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***That Old Thing, Copyright.....: Rethinking “Progress” and “Originality”
in (and for) the Remix Age***

I. INTRODUCTION

About eight years ago, a friend and I had been sitting around discussing this silly old thing called “art.” We were both aspiring creative writers; we were both wondering what it meant to innovate in a field of art, the idea of creating something that was *different* from what came before it. We were fascinated with what progress was and what it wasn’t, because all artists are interested in being the first man on the metaphorical moon, so to speak. “It’s a funny thing,” she had said. “The fact that the fine arts have progressed so much faster than music, or film, or writing.” We both agreed on that—knew with all certainty that literature, with the exception of a few writers like Gertrude Stein, was still doing the same thing it *had* been doing since the beginning of time: which is to tell a good story.¹

¹ For a recent exploration of whether or not literature can even progress like other fields of art, see James Wood, *Keeping It Real*, NEW YORKER, Mar. 15, 2010, at 71.

To see how far the fine arts have come since the days of the Renaissance, on the other hand, just hold up Leonardo da Vinci's *Mona Lisa* from 1503 next to Robert Rauschenberg's *Bed* combine from 1955. At the highest level of abstraction, both pieces may still be engaged in the same thing, which is to depict what the *real* is. The only difference is that Rauschenberg's reflection of reality is a series of colorful drips, tacked-on found objects, mottled city debris, and cut-out newspaper bits. Rauschenberg was simply playing collector, taking the little things of urban life and putting them up on a museum wall, and, in the process, fragmenting the idea of the lone heroic author.

The reason I would argue that this constitutes a more radical form of progress than much else that has been created in other fields of art—literature, music, and film, for example—is due to how the concepts of “authenticity,” “originality,” and “authorship” have changed as the decades passed. As modernity—and the values of romantic authorship and infinite progress—gave way to the “cultural, textual site of the postmodern picture,”² the fine arts responded to the paradigm shift by producing work that seemed to mimic, for example, the Foucaultian restructuring of the coherent author, or what Walter Benjamin had called a society of the simulacrum—a series of copies without an original.³

In the new digital age of the twenty-first century, however, the other arts are beginning to catch up. Interestingly enough, this time around, it is the *consumers* of

² Hal Foster, *Postmodernism: A Preface*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* at ix, xiii (Hal Foster ed., 7th ed. 1991) (1983) [hereinafter *THE ANTI-AESTHETIC*].

³ “To an ever-increasing degree, the work reproduced becomes the reproduction of a work designed for reproducibility.” Walter Benjamin, *The Work of Art in the Age of Its Technological Reproducibility (Second Version)*, in *THE WORK OF ART IN THE AGE OF TECHNOLOGICAL REPRODUCIBILITY AND OTHER WRITINGS ON MEDIA* 19, 24 (Michael W. Jennings et al. eds., 2008).

culture, rather than the *producers*, who are leading the revolution. In fact, the twentieth century shift from nature to culture and from author to audience has arguably fully realized itself in our new information age, in which a slew of works in all fields (writing, music, art, film), created by piecing together the pre-existing material of our shared cultural lexicon, are emerging.

But even as many artists (both amateur and professional) working in art, music, and film are now harnessing the tools of the digital age to create mash-ups and remixes that resonate precisely *because* they draw from the shared vocabulary of our collective cultural pool, precisely *because* they reflect that notion of progress the fine arts have been moving toward for quite some time now, those artists are finding it increasingly difficult—*legally* speaking—to do so.

More than two centuries ago, the Framers incorporated Article I, Section 8, Clause 8 into the Constitution, which empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴ What follows from that, however, is more than two centuries of ever-changing copyright law, each revision seemingly more intent on *regressing* this very notion of “progress” that the Clause is intended to achieve. Thus, even as remix culture is flourishing, copyright holders’ power to lock down intellectual property and prohibit such creative appropriation continues to widen, rather than weaken.

⁴ Perhaps somewhat counter-intuitively, “the Framers viewed copyrights to be for the purpose of promoting ‘science,’ i.e., learning, and patents to be for the purpose of promoting ‘useful arts.’” EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE* 151 (2002).

In this Paper, I will examine how changing technologies, philosophical thought, and the new information age creates a fundamental shift—or, more precisely, a paradox—in the meaning of “progress” as it relates to the Copyright Clause. I will then attempt to resolve that paradox by situating the postmodern move toward ahistoricism on a larger, progress-driven, historical timeline. Next, I will argue why the fine art assault on traditional ideas of authorship and originality embodies *all* art’s essential function: which is to both *reflect* and *propel forth* our current societal state of being—to express, in effect, what it is like to be alive and human at this particular moment in time. Remix culture, then, is really just a continuation (and a realization) of the ongoing project of postmodern art. I will then look at the fair use doctrine as a viable nexus for both the current trouble with copyright law as well as the starting place for copyright reform. And, lastly, I will show how, rather than fearing the move toward postmodernism as irreverent relativism or pluralistic anarchy, this new mode of seeing and creating can actually open up the artistic work as a space for re-definition, re-contextualization, subversion, critique, and play.

Many papers on contemporary copyright problems have focused on economic arguments.⁵ This Paper is not such a paper. Rather, it takes an intellectually curious, rather than pragmatic and practical, approach. It examines if there can ever be a reconciliation between the, by now, well-documented split between the postmodern move in art and the legal regime that regulates such art, and decides that in fact, there *must* be, and *is*. I suggest, albeit with stipulations, that in order to actualize the Copyright Clause’s full potential, and to stay true to the Copyright Clause’s spirit of progress and innovation,

⁵ See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009); Paul Ganley, *The Internet, Creativity, and Copyright Incentives*, 10 J. INTELL. PROP. RIGHTS 188 (2005); Jane Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 2001.

courts and legislatures should adopt, at the very least, a revised form of the fair use doctrine that affords current artistic developments—like remix culture—greater freedom under the law. Only by doing so can we *truly* move forward in the Constitution’s call for progress in the arts—art as mirror and art as social commentary—rather than staying forever relegated to that perished nineteenth century ideal of the romantic poet-genius.

II. THE COPYRIGHT CLAUSE TODAY: PROBLEMS, SHIFTS, AND HOPEFUL RESOLUTIONS

II.A. THE CRISIS OF COPYRIGHT LAW IN THE DIGITAL AGE

To say that we are standing on the crossroads between the world as we once knew it and a new digital era of information, technology, *freedom*, and possibility is not a mere exaggeration: scholarly literature from the past decade has been rife with it.⁶ Given the choice, lawmakers could either respond to and help facilitate that change, or they could scramble to protect the old status quo in some backwards move toward safe standby beliefs. The most recent Supreme Court case to sound out on the issue, *Eldred v. Ashcroft*,⁷ clearly chose the latter. The argument on the side of petitioner Eldred was simply that Congress had exceeded their powers under the Copyright Clause by passing the Sonny Bono Copyright Term Extension Act (CTEA), which extended the already-lengthy copyright term another twenty years. That means life of the author plus seventy

⁶ See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); LAWRENCE LESSIG, *FREE CULTURE: HOW THE BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004) [hereinafter LESSIG, *FREE CULTURE*]; LAWRENCE LESSIG, *REMIX* (2008) [hereinafter LESSIG, *REMIX*]; 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 (2004).

⁷ 537 U.S. 186 (2003).

years or seventy five years for corporate works. The implications of the act may seem simple to some: if Congress can continue extending the copyright term, what are the limits to this power? When will it stop?

Lawrence Lessig, who argued for petitioner Eldred, beautifully details the battle in his book *Free Culture*.⁸ When I first read the Court opinion for *Eldred*, my thoughts were promptly: but what about *Lopez*? Justice Ginsburg claims that “[t]he wisdom of Congress’ action...is not within [the Court’s] power to second guess.”⁹ But certainly the Court had done it before, in the 1995 case *United States v. Lopez*,¹⁰ which struck down the Gun-Free School Zones Act of 1990 as exceeding Congress’s power under the Commerce Clause.

