"A DANGEROUS UNDERTAKING":

THE PROBLEM OF INTENTIONALISM AND PROMISE OF EXPERT TESTIMONY IN APPROPRIATION ART INFRINGEMENT CASES

"It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." — Justice Oliver Wendell Holmes[1]

I. Introduction

In May 2011, a federal district court issued a ruling that shocked the art world. In a copyright infringement action against prominent artist Richard Prince,[2] Judge Deborah Batts of the Southern District of New York dispensed the art world equivalent of the death penalty: an injunction requiring that artworks be "deliver[ed] up for impounding, destruction, or other disposition."[3] The condemned works—a series of Prince collages titled "Canal Zone"—contained photographs from *Yes, Rasta*, a book of portraits of Jamaican Rastafarians by the photographer Patrick Cariou.[4] Prince had cut out images from the book and painted over them, combining them in his collages with other original and found images.[5] The court held that by using images from *Yes, Rasta*, Prince infringed Cariou's copyrights, and his work did not qualify for the fair use defense.[6]

Two years later, in April 2013, the Second Circuit reversed Judge Batts's decision, holding that several of Prince's images constituted fair use and remanding the remainder of the

---

[1] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).
[2] *See Richard Prince Biography*, GAGOSIAN GALLERY, http://gagosian.vaesite.net/__data/9fc46da40860e8dfbd593fb7af4bc63f.pdf (last visited Feb. 1, 2013).
[3] Cariou v. Prince, 784 F.Supp.2d 337, 355 (S.D.N.Y. 2011).
[4] *Id.* at 343-44.
[5] *Id.*
[6] *Id.* at 353-54.

photocollages for further consideration by the district court.[7] The Second Circuit's decision is a landmark ruling on a problem that has plagued American intellectual property law for some time: how copyright law should handle appropriation art, the genre of contemporary visual art that takes preexisting images from pop culture, media, or other artists and incorporates them into new works.[8] Yet despite the case's high profile, the Second Circuit missed an opportunity in *Cariou v. Prince*. By refusing to define a clear standard for when appropriation art constitutes fair use, the Second Circuit has left the state of copyright law in this realm muddled. Most troublingly, it leaves in place a major problem in courts' current treatment of the fair use question appropriation art cases: courts' overreliance on artists' testimony.

As the Second Circuit acknowledged, the district court in *Cariou v. Prince* based its conclusion "in large part"[9] on Prince's deposition testimony. Prince testified in early stages of litigation that he had no real interest in the meaning behind Cariou's work, and that he took Cariou's images as "raw material" for his own artistic production.[10] Prince refused, in short, to articulate a reason for taking Cariou's works, stating instead that he simply liked the photographs. Many viewed this testimony as "fatal" to Prince's defense,[11] prompting the court to view his appropriation as theft rather than as fair use.

This is not the first time that an artist's failure to articulate the meaning behind his appropriation has resulted in a court siding against him. One need only think of the famous pair

---

[7] Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).
[8] *Compare* Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (finding fair use in an appropriation art case), *with* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1991) (finding an appropriation artwork infringing), Friedman v. Guetta, No. CV 10-00014 DDP (JCx), 2011 WL 3510890 (C.D. Cal. May 27, 2011) (same), *and* United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993) (same).
[9] *Cariou*, 714 F.3d at 707.
[10] Cariou v. Prince, 785 F. Supp. 2d. 337, 349 (S.D.N.Y. 2011).
[11] Rachel Corbett, *Cariou Fights on Copyright Appeal*, ARTNET.COM (Jan. 25, 2012), http://www.artnet.com/magazineus/news/corbett/cariou-versus-prince-1-25-12.asp ("Prince plainly, arrogantly, and perhaps fatally, said in district court that he had no real interest in the meaning behind Cariou's work . . . .") .

of appropriation art cases: *Rogers v. Koons*[12] and *Blanch v. Koons*.[13] In the former case, the artist Jeff Koons was unable to articulate why he had selected the plaintiff's photograph to adapt in sculptural form. The Second Circuit held Koons liable.[14] In *Blanch*, on the other hand, Koons testified as to why he selected a fashion photographer's images to incorporate into his painting and how his use was transformative—and the court looked upon his testimony favorably, holding that Koons had demonstrated fair use.[15]

This paper argues that this phenomenon, whereby appropriation artists are forced to verbally advance a particular interpretation of their own work in order to claim fair use, is contrary to current trends in art theory—and, even more problematically, has serious First Amendment consequences. The problem arises because courts are notoriously unwilling to weigh in on matters of aesthetics and artistic meaning.[16] Rather than reaching independent conclusions about fair use, therefore, courts require appropriation artists claiming the affirmative defense to explain *why* they have appropriated another's images. By forcing artists to articulate their intent, courts are not staying out of the business of making artistic judgments, as they may hope that they are.[17] On the contrary, courts are taking sides in a running debate in the art theoretical community about whether artists or critics should be the ones to interpret artworks—a debate which tends to *disfavor* the artist's own statement of intent.[18] While many have criticized

---

[12] 960 F.2d 301 (2d Cir. 1991).
[13] 467 F.3d 244 (2d Cir. 2006).
[14] *Rogers*, 960 F.2d at 308-09.
[15] *Blanch*, 467 F.3d at 259.
[16] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . ."); *see also* Christine Haight Farley, *Judging Art*, 79 TULANE L. REV. 805 (2005) (criticizing the "doctrine of avoidance" of aesthetic judgments).
[17] *See id.* (describing the principle of "aesthetic non-discrimination" in copyright law).
[18] This trend toward disfavoring artist's own interpretations is closely associated with the "death of the author" in postmodern art and literary theory. The two seminal works in this vein are ROLAND BARTHES, *The Death of the Author*, *in* IMAGE-MUSIC-TEXT (Stephen Heath trans., Hill and Wang 1977) (1967), and MICHEL FOUCAULT, *What Is*

courts for not understanding the transformativeness inherent in appropriation art, it appears that no commentators have thus far identified the particular irony of using artists' testimony to substitute for aesthetic judgment, or the particular harms that this trend produces.

At first blush, the Second Circuit's opinion in *Cariou v. Prince* appears to make progress on the issue of intentionalism in appropriation art cases, by acknowledging that Prince's statements are not dispositive on the question of fair use. Rather than relying exclusively on artists' testimony, the Second Circuit explained, courts should look to "how the work in question appears to the reasonable observer, not simply what an artist may say about a particular piece or body of work."[19] Yet as I will explain, because the Second Circuit failed to instruct courts on how exactly to handle artistic testimony, there remains the threat that courts will default back on intentionalism. Furthermore, the "reasonable observer" standard is unworkable in the context of appropriation art, which requires informed reading for viable interpretation.

This paper proceeds in six Parts. In Part II below, I provide a brief primer on contemporary appropriation art in order to demonstrate how the genre advances artistic progress. Next, in Part III, I explain why licensing breaks down in the context of appropriation art, and how courts handle the consequent infringement actions in this arena. As I explain in Part IV, this status quo is troubling from both an art-theoretical and a First Amendment perspective. In Part V, I propose that courts should invite expert testimony on the question of whether an artistic use is "transformative" in a way that would qualify for the fair use defense.[20] Currently, expert testimony on fair use is not strictly speaking inadmissible, but it has been criticized as irrelevant

---

an Author?, *in* THE FOUCAULT READER (Paul Rainbow ed., Josué v. Harari, trans., Pantheon 1984) (1969). *See infra* Part II.

[19] Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013).

[20] 17 U.S.C. § 107 (2006).

because transformativeness is typically evaluated from the perspective of the ordinary observer.[21] If transformativeness were evaluated from the perspective of the art "expert" or critic, however, two (in my view, positive) results would follow: (1) courts could rely on expert testimony and would not be tethered to artists' own interpretations of their work in a way that stands in tension with contemporary art theory; and (2) "transformativeness" would expand to include transformations in meaning that trained art critics—but not necessarily uneducated observers—can recognize, thereby broadening the First Amendment safeguard of fair use in appropriation art cases.

II. A Brief Primer on Contemporary Appropriation Art

Introductory courses in art history often begin with a discussion of a hackneyed slogan: "Good artists borrow; great artists steal." It is fitting, in a way, that the phrase's origins are unclear; perhaps the words originate with Pablo Picasso, or maybe with T.S. Eliot,[22] or possibly with Igor Stravinsky.[23] Regardless of where the phrase was born, it has now been so often repeated and copied that it is part of our cultural landscape.[24] The appropriation artist's project is embodied in both the content and the widespread dissemination of "Good artists borrow; great artists steal." The appropriation artist takes from the landscape of images and phrases in which we live, quoting from it and recontextualizing what he has quoted.[25]

---

[21] *See* Denise Cote, *Making Experts Count*, 58 J. COPYRIGHT SOC'Y U.S.A. 223, 236-37 (2011).
[22] *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 552 n.73 (2004).
[23] *See* Kembrew McLeod & Rudolf Kuenzli, *I Collage, Therefore I Am: An Introduction to* Cutting Across Media, *in* CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW 1, 1 (Kembrew McLeod & Rudolf Kuenzli eds., 2011).
[24] This is so even within the world of law review articles. *See, e.g.*, Debra L. Quentel, *"Bad Artists Copy. Good Artists Steal.": The Ugly Conflict Between Copyright Law and Appropriationism*, 4 UCLA ENT. L. REV. 39 (1996).
[25] In a 2001 addition to the Oxford English Dictionary, the specific art-historical usage of the term "appropriation" is defined as "the practice or technique of reworking the images or styles contained in earlier works of art, esp. (in later

While elements of appropriation can be found in a variety of artistic practices—not only in the visual arts, but also in music[26] and literature—I wish to focus here on a particular brand of appropriation: the contemporary visual artist's use of existing images in his own works. As the history of this genre reveals, contemporary appropriation art is not premised on rote copying. Rather, it is about quotation, recontextualization, and criticism—the very building blocks of artistic progress.

Todays' appropriation art traces its origins to the development of modernism, when the act of copying first began to take on a critical tenor. Nineteenth-century traditions conceived of imitation as a means to an end, a practice whereby an artist would arrive at his own original style.[27] "In contrast," art critic David Evans has explained, modernist copying is not a means to this end. It *is* the end."[28] This shift was registered in, among others, Pablo Picasso and George Braque's cubist collages of 1912-13, [29] which incorporated newspapers, musical scores, and drawing scraps, thus manipulating signs through their displacement and combination.[30]

While the Cubists manipulated the images with which they worked to a considerable degree, a 1912 work by Marcel Duchamp presaged the later contemporary practice of copying images wholesale. In a painting titled "L.H.O.O.Q.," Duchamp painted a moustache onto Leonardo da Vinci's storied *Mona Lisa*. He also inscribed the image with its homonymic title,

---

use) in order to provoke critical re-evaluation of well-known pieces by presenting them in new contexts, or to challenge notions of individual creativity or authenticity in art."

