept. 18, 2008), http://www.lawupdates.com/commentary/icartoon_network_v_csc_holdings_i_remote_dvr_does_not_violate_copyright_pro; *see also* Posting of Jeff Neuburger to New Media & Tech. Law Blog, http://newmedialaw.proskauer.com/2008/08/articles/copyright/ram-copying-an-issue-of-more-than-transitory-duration/ (Aug. 20, 2008).

70. *Cartoon Network*, 536 F.3d at 129-30.

71. Some sense of how controversial the decision was can be gleaned from the Amicus Brief filed by the Copyright Alliance, an umbrella organization of major copyright industry companies and associations, urging the Supreme Court to hear the case. Brief for Copyright Alliance as Amicus Curiae Supporting Petitioners, CNN, Inc. v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) (No. 08-448), 2008 WL 4887717, at *17-23. In effect, the Alliance argued that the Second Circuit (1) had erred in accepting the analogy between the home VCR involved in Sony and the remote, virtual service offered by Cablevision; (2) had improperly invaded the policy-making province of the legislature; and (3) had made various serious mistakes of law and fact. *Id.* at *3-5, 9-10, 13-17. It also foresaw enormous difficulties if the panel's interpretation of the law were to be applied to various other new technologies, such as "cloud computing":

> The copies that users obtain in . . . cloud computing models are clearly stable enough to be used for their intended purpose, but may not exist long enough to satisfy the Second Circuit's additional "duration requirement" for copyright protection. Thus, the decision below may call into question the ability of a copyright owner to enter into an enforceable license for these "fleeting," short-term uses of its works, as well as its capability to bring infringement actions against those who access these works without a

other recent decisions discussed here, may signal for the future is another question. It is too soon to pronounce the death of the Modernist conception of authority in copyright, or the desuetude of the related concept of the fixed work. But change may, nevertheless, be underway.

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license, or in excess of licensing provisions, solely for the purpose of extracting their value through making a short term copy.

Id. at *16-17.