A typical law student reading *Eldred* might make the *Lopez* connection, but the opinion never mentions it. Turns out, *Lopez* was the exact case that Lessig had based his entire strategy around: getting the Court to see that there was a clear limit on Congress’s power to legislate under the Copyright Clause, that Congress had exceeded this limit by extending the copyright term yet again—thus effectively overstepping the “limited Time” restriction—that the CTEA must die. But Ginsburg merely replies that the word limited, “at the time of the Framing...meant what it means today: ‘confined within certain bounds,’ ‘restrained,’ or circumscribed.”¹¹ While life plus seventy years (or, in the case of corporations, seventy five years) may as well be seeming perpetuity, viewed in the most technical sense, it certainly is still “limited”: there is a definite time limit to a copyright holder’s monopoly, no matter how long it may be.

⁸ LESSIG, *FREE CULTURE*, *supra* note 6, at 213-56.

⁹ 537 U.S. at 222.

¹⁰ 514 U.S. 549.

¹¹ 537 U.S. at 186.

Clearly, the constitutional strategy in advancing the move toward greater freedom and lessened copyright restrictions post-*Eldred* must change. What is needed is a different strategy, one that, as Lessig himself addressed after the *Eldred* case,¹² speaks to the *harm* in allowing copyright to lock down intellectual property for a term that might as well border on perpetuity. There are many ways to go about this, of course, and there have been abundant First Amendment arguments made on the issue. But perhaps another route would be to examine the Copyright Clause itself, the aim of which, dare we forget, it is promote *progress* in both creative works and technological discoveries. The harm here is as such: art (which has, in the digital age, become inextricably linked to technology) cannot progress as it wants to progress precisely because of a Copyright Clause the aim of which is to promote progress.¹³ The harm, as I will later elaborate on, in denying the postmodern move towards subjectivity rather than objectivity, relativity rather than absolutes, and pluralism rather than a singularity of vision, also extends beyond the debate between nature and culture or author and audience. Rather, it is intricately involved in the battle between female and male, black and white, subject and master, the marginalized and the powerful. We are reaching a point in history in which the once voiceless may finally have a voice. To deny them such a voice, then, would be pernicious indeed.

¹² LESSIG, *FREE CULTURE*, *supra* note 6, at 237.

¹³ The fact that the Clause gives Congress the power to promote Progress “by securing for limited Times...to Authors...the exclusive right to their writings” does not necessarily mean that endowing an author with exclusive proprietary control over his work for a limited time is the only way in which the Framers intended Congress to promote Progress in the arts and sciences. WALTERSCHEID, *supra* note 4, at 12 (2002).

II. B. POSTMODERN MOVES: FROM AUDIENCE TO PRODUCER

But first things first. Fundamentally, we are living in a time in which “Progress”—even if used in the strictest dictionary definition sense of the word—is moving along at a breathtakingly rapid speed. The Internet has opened up a world that we could not possibly have even *imagined* for ourselves just twenty years ago: a world in which information sharing can come at a click, where massive files are exchanged in a moment’s time, where virtual realities, online identities, and cyber communities are beginning to feel just as real as reality itself. We have reached an age in which audience and producer has merged, a culture, as Lessig calls it, that has moved from merely Read-Only to Read/Write.¹⁴ More than forty years ago, Andy Warhol smirkingly merged the line between high art and low art by installing a series of “Do-It-Yourself” paintings on the museum wall—paintings that imitated, stroke by stroke, the popular coloring kits that children bought and then filled in with crayon.¹⁵ But Warhol’s joke was, at most, just that: a mere gesture. Certainly, nobody would think to actually walk up to one of his paintings and start coloring away at it. In effect, the bifurcated roles of creator/consumer had not changed. No matter how radical Warhol’s paintings may have been at the time, no matter how pronounced his statements about stardom being so facile that he coined the well-known phrase, “In the future, everyone will be world-famous for fifteen minutes,”¹⁶

¹⁴ LESSIG, REMIX, *supra* note 6, at 51-83.

¹⁵ See 2 ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM 486 (Hal Foster et al. eds., 2004).

¹⁶ RALPH KEYES, THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN 288 (2006)

Warhol did nothing to actually break down the lines between passive audience and active artist.

So imagine the sheer beauty of being alive at a time in which the audience becomes the producers, shocked out of their passive couch-potato-consumerist states to actually engage with, have a dialogue about, and exchange ideas by appropriating from, adding to, or dissecting the shared products of cultural production. Technology—in the form of software, hardware, and websites—makes this possible.¹⁷

To sum: we are living at a time in which progress—in the linear sense of moving forward, of technological growth—is developing rapidly. As usually happens in times of rapid social flux, intellectual schools of thought, scholarly literature, and belief systems evolve alongside it, both fueled by cultural developments as it inevitably fuels them.

II. C. PROGRESSING BEYOND MODERNITY: THE DEATH OF THE ROMANTIC AUTHOR

To understand how we arrived at the condition of postmodernity, it might help to backtrack first and examine the project of modernity, especially because so much of it helps drive *current* copyright doctrine's concepts about what progress, authorship, and originality means. Modernity's project "is one with that of the Enlightenment: to develop the spheres of science, morality and art 'according to their inner logic.' This program is still at work...in postwar or late modernism, with its stress on the purity of each art and

¹⁷ For a thoughtful analysis of how the Internet shifts content production from a small subset of players to the masses, see Balkin, *supra* note 6.

the autonomy of culture as a whole.”¹⁸ If copyright doctrine, to date, has refused to acknowledge postmodernism’s paradigm shift through which our concepts of the master narrative or romantic author have changed, then it might be helpful to step back for a moment and understand the historical conditions through which *modernism*, or, the *modern*, began in its most nascent form. For Jurgen Habermas, the French Enlightenment first brought about the idea of the “modern” as “inspired by modern science, in the infinite progress of knowledge and in the infinite advance towards social and moral betterment....The romantic modernist sought to oppose the antique ideals of the classicists; he looked for a new historical epoch and found it in the idealized Middle Ages.”¹⁹ The break between the classicists and the modernists of the Enlightenment is instructive, for it highlights—as, indeed, Habermas acknowledges—that before the eighteenth century, the artistic ideal was not an infinite propelling forth so much as a looking back in an attempt to recover the greatness of the ancients.²⁰

That Congress passed the first Copyright Act in 1790, three years after the incorporation of the Copyright Clause and well at the height of the Age of Enlightenment, suggests that our Founding Fathers had a very specific notion of “Progress”²¹ that rested on the same “project of modernity formulated in the eighteenth century by the philosophers of the Enlightenment,” which consisted, as Habermas writes,

¹⁸ Foster, *supra* note 2, at x.

¹⁹ Jurgen Habermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC*, *supra* note 2, at 3, 4.

²⁰ “[A]ntiquity was considered a model to be recovered through some kind of imitation.” *Id.*

²¹ As Walterscheid, *supra* note 4, at 38, notes, “[t]he term intellectual property is a relatively recent one which first came to be used in the second half of the nineteenth century....Despite occasional argument to the contrary, ancient law failed completely to recognize the concept of intellectual property.”

“to develop objective science, universal morality and law, and autonomous art according to their inner logic.”²² Indeed, Justice Miller, in the 1884 copyright case *Burrow-Giles Lithographic Co. v. Sarony*, articulated as much when he asserts:

Nor is it to be supposed that the framers of the Constitution did not understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect, existed in England at that time.²³

The focus on man as capable, by virtue of his *genius* and *intellect*, to harness those innate gifts in the production of works, inevitably links the human mind with nature, and, in turn, with God. For example, William Wordsworth, one of the most notable Romantic poets of the nineteenth century, had addressed the idea of divine imagination in his *Prelude*, a rapturous ode to the powers of his mind by which “Nature” had “lodged The Soul, the Imagination of the whole.”²⁴ This imagination, a gift “exalted by an underpresence,” or, “the sense of God...vast in its own being” must naturally come “from the Deity.”²⁵ This belief was shared with many of Wordsworth’s nineteenth century literary contemporaries, among them William Blake and John Keats. That authorial genius is linked with nature through God is an important connection. As the art critic Stanley Kunitz notes,

²² Jurgen Habermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC*, *supra* note 2, at 3, 9.

²³ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

²⁴ WILLIAM WORDSWORTH, *THE MAJOR WORKS* 580 ll.64-65 (Oxford University Press, 1984).

²⁵ *Id.* at 580 ll.71-73 & 581 l.104.

Ever since the Enlightenment, the arts have been the vehicle for conveying much of the mystery and disorder, the transcendental yearnings, that the Church had been able to contain before it became rationalized.