[26] Appropriative music is particularly significant in that it has played a key role in the development of copyright fair use doctrine. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding that rap music group 2 Live Crew's song "Pretty Woman," a parody of Roy Orbison's "Oh, Pretty Woman," qualified for the fair use defense as commercial parody).

[27] David Evans, *Introduction: Seven Types of Appropriation*, *in* APPROPRIATION 12, 15 (David Evans ed., 2009).

[28] *Id.*

[29] *See* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 108-09 (1989).

[30] *See* Rosalind Krauss, *1912: The Cubist Invention of Collage*, *in* 1 ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM, 1900 TO 1944, 112, 112 (Hal Foster et al. eds., 2004).

which, in French, sounds like the phrase "elle a chaud au cul," meaning "she's got a hot ass." Duchamp's use of the *Mona Lisa* was not quite parody, not quite mimicry. Instead, Duchamp played with the traditions of painting, using the iconic image as a sign that he manipulated and teased.[31]

The notion of images as signs developed significantly in mid-twentieth-century art theory. While artists once focused on mimeticism, postmodern artistic practice shifted toward semiotic[32] forms of representation, in which artists took signs from the world around them and used them to construct new meanings.[33] In semiotic practice, artists use images as "signifiers" of real-world "referents," treating signs as their raw material. By the 1960s, many artistic movements went from using linguistic or invented signs—as was common in the practice of the Dadaists[34] or Lettristes[35]—to using borrowed images from the world around them, especially the distinctive imagery of consumer culture.

This shift was particularly pronounced in the work of a French movement called Situationism. Guy Debord, the Situationist leader, published his landmark text *The Society of the Spectacle* in 1967, in which he argued that social life has turned into a "spectacle" of commodity imagery, from advertising to mass media.[36] This concept is fundamental to the postmodern practice of appropriation because, as George Carlin has explained, "the referent in post-Modern art is no longer 'nature,' but the closed system of fabricated signs that make up our

---

[31] Carlin, *supra* note **Error! Bookmark not defined.**, at 109.
[32] The term "semiotic," as it is used in art-theoretical discourse, comes from the work of Swiss linguist Ferdinand de Saussure. *See generally* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Roy Harris trans., Open Court 1983) (1972) (laying out Saussure's "Semiology," or theoretical approach to linguistics based on the concepts of sign, signifier, signified, and referent).
[33] *See* Carlin, *supra* note **Error! Bookmark not defined.**, at 110.
[34] *See generally* THE DADA PAINTERS AND POETS: AN ANTHOLOGY (Robert Motherwell ed., 1951) (compiling original and secondary source materials about Dadaist art).
[35] *See generally* DAVID SEAMAN, CONCRETE POETRY IN FRANCE (1981) (providing an overview of Lettriste practice).
[36] GUY DEBORD, THE SOCIETY OF THE SPECTACLE (Donald Nicholson-Smith trans., Zone Books 1994) (1962).

environment. . . . In the present century culture functions as the ideal artistic referent."[37] In other words, where an artist once painted a landscape, he now constructs a compilation of the pre-existing images and signs that saturate our visual environment. Consider, for instance, the works of Jasper Johns,[38] who incorporated newspaper scraps into his 1954 painting "Flag,"[39] or Andy Warhol, who openly appropriated trademarked commercial images in his silk-screens of Campbell's soup cans and sculptures of Brillo pad boxes.[40]

Around the same time that copying became a semiotic enterprise, traditional notions of "originality" and "authenticity" came under attack as art and literary theorists began to question prior conceptions of authorship. Traditionally, artists themselves have been seen as bearing primary responsibility for the interpretation of their own works. As Ernst Gombrich wrote in his canonical *Story of Art*, "every one of [an artwork's] features is the result of a decision by the artist," so that the artist is accountable for every aspect of his creation.[41] This viewpoint can be called "intentionalism," or the belief that the meaning of a work is determined by the artist's intentions.

Postmodern art, however, actively challenges this base assumption by questioning the traditional conception of the author as the romantic figure that creates original works. This challenge is associated with two seminal essays in postmodern criticism: Roland Barthes's 1967 *The Death of the Author*, as well as Michel Foucault's *What Is an Author*? of 1969.[42] In broad terms, Barthes and Foucault both argue against intentionalism, arguing instead that the text and

---

[37] Carlin, *supra* note **Error! Bookmark not defined.**, at 111.
[38] Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, 60 OCTOBER 82, 110 (1992).
[39] *See* Jasper Johns, *Flag*, MUSEUM OF MODERN ART, http://www.moma.org/collection/object.php?object_id=78805 (last visited Feb. 4, 2013).
[40] Carlin, *supra* note **Error! Bookmark not defined.**, at 111. Appropriation of trademarked signs raises a separate set of legal issues that are beyond the scope of this paper.
[41] ERNST GOMBRICH, *Introduction: On Art and Artists*, *in* THE STORY OF ART 32 (16th ed. 1995); *see also* Irvin, *supra* note 46, at 126 (quoting Gombrich).
[42] BARTHES, *supra* note 18; FOUCAULT, *supra* note 18.

the author are unrelated, and that critics should interpret a text on its face. Barthes in particular challenged the premise that the author is the creator of an "original" work, arguing instead that the author merely compiles signs that already exist in the world:

> The text is a tissue of quotations drawn from the innumerable centres of culture. . . . [T]he writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with others, in such a way as never to rest on any one of them.[43]

In other words, Barthes's "author" may more properly be termed an "appropriator."

Postmodern author-appropriators emerged in full force in the 1970s with the so-called "re-photographers," including Sherrie Levine, Cindy Sherman, and Barbara Kruger, as well as Richard Prince.[44] During this period, the preferred technology of appropriation artists became photography rather than collage, and with this technological shift the romantic notion of the "artist's hand" left the artwork, thus further challenging traditional notions of originality and authenticity.[45]

Perhaps the most provocative of the re-photographers was Sherrie Levine, who took the practice of appropriation to a new and radical level in the 1980s. Levine re-photographed book plate reproductions of works by well-known artists such as Walker Evans, Alexander Rodchenko, and Kasimir Malevich and presented them as her own work.[46] Levine's "After Walker Evans" series of 1981 has become so emblematic of appropriation art that, in a radical act of what one might call "meta-appropriation," the artist Michael Mandiberg created a website in 2001 titled

---

[43] BARTHES, *supra* note 18, at 146.
[44] John C. Welchman, *Introduction: Global Nets, Appropriation and Postmodernity*, *in* ART AFTER APPROPRIATION: ESSAYS ON ART IN THE 1990S 1, 4 (John C. Welchman ed., 2001).
[45] *See* Heather J. Meeker, Comment, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 215 (1993).
[46] *See* Sherri Irvin, *Appropriation and Authorship in Contemporary Art*, 45 BRIT. J. AESTHETICS 123, 125 (2005); Welchman, *supra* note 44, at 10-11.

AfterSherrieLevine.com, which appropriates Levine's images by making them available for viewers to print out from the Internet.[47] Levine's "re-photographs" are, on one level, the faithful reproduction of a real-life referent: Levine wrote in 1984 that she considered herself "a still-life artist—with the book plate as my subject."[48] On another level, as the critic Rosalind Krauss has pointed out, the re-photographed series function as "collages," in which the appropriated image, taken from the pages of an art book, "acquires along with its status as a readymade, the reified condition of the object."[49]

Crucially, Levine's appropriative gestures are also deeply critical of the original works that they reproduce. As the critic Hal Foster has explained, Levine's re-photographs are a critical "re-presentation of modern art works."[50] Levine's appropriation "reframe[s] the conventional image of the artist-as expressionist,"[51] thus commenting on the nature of Walker Evans's work and authorship even as she challenges its originality.[52]

As Levine's work reveals, contemporary appropriation art finds its theoretical foundations in a very different realm from plagiarism or piracy. Levine does not appropriate Evans's iconic photographs because she wishes to create images of the Great Depression. Instead, her appropriation is a form of "criticism" or "comment"—types of use that are supposed to be

---

[47] AFTERSHERRIELEVINE.COM, http://aftersherrielevine.com (last visited Feb. 5, 2013).
[48] Welchman, *supra* note 44, at 11 (quoting Sherrie Levine).
[49] *Id.* (quoting Rosalind Krauss).
[50] HAL FOSTER, RECODINGS: ART, SPECTACLE, CULTURAL POLITICS 36 (1985).
[51] *Id.* at 72.
[52] Krauss has described Levine's work as an "explicit deconstruction" of modernist and avant-garde notions of originality. ROSALIND KRAUSS, *The Originality of the Avant-Garde, in* THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 151, 168 (1985).

privileged in fair use analysis, [53] though as will be explained below, the fair use defense does not always apply to appropriation art.[54]

Furthermore, as the history of appropriation art reveals, the practice of appropriation is fundamentally aimed at challenging and departing from prior modes of representation. In fact, the practice of contemporary appropriation artists is the sort of innovative criticism and reassessment of our environment that one might argue the Copyright Act is designed to protect. Copyright's constitutional mandate is, after all, "to promote the Progress of Science and useful Arts."[55] If "progress" is central to copyright's mission, surely the paradigm shift from mimetic to semiotic representation, and the accompanying rise of appropriation as a novel form of artistic meaning-making, should fall within its aims.[56] As it turns out, however, copyright doctrine has not wholeheartedly embraced appropriation as the sort of work it is supposed to protect—or even tolerate.

III. How Courts Handle Appropriation Art Infringement Cases

Although it may be valuable and progressive as an artistic strategy, appropriation stands in obvious tension with copyright law. As a threshold mater, one might argue that appropriation art is fundamentally opposed to the basic value premises of copyright, which maintain that "originality" is central to the notion of "authorship," or at least to the ownership of a monopoly

---

[53] 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyright work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.").
[54] *See* Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y U.S.A. 93, 110 (1994) ("The argument for fair use across the spectrum of art appropriation is so weak that even appropriation art advocates cabin their arguments significantly.").
[55] U.S. CONST. art. I, § 8, cl. 8.
[56] *See, e.g.*, Xiyin Tang, *That Old Thing, Copyright . . .: Reconciling the Postmodern Parodox in the New Digital Age*, 39 AIPLA Q.J. 71 (2011) (arguing that copyright doctrine that denies the legitimacy of postmodern art forms, particularly so-called "remix culture," defies the Copyright Clause's mandate "to promote the Progress of Science.")

right in artwork.[57] Appropriation artists, in contrast, actively disavow traditional notions of originality.[58] Their original contribution lies not in the creation of the image itself, but in its manipulation.[59] Given that appropriation artists collect preexisting images rather than creating their own, one might wonder whether appropriation artworks themselves qualify as "original works of authorship" warranting copyright protection.[60]

This paper focuses on a narrower question: how courts should handle cases in which an original artist sues an appropriator for copyright infringement. Since Section 106 of the Copyright Act makes reproducing a copyrighted work the exclusive province of the copyright holder,[61] appropriation art clearly "violates the letter, if not the spirit, of intellectual property law."[62] What is more, the Copyright Act also grants copyright holders the exclusive right to make derivative works,[63] defined as:

> work[s] based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.[64]

---

[57] According to Section 102(a) of the Copyright Act, copyright protection extends to "original works of authorship." 17 U.S.C. § 102(a) (2006). The Supreme Court has interpreted this phrase to require "independent creation plus a modicum of creativity." Feist Publications v. Rural Tel. Serv., 494 U.S. 340, 346 (1991).
[58] *See supra* note 52 and accompanying text.
[59] *See, e.g.*, Irvin, *supra* note 46, at 123 (arguing that although appropriation art appears "to support the view that authorship in art is an outmoded or misguided notion," appropriations artists actually reaffirm the concept of authorship in art by "revealing that no aspect of the objectives an artist pursues are in fact build in to the concept of art."); *see also* Carlin, *supra* note **Error! Bookmark not defined.**, at 110 (describing Warhol's contributions as "more on the order of manipulation than on the creation of original imagery.")
[60] 17 U.S.C. § 102(a) (2006).
[61] *Id.* § 106.
[62] Carlin, *supra* note **Error! Bookmark not defined.**, at 105.
[63] 17 U.S.C. § 106 (2006).
[64] *Id.* § 101.