Consequently the modern arts have found their analogue in religious ritual and action, in the communion that predicates the sharing of a deeply felt experience.²⁶

But something happened in the twentieth century. Whereas “[e]nlightenment thinkers of the cast of mind of Condorcet still had the extravagant expectation that the arts and sciences would promote not only the control of natural forces but also understanding of the world and of the self...The 20th century has shattered this optimism.”²⁷ In 1935, Walter Benjamin, in his infamous article *The Work of Art in the Age of Its Technological Reproducibility*, had predicted that technological advances (he was mostly writing about film and photography, the new inventions at the time) would drastically change the way art was both received and perceived through the driving back of a work’s aura in favor of a simulacrum without originals.²⁸ The crisis of art in the postmodern age, then, is that *because* of this loss of a work’s aura, “[t]he fiction of the creating subject gives way to the frank confiscation, quotation, excerptation,

²⁶ Selz et al., *A Symposium on Pop Art*, in *POP ART, A CRITICAL HISTORY* 65, 75 (Steven Madoff ed., 1997).

²⁷ Jurgen Habermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC*, *supra* note 2, at 3, 9.

²⁸ Benjamin describes the Dadaists as predecessors to film, with their “word-salad” poems and brickolage paintings. “What they achieved by such means was a ruthless annihilation of the aura in every object they produced, which they branded as a reproduction through the very means of its production.” Benjamin, *supra* note 3, at 39.

accumulation and repetition of already existing images. Notions of originality, authenticity and presence...are undermined.”²⁹ The author-genius, working from divine inspiration, was also recognized to be a construct of the Enlightenment rather than taken as truth.³⁰ And whereas modern art had sought to achieve religious ritual or communion and transcendence, postmodern art—starting with Pop—“rejects the impulse towards communion; most of its signs and slogans and stratagems come straight out of the citadel of bourgeois society, the communications stronghold where the images and desires of mass man are produced, usually in plastic.”³¹ We can now begin to see the crisis that this poses for all artistic production in general. In the new postmodern society, Habermas posits an interesting question, one that, whether we would like to admit it or not, is absolutely the question implicit in legal doctrine (and, of course, in the artistic community) today: “should we try to hold on to the *intentions* of the Enlightenment, feeble as they may be, or should we declare the entire project of modernity a lost cause?”³²

II. D. RECONCILING THE “PROGRESS” PARADOX

Of course, for a Constitutional originalist, to declare that in certain academic circles or artistic realms, the meaning of the words “Progress” and “Author” as they had

²⁹ Douglas Crimp, *On the Museum’s Ruins*, in *THE ANTI-AESTHETIC*, *supra* note 2, at 43, 53.

³⁰ See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 *EIGHTEENTH-CENTURY STUD.* 425, 428-30 (1983-1984). There has also been recent scholarship addressing the conception of author as social construct especially as it relates to law. See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 *DUKE L.J.* 455.

³¹ Selz et al., *supra* note 26, at 75.

³² Jurgen Habermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC*, *supra* note 2, at 3, 9-10.

been written into the Constitution has changed, does not mean that we should abandon the entire project completely and launch some sort of free-for-all where authors do not exist and works receive no protection as a result.³³ Nor am I suggesting that we do so. Rather, I would like to situate the ahistorical (what Frederic Jameson would call “schizophrenic”³⁴) approach of postmodernism within a pragmatic and workable framework that must be, inevitably, incorporated into a larger historical, linear timeline. This approach is not out of sync with general postmodernist theory. A system of thought which is based, in part, on the death of a totalizing worldview in favor of a series of ideological codes, of course, recognizes the inherent fallacy in attempting to systematize “something that is resolutely unsystematic” or historicize “something that is resolutely ahistorical.”³⁵ To advocate a certain sense of “Progress” in art by moving toward the anti-progress turns of pastiche or appropriation would be to, nonetheless, allow the arts to evolve perhaps not in the sense that there is some perfect Platonic ideal out there through which we must move ever-upwards to achieve, but in the sense that we are allowing art to respond to and shape the changing social, political, and theoretical conditions of its time. The contemporary poet Anne Carson had once written a line which I think is very telling:

³³ Foucault, for example, acknowledges that even in “call[ing] for a form of culture in which fiction would not be limited by the figure of the author,” it “would be pure romanticism...to imagine a culture in which the fictive would operate in an absolutely free state, in which fiction would be put at the disposal of everyone and would develop without passing through something like a necessary or constraining figure.” Michel Foucault, *What is an Author?* at 119 in *THE FOUCAULT READER* (Paul Rabinow ed., 1984) (1969). The fact that he replaces the authorial figure with a “necessary” figure is instructive, and helpful, when thinking about how postmodernism’s prerogatives do not necessarily call for the end of any creator-types.

³⁴ FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* 26-31 (1992).

³⁵ *Id.* at 418.

“In every story I tell comes a point where I can see no further.”³⁶ In life, as in art, there often comes just that point. After a century of modernism’s pursuit of the ever-upwards race toward progress, the exhaustion of its once oppositional values inevitably means that a new reactionary practice must emerge if we are to make something “new,” even if it means by appropriating the old, at all. The critic Hal Foster had written what I think is the best justification for why this is so when he speaks of postmodernism’s goal being to *exceed* that of the modern, *progressing* beyond the era of Progress, and *transgressing* the ideology of the transgressive.³⁷ Postmodernism thus must acknowledge that there *is* a tradition it is reacting against, exceeding, and progressing beyond, even if it questions the truth of such modernist objectives as progress. This is due in no small part to the belief, long-held, that art must be oppositional in some way to the status quo, perhaps as a mirror through which society’s gaping inadequacies are reflected, magnified, and then critiqued.³⁸ What follows naturally, of course, is that once the reactionary tactics of modernism became integrated into the mainstream, something new must arise as its antecedent and opposition.

Enter postmodernism. Read in this way, that current copyright doctrine refuses to acknowledge for the most part, the *new* reactionary mode of artistic production actually

³⁶ ANNE CARSON, *PLAINWATER* 30 (1995).

³⁷ Foster, *supra* note 2, at ix.

³⁸ Foucault dates art’s oppositional agenda to the end of the eighteenth and the beginning of the nineteenth century, precisely (and perhaps paradoxically) when author’s rights and ownerships rights came into being. “It is as if the author, beginning with the moment at which he was placed in the system of property that characterizes our society, compensated for the status that he thus acquired by rediscovering the old bipolar field of discourse, systematically practicing transgression and thereby restoring danger to a writing which was now guaranteed the benefits of ownerships.” Foucault, *supra* note 33, at 108.

means that it is defying “Progress” in the arts as a constitutional imperative.³⁹ “Stripped of its association with modernist teleologies, ‘progress’ consists, simply, in that which causes knowledge systems to come under challenge and sometimes to shift.”⁴⁰ It is this shift that the law has failed to account for and yet that which is absolutely fundamental if art is to accurately reflect the changing social norms of our time.

III. FROM NATURE TO CULTURE: HOW REMIXES REFLECT THE US OF NOW

One of the most fundamental and drastic shifts in the move from modernism to postmodernism is this shift from nature to culture. That difference, as it turns out, will account for much of what the fine arts—and the other arts, consciously or unconsciously—are attempting to reflect today.

But from nature to culture: what does this mean? The art critic Leo Steinberg first characterized (and characterized best) this move toward postmodern painting in his monumental 1972 essay, “Reflections on the State of Criticism.” “A picture that harks back to the natural world evokes sense data which are experienced in the normal erect posture. Therefore the Renaissance picture plane affirms verticality as its essential condition.”⁴¹ Even the Abstract Expressionists—from Newman to Pollock—still lived with the picture in its essentially “uprighted state, as with a world confronting his human

³⁹ For a discussion of contemporary cases in law that has addressed appropriation art and remix culture, see *infra* pp. 21-33.

⁴⁰ Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1168 (2007).