The derivative works right might seem—again, in letter if not spirit[65]—to bar the production of appropriation art entirely. Yet the relationship of copyright and appropriation art is complex, since appropriation is not theoretically premised on copying or plagiarism, but rather on quotation, recontextualization, or even criticism—in other words, the sorts of activities that in other contexts fall within the realm of the fair use defense.[66]

It is unsurprising, then, that appropriation art spurs a hotbed of copyright litigation, particularly because appropriation artists, by the very nature of their artistic endeavor, are unlikely to seek licenses for their appropriative uses.[67] As explained above, much of the value of appropriation art comes from its critical tenor—a quality that would be eradicated or at least compromised if appropriation artists copied works with the original author's permission. A license might act as an implied "stamp of approval," leading the viewer to infer that the appropriator's criticism of a work bears its original author's imprimatur. Permission thus weakens the effectiveness of appropriation as a strategy for critical discourse. In addition, licenses may be costly for appropriation artists to obtain, and original authors may have unequal bargaining power over potential licensees. Since copyright holders contain monopoly rights in their works, they may capitalize on their monopoly by driving up the price of a license. Appropriation artists may not have the financial resources to obtain such costly licenses,[68] or they may meet resistance from copyright holders who refuse to grant licenses for uses that they

---

[65] Carlin, *supra* note 12, at 105.
[66] 17 U.S.C. § 107 (2006).
[67] *See* William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 313 (2012) ("In the past, a large proportion of the artists working in [the appropriation art] tradition have not obtained licenses from the owners of the copyrights in the materials that they appropriate. With some frequency, those copyright owners have brought suit (or threatened to bring suit) against the artists.").
[68] *See id.* at 275 ("For many artists, even licensing an image is not financially feasible.").

view as critical.[69] Finally, appropriation artists with some knowledge of fair use doctrine may assume that they do not need to acquire licenses—and incur the real and transaction costs associated with doing so—because they view their appropriations as transformative in nature and thus privileged in fair use analysis. For instance, the artist Shepard Fairey, whose "Obama Hope Poster" was the subject of an infringement action by the Associated Press, has stated that he did not seek a license for the AP photograph that he appropriated because "I did not think I needed permission to make an art piece using a reference photo. . . . [T]he photograph is just a starting point. The illustration transforms it . . . ."[70]

Given the art-theoretical, economic, and psychological barriers to licensing in the appropriation art context, it is unsurprising that infringement actions against appropriation artists are common. Yet the case law on these actions is less extensive than one might expect because artists frequently settle disputes out of court.[71] One prominent example is a case involving the appropriation artist Robert Rauschenberg. The photographer Morton Beebe sued Rauschenberg after the artist used one of Beebe's photographs in a collage print.[72] Rauschenberg and Beebe settled the case for $3,000, and Rauschenberg gave Beebe the original copy of the collage, which was worth about $10,000.[73] Notably, Rauschenberg did not admit to any wrongdoing, specifically stating that he "never felt that [he] was infringing on anyone's right."[74] He offered a settlement because neither party wanted to endure the costs of litigation.[75]

---

[69] *See* William M. Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 11 (2000) ("Parody can involve high transaction costs due to the difficulty of negotiating with someone at whom you wish to poke fun.").
[70] Fisher et al., *supra* note 67, at 274.
[71] *See id.* at 313-14.
[72] Rachel Isabelle Butt, *Appropriation Art and Fair Use*, 25 OHIO ST. J. DISP. RESOL. 1055, 1067-68 (2010).
[73] Landes, *supra* note 69, at 4 n.10.
[74] JOHN HENRY MERRYMAN, ALBERT E. ELSEN, & STEPHEN K. URICE, LAW, ETHICS, AND THE VISUAL ARTS 563-64 (5th ed. 2007) (quoting letter from Robert Rauschenberg to Morton Beebe).
[75] Butt, *supra* note 72, at 1068.

Rauschenberg is not the only artist to settle an infringement case out of court while believing that he has made a fair use of a copyrighted image. Other prominent examples include Andy Warhol,[76] David Salle,[77] and most recently, Shepard Fairey.[78] The prevalence of settlement in this area arises in large part because, as this Part will explain, the outcomes of copyright infringement actions in the appropriation art context are context-sensitive and difficult to predict.[79] Even the same artist can be held liable for infringement in one suit and let off in the next, as in the case of Roger Koons discussed below.[80] As I will argue, the deciding factor in this inquiry often turns out to be the artist-defendant's own testimony, in large part because courts are unwilling to make aesthetic judgments themselves and prefer to leave this task to the authors of artistic works.

A. Transformative Fair Use

Before turning to the specific problem of courts' overreliance on artists' testimony, some doctrinal background on copyright infringement is warranted. In order to bring a successful action for copyright infringement, a plaintiff must prove must prove (1) that he owns a valid copyright in the work at issue and (2) that the defendant has copied that work or original aspects of that work.[81] In appropriation art cases, these elements usually are not difficult to establish, because appropriation artists deliberately copy protected elements of other copyrighted works. As a result, appropriation art cases tend to hinge on the affirmative defense of fair use.

---

[76] Landes, *supra* note 69, at 4 n.10 ("Warhol paid $6,000 cash and royalties on the print edition of Flowers to the photographer Patricia Caulfield who had threatened to sue Warhol over his flower paintings.").
[77] Buskirk, *supra* note **Error! Bookmark not defined.**, at 101 (recounting how the artist David Salle settled a suit brought by collaborative graphic artists Cockrill and Hughes for his appropriation of their drawing).
[78] *See* Fisher et al.,*supra* note 67, at 268.
[79] *See* Buskirk, *supra* note **Error! Bookmark not defined.**, at 1069 ("In the few cases that have gone to trial, there is no consistency in the holdings to provide guidance to artists or courts, which illustrates that judges do not know what is fair use in the visual arts.").
[80] *See* Section III.C *infra* (discussing *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) and *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006)).
[81] MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.01 (2012).

Section 107 of the Copyright Act states that fair use, including "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright."[82] The statute outlines four factors that courts should weigh in determining whether or not the fair use defense applies:

> (1) the purpose and character of the use, including whether such use is of a commercial nature . . .; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market or value of the copyrighted work."[83]

Interestingly for appropriation art cases, the final factor includes the effect of an infringing use on the market for authorized derivative works, meaning that a sculptural version of the photographic image contained on a postcard, for instance, can be held to adversely affect the potential market for the original image despite the fact that sculpture and photography are different mediums.[84]

As it turns out, however, fair use outcomes in appropriation art cases most frequently hinge not on the existence of derivative markets, but rather on the question of transformativeness. In *Campbell v. Acuff-Rose Music, Inc.*, a landmark case dealing with appropriation in pop music, the Supreme Court held that "transformative" uses are favored under the first statutory fair use factor and are furthermore assumed to have a lesser adverse effect on the potential market for the original copyright holder's works.[85] The *Campbell* Court explained that the key question to be considered when determining whether a use is transformative is whether it "merely supersedes

---

[82] 17 U.S.C. § 107 (2006).
[83] *Id.*
[84] *See* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1991).
[85] 510 U.S. 569, 579 (1994) ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."); *see also* Tushnet, *supra* note 22, at 544 (stating that transformative uses "are assumed to be less likely to damage the copyright owner's markets").

the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[86] Since *Campbell*, courts have increasingly required elements of transformation—that is, of new material or new meaning (particularly critical meaning)—to be present in a work in order for defendants to claim fair use.[87] A 2000 study found that in all but one of the thirty-eight lower court fair use opinions issued in the six years following *Campbell*, "the courts' determinations regarding transformative use have correlated to their overall decisions regarding fair use."[88]

The centrality of transformativeness in fair use inquiry has been (perhaps rightly) criticized by scholars such as Rebecca Tushnet, who has argued that equating fair use and transformativeness has negative First Amendment consequences because it penalizes valuable forms of non-transformative copying.[89] As a practical matter, however, the emphasis on transformativeness and the influence of *Campbell* are all but inextricable from fair use determinations in the appropriation art context. While it may seem as if a strong correlation between transformativeness and fair use should make it easier to predict infringement outcomes, the truth is that the question of whether or not an appropriation is transformative is a difficult one to answer.

Embedded in the concept of transformativeness are a whole host of secondary issues, both economic and aesthetic. On one hand, the *Campbell* Court justified its emphasis on transformativeness in economic terms, conceiving of fair use as a means to combat market

---

[86] *Campbell*, 510 U.S. at 579.
[87] *See* Tushnet, *supra* note 22, at 550 ("[F]air use increasingly requires transformation . . . .").
[88] Jeremy Kudon, Note, *Form over Function: Expanding the Transformative Use Test For Fair Use*, 80 B.U. L. REV. 579, 583 (2000). Notably, the one case that departed from the trend, *Castle Rock Entertainment, Inc. v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260 (S.D.N.Y. 1997), was subsequently rejected by the Second Circuit, which reversed the transformative use determination to correlate with the overall fair use decision. Castle Rock Entertainment, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 142 (2d Cir. 1998). *See* Kudon, *supra*, at 583 n.28.
[89] Tushnet, *supra* note 22.

failure in licensing.[90] As Justice Souter explained, "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market."[91] Transformative uses—particularly parodies or other critical appropriations—are thus less likely to be licensed, so fair use can step in as a corrective mechanism.