⁴¹ Leo Steinberg, *Reflections on the State of Criticism*, in ROBERT RAUSCHENBERG (OCTOBER FILES)) 1, 27 (Branden W. Joseph ed., 2002) (1972).

posture,” and in that sense they were all nature painters. As to the meaning of “nature,” criticism varies. Roland Barthes, for example, distinguishes between the “nature” of old and the “new nature” (what Steinberg, of course, would call culture), by referring to the former as “vegetal, scenic, or human (psychological),” and the latter as “the social absolute.”⁴² One can begin to understand that Nature as a romantic modernist ideal was firmly rooted in this idea of the human mind as capable of reaching God through its own innate and endless imaginative powers,⁴³ and nature (or culture) in the postmodern world as re-situating the human within its social context, rather than its divine absolute. There is also a certain sense in which Nature in its proper vegetal form—the scenic greenery of the world in its newly-created, real, untouched state—has been lost, driven back by cultural production, so that even to attempt to return to nature, and the real, becomes a bit like tracing images in Plato’s cave.⁴⁴ Indeed, we have reached a point in which “we [seem] condemned to seek the historical past through our own pop images and stereotypes about that past, which itself remains forever out of reach.”⁴⁵

⁴² Roland Barthes, “That Old Thing, Art...” in *POP ART, A CRITICAL HISTORY*, *supra* note 25, at 370, 374.

⁴³ Wordsworth, in his *Prelude*, for example, had written:

The perfect image of a mighty Mind,
Of one that feeds upon infinity,
That is exalted by an underpresence,
The sense of God, or whatso’er is dim
Or vast in its own being; above all
One function of such mind had Nature there
Exhibited by putting forth....

WORDSWORTH, *supra* note 23, at 580 ll. 69-75.

⁴⁴ Frederic Jameson, *Postmodernism and Consumer Society*, in *THE ANTI-AESTHETIC*, *supra* note 2, at 111, 118 (“Cultural production has been driven back inside the mind, within the monadic subject: it can no longer look directly out of its eyes at the real world for the referent but must, as in Plato’s cave, trace its mental images of the world on its confining walls.”).

⁴⁵ *Id.*

Thus, given the impossibility of returning to nature (one can see so clearly through the Abstract Expressionist's last grand stand of the romantic author's claim to authentic experience through sublime mysticism or primitive longings⁴⁶), the only viable option, then, is to immerse the human in culture. What Steinberg dubs the "flatbed picture plane" depends upon "a radically new orientation, in which the painted surface is no longer the analogue of a visual experience of nature but of operational processes."⁴⁷ It is helpful to visualize this new orientation, from verticality to horizontality, as the moment through which a vertical painting on the museum wall—finished, stoic, hermetic—gets flipped to represent the surfaces that we live with, work on, and yes, even sleep on, "such as tabletops, studio floors, charts, bulletin boards"—as well as "the flat bedding in which we do our begetting, conceiving, and dreaming."⁴⁸

Such surfaces do more than change the orientation through which we view a piece—it also stands for a fundamental shift in the way we *engage* with the world. Thus, Steinberg's flatbed picture planes become interactive sites of play, reinterpretation, and information reception. The postmodern painter Robert Rauschenberg, for example, championed this move from the romantic author to the cultural collector with his "combine" paintings, which Steinberg says is "[n]ot the world of the Renaissance man who looked for his weather clues out of the window; but the world of men who turn

⁴⁶ The abstract painter Barnett Newman, for example, had been obsessed with the notion of approaching the Sublime (in the Burkian sense) through painting. See 2 ART SINCE 1900, *supra* note 15, at 365. "The Sublime, for Newman, is something that gives one the feeling of being where one is, of *hic et nunc*—of the here and now—courageously confronting the human fate, standing alone in front of chaos, without the props of 'memory, association, nostalgia, legend, myth.'" *Id.* (quoting Barnett Newman, *The Sublime is Now*, in BARNETT NEWMAN: SELECTED WRITINGS AND INTERVIEWS (Barnett Newman ed., 1992)).

⁴⁷ Steinberg, *supra* note 41, at 28.

⁴⁸ *Id.* at 28 & 34.

knobs to hear a taped message....Rauschenberg's picture plane is for the consciousness immersed in the brain of the city."⁴⁹ Rauschenberg may have been working forty years ago, but what the postmodern painters—from Lichtenstein to Rauschenberg—did actually predated (or predicted) the new information society's predilection to, as art critic Michael Lobel describes it, *scan* instead of read.⁵⁰ Indeed, in Rauschenberg's pictorial depositories of information, in Roy Lichtenstein's blown-up comic strips replete with ben-ray dots and shared cultural codes (which he took straight from comic books, landing him with accusations of unoriginality and at least one charge of copyright liability⁵¹), emerges "a mode of seeing that has become dominant only in our own age of the computer screen....we are trained to sweep through information...we scan it (and often it scans us, tracing keystrokes, counting website hits, and so forth)."⁵²

As Steinberg describes the studio floors, charts, and workspaces through which we tack on and mediate the infinite bits of informational data from our lives, I cannot help but think of current remix culture as just that process through which we cut, copy, and paste familiar sounds, words, or images onto a blank space for creative play. Lessig, too, recalls the nature to culture shift on a different scale: his "nature" is the nature of analog technology, and, he asserts, with the advent of digital technology, this Read-Only "nature" was, essentially, remade into Read-Write culture.⁵³ Read-Write culture is basically what we would call remix culture: that of taking and reordering pre-existing bits of sound, video, text, or images into a new whole. Take the artist Greg Gillis, who goes

⁴⁹ *Id.*

⁵⁰ See MICHAEL LOBEL, *IMAGE DUPLICATOR: ROY LICHTENSTEIN AND THE EMERGENCE OF POP ART* (New Haven and London: Yale University Press, 2002).

⁵¹ See 2 *ART SINCE 1900*, *supra* note 15, at 445.

⁵² *Id.* at 449.

⁵³ See LESSIG, *REMIX*, *supra* note 6, at 36-83.

by the name of Girl Talk. Gillis's remixes are mash-ups of popular songs by such well-known artists as Elton John, Destiny's Child, and Britney Spears. Gillis cuts snippets from the artists' songs and reorders them on his computer with a program called AudioMulch; the result could be a four-minute long song "sampling" over twenty different artists.⁵⁴ Ten years ago, at a time when MTV still dominated the market as *the* source for new music, Frederic Jameson had written that "[w]hat MTV does to music...is not some inversion of that defunct nineteenth-century form called program music but rather the nailing of sounds (using Lacan's carpet tacks, no doubt) onto visible space and spatial segments."⁵⁵ In the new digital age, however, the user has replaced the mass media player as the nailer of such sounds onto visible space. What Steinberg had said about this revolution in painting over thirty years ago, that "as a change within painting that changed the relationship between artist and image, image and viewer," has transferred over from the fine arts to other forms of art—in Gillis's case, music. What's more important, however, is that whereas Rauschenberg, Lichtenstein, Warhol, and the like had merely *suggested* a change in the relationship between artist and image, image and viewer, what Gillis is doing, in effect, is blurring those lines and those relationships completely, until the viewer actually *becomes* the artist, and so on and so forth (as in, there is nothing stopping another "viewer" of Gillis's work to reappropriate it as a different piece). But the common link between the Steinberg of the '70s and the Gillis of now is the idea that *culture*, by nature of its ubiquity, is shared. "Recognizable objects, man-made things of universally familiar character,"⁵⁶ belong to all of us precisely

⁵⁴ *Id.* at 11-15.

⁵⁵ JAMESON, *supra* note 34, at 300.

⁵⁶ Steinberg, *supra* note 41, at 34.

because of their recognizability. That sense of the ubiquitously familiar, on the other hand, is also precisely what makes the works relevant as the art of now. As Lessig writes:

Their meaning comes not from the content of what they say; it comes from the reference, which is expressible only if it is the original that gets used. Images or sounds collected from real-world examples become ‘paint on a palette.’ And it is this ‘cultural reference,’ as coder and remix artist Victor Stone explained, that ‘has emotional meaning to people.’⁵⁷

Steinberg’s revolutionary flatbed picture plane as the workspace of our collective imaginations would not exist without the ability to collect real-life referents and tack them up on blank spaces. Neither, too, would much of postmodernist painting, predicated on just that reappropriation of the familiar and the recognizable.⁵⁸ Furthermore, it appears as if Benjamin’s prediction at the advent of photography over seventy years ago, that “[a]t any moment, the reader is ready to become a writer,”⁵⁹ has finally come true. We are at that moment in which us as readers can, and do, participate in writing our culture. But courts and, indeed, much of legal scholarship, do not much like engaging this argument.⁶⁰ A recent note, for example, refers to music sampling derogatorily as “enabl[ing] the sampler to use a musical performance without hiring...the musician who

⁵⁷ LESSIG, REMIX, *supra* note 6, at 74-75 (quoting Victor Stone, remix artist, telephone interview (Feb. 15, 2007)).