At the same time, however, Justice Souter also justified the transformativeness test in loftier constitutional terms. He explained that this emphasis on transformativeness is intended to further the fundamental goal of copyright, to promote "Progress": "[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing room within the confines of copyright . . . ."[92] In this sense, transformativeness is associated not only with the failure of licensing markets, but also with the notion of artistic progress and with First Amendment values. Indeed, transformative uses that alter the original "with new expression, meaning, or message"[93] expand the so-called "marketplace of ideas" and may be considered fair uses for this reason alone.

In the context of appropriation art specifically, these various notions embedded within transformativeness inquiry tend to push courts to make aesthetic judgments and interpretations, regardless of whether they conceive of fair use as an economic concept or a mechanism for promoting artistic production. This is so because, as has already been explained, it is most likely that the licensing market will fail when the appropriation artist's project is critical in nature.

---

[90] The market failure rationale for fair use is associated with a large body of literature, the full reach of which is beyond the scope of this paper. The canonical work in this realm is Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).
[91] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994).
[92] *Id.* at 579.
[93] *Id.* at 579.

Deciding whether an appropriation is critical and thus unlikely to be licensed is an interpretative exercise that requires the trier of fact to decipher the purpose and meaning of the appropriation. In constitutional terms, meanwhile, the outcome of an appropriation art infringement case will depend in large part on whether or not a court finds that a given appropriation is the sort of transformative, progress-promoting work that the Copyright Act is intended to support. This decision likewise requires some degree of critical and aesthetic evaluation.

B. Courts' Reluctance To Make Aesthetic Judgments

Given that fair use is such a subjective matter, it should come as no surprise that determinations of fair use in the context of appropriation art involve a degree of aesthetic judgment. If the availability of the fair use defense is intimately tied to copyright's goal in promoting progress, then it becomes quite easy for the concept of fair use to blur together with the notion of artistic worth. Yet for a variety of reasons, courts are unwilling to enter the business of evaluating works on their aesthetic merits—or at least they say they are.

No discussion of courts' reluctance to make aesthetic judgments can begin without invocation of Justice Holmes's oft-cited warning: "It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[94] As John Carlin has noted, Justice Holmes uttered this phrase in a context that dealt with copyrightability rather than infringement[95]—and yet, "the underlying idea that judges should remain sensitive to aesthetic criteria that they may not completely understand or agree with remains relevant in the context of

[94] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).
[95] The question in *Bleistein* concerned whether advertisements could be considered "art" for the purposes of copyright protection. *Id.* at 239.

whether appropriation should be considered a fair use or an infringement."[96] Since Justice Holmes first made this canonical statement in 1903, courts have applied it in contexts dealing with non-visual art as well, establishing "a broad nondiscrimination principle, such that copyright should not make judgments about artistic value."[97]

Yet the fact that Justice Holmes made his statement in the context of visual art is particularly significant for appropriation art cases, as it suggests that there is something special about images that places them beyond the reach of ordinary judicial interpretation. Tushnet has suggested that courts tend to view images as either entirely transparent, meaning that they are an accurate reflection of reality whose meaning is obvious and not susceptible to interpretation; or entirely opaque, meaning that they are impossible to interpret because images are somehow not suited for discussion and analysis.[98] Courts' vacillation between the two extremes arises in large part due to the expectation that courts will articulate their determinations verbally, as well as their consequent reliance on modes of textual rather than visual criticism.[99]

Christine Haight Farley has identified a number of additional reasons why courts tend to avoid aesthetic judgment, premised on a series of conventional understandings: "First, art and law belong in separate cognitive and intellectual spheres. Second, art and law exist in polarity where law is objective and art is subjective. Third, law is about precedent whereas art is about the evolution of ideas."[100] These assumptions, however, break down in the realm of fair use, where aesthetic judgments are inevitable, or at the very least where the law must reach objective

---

[96] Carlin, *supra* note **Error! Bookmark not defined.**, at 103 n.3.
[97] Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 712 (2012).
[98] Tushnet, *supra* note 97, at 687.
[99] *Id.* at 688 ("[F]air use, a crucial limit on copyright's breadth, is presently hampered by the model of textual criticism, which makes visual fair uses harder to identify or explain. The baseline expectation that text will be the unit of analysis confounds our ability to work with other creations.")
[100] Farley, *supra* note 16, at 807.

answers to subjective questions.[101] Technically, resolving a copyright infringement case should not involve the sort of purely aesthetic determination that goes into deciding whether or not an object has "art status," meaning that it qualifies as a work of art. This is so because copyright protection vests in "original work[s] of authorship" rather than "works of art."[102] Yet, as I have already explained, determinations of an object's value as art often "operate below the surface" in fair use inquiry.[103]

Nevertheless, because courts put themselves out as objective institutions that stay out of the business of aesthetics, judges have arrived at a variety of avoidance techniques to escape artistic interpretation.[104] These techniques include making automatic decisions about an object's art status without including supporting analysis[105] and deferring to secondary evidence without explaining how it proves the object's art status.[106] In the context of appropriation art, courts rely on one avoidance technique in particular: using an artist's statement of intent as a stand-in for judicial aesthetic interpretation.

C. Role of the Artist's Testimony in Fair Use Determinations

Because courts are loath to make aesthetic judgments on their own, they frequently defer to artists' own statements of intent when evaluating fair use claims in appropriation art cases. In fact, all three appropriation art cases to have reached the circuit court level—all of which happen

---

[101] *See* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 301 (1998) ("[T]he existence of copyright makes subjective judicial pronouncements of aesthetic taste necessary.").
[102] 17 U.S.C. § 102(a) (2006).
[103] Farley, *supra* note 16, at 805.
[104] Farley, *supra* note 16, at 836.
[105] *See id.* at 838 (describing cases where courts "either made conclusions about the artwork's meaning or about whether the artist' contributions were artistic," and stated these conclusions "flatly, as if self-evident.")
[106] *See id.* at 837.

to come from the Second Circuit[107]—were decided with reference to authorial intent. In a famous pair of cases, Jeff Koons's ability or inability to articulate why he had appropriated a particular image turned out to be outcome-determinative. In *Cariou v. Prince*, meanwhile, Prince's perceived aloofness initially presented a major obstacle to his defense. And although the Second Circuit displayed some willingness to look beyond Prince's deposition testimony, their stated approach is likewise problematic from an art theoretical perspective.

1. The Koons Cases

Two cases, separated by a span of fourteen years, have brought artist Jeff Koons to the fore of the appropriation art debate. In *Rogers v. Koons*,[108] a widely criticized[109] pre-*Campbell* case from 1992, the Second Circuit held Koons liable for copyright infringement. In the 2006 case of *Blanch v. Koons*, meanwhile, Koons's work qualified for the fair use defense.[110] In each case, Koons's testimony played a central role.

Koons's work, which has been the subject of both praise and criticism in the art world,[111] follows in a strand of the appropriation art tradition that traces back to the Pop Art of the 1960s. Unlike Levine, for instance, who appropriates images by well-known artists in order to challenge traditional notions of authorship, Koons's appropriation practice is focused on more pedestrian and banal images, particularly images from consumer culture. His work is thus connected with the critical theory of commodity and the Pop Art legacy of depicting consumer culture. The critic

---

[107] This count includes only cases dealing with visual appropriation art, not those addressing practices of appropriation in other media such as music.
[108] 960 F.2d 301 (1992).
[109] *See, e.g.*, A. Michael Warnecke, *The Art of Applying the Fair Use Doctrine: The Postmodern-Art Challenge to the Copyright Law*, 13 REV. LITIG. 685 (1994) (arguing that *Rogers* was wrongly decided).
[110] 467 F.3d 244 (2006).
[111] *Rogers*, 960 F.2d at 304 ("He is a controversial artist hailed by some as a 'modern Michelangelo,' while others find his art 'truly offensive.'")

Hal Foster has coined the term "commodity sculpture" to describe Koons's most famous works, sculptural renderings of appropriated consumer images that treat their subject as a sort of readymade, "collaps[ing] high art and commodity culture programmatically."[112]

In *Rogers*, the photographer behind a black-and-white postcard image of a couple and their eight German Shepherd puppies sued Koons after he created as three-dimensional colored rendering of the image as one of his signature commodity sculptures.[113] In a deposition early on in the litigation, Koons stated, rather brazenly, that he had not sought permission from Rogers to copy his work because in his view, the "Puppies" postcard "[was] not art. . . . It is something that is reproduced over and over again to penetrate into a culture. . . . It is just part of the public domain."[114] In other words, Koons stated explicitly that he saw "Puppies" as a commodity.

To the layperson, Koons's testimony may seem to dodge the question of *why* he appropriated Rogers's work. Yet the fact that Koons saw "Puppies" as a commodity *is* the statement that "String of Puppies" embodies. Koons described the "Puppies" postcard as an example of "visual excess" in society.[115] By appropriating Rogers's image, Koons treated it as a referent, manipulating its signification to comment on a world of visual excess—or, as Koons's artistic ancestors would call it, the "society of the spectacle."[116]

In an action for copyright infringement, however, Koons's deposition testimony did him no favors. Koons admitted to actual copying, and he did not provide a clear verbal justification for why he selected Rogers's image to copy or how his use of Rogers's work was transformative or critical. In holding against Koons, the district court zeroed in on the fact that "Koons

---

[112] HAL FOSTER, THE RETURN OF THE REAL: THE AVANT-GARDE AT THE END OF THE CENTURY 108 (1996).
[113] *Id.*
[114] VILLIS R. INDE, ART IN THE COURTROOM 15 (1998) (quoting Koons's deposition testimony).
[117] *Id.* at 476-77.
[117] *Id.* at 476-77.

concede[d], as he must, that he 'used' Rogers' photograph 'Puppies' as 'source material for his sculpture 'String of Puppies.'"[117] While the court acknowledged that "Koons prefers to avoid the verb 'copied,'" it concluded that "[s]emantics do not decide the issue" and held Koons liable.[118]

The Second Circuit also examined Koons's testimony when it affirmed the district court's holding. Koons had argued that his sculpture was properly understood as a satire or party, explaining that "he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition . . . proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it."[119]

Yet although the Second Circuit "accept[ed] this definition of the objective of this group of American artists,"[120] it did not accept that Koons's appropriation constituted criticism or commentary for purposes of the fair use defense. In so holding, the Second Circuit drew a distinction between satire, which criticizes society at large, and parody, which aims its criticism at the appropriated work. The court concluded 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."[121]

One wonders what might have happened if Koons had explained more specifically why he had appropriated "Puppies" instead of just describing the appropriation art tradition in which he worked. Perhaps Koons simply gave the court the wrong narrative when he described the

---

[117] *Id.* at 476-77.
[118] *Id.*
[119] *Id.* at 309.
[120] *Id.*
[121] *Id.*

context of his work rather than explaining why "Puppies" should be the target of his appropriative practice. It is naturally impossible to know what would have happened had Koons explained that "Puppies" was an exemplar of the commodity-filled visual environment that he sought to criticize—though *Blanch v. Koons* may provide some clues.