⁵⁸ For case studies involving modern-day examples of appropriation art, see *infra* pp. 23-30.

⁵⁹ Benjamin, *supra* note 3, at 34.

⁶⁰ See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005); Jane Ginsburg, *Authors and Users in Copyright, the 1997 Brace Lecture*, 45 J. COPYRIGHT SOC. 1 (1998).

originally played it...this practice poses the greatest danger to the musical profession because the musician is being replaced with himself.”⁶¹ Despite the irony of the phrase “being replaced with himself,” the argument, it seems to me, is missing the point. It supposes that the “musician who originally played it” is the *ideal* object, that the mission of the sampler is not to *appropriate* and *collect*, but to *reproduce* an experience which, as postmodern theory already suggests, is intrinsically *irreproducible*. That there is an original musician that is to be preferred suggests in some way that there remains a grain of uniqueness to the “original” author’s aura, even as the very nature of the digital age transforms how we engage with a work and, subsequently, its author. And if “technological reproducibility emancipates the work of art from its parasitic subservience to ritual” (here ritual is tied to the aura) such that “the work reproduced becomes the reproduction of a work designed for reproducibility,” then to even ask for the original musician who played it makes no sense.⁶² The sampler, in constructing his work, wants not to recreate the performance of the original *musician*, but the work itself, which is, of course, just one of many copies. “To ask for the ‘authentic’ ...makes no sense.”⁶³

Nor does the advice posed by the courts—to either get a license or refrain from sampling⁶⁴—prove practical. As has routinely been shown over and over again, there is considerable lack of bargaining power between the would-be sampler and the owner of the copyrighted work.⁶⁵ Furthermore, current copyright law frequently issues strict

⁶¹ Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1668 (1999).

⁶² Benjamin, *supra* note 3, at 24.

⁶³ *Id.*

⁶⁴ See *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d at 801.

⁶⁵ See, e.g., Kenneth A. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing*

property rules as a remedy rather than liability rules—which means injunctions rather than mere damages to the plaintiff if infringement is found.⁶⁶ There has been an abundance of legal scholarship addressing how mere burden-shifting or changing the remedy can solve the harsh measures courts dole out to so-called infringers.⁶⁷ But the harm in the current trend of courts continuously upholding copyright holders’ rights over the defendant user’s extends beyond harsh remedies: it also encourages a litigation-happy trend on the part of copyright owners,⁶⁸ which inevitably stops some remix artists from creating (or at the very least, using copyrighted material) in the first place.⁶⁹ Thus, before proposing a structural change in the way law is made, interpreted, or enforced, judges, legal scholars, and lawmakers must first undergo a shift in how they *think* about artistic creation and the meaning of progress—both ontologically and historically, especially as it stands in the new millennia.

for Sample-Based Works, 6 N.C. J. L. & TECH. 187, 199 (2004); Michael L. Baroni, *A Pirate’s Palette: The Dilemmas of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65 (1993).

⁶⁶ See, e.g., *Grand Upright Music Ltd. v. Warner Brothers Records*, 780 F. Supp. 182 (S.D.N.Y. 1991).

⁶⁷ See NEIL NETANEL, *COPYRIGHT’S PARADOX* 191-218 (2008).

⁶⁸ Indeed, the court in *Bridgeport*, 410 F.3d at 799, acknowledges as much (“Advances in technology coupled with the advent of the popularity of hip hop or rap music...have spawned a plethora of copyright disputes and litigation.”).

⁶⁹ See, e.g., LESSIG, *FREE CULTURE*, *supra* note 6, at 98-99; Josh Norek, Comment, “*You Can’t Sing Without the Bling*”: *The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System*, 11 UCLA ENT. L. REV. 83 (2004).

IV. THE FAIR USE DEFENSE: PROBLEMATIC PAST, PROMISING FUTURE

This mode of seeing the world—as pastiche or collage inextricably mediated by mass media and shared cultural imagery—has found new forms of representation in art today, and has, at least in one case, found acceptance in the law under the fair use doctrine.⁷⁰ The courts often tout the fair use defense as somehow mitigating the tension between beneficial public use and proprietary private right, between the belief, stolidly held, that material must be “new” and “original” to be copyrightable and the reluctant acknowledgment that “in truth, in literature, in science and in art, there are, and can be, few, if any, things, which...are strictly new and original throughout.”⁷¹ However, aside from the already abundant problems with current fair use doctrine (its very unpredictability, expensive litigation fees, and high damages in the event of failure),⁷² the very criteria used to determine “fair use” in the first place is undergoing a sort of crisis under current postmodern production, and might prove unproductive if we are to examine and discuss postmodern art. A case study of the recent 2006 Second Circuit decision *Blanch v. Koons* will prove useful in highlighting the tension between the fair use doctrine and the new art of our time.

Blanch v. Koons was a suit brought by fashion photographer Andrea Blanch against visual artist Jeff Koons, widely known for his use of “images taken from popular media and consumer advertising” in a style the court rightly deems as “‘neo-Pop art’ or

⁷⁰ See *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

⁷¹ *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

⁷² See, e.g., Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, J., COPYRIGHT SOC’Y U.S. 514 (1999).

(perhaps unfortunately in a legal context) ‘appropriation art’.’⁷³ The image in question, “Niagara,” was part of Koons’ *Banality* series in the late ‘80s, which spawned, as one may well have predicted from the title, three separate copyright infringement suits.⁷⁴ As the unpredictable nature of fair use will have it, only “Niagara” passed muster under the doctrine.

The copyrighted work under question in *Blanch* was a photograph of a pair of woman’s legs and feet, taken by photographer Blanch. Koons had seen the photograph in an issue of *Allure* and subsequently scanned and incorporated the work into “Niagara” among other images like doughnuts, pastries, and ice-cream, all superimposed against a pastoral landscape.⁷⁵ The court quotes Koons as explaining, “By re-contextualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.”⁷⁶ That Koons chose to use words as “re-contextualize” and “break out” is quite clever, and, dare I venture to guess, specifically tailored to speak to the “transformative use” criteria of fair use—one of four factors in the fair use test. In order to be transformative, a secondary use must necessarily add “new information, new aesthetics, [and] new insights” to the original.⁷⁷ But whereas here, Koons prevailed because the court deems “Niagara” to be sufficiently transformative in changing the colors, background, medium, size, and details of the

⁷³ *Blanch*, 467 F.3d at 246.

⁷⁴ *Id.* (“In separate cases based on three different sculptures from “Banality,” this Court and two district courts concluded the Koons’s use of the copyrighted images infringed on the rights of the copyright holders and did not constitute fair use under the copyright law.”).

⁷⁵ *Id.* at 247-248.

⁷⁶ *Id.* at 247.

⁷⁷ *Castle Rock Entertainment v. Carol Publ’g Group*, 150 F.3d 132, 141 (2d Cir. N.Y. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

original photo,⁷⁸ he was not so lucky in another Second Circuit decision, *Art Rogers v. Koons*,⁷⁹ which also involved a *Banality* piece. But the court seems determined to distinguish the two results by claiming that in “String of Puppies (the work in question in *Art Rogers*), Koons had “slavishly recreated a copyrighted work in a different medium without any objective indicia of transforming it or commenting on the copyrighted work.”⁸⁰ And, as it will be noted, one of the main reasons Koons’ defense failed in *Art Rogers* was because the court had found that “String of Puppies” was not a parody of the original work itself, but rather, a satire (I prefer the word “pastiche,” but more on that later). “In short,” the court noted, “it is not really the parody flag that appellants are sailing under, but rather the flag of piracy.”⁸¹

The fair use focus on the distinction between satire and parody, and between “transforming” a work rather than “copying,” are precisely the distinctions postmodern art problematizes, as do they run against the ultimate objective of Koons’ work. Parody, which targets the original work as the object of its ridicule, is allowed under the fair use defense, at least in part because it makes “the audience...aware that underlying the parody there is an original and separate expression, attributable to a different artist.”⁸² On the other hand, because “satire can stand on its own two feet” rather than necessarily relying on the original, courts have been reluctant to allow them the same fair use defense that parodies have.⁸³ In particular, courts have leveled at satires a number of criticisms, such as the idea that authors only use “the copyrighted work...[as] a vehicle to poke fun

⁷⁸ *Blanch*, 467 F.3d at 253.