In *Blanch*, the Second Circuit held that Koons's work qualified for the fair use defense when he incorporated the plaintiff's photograph into a transformative collage painting.[122] The work at issue was a photograph of a woman's feet wearing Gucci sandals, taken for the fashion magazine *Allure*. Koons scanned the image and incorporated it in a collage of women's feet dangling over images of confections, with Niagara Falls in the background.[123]

As he had done in *Rogers*, Koons again provided the court with a narrative, this time in the form of an affidavit. But rather than discounting Blanch's work as commonplace, as he had done with Rogers's photograph, Koons explained that he saw Blanch's image as an exemplar of the society that he criticized. He also explained why he chose to copy Blanch's image rather than painting a pair of women's legs himself:

> 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. . . . [I]n order to make statements about contemporary society and in order for the artwork to be valid, I must use images from the real world. I must present real things that are actually in our mass consciousness.[124]

In other words, Koons provided a statement of artistic intent that justified his appropriation of Blanch's image as necessary to his artistic strategy.

---

[122] Blanch v. Koons, 437 F.3d 244 (2006).
[123] *Id.* at 247-48.
[124] Blanch v. Koons, 396 F. Supp. 2d 475, 481 (S.D.N.Y. 2005) (quoting Koons's affidavit).

Quoting extensively from Koons's affidavit, the district court granted him summary judgment, finding that Koons's work qualified as "transformative."[125] The Second Circuit agreed, and like the district court, it relied heavily on Koons's affidavit.[126] The Second Circuit was persuaded by the way in which Koons articulated his intent in appropriating the image, namely to prompt the viewer to contemplate his or her own experience with advertising images.[127]

In a concurring opinion, Judge Robert Katzmann made a point of distinguishing *Blanch* from *Rogers*, in which, he contended, "Koons slavishly recreated a copyrighted work in a different medium without any objective indicia of transforming it or commenting on the copyrighted work."[128] Interestingly, however, neither Judge Katzmann nor the *Blanch* majority indicated what the "objective indicia" of transformation in the "Niagara" painting might be. On the contrary, the only evidence of transformativeness to which the Second Circuit pointed was Koons's testimony explaining the purpose and necessity of his appropriation.

2. *Cariou v. Prince*

At first blush, the Second Circuit's recent decision in *Cariou v. Prince* appears to signal a departure from the testimony-based approach to fair use inquiry that emerged in *Rogers* and *Blanch*. The district court, in keeping with the tradition of the Koons cases, had relied heavily on Prince's statements of intent when it ruled against him.[129] It focused in particular on portions of Prince's testimony that suggest that his appropriation did not aim commentary or criticism at Cariou's work: "Prince testified that he doesn't 'really have a message' he attempts to

---

[125] *Id.* at 482.
[126] Blanch v. Koons, 467 F.3d 244, 252 (2006) (quoting Koons's affidavit as support for the court's conclusion that "[t]he sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals' confirms the transformative nature of the use.")
[127] *Id.*
[128] *Id.* at 262 (Katzmann, J., concurring).
[129] Cariou v. Prince, 784 F.Supp.2d 337, 340-50 (S.D.N.Y. 2011).

communicate when making art. In creating the Paintings, Prince did not intend to comment on any aspects of the original works or on the broader culture."[130] Based on this testimony, Judge Batts concluded that "Prince did not intend to comment on [Cariou's work] . . . and Prince's own testimony shows that his intent was not transformative within the meaning of Section 107."[131] In other words, Judge Batts considered the question of transformativeness entirely from the perspective of Prince's statements of authorial intent, rather than reaching an independent judgment about the transformative value of Prince's work.

On appeal, however, the Second Circuit not only reversed Judge Batts's holding, but also took issue with her approach. Writing for the Court, Judge Barrington Daniels Parker, Jr., refused to "hold Prince to his testimony" alone, stating that "the fact that Prince did not provide . . . explanations in his deposition—which might have lent strong support to his defense—is not dispositive."[132] Instead, Judge Parker explained,

> What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so. Rather than confining our inquiry to Prince's explanations of his artworks, we must instead examine how the artworks may "reasonably be perceived" in order to assess their transformative nature.[133]

Judge Parker's opinion went on to undertake an analysis remarkable in appropriation art cases: independent aesthetic interpretation. Judge Parker concluded that all but five of the challenged thirty artworks were transformative as a matter of law, making reference to the "crude and

---

[130] *Id.* at 349.
[131] *Id.*
[132] Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013).
[133] *Id.* (quoting *Campbell*, 510 U.S. at 582).

jarring" nature of Prince's work compared with "Cariou's serene and deliberately composed photographs" to support his argument that "Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work."[134]

Judge J. Clifford Wallace, meanwhile, wrote a separate opinion concurring in part and dissenting in part, in which he stated that he would remand all thirty works for further consideration by the trier of fact.[135] "I see no reason to discount Prince's statements as the majority does," Judge Wallace stated, though he also noted that "perhaps new evidence or expert opinions will be deemed necessary by the factfinder."[136]

Taking the opinions in *Cariou v. Prince* together, the Second Circuit did signal some shift away from the persistent reliance on artists' testimony in earlier appropriation art cases. Yet the ruling remains problematic in two different ways. First, the Second Circuit provided no clear guidance on how artists' testimony should factor into courts' fair use inquiries, and indeed there was disagreement on the court as to whether artists' testimony should be relevant and if so, to what degree.

Second, the "reasonable observer" standard is problematic on its own, because purely visual interpretation of appropriation artworks is just as problematic from an art theoretical standpoint as intentionalist interpretation. Although the reasons for this are discussed in greater detail in Section V.A below, the main issue with pure visual interpretation is immediately apparent from the disposition of the *Cariou* case. The court decided definitively that twenty-five of the thirty artworks at issue qualified as fair use, but it remanded five more works for further

---

[134] *Id.* at 706.
[135] Judge Wallace is a Ninth Circuit judge who sat by designation on the *Cariou* panel. *See id.* at 694.
[136] *Id.* at 712-13 (Wallace, J., concurring in part and dissenting in part).

consideration by the district court. Specifically, Judge Parker explained that these five works contain "relatively minimal alterations" to Cariou's photographs and held that "it is unclear whether these alterations amount to a sufficient transformation of the original work of art such that the new work is transformative."[137] Judge Parker described the visual characteristics of these five works and concluded that because the apparent alterations that Prince made were not optically dramatic, he could not conclude whether or not they were truly transformative, despite his acknowledgment that Prince's alterations "unarguably change the tenor of the piece."[138] The limitations of visual analysis caused Judge Parker to draw an essentially arbitrary distinction between twenty-five "fair uses" and five "question marks." As Bob Clarida put it, Judge Parker's purely visual approach thus "sort of de-conceptualizes the art and treats it as merely a bunch of marks on a surface—very old-timey and reductionist."[139]

Cariou v. Prince, then, leaves courts today in an uncomfortable position. On one hand, Judge Parker's approach invites courts to undertake independent artistic interpretation. This mode of analysis would mark a complete departure from a century's worth of case law, including Supreme Court case law, maintaining an aesthetic nondiscrimination principle in copyright.[140] On the other hand, Judge Wallace's harshly worded dissent warns against this shift, stating that he would be "extremely uncomfortable" conducting independent aesthetic interpretation "in my appellate capacity, let alone my limited art experience."[141] Moreover, the purely visual approach

---

[137] *Id.* at 711.
[138] *Id.*
[139] Donn Zaretsky, *What You See Is What You See*, The Art Law Blog (Apr. 26, 2013), http://theartlawblog.blogspot.com/2013/04/what-you-see-is-what-you-see.html (quoting Bob Clarida); *see also id.* ("If not a jury, you could program a scanner to do it: 88% optically similar is infringement, 38% optically similar is fair use.")
[140] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[141] *Cariou*, 714 F.3d at 714.

to interpretation that Judge Parker embraced has its own shortcomings, as it leads to potentially arbitrary distinctions and is itself out of sync with contemporary art theory. In short, the Second Circuit provided no clear indication of where the proper balance lies between independent visual analysis and reliance on artists' testimony. Courts are left between Scylla and Charybdis: either they should take the leap toward Justice Holmes's "dangerous undertaking" of aesthetic judgment,[142] or they should fall back on overreliance on artists' testimony. Either approach is problematic, as I will now explain.

IV. Problems with the Status Quo

Courts' current treatment of appropriation art infringement cases has been widely criticized, in large part because copyright doctrine in this realm seems to be so fundamentally incompatible with the aims of contemporary appropriation artists. So far, however, commentators have failed to recognize the particular harms that arise when courts rely on artists' narratives to substitute for their own aesthetic evaluation in fair use inquiry.

The fact that the proxy of authorial intent in fair use inquiry has not been commented upon is problematic, because the practice is ill-suited to appropriation art cases in two distinctive ways. First, when courts rely on artist-defendants' testimony, they are not actually avoiding making an aesthetic judgment, as they may hope they are. On the contrary, courts are actually taking sides in a debate in the art theoretical community about appropriate interpretative agents for contemporary art, and doing so in a way that is contrary to the theoretical premises of appropriation.

---

[142] *Bleistein*, 188 U.S. at 251.

Aside from injecting themselves into art world debates, courts also run the risk of abridging First Amendment values when they make fair use determinations on the basis of authorial narrative alone. Fair use is a First Amendment safeguard built into the copyright system. When courts locate appropriation artists outside of the bounds of fair use, appropriation artists' free speech rights may be infringed. In addition, by forcing artists to verbally articulate why they have appropriated certain images in order to be able to claim the fair use defense, courts relegate visual art to a lower position in the speech hierarchy, thus disadvantaging artists who prefer to operate in visual media alone. The freedom of speech implies the freedom to choose a medium and means of expression.[143] Yet in the appropriation art context, copyright law not only places limits on the particular images that an artist can use, it also forces artists to depart from their chosen medium of visual expression in order to be able to justify potentially infringing uses.

A. The Art World Debate over Interpretative Agents and the "Death of the Author"

By relying on the proxy of artists' intent in the interpretative aspects of fair use inquiry, courts unintentionally espouse a specifically intentionalist view on the art theoretical question of who should be the final arbiter of artistic meaning. As I already explained above, however, appropriation artists operate in the shadow of the "death of the author" and changed notions of authorship and interpretation.[144]

It is no surprise, then, that many appropriation artists disclaim intentionalism and espouse the death of the author instead. Levine, for instance, actually appropriated phrases from *The Death of the Author* in a written "Statement" on her artistic practice that appeared in *Style*

---

[143] *See* Cohen v. California, 403 U.S. 15, 26 (1971) (reversing a man's conviction for wearing a jacket bearing the phrase "fuck the draft" and explaining that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").
[144] *See* Part II *supra*.

magazine in 1982.[145] And Prince himself has actively disavowed intentionalism. In a 1984 interview, the artist Peter Halley observed that Prince's works seem to come from different points of view. Halley then asked Prince, "[I]s it possible to conduct an interview with you? Because what voice would address me?" Prince responded: "I don't think it's necessarily important to have a particular point of view. Whether you believe me or not, isn't important."[146]

It also bears noting that the rise of appropriation art coincided with the development of a particular brand of art criticism. At the very moment when the re-photographers arrived on the scene in the late 1970s, the influential journal *October* came into being. In fact, it was in the pages of *October*—founded by the critics Rosalind Krauss, Jeremy Gilbert-Rolf, and Annette Michelson—that many of the key ideas associated with postmodern appropriation "first found their sustained expression."[147] Currently active appropriation artists have, in other words, always worked in the shadow of art criticism; their works consciously, if not actively, seek out the interpretation of trained critics and observers.

And yet courts require appropriation artists to be the ones to articulate the intentions and meanings behind their work in order to claim that their uses are transformative. Courts may hope that by doing so, they are staying out of the business of aesthetics altogether. Yet courts treat artists' testimony in an intentionalist way whenever they use it as the foundation upon which to judge whether a work is transformative in a way that "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message."[148] And by treating artists' testimony in an intentionalist way, courts are not only

---

[145] *See* Sherrie Levine, *Statement*, *in* APPROPRIATION 81 (David Evans ed. 2009).
[146] Richard Prince, *Interview with Peter Hailey*, *in* APPROPRIATION 83, 83 (David Evans ed. 2009).
[147] Welchman, *supra* note 44, at 10.
[148] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

taking sides in the art world debate over interpretative agents; they are taking what the artists at issue would consider to be the *wrong* side.

One might object that the artists' intentions should be relevant to the fair use inquiry, if only with regards to the market failure rationale. If fair use is intended to fill in the gaps where licensing is impossible, the artist's intention may be relevant because the artist is the negotiator, and thus best suited to speak to the question of whether or not acquiring a license would be possible. Yet the artist's intent is not necessarily a good proxy for what the other party to the licensing agreement—the original creator of the copyrighted work—would understand of the potential use. Therefore, the artist's statement of intent will not necessarily accurately reflect what the bargaining conditions surrounding a potential license would have been, since the original artist's interpretation of the appropriated use is relevant to this inquiry as well. Furthermore, fair use serves not only to correct licensing failure between the original parties, but also to broaden the First Amendment safeguard built into copyright law and to signal to other potential appropriators what sorts of unlicensed uses are permitted. Under this broader view of fair use doctrine's purposes, the appropriation artist's intent is actually not as significant as viewers' interpretations of his use.

B. First Amendment Considerations

Aside from standing in tension with contemporary art theory, courts' current treatment of appropriation art also implicates First Amendment concerns. Copyright law and the First Amendment operate on a sliding scale: any monopoly right to an artwork limits the freedom of expression, and any expansion of free speech rights adds to the marketplace of ideas and,

ultimately, to the public domain. On one hand, copyright is "the engine of free expression,"[149] a system meant to incentivize creative production by giving authors monopoly rights to their works. It is the "supply side" of the First Amendment. On the other hand, however, copyright contains certain "built-in First Amendment accommodations" intended to temper monopoly speech rights—first and foremost of which is fair use.[150]

There are at least two ways in which the current state of the law on appropriation art raises First Amendment concerns. First, whenever a court rules against an appropriation artist, it limits the artist's ability to contribute to the marketplace of ideas through his chosen strategy of meaning-making. On the micro scale this may mean that a particular artist is enjoined from displaying or continuing to make a particular type of work; on the macro level, it may produce chilling effects that will hamper future appropriations artists.[151] Second, because courts rely on artists' testimony as a proxy for independent judicial interpretation, courts currently tend to privilege artists skilled in both visual and verbal expression and disadvantage artists who prefer to work through visual means alone.

Appropriation is, in many ways, central to the values that First Amendment seeks to protect.[152] Jack Balkin has stated that freedom of expression depends on people's ability to "participate in culture through building on what they find in culture and innovating with it,

---

[149] Eldred v. Ashcroft, 537 U.S. 186, 191 (2003).
[150] Golan v. Holder, 132 S. Ct. 873, 876 (2012) (quoting *Eldred*, 537 U.S. at 219).
[151] Naturally, the chilling effects will be tempered if licensing is possible; however, as I have already explained, there are many barriers that stand in the way of licensing in the appropriation art context. The chilling effects might also be mitigated if the law operated on liability rules and damages only, instead of injunction; however, the current state of the law makes injunction a very real possibility, as the district court's disposition of *Cariou v. Prince* illustrates. *See* Cariou v. Prince, 784 F. Supp. 2d 337, 355 (S.D.N.Y. 2011).
[152] NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 43 (2008) ("Appropriation lies at the heart, not the margins, of freedom of speech.").

modifying it, and turning it to their purposes."[153] As Roxana Badin has observed, appropriation is a form of expression all its own:

> [T]he very act of appropriation operates as language with which creators speak to and about their audiences. Such communication takes on an interactive dimension that has led, in many cases, to a more direct relationship between the creative arts and popular culture, inevitably increasing the public's exposure to the arts.[154]

In this sense, appropriation is a subcategory of speech, and as such it is entitled to First Amendment protection and even esteem as a public good.

The threats to freedom of expression that arise when courts define fair use too narrowly are well documented elsewhere. Lawrence Lessig and Jed Rubenfeld, among others, have warned that heightened copyright protection for original works can create chilling effects on creative production, disincentivizing transformative uses that would be socially valuable.[155] Naturally, it is difficult to measure chilling effects empirically, so it is hard to tell whether current fair use doctrine actually dissuades appropriation artists from producing works incorporating copyrighted images. Commentators have speculated, however, that the doctrine's lack of clarity necessarily will result in chilling effects.[156] The trend toward settlement, moreover, seems to indicate that many artists are not willing to take the risk of litigation when

---

[153] *Id.* (quoting Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4-5 (2004)).
[154] Badin, *supra* note **Error! Bookmark not defined.**, at 1655.
[155] *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2009); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).
[156] *See* Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1568 (1984) ("The absence of a definitive legal standard for appropriation of visual images results in a chilling of freedom of speech interests. Artists will hesitate to experiment with creative modes if such experimentation may result in liability for copyright infringement."). Although this particular statement predates the Second Circuit case law on appropriation, as well as the Supreme Court's decision in *Campbell*, its underlying logic remains sound. *See also* Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 33 (1992) (stating that *Rogers v. Koons* "ultimately acts to chill—rather than to foster— creative expression, the very antithesis of the economic incentives at the heart of copyright law.").

there is so much uncertainty inherent in the law. This insecurity is particularly acute given courts' lack of confidence in making aesthetic determinations. For instance, Fairey has stated that he settled the AP's suit against him because he was "concerned that the judge and potentially the jury would not have a sufficiently sophisticated understanding of either art or copyright law to judge in [his] favor."[157]

Aside from large-scale chilling effects, moreover, the trend toward intentionalism in copyright infringement actions has another consequence that abridges First Amendment values: it privileges artists' verbal explanations of their intentions over their visual work. Tushnet has linked this tendency to a psychological concept called "verbal overshadowing," whereby verbal descriptions alter an individual's perception of images.[158] Verbal overshadowing can be such a powerful force that different courts contemplating the same copyrighted images can be said to literally "s[ee] different works" depending on how those works were described to them.[159] Although the *Rogers* and *Blanch* courts did see different works, they were, after all, works by the same artist, employing the same fundamental strategy of appropriation. The difference between the two cases, as I have argued, arose from the artist's testimony and from the verbal overshadowing effects that accompanied it. As Tushnet put it, dependence on artists' testimony to justify fair use in visual art cases "means that results may be unpredictable or idiosyncratic, depending on whether the judge has—in Justice Holmes's text-focused words—'learned the new language in which [the artist engaged in fair use] spoke.'"[160]

This unpredictability can cause lopsided results, where visual artists who are also talented wordsmiths are more likely to succeed in claiming fair use. This trend relegates visual art to a

---

[157] Fisher et al., *supra* note 67, at 274.
[158] *See* Tushnet, *supra* note 97, at 735.
[159] *Id.* at 738.
[160] *Id.* at 755 (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)).

lower position in the speech hierarchy, subordinate to verbal explanations. From a First Amendment perspective, such a development is fundamentally undesirable, as freedom of expression implies freedom to choose one's *means* of expression. This issue is particularly troubling given that contemporary appropriation art has actually shifted toward purely visual expression. Levine, for instance, published written works describing the significance of her re-photographs;[161] Prince and others, on the other hand, have abandoned this practice. If artists such as Prince as forced to verbally justify their work, this requirement necessarily implicates First Amendment concerns.

V. Proposal for Transformativeness as an Expert Question

Many of the preceding concerns about overreliance on artists' testimony are difficult to address because they arise from the combination of two doctrinal facts: the Supreme Court has never articulated the perspective from which transformativeness is to be evaluated, and fair use is an affirmative defense. Since the Supreme Court has never stated whether transformativeness should be considered from the viewpoint of a person skilled in art theory or an ordinary observer, lower courts consider it from the artist-defendant's perspective as a default, since the burden lies on the defendant to prove that his use has been fair.[162] To enable courts to depart from their problematic reliance on intentionalism, I propose that transformativeness should be evaluated from the perspective of the expert trained in art criticism. Expert testimony should be both admissible and relevant in this inquiry, so that artist-defendants do not need to be the agents of interpretation for their own work in order to claim fair use.

---

[161] *See, e.g.*, Levine, *supra* note 145.
[162] NIMMER & NIMMER, *supra* note 81, at §13.05.

A. Current Treatment of Expert Testimony in Copyright Infringement Cases

Currently, expert testimony in copyright infringement cases is used in a variety of ways, though courts and litigants frequently lack clear standards for when it should be admitted and how it should be used. Substantive copyright law, including the law on fair use, is largely silent on the issue of expert testimony, with one significant exception: the law on substantial similarity.

The Second Circuit's two-part test for substantial similarity,[163] laid out in *Arnstein v. Porter*, states specifically that expert testimony is admissible on the question of probative similarity (i.e. whether or not copying occurred as a factual matter), but irrelevant with respect to the question of unlawful appropriation (i.e. whether the copying constituted copyright infringement).[164] The latter is subject to an "ordinary observer" test.[165]

This analysis of proof may seem counterintuitive. Probative similarity asks merely whether or not copying has occurred; this seems to be the sort of question that a jury (or a judge faced with a summary judgment motion) can easily answer based on seeing the works at issue. The question of unlawful appropriation, on the other hand, requires the trier of fact to determine whether the defendant has copied copyrightable elements of the original work. This analysis requires the trier of fact to separate out scenes a faire elements, for instance, or features of the work that are dictated by necessity.[166] Doing so could require or at least benefit from some

---

[163] I do not discuss the Ninth Circuit's test here because the appropriation art cases that I am concerned with have all been brought in the Second Circuit. The Ninth Circuit's approach, however, generally treats the analysis of proof the same way, though it uses different terminology. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977); *see also* Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC'Y U.S.A. 719, 723 (2010) (describing the *Sid & Marty Krofft* test as advancing "the same basic two-step approach" that appears in *Arnstein*).