⁷⁹ 960 F.2d 301 (2d Cir. 1992).

⁸⁰ *Id.* (Katzmann, J., concurring).

⁸¹ *Id.* at 311.

⁸² *Id.* at 310.

⁸³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S 569, 580 (1994).

at another target,”⁸⁴ or that they do so “to avoid the drudgery in working up something fresh.”⁸⁵

But the notion that there is “an original and separate expression, attributable to a different artist” at all is a problematized one under both postmodern art and current critical theory. Rather, the move from making parodies to making pastiche or satire is precisely one of the fundamental differences between modernism and postmodernism.⁸⁶ Specifically, to parody a work means that the secondary user implicitly acknowledges something *unique* in the original that makes it worthy of imitation—Jameson urges us to think of “Wallace Stevens’s peculiar way of using abstractions” or “of the musical styles of Mahler or Prokofiev. All of these styles, however different from each other, are comparable in this: each is quite unmistakable.”⁸⁷ Satire or pastiche, however, is what happens when we stop believing in the uniqueness or unmistakability of a style, or a piece. “Pastiche is blank parody, parody that has lost its sense of humor.”⁸⁸ This is due in no small part to the death of the subject or the author, at least in the sense that “a unique personality and individuality...can be expected to generate its own unique vision of the world.”⁸⁹ Pastiche is the poetic and artistic realization of what Walter Benjamin had championed in mechanical reproduction and the simulacrum of copies. Barthes, for example, claims that the modern-day writer is no author at all, at least in the traditional sense, but is more aptly deemed a collector, collage-maker, or “scriptor” of our cultural past:

⁸⁴ Dr. Seuss Enters., L.P. v. Penguins Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

⁸⁵ Campbell, 510 U.S. at 580.

⁸⁶ See Jameson, *supra* note 45, at 113.

⁸⁷ *Id.*

⁸⁸ *Id.* at 114.

⁸⁹ *Id.*

The writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them. Did he wish to express himself, he ought at least to know that the inner ‘thing’ he thinks to ‘translate’ is itself only a ready-formed dictionary, its words only explainable through other words, and so on indefinitely....Succeeding the Author, the scriptor no longer bears within him passions, humours, feelings, impressions, but rather this immense dictionary from which he draws a writing that can know no halt: life never does more than imitate the book, and the book itself is only a tissue of signs imitation that is lost, infinitely deferred.⁹⁰

Koons, working in the postmodern fashion, is precisely that collector of dead languages: he had, after all, obtained most of his materials for the *Banalities* series by looking through magazines, advertisements, and postcards⁹¹—those sources of kitsch that the postmodern artist capitalizes and comments on. His justification for appropriating from said sources is that these pictures—the congenial man and woman with their string of puppies in the plaintiff’s photograph in *Art Rogers*, the sensuous woman’s leg with silk sandals in *Blanch*, and the happy farm family with pigs in *Campbell*—all speak to

⁹⁰ Roland Barthes, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142, 146 (Stephen Heath trans., 1977) [hereinafter Barthes, *Death of the Author*].

⁹¹ See *Blanch v. Koons*, 467 F.3d 244, 248 (2d Cir. 2006); *Campbell v. Koons*, 1993 U.S. Dist. LEXIS 3957 at *6 (S.D.N.Y. Mar. 30, 1993); *Art Rogers v. Koons*, 960 F.2d 301, 305 (2d Cir. 1992).

our “collective sub-conscious...regardless of whether...[they have] actually ever been seen by...people.”⁹² Indeed, as the title of his series suggests, such images have become so part of our consumer society as to be banal. Parody—which implicitly must acknowledge the uniqueness of both the appropriated work and the uniqueness of the appropriating author—would not suffice.⁹³ As a matter of fact, pastiche is the ultimate realization of the postmodern move from nature to culture, God to Pop,⁹⁴ man as creator to man as machine.⁹⁵ It is antithetical to the project of the postmodern creator to attempt to “transform” the work (as if via some divine inspiration) into something “new” or “original.” Rather, the concept of man as scriptor, collector, or machine requires him to recreate the original (which, of course, is arguably not “original” at all) exactly as he sees it—indeed, Andy Warhol had worked to imbue his art with an “assembly-line effect,”

⁹² *Art Rogers*, 960 F.2d, at 305.

⁹³ Neither, too, would the court’s suggestion that Koons merely take the plaintiff photographer’s “idea” itself rather than the expression of that idea. *Id.* at 307. For the point of the humorless pastiche is to “look into the conscience of America’s commercial culture, find the glint of shiny metal no more than an inch thick, and *mirror it brilliantly.*” Steven Henry Madoff, *Wham! Blam! How Pop Stormed the High Art Citadel and What the Critics Said*, in *POP ART, A CRITICAL HISTORY*, *supra* note 26, at xiii, xiv (emphasis added). The end goal is to erase all traces of the author’s hand from the finished product (see 2 *ART SINCE 1900*, *supra* note 15, at 486-91) something that would not be possible if Koons were to use the “idea” of “Puppies” in creating his own work would go against the whole project of copying something as the author sees it.

⁹⁴ Leo Steinberg, in discussing the consumerist focus of Pop Art, had said, I think it has something to do with God and idolatry, God being understood as the object of man’s absolute worship...And now Lichtenstein and certain others treat mass-produced popular culture as Duccio would treat the Madonna, Turner the Sea, Picasso the Art of Painting...the artists are moving in, naively or mockingly, each in his way, an uninvited priesthood for an unacknowledged, long-practiced cult.

Selz et al., *supra* note 26, at 72.

⁹⁵ Andy Warhol, for example, made a remark in contrast to Jackson Pollock (a high modernist painter)’s statement, “I am nature.” Warhol states flatly instead, “I am a machine.” Steven Henry Madoff, *Wham! Blam! How Pop Art Stormed the High Art Citadel and What the Critics Said*, in *POP ART: A CRITICAL HISTORY*, *supra* note 26, at xiii, xiii.

completely devoid of any traces of the author.⁹⁶

The court in *Blanch*, unlike in *Art Rogers* and *Campbell*, was surprisingly receptive to Koons' argument for satire as symbolic of our greater societal state. However, what is most shocking is how hard the court worked to hammer their justification for the holding into the fair use doctrine—the disconnects are palpable. For one, while they acknowledge that fair use doctrine is traditionally hostile to satires, they conclude nonetheless that Koons has established an adequate justification for the satire. “[W]e need not depend on our own poorly honed artistic sensibilities,”⁹⁷ the Second Circuit claims in deferring to a lengthy description of Koons' project, though it is clear that the same court had engaged in just that valuation of artistic sensibility when they struck down Koons' fair use defense in *Art Rogers*. Similarly, their justification for finding a “transformative” nature in Koons' “Niagara” is just as spotty: “When, as here, the copyrighted work is used as ‘raw material’...in the furtherance of distinct creative or communicative objectives, the use is transformative.”⁹⁸ However, Koons had clearly delineated his creative objectives in *Art Rogers*, as well⁹⁹: as a matter of fact, the extent to which the nature of the two artworks (“Niagara” and “String of Puppies”) varies is slight, if at all. And, of course, it would be ridiculous to suggest that *any* work of art (fine art or otherwise) does not have as its objective to communicate some sort of message—to chalk

⁹⁶ See ANDY WARHOL & PAT HACKETT, POPISM 28 (1980).

⁹⁷ *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

⁹⁸ *Id.* at 253.

⁹⁹ Indeed, the Second Circuit in *Art Rogers v. Koons* goes to great lengths to detail Koons' own description of his role as an appropriation artist in a long line of similar artistic movements (Cubism, Dadaism, and one of the first appropriators, Marcel Duchamp) with a shared goal of incorporating images from mass media and commodity culture to comment on them, but just as quickly dismisses it. 960 F.2d 301, 309 (2d Cir. 1992).

up “transformative” use to its “communicative objectives” seems much like the Second Circuit attempting to fit a square peg into a round hole.

Given both the unpredictable nature of the fair use doctrine and the fundamental ways in which it is oppositional to the postmodern objectives of pastiche and artless reproduction, the fair use doctrine presents lawmakers with the perfect starting point for copyright reform. A reformed fair use doctrine will preserve the First Amendment principles it is meant to champion and move toward reconciling the postmodern paradox, all the while retaining many of the other rights traditional copyright law affords its owners.

V. FINDING VOICE: POSTMODERN ART’S MULTIDIMENSIONAL SPACES FOR RESISTANCE

This is the point in the narrative in which some might wonder why society should want this at all, should, in fact, *encourage* the postmodern moves toward appropriation, humorless pastiche, unoriginality, and mechanization (or, the removal of the artist’s hand from the final product). To go back to Lessig in *Eldred*: what is the *harm* in preventing such a move? Aside from what I have already argued—that these changes not only are inevitable given its historical precedent (high modernism) *and* desirable as a way of reflecting and commenting on our new technological realities—there is also something irreducibly valuable in allowing the postmodern text to reflect Barthes’ idea of the “multidimensional space in which a variety of writings, none of them original, blend and

clash.”¹⁰⁰ As a matter of fact, in dismantling “the modernist ideas of ‘master’ works and ‘master’ artists, which were viewed as ideological ‘myths’ to expose—to ‘demystify’ or to ‘deconstruct’,” postmodern authors—many of them female, and some of them minorities—can reappropriate these spaces as a means through which to critique the dominant male ideology.¹⁰¹

One of the most notable appropriation artists from the late ‘70s, Sherrie Levine, did just that. Levine was part of an artistic movement known as the “Pictures” generation, a “picture” being the “palimpsest of representations, often found or ‘appropriated,’ rarely original or unique, that complicated, even contradicted, the claims of authorship and authenticity so important to most modern aesthetics.”¹⁰² In using the word “pictures,” one should immediately think of Steinberg’s postmodern “flat-bed picture plane” or what Foster had called the “cultural, textual site of the postmodern picture.”¹⁰³ Perhaps unsurprisingly, unlike many other artistic movements, most “Pictures” artists were female—Levine, Barbara Kruger, Cindy Sherman, and Louise Lawler were just a few of the women working in the medium, all of whom were dedicated to the project of taking pre-existing works and stripping them of their masculine origins, most often to train the male gaze back in on itself. In Levine’s case, she copied—wholesale without a modicum of modification—a photograph of Edward Weston’s, titling it *Untitled, After Edward Weston*. (Needless to say, Weston’s estate, claiming copyright infringement, had confiscated the Levine images and prohibited them from being sold. Currently, the

¹⁰⁰ Barthes, *Death of the Author*, *supra* note 90, at 147.

¹⁰¹ 2 ART SINCE 1900, *supra* note 15, at 598.

¹⁰² *Id.* at 580.

¹⁰³ *Supra*, p.2 & p.15.

Metropolitan Museum of Art owns both the Weston and the Levine images.)¹⁰⁴ The photograph, of Weston's nude son's torso—recalls all sorts of associations with the classic Greek sculptures of the ancients through the work of Renaissance painters like Michelangelo. In “appropriating,” or, blatantly pirating Weston's work, Levine is making a claim that goes deeper than merely “challenging his legal status as the creator, and therefore the holder of the copyright to his own work,” but “extending to Weston's very claim to originality, in the sense of being the origin of his images. For in framing his son's body in such a way...it could be argued that Weston was in fact helping himself to one of the most culturally disseminated visual tropes in Western culture.”¹⁰⁵

Demystifying, or dismantling the idea of the lone, heroic male creator was just one of the first ways the Pictures artists challenged the authorial power of their male predecessors. Here, form and content, theory and technology, fuse inextricably. For, if the idea is to emasculate the work—by stealing, copying, and denigrating the holy “image” to something as derisive as a mere “picture”—the *form* that emasculation takes on is enabled by the technology of Levine's day—“[p]hotography, she implied, only made it technically easier and more transparent to do the kind of stealing—politely called ‘appropriation’—that has always been endemic to the ‘fine arts’.”¹⁰⁶

Other Pictures artists in the late '70s and '80s engaged in various forms of “appropriation” in taking familiar images, tropes, and text—almost all of them created or dictated by the dominant male ideology—to dismantle them, question them, and expose them for what they are: social constructs rather than absolute truths (here, one can again

¹⁰⁴ Reena Jana, *Is It Art, Or Memorex?*, (May 21, 2001), <http://www.wired.com/culture/lifestyle/news/2001/05/43902>.

¹⁰⁵ 2 ART SINCE 1900, *supra* note 15, at 580.

¹⁰⁶ *Id.* at 581.

think of the shift from Nature to Culture or from God to Pop). If men are “the actors in a world in which women [are] the passive objects”—men being the “makers of meaning, while women—the spoken for—[are] the bearers of meaning,” then the only way to take control again is to hijack those spaces from which men speak—movie stills (in the case of Cindy Sherman’s work¹⁰⁷), magazines and other sites of mass circulation (like Barbara Kruger did¹⁰⁸), or photographs, and retrain the gaze elsewhere. Indeed, it would be difficult to imagine the success of the project *without* some “stealing” of the original work. That is why I used the word hijack; the violence of the word seems to imply some sort of willful act of criminality, like an artistic sit-in on property that had been deemed to be inaccessible to the marginalized and the voiceless. Foucault, in describing the postmodern condition, had replaced “those unities of humanist historical thought such as tradition, influence, development, evolution, source and origin with concepts like discontinuity, rupture, threshold, limit and transformation.”¹⁰⁹ Postmodernism, in widening the arena of the possible, has opened up the artistic space reciprocally for the “Others,” as well.

There is a recent case that I think has very much to do with this retextualization of existing works by long-subjugated Others, and that is the one involving African American writer Alice Randall. Randall, in 2001, published a novel titled *The Wind Done Gone*, which, as the title might suggest, appropriates the characters, plot line, and scenes from Margaret Mitchell’s classic, *Gone With the Wind*, to tell a different story from the viewpoint of Scarlett’s half-sister, a mulatto slave. Mitchell’s estate, unsurprisingly, sued

¹⁰⁷ *Id.* at 582.

¹⁰⁸ *Id.* at 583.

¹⁰⁹ Douglas Crimp, *On the Museum’s Ruins*, in *THE ANTI-AESTHETIC*, *supra* note 2, at 43, 45.

for copyright infringement, and was granted a preliminary injunction by the district court.¹¹⁰ Though the Eleventh Circuit eventually reversed and remanded the case under the Fair Use doctrine, the copyright issues surrounding the case make it an interesting one for legal commentary and scholarship. Neil Netanel, for example, makes a claim for why stifling Randall’s speech—predicated on liberal borrowing from Mitchell’s original—is an indefensible wrong under First Amendment principles.¹¹¹ As he argues, “From feminist fan fiction to mashups that meld white-bread music with hip-hop, creative appropriation gives individuals a voice, a means to challenge the ubiquity of mass media culture and the prevailing mores, ideology, and artistic judgments it represents.”¹¹²

I agree with Netanel that creative appropriation gives individuals a voice—specifically individuals who have long been denied one. But I think the reason why *appropriation* specifically—rather than, as many critics have argued, simply creating their “own” work¹¹³—is both a legal right and a powerful artistic tool goes back to how the postmodern paradigm shift (and, in turn, if the imperative of the copyright clause demands that the arts be allowed to reflect such a shift) has dismantled the myth of the master text itself. And in so demystifying the text and the author, the creator and the object of its creation, the constructs we’ve long taken for granted as true must be resituated if we are to understand them at all. Edward Said, for example, does just that, with Orientalist scholarship, in his book *Orientalism*. In describing the illusion known as “the Orient,” Said reveals Western meanings of Orientalism and the Orient to be a kind of

¹¹⁰ SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357 (N.D. Ga. 2001).

¹¹¹ NETANEL, *supra* note 67, at 158-60.

¹¹² *Id.* at 160.

¹¹³ See, e.g., Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933 (2000).

cultural hegemony created by the West to retain their dominance. “[I]n discussions of the Orient, the Orient is all absence, whereas one feels the Orientalist and what he says as presence; yet we must not forget that Orientalist’s presence is enabled by the Orient’s effective absence.”¹¹⁴ Said’s distinction between absence and presence—between the enabling of the latter by the former—can also be applied to why postmodern authors appropriate known texts to expose either their falsity or to tell a different story. If the presence of canonical works like *Gone With the Wind*—mostly made by white males, or, in Mitchell’s case, by a white female—are canonical, it is because they are dependant on privileging one set of dominant social ideals over another’s. The marginalized position of females and minorities—and their marked absences—are so painfully palpable as to entrench and enable the dominant majority’s presences in the cultural canon.