[164] 154 F.2d 464, 468 (2d Cir. 1946).

[165] *Id. Arnstein* dealt with the copyright to a song, so it uses the term "ordinary lay hearer," but the Second Circuit has applied the *Arnstein* test to other forms of expression as well. *See, e.g.*, Ringgold v. BET, 126 F.3d 70 (2d Cir. 1997); Laureyssens v. Idea Group, 964 F.2d 131 (2d Cir. 1992); Walker v. Time Life Films, Inc., 784 F.2d 44, 51-52 (2d Cir. 1986).

[166] *See* Lemley, *supra* note 163, at 737-38.

knowledge of the underlying art form; a photographer, for instance, would be more likely to be able to tell which lighting choices were in a photographer's control versus which ones were dictated by technological limitations.

The counterintuitiveness of the *Arnstein* test has prompted commentators such as Mark Lemley to suggest that courts "ha[ve] the analysis of proof exactly backwards—permitting analytic dissection of the works and expert testimony where the question is one that should be handed to the members of the jury, and falling back on the 'ordinary observer' test on the very questions that require careful dissection by the court."[167] Some courts have attempted to revolve this issue, at least in part, by introducing a so-called "extraordinary observer" test for particular forms of expression.[168] A particularly clear statement of this standard comes out of the Fourth Circuit:

> When conducting the second prong of the substantial similarity inquiry, a district court must consider the nature of the intended audience of the plaintiff's work. If . . . the intended audience . . . possesses a specialized expertise, relevant to the purchasing decision, that lay people would lack, the court's inquiry should focus on whether a member of the intended audience would find the two works to be substantially similar. Such an inquiry may include, and no doubt in many cases will require, admission of testimony from members of the intended audience or, possibly, from those who possess expertise with reference to the tastes and perceptions of the intended audience.[169]

This specialized observer test does not quite turn unlawful appropriation into an expert question, but it provides courts with some flexibility to admit testimony about features of a work that

---

[167] *Id.* at 719.
[168] *Id.* at 730.
[169] Dawson v. Hinshaw Music Inc., 905 F.2d 731, 736 (4th Cir. 1990).

would not necessarily be obvious to a jury or to an untrained judge. The Ninth Circuit, for instance, has used this test to admit background on video games; in that context, it stated that unlawful appropriation should be considered from the perspective of "a discerning 17.5-year-old boy."[170] In the appropriation art context, where artists often make works with the critical establishment in mind,[171] perhaps substantial similarity should be considered from the perspective of the observer trained in art criticism, since appropriation art's "intended audience" is largely populated with such experts. One might object that this reasoning is itself problematically intentionalist, since the artist's intention is relevant to a determination that his "intended audience" is a trained observer. It is crucial to note, however, that this reasoning does *not* presuppose that the artist's intention is relevant to the *interpretation* of his work. On the contrary, the artist is relevant in this framework only insofar as his intentions define the audience of the work, and not the work's meaning or purpose or whether his appropriation qualifies as fair. Understanding the artist's intention to be relevant to the definition of a work's audience is, in other words, not outcome-determinative in an infringement action, and thus much less problematic than overreliance on artists' testimony.

If courts should in fact invite the testimony of "extraordinary observers" on the question of unlawful appropriation, they should almost certainly do so for the question of fair use. After all, a work can be transformative in many ways, some of which may not be obvious to the untrained eye. The *Campbell* Court stated that transformative uses "alter[] the first with new expression, meaning, or message"[172]—a definition that contemplates more than mere visual alteration of the appropriated image. On the contrary, even Levine's re-photographs may be

[170] Data East USA, Inc. v. Epyx, Inc., 862 F.2d 204, 209 (9th Cir. 1988).
[171] *See supra* note 147 and accompanying text.
[172] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

considered transformative because they use Evans's images in order to question traditional conceptions of authorship and not to depict the Great Depression. To borrow a phrase from the law of hearsay, Levine does not use Evans's images for "the truth of the matter asserted";[173] she uses them as quotations in a critical commentary, thus repurposing them.

The trouble with transformation in appropriation art is that, because it frequently does not rely on visual manipulation, it is not always visible to the ordinary observer who has not, in Justice Holmes's words, "learned the new language in which [the] author spoke."[174] Visual art is, in fact, a sort of language, requiring a degree of visual literacy from its viewers. This is why art historians speak of "reading" an image—a practice that requires the critical observer to bring to bear some knowledge of formal, theoretical, and historical context. Appropriation artworks may be particularly difficult for uneducated observers to read because they intentionally re-code referents as signifiers; in other words, they literally speak their own language. The critiques inherent in appropriation artworks are thus, in Louis Harmon's words, "ghosts which haunt the art object, but are manifested nowhere on its surface . . . visible only to the cognoscenti."[175]

It may be that privileging the opinions of trained observers over "ordinary observers" is problematic for the very same reason that intentionalism is ill-suited as an interpretative mode for appropriation art. After all, Barthes's "death of the author" is also associated with the "birth of the reader." Perhaps the "ordinary observer" standard would be appealing in light of this phenomenon. Yet, as Harmon has noted, artists like Koons work within the confines of their tradition, and viewers unfamiliar with that tradition should not necessarily be trusted to make definitive judgments about transformativeness where legal rights are at stake:

---

[173] FED. R. EVID. 801(c)(2).
[174] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).
[175] Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 405 (1994).

> Behind Koons's use of another's image were ideas that belonged solidly to the postmodern tradition . . . the attack on originality, on the model of the artist as genius, on the separation of art from the rest of the mess we live in, on the hermeneutical primacy of authorial intent. . . . To appreciate their value, or at least to articulate their value, one must either be a member of the artworld or perch on the edge of the artworld long enough to catch a glimpse of what is going on. Indeed, without a historical context in which to place these objects, the strategies of appropriation look just like theft.[176]

Given that critical commentary is frequently "hidden" in appropriation art, it seems natural to allow courts to consider expert testimony on the question of whether the purpose and character of an appropriation are transformative. Yet it seems that no court has ever articulated a standard akin to the *Arnstein* test for whether or not expert testimony is relevant in the fair use inquiry.

Expert testimony on the question of fair use is not strictly speaking inadmissible, though it has been criticized as irrelevant. In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, for instance, the author of publisher of a book of trivia about the television show "Seinfeld" offered expert testimony to demonstrate that the book constituted fair use of show.[177] The court dismissed the experts' arguments, however, because, as Judge Denise Cote later put it, "the court did not require the testimony of experts to conclude that a multiple-choice trivia book was not exactly the same thing as a sophisticated critique of the show."[178]

It seems, then, that courts view transformativeness from the perspective of the lay observer or, where the court is uncomfortable playing the lay observer in the context of visual art, from the perspective of the artist-defendant. Given the degree of visual literacy required to

---

[176] *Id.*
[177] 150 F.3d 132 (2d Cir. 1998); *see also* Cote, *supra* note 21, at 236-37 (describing the testimony).
[178] Cote, *supra* note 21, at 237.

identify transformativeness in appropriation art, courts should specify that expert testimony is relevant to this determination, just as the *Arnstein* court did for probative similarity.

In doing so, courts could comfortably rely on standards that are already in place for expert testimony on art in other contexts. As Judge Cote has pointed out, there is no need for special treatment of expert testimony in copyright cases when the Federal Rules of Evidence already provide a simple standard for the admissibility of expert opinions. Judge Cote has proposed that rather than attempting to make sense of the distinction in *Arnstein v. Porter*, judges faced with infringement actions should instead rely on the standard set forward by Rule 702,[179] which states that an expert may testify is if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue."[180]

As Judge Cote has suggested, district court judges following the guidance of Rule 702 and its accompanying case law are "quite capable of assessing the extent to which any proffered expert testimony will assist the trier of fact."[181] Although Judge Cote has proposed that the *Arnstein* standard is no longer necessary,[182] an *Arnstein*-like statement that expert testimony is relevant to a determination of transformativeness could serve an important signaling function to courts. If a court were to state affirmatively that transformativeness in the appropriation art context should be considered from an expert's perspective, future courts would likely be more willing to qualify experts under Rule 702, recognizing that interpretation of appropriation art may require some expert guidance.

---

[179] *Id.* at 237-38.
[180] FED. R. EVID. 702. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-93 (1993) (conceiving of the district court as a gatekeeper for expert testimony); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-48 (1999) (extending *Daubert* to testimony by non-scientifici experts).
[181] Cote, *supra* note 24, at 238.
[182] *Id.*

Once art experts are qualified, they may provide opinion testimony on the question of transformativeness, relying on their familiarity with art history and criticism. Although art experts are most often used for factual inquiries such as value appraisals and authentication,[183] courts have already invited more subjective forms of testimony from art experts in different areas of art law.

First, the Visual Artists Rights Act of 1990 provides a special form of moral rights protection against destruction for "work[s of visual art] of recognized stature."[184] The leading test[185] specifies that litigants wishing to claim "recognized stature status" must prove:

> (1) that the visual art in question has "stature," i.e. is viewed as meritorious, and (2) that this stature is "recognized" by art experts, other members of the artistic community, or by some cross-section of society. In making this showing, plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.[186]

This test invites experts to testify as to whether a work is "viewed as meritorious" and "recognized" as such in the art world. Experts could provide similar testimony in the fair use context in order to demonstrate that an appropriation artwork is "viewed as critical" or "recognized" as transformative among art critics and other trained observers.

Second, courts deciding whether or not artworks qualify as obscene for purposes of First Amendment doctrine admit expert testimony as to the "serious artistic value" of the work in question. In *Miller v. California*, the Supreme Court held that one of the characteristics of

---

[183] *See* MERRYMAN ET AL., *supra* note 74, at 1078-1100.
[184] 17 U.S.C. § 106A(a)(3)(B) (2006).
[185] *See* Martin v. City of Indianapolis, 192 F.3d 608, 612 (citing Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995)).
[186] Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994).

obscenity is that it "lacks serious literary, artistic, political or scientific value."[187] Whether or not a work is of "serious artistic value" is to be judged by national standards.[188] Courts therefore allow experts to testify on what such national standards are, so that juries are not tethered to their own experiences (which would better reflect "community standards") in evaluating artwork.[189] Experts could fulfill a similar function in fair use inquiry by speaking to a sort of critical consensus surrounding artworks, thus freeing courts from the uncomfortable business of exercising independent artistic judgment while addressing more than just the artist's intention.

B. Benefits of Considering Transformativeness from the Perspective of the Expert Witness

By evaluating transformativeness from the perspective of the expert witness, courts could bring about two positive developments in the law of copyright and appropriation art. First, if artist-defendants are allowed to put on expert witnesses instead of providing their own authorial narratives, courts will no longer be forcing intentionalist or uninformed interpretations onto appropriation art. Second, evaluating transformativeness from the perspective of a specialized observer will broaden the First Amendment safeguard of fair use, thus limiting chilling effects and ensuring that artists continue to produce appropriation works.