Thus, to take back power, what is needed now is for those textual sites of domination and oppression to be first emptied out of meaning—excavated, in effect—and then filled, this time by the voice of the oppressed. Hence the word “hijack.” Without the violent appropriation of the oppressor’s work, the shock value of both the new work and the message behind the taking would be lost.

VI. CONCLUSION

As Leo Steinberg had foreshadowed over thirty years ago, “[t]he deepening inroads of art into non-art continue to alienate the connoisseur as art defects and departs

¹¹⁴ EDWARD SAID, *ORIENTALISM* 208 (Vintage Books ed. 1979) (1978).

into strange territories, leaving the old standby criteria to rule an eroding plain.”¹¹⁵ These changes can be confusing, painful, and uncomfortable—indeed, this paper has raised more problems with current copyright doctrine and changes in contemporary thought than it has solved them. But moments of extreme crisis can also lead to extreme growth. Thus, we should not be content to automatically default to, or, more perniciously, stay entrenched in, a series of legislation spurred on and dictated by powerful media players rather than think through the intellectual, cultural, and social significance and harm in doing so.

It would be wrong to think that the point of this paper was to suggest that the law should completely overhaul itself in accord with whatever new brand of philosophical thought or intellectual school emerges, only to change course the next time there is a fundamental shift in thinking and privilege those new schools of thought, instead. Rather, the *real* question that judges, scholars, and lawmakers should be asking themselves when undertaking any inquiry of the Copyright Clause is the true meaning of “Progress” in relation to artistic production and output. If one chooses to view Progress mechanistically, if what it means to “make something new” is merely evaluated in terms of the sheer *number* of works being produced in a given, say, year, then a certain motive-based view of artistic production might justify current copyright law as protecting the interests of those authors who need the promise of proprietary control over their works before beginning to create.¹¹⁶ But that view robotically dumbs down “Progress” to

¹¹⁵ Steinberg, *supra* note 41, at 36.

¹¹⁶ See *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15 (2003) (“Congress heard testimony from a number of prominent artists; each expressed the belief that the copyright system’s assurance of fair compensation for themselves and their heirs was an incentive to create.”).

quantity, encouraging “authors” driven by monetary incentives—that pot of gold at the end of the rainbow—to continue churning out pages of words as if producing sausages out of a meat grinder: *production* is there, even if *progress* is not.¹¹⁷ Even read in the strictest dictionary sense of the word (of progress as development or growth), that view cannot hold water. Artistic production would be the mouse trapped in its wheel, continuously moving but never *going* anywhere. Surely, that “progress” is defined as *development* and *growth* must mean that there is something more to artistic output than mere numbers.

The second view goes back to what my friend and I had discussed many years ago, and it is what subconsciously lead us to conclude that the fine arts had progressed faster than any of the other forms of art. It is the view that to make something “new” does not mean merely rehashing the same idea in different words, which lies at the heart of current copyright law’s idea/expression dichotomy.¹¹⁸ Rather, “newness” is making art that is different even in *idea* from what came before it. Hence, the Romantic poets’ vision of what made good literature differed markedly from the Modernists’ vision of what makes good literature. However, it just so happened that those shifts in ideas, and, indeed, ideologies, has fitted along nicely with copyright law all the way up to the twenty-first century. Whereas perhaps the author’s prerogative in the nineteenth century

¹¹⁷ As the court in *Mazer v. Stein*, 347 U.S. 201, 219 (1954) seems to think, “The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”

¹¹⁸ See *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 556 (1985).

was to come closer to God in the pursuit of the Burkian notion of the sublime¹¹⁹ and the early twentieth century prerogative was to reflect the world as machine: cold and senseless in the existential search for God,¹²⁰ what does one do when, in the postmodern era, the very *idea* of the master narrative, of the singular author, has come under attack? When you get rid of the romantic author, what can be the meat holding up the bones of the story? Or, to put it more practically, if the romantic author does not exist, then what is copyright law out to protect?

This is the fundamental fear underlying the copyright battle today. Certainly, the anxiety that to free up information completely under this guise would be to give in to anarchy or complete relativity is not an unfounded one—to truly acknowledge that there are no authors or original works would mean the death of copyright law as we know it. Nor am I advocating such an approach. But, what is needed from the law, at this moment in which our culture, our beliefs, and our literature has already approached a new paradigm shift, is for Congress and/or the courts to fulfill the constitutional imperative of promoting progress in the arts—by, well, actually allowing the arts to *progress* in line with shifting belief systems and artistic practices. To do so—as other scholars have already suggested¹²¹—does not spell some anarchic end of copyright law. It does not even involve so much a restructuring of copyright law as it does changing the remedies

¹¹⁹ See EDMUND BURKE, *A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL* (Adam Phillips ed., New York, Oxford University Press 2009) (1757).

¹²⁰ For an example of high modernist literature, see KNUT HAMSUN, *HUNGER* (New York, Farrar, Straus and Giroux 1967) (1890), a novel without chapter breaks or a traditional plot, instead focusing on the psychological inner workings of a starving narrator as he wanders the streets of Christiana (modern-day Oslo) searching for food.

¹²¹ See, e.g., Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Transactions and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1311 (1996).

(from property rules to liability rules), expanding the rights of others to appropriate from copyrighted works (either by allowing limited sampling or expanding the fair use doctrine and the criteria used to engage in such an analysis), or limiting the rights copyright owners wield (by rethinking, for example, the derivative works doctrine).

Remixes, collage, and bricolage is the art of now precisely because it highlights so many of the focal points resonant in our society today. Collage, whether or not one chooses to believe it, is power. Just as how the original works from which collage “steals” are sites of constructed truths, false illusions used to keep the dominant in power, so collage liberates us from those constructs.

Its [collage’s] heterogeneity, even if it is reduced by every operation of composition, imposes itself on the reading as stimulation to produce a signification which could be neither univocal nor stable. Each cited element breaks the continuity or the linearity of the discourse and leads necessarily to a double reading: that of the fragment perceived in relation to its text of origin; that of the same fragment as incorporated into a new whole....The trick of collage consists also of never entirely suppressing the alterity of these elements reunited in a temporary composition. Thus the art of collage proves to be one of the most effective strategies in the putting into question of all the illusions of representation.¹²²

¹²² Gregory L. Ulmer, *The Object of Post-Criticism*, in *THE ANTI-AESTHETIC*, *supra* note 23, at 83, 88.

I would like now for a moment to point to the radical movements of that storied era known as the '60s—a time in which African Americans were struggling for their voice, in which the beat generation roamed free on the streets of Greenwich Village in some attempt to transcend the very deadness of their white skin—in which general civil unrest seemed to mirror that of a larger problem in society: the happy complacency of the American mainstream, their white-picket fences and suburban homes, their shiny new automobiles and plastic celebrities.¹²³ There was a general acknowledgment that “something fundamental had changed in culture.”¹²⁴ That was when Pop was born, when Lichtenstein and Warhol and Rosenquist, with their smirking, winking reproductions of Coke bottles, Campbell’s soup cans, and cartoon strips, set about to *reflect* and *define* that change. Now, almost five decades later, we are at the brink of another paradigm shift. Will we let the remix artists—young, old, amateurs, professionals, musicians, writers, artists, thinkers—of today reflect that change? Our legal system has the power, after all, to both dictate norms as it can also reflect them. What is needed now, more than ever, is for the law to take baby steps into the wide breadth of the unknown, beginning at first with remix culture.

¹²³ For a moving polemic of the radicalism and conformity riddling post-World-War-II America, see NORMAN MAILER, *THE WHITE NEGRO: SUPERFICIAL REFLECTIONS ON THE HIPSTER* (City Lights Books 4th ed., 1970) (1957).

¹²⁴ Steven Henry Madoff, *Wham! Blam! How Pop Art Stormed the High Art Citadel and What the Critics Said*, in *POP ART: A CRITICAL HISTORY*, *supra* note 26, at xiii, xv.