With regard to the first benefit, it bears noting that since fair use is an affirmative defense, defendants will have to call up experts on their own behalf. This begs the question: How is an artist calling an expert to the stand any less problematic than an artist testifying himself? After all, one could say that an expert witness is merely the mouthpiece of the party calling for his testimony. Yet there is a crucial difference between an artist's statement of intent and a

---

[187] 413 U.S. 15, 24 (1973).
[188] Pope v. Illinois, 481 U.S. 497, 499-501 (1987).
[189] *See* David Greene, *Is Anything Obscene Anymore? The Need for Expert Testimony To Prove Lack of Serious Artistic Value in Obscenity Cases*, 10 NEXUS J. OP. 171 (2005).

secondary interpretation of his work that he happens to "endorse." The trouble with courts' current overreliance on artists' testimony is that it takes away interpretative agency from critics and viewers and returns it to the traditional "author"—a role that the appropriation artist does not want to play. Treating transformativeness as an expert question would move the locus of interpretation a degree away from the artist. This shift would enable an artist who is notoriously inscrutable and prefers to work through visual media alone, like Prince,[190] to dismiss the expert's opinion as not his own, even if he is the one calling the expert to the stand. In this way, courts evaluating transformativeness from the perspective of the trained art expert would benefit both artists who wish to remain silent and courts themselves, which wish to stay out of the business of making aesthetic judgments but are currently failing at this endeavor by pushing intentionalism to the fore.

From a First Amendment perspective, expert transformativeness would widen the safety valve of fair use by permitting appropriations that ordinary observers would not immediately identify as transformative, as noted above. For instance, if the court in *Rogers v. Koons* had been more receptive to expert testimony, Koons could have called an expert to testify about how his sculpture had been received in the critical community, and how it should be "read" in light of the appropriation art tradition in which Koons works. The expert could explain how a cheap and campy image for sale on a greeting card exemplified the culture of commodity kitsch that Koons critically reexamined, as well as how critics like Foster have located Koons's work within the art theoretical discourse about commodity culture.[191]

---

[190] *See* Cat Weaver, *Law vs. Art Criticism: Judging Appropriation Art*, HYPERALLERGIC (May 5, 2011) (quoting an audience member at a Volunteer Lawyer for the Arts event about the *Cariou v. Prince* litigation as commenting that Prince "has made a name out of being inscrutable" and for this reason "by his own traditional practice . . . could not comment on what he's doing.").

[191] *See* FOSTER, *supra* note 112, at 108.

Making the fair use safeguard more inclusive would respond to the common criticism that transformative fair use is underprotective of First Amendment values. Tushnet, for instance, has argued that nontransformative appropriations also have free speech values attached to them, and that courts should "recognize that many kinds of uses of copyrighted material may be justified, not just uses that put a critical spin on a prior work."[192] Treating transformativeness as an expert question does not go all the way in satisfying Tushnet's concerns, of course, but it is certainly preferable to defining transformativeness from the perspective of the ordinary observer, which would exclude certain nonobvious transformations, as in the district court's decision in *Cariou v. Prince*.

Expanding the First Amendment safeguard of fair use could also reduce chilling effects. As noted above, Fairey settled the AP's suit against him in large part he was concerned that the court would not have "a sufficiently sophisticated understanding" of his work.[193] If artists like Fairey fear that courts will not understand their artistic practice, they could draw comfort from a system that encourages experts to point out and explain artistic nuances to the trier of fact. This development would help to ensure that appropriation artists continue their artistic practices without unduly fearing liability for legitimate transformations.

Finally, treating fair use as an expert question would guarantee the integrity of artists' appropriative gestures in a way that a voluntary or compulsory licensing scheme, for instance, could not. Some commentators have suggested that appropriation artists who wish to avoid legal liability should simply use licensing agreements to obtain permission ex ante from the artists whose works they copy.[194] Although licenses can be costly, they are probably not more costly

---

[192] Tushnet, *supra* note 22, at 587.
[193] Fisher et al., *supra* note 67, at 274.
[194] *See, e.g.*, Carlin, *supra* note **Error! Bookmark not defined.**, at 141-43 (providing a model licensing agreement).

than falling back on expert transformativeness, which would require artists to pay experts called in their defense. As has already been explained, however, permission weakens the effectiveness of appropriation as a strategy for critical discourse. Relying on fair use to protect transformative uses ex post, in contrast, does not compromise the essential nature of appropriation ex ante.

Allowing artists to forego pursuing a license in order to preserve the integrity of their commentary may seem unduly permissive. After all, artists are not ordinarily entitled to violate laws of general applicability in order to "make a statement." Graffiti artists, for instance, are often prosecuted for vandalism, despite the fact that their artworks are sometimes hailed as critical commentaries on contemporary society. Renowned street artist Banksy keeps his identity secret, presumably to avoid prosecution,[195] even while he gains international renown and critical acclaim for his work.[196] One might argue that an appropriation artist who makes an unlicensed use of a copyrighted work should be equally subject to liability, and that free speech values do not counsel any more in favor of the unlicensed appropriator than they do in favor of the graffiti artist. Yet the crucial difference is that vandalism laws, and other laws of general applicability, do not contain intentional First Amendment safeguards like fair use. Copyright is not the ordinary generally applicable law; it is the "engine of free expression."[197] The requirement to purchase a license is intended to support the copyright holder's monopoly right, but that monopoly right is already substantively limited by fair use, by the Copyright Act's own terms.[198]

C. Limits of Expert Transformativeness as a Solution

---

[195] *See* Mark Oliver, *Another Kick to the Wall*, THE GUARDIAN (Nov. 30, 2005, 5:08 A.M.), http://www.guardian.co.uk/news/blog/2005/nov/30/anotherkickon1.
[196] *See, e.g.*, Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN (Feb. 2013), http://www.smithsonianmag.com/arts-culture/The-Story-Behind-Banksy-187953941.html?c=y&page=2.
[197] Eldred v. Ashcroft, 537 U.S. 186, 191 (2003).
[198] 17 U.S.C. § 107 (2006).

Evaluating transformativeness from the perspective of the expert trained in art criticism and theory raises a number of practical and substantive concerns. From a practical perspective, calling experts to the stand can be costly, which may unduly benefit artist-defendants with deep pockets. Substantively speaking, turning transformativeness into an expert question will require courts to articulate standards for evaluating expert testimony, and the problem remains of how to clearly delineate a transformative fair use from mere infringement.

Notably, inviting expert testimony on transformativeness is not the same as requiring it, and some defendants may be able to successfully claim the fair use defense without calling an expert to the stand. For the reasons discussed above, however, many artists may perceive benefits to relying on expert testimony rather than advancing a favorable authorial narrative. Yet because experts are costly, this framework might favor defendants with more substantial resources. Typically, these will be more established artists, such as Koons, who by the time of the *Rogers* litigation was routinely selling artworks for prices in excess of $100,000.[199] Advantaging well-known artists may seem undesirable considering copyright's mandate to "promote Progress."[200] Yet it is important to note that more established artists are more likely to get sued in the first place, for two very simple reasons: plaintiffs are more likely to find out about their appropriations, and established artists have deeper pockets that will seem more promising to plaintiffs hoping to recover damages.[201]

From a substantive perspective, the proposal to treat transformativeness as an expert question raises different concerns. A major problem that carries over from ordinary observer fair use inquiry is how to draw the line between a transformative fair use and infringement, given

[199] Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992).
[200] U.S. CONST. art. I, § 8, cl. 8.
[201] Other artists, however, may get cease and desist letters.

how necessarily subjective this question is. This problem is virtually impossible to solve. A specific version of the issue, however, may arise from the fact that an expert called up by a defendant might be unwilling to testify that the defendant's work is *not* transformative. In fact, contemporary art theory indicates that even direct copies, like Levine's re-photographs, are transformations, so it is difficult to imagine a case in which an expert would not say a work is transformative. Indeed, one might well argue that contemporary art theory does not distinguish between "legitimate" and "illegitimate" appropriations at all. Appropriation art stands in clear tension with the very premises of fair use, which distinguishes "criticism" from mere "copying"—a distinction without a difference to appropriation artists and, potentially, their experts. The fear, then, is that a defendant's expert will not "play by the rules" of the copyright game that he rejects in the first place.

The effects of this concern can be mitigated, however, if courts develop careful standards for how expert testimony should be treated. For instance, a court might provide juries with instructions indicating that expert testimony must clearly indicate that a work is "highly" transformative. Courts could also consider the strength of expert testimony at the remedy stage, perhaps permitting damages but not injunctive relief where an expert raises a plausible—but not completely convincing—claim of transformativeness. Finally, plaintiffs may also call up competing experts to testify that a defendant's work is *not* transformative, and the trier of fact—whether it be a jury, or a judge deciding a summary judgment motion—can weigh the competing expert testimonies. Doing so will of course require the trier of fact to exercise some independent judgment, but it will have a more informed foundation on which to make this decision than if it were considering transformativeness from the perspective of the lay observer.

VI. Conclusion

The conflict between copyright law and appropriation art is, at heart, ultimately irreconcilable. Copyright and appropriation are fundamentally opposing forces. Copyright explicitly exalts originality; appropriation actively challenges it. Copyright grants property rights in artworks; appropriation treats artworks as universally owned components of our visual environment. As Lisa Petruzzelli put it, "Appropriation art is, in essence, infringement for a reason."[202]

My goal in this paper has not been to devise a perfect system of copyright that will simultaneously protect original authors' proprietary interests and appropriation artists' freedom of expression. As Tushnet has explained, "Some forms of copyright law are better for free speech than others, no doubt, but any system of copyright will suppress speech, and some of that speech will be quite valuable in constitutional terms."[203] Instead, my aims in this project have been much more modest. I wish only to call attention to the thus far unacknowledged fact that when courts rely on artists' testimony in order to avoid artistic interpretation, they are actually taking sides with intentionalists in the art world debate over interpretative agents. My proposal for expert transformativeness, likewise, is intended only to solve this narrow problem. But it is my hope that treating transformativeness as an expert question will solve the particular art-theoretical and First Amendment harms that arise from the problem of intentionalism, while still providing a firmer foundation for artistic interpretation than would the "reasonable observer" test from *Cariou v. Prince*. This development would be just one small step toward ensuring that

---

[202] Lisa Petruzzelli, *Copyright Problems in Postmodern Art*, 5 DEPAUL-LCA J. ART & ENT. L. 115, 115 (1995).
[203] Tushnet, *supra* note 22, at 547.

copyright law treats appropriation art in a manner consistent with its constitutional mandate to "promote Progress of Science and useful Arts."[204]

[204] U.S. CONST. art. I, § 8, cl. 8.