A Dangerous Undertaking: Appropriation Art, Intellectual Property, and Fair Use Since the 1990s

by

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Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of Art, Art History & Visual Studies in the Graduate School of Duke University

2017
ABSTRACT

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Abstract

This dissertation is a historical examination of the broad and multifaceted role of appropriation in twentieth and twenty-first century American art. It argues for the complementarity of research in legal and art theory with respect to the origins, significance, and future of appropriation and contends that the historical development of appropriation art is indissolubly interconnected with changes in intellectual property laws. This dissertation proposes that a history of contemporary appropriation requires an interdisciplinary approach, employing art historical, legal, and economic theory to examine interrelations between appropriation art, art critical theory, and the legal doctrine of fair use. Special attention is paid to the development of terms used to describe and define appropriation art. The art historical definition of appropriation is traced through a review of academic criticism and museum exhibitions. The legal understanding of appropriation, which has a direct impact on the creation and dissemination of art that builds on prior works, is explored and clarified. Economic claims about artistic property rights and art markets are also considered and differentiated. Throughout, I question established understandings of appropriation and identify unresolved issues in the scholarly treatment of appropriation art. I draw
distinctions between ethical and legal guidelines for reuse of images and suggest that further development of ethical guidelines is more important than further clarification of legal rules. Ultimately, I conclude that transformative use is a valuable framework for understanding appropriation, but judges cannot be expected to determine whether or not a work is transformative without expert guidance, preferably from artists themselves, and recommend that artists participate actively in the development of aware appropriation and ethical fair use.
Dedication

For the woman in the black suit.
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Introduction

An appropriation artist takes and adopts images, objects, or representations for his or her own use, typically without the originator’s permission. Such acts complicate definitions of creativity and authorship, deny the possibility of stable meaning, critique capitalism, disrupt apprehension of the “real,” and unveil the role of representation in the structures and flow of power. To achieve such disruptive ends, appropriation artists arrogate, recontextualize, and give alternate meaning to existing images. In almost every instance, these operations are performed on copies of images. For some, the illicit nature of a reproduction is a fundamental aspect of the artwork. Thus, appropriation artists organize their practice around copying, despite the prohibitions of copyright law.

Under United States law, the creator of an original work is afforded the exclusive rights to display, distribute, perform, and reproduce the work.1 Thus, copyright law bars the kind of copying and reuse that is foundational to appropriation art. Appropriation art depends on copying, but copyright law exists to regulate and, in most cases, prevent copying. If copyright law prohibits unauthorized copies, but appropriation art is unauthorized copying, then an inexorable conflict exists between copyright and appropriation.

The doctrine of fair use was designed to account for and mediate such conflicts between copyright and creative expression, as creative expression is a form of constitutionally protected free speech. In practical terms, fair use is an “affirmative defense” in a lawsuit, a permissible excuse to an admission of copyright infringement.\(^2\) Theoretically, fair use is a public right, an easement in an otherwise privatized area of property.\(^3\) As applied to works of appropriation art, fair use should allow appropriation artists to include copyrighted material in a work of art without the copyright holder’s permission.

However, appropriation art has proven particularly difficult for judges to parse in fair use determinations. The word “appropriation” implies illegality, the process of creating an appropriation artwork resembles the process of copyright infringement, and seeing fair use in a work of appropriation art can be very difficult for a judge who has not been trained to look at art. The difficulties of interpreting fair use in appropriation art are compounded by a broader judicial avoidance of art interpretation and a lack of

\(^2\) An affirmative defense is “a defendant’s assertion of facts that, if true, will defeat the plaintiff’s or the prosecution’s claim, even if all the allegations in the complaint are true.” Bryan A. Garner, ed., *Black’s Law Dictionary*, 8th ed. (St. Paul: West Publishing, 2004), 451.

\(^3\) As described below, this could be considered a contentious statement. This dissertation adopts a specific interpretation of copyright’s origins and function that defines copyright as a socially, historically, and economically contingent monopoly on creative expression extended by a government to a private citizen for a limited time.
good models for judicial analysis of artworks. Supreme Court Justice Oliver Wendell Holmes first warned judges away from engaging in aesthetic evaluations in 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, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value – it would be bold to say that they have not an aesthetic and educational value – and the taste of any public is not to be treated with contempt.⁴

In the century to follow, Justice Holmes’ warning was reproduced in nearly every copyright case concerning visual art. Judges repeatedly advised against the “dangerous undertaking” of art analysis, relying instead on alternatives to aesthetics rather than engaging directly with objects.⁵ However, fair use doctrine, when applied to works of visual art, requires inquiry into the specific conditions of an artwork’s form, history, construction, and context.

To address works of appropriation art, judges needed a conceptual framework to help them navigate evaluations of creative works that depend on pre-existing source

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material. The doctrine of “transformative use,” which was introduced into fair use jurisprudence in the 1990s, has since provided a guide to establishing a fair use purpose for an appropriation artist’s borrowings. Since then, transformation has become an essential aspect of fair use jurisprudence; law professor Peter Jaszi has suggested that it may even serve as “a kind of metaconsideration arching over fair use analysis.”

Specifically, transformation addresses the purpose of an artist’s use of pre-existing imagery and emphasizes the public benefits imparted by the fair use doctrine.

Yet, although the doctrine of transformative use has expanded the range of operations that can be considered fair use, recent case law has demonstrated that judges cannot always be relied upon to determine whether or not artworks are transformative. This raises serious questions about the utility of the heuristic, creating unpredictability for lawyers and confusion for artists, and may chill rather than promote artistic expression.

This dissertation contends that the limitations and flaws of the fair use doctrine are not wholly to blame. Instead, the difficulties are also attributable to indeterminate

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420. For an explanation of transformative as applied to other copyrightable subject matter, such as see James Boyle and Jennifer Jenkins, Intellectual Property: Law & the Information Society – Cases and Materials. 3rd ed., 2016, 450-489.
definitions of appropriation art promulgated by artists and art critics. Throughout, I pay careful attention to terms and their etymologies, and the dissertation is thus a history not just of appropriation art and copyright, but also of how copyright and appropriation art are discussed.

The history of copyright is a history of battles over words: for centuries, lawmakers, scholars, and rightsholders have clashed over the proper definition of terms like “author,” “work,” “genius,” and “original.” The establishment of the individual rightsholder – the author – was a necessary precursor to the conveyance of a property right in his or her creative work. Thus, in defining the property rights accorded to painting, photography, sculpture, and other visual media, legislators and courts first had to define “art” and “artist,” and these definitions tended to follow from prior efforts to define “author” and “text.”

Competing definitions for these terms were broadly founded on opposed understandings of the right to creative property as either natural or positive.\(^7\) Natural law is a system of legal principles that derive from universal philosophical understandings: human nature, divine justice, or moral principles. By contrast, positive law is “law established by human authority,” formed by a particular community, according to

\(^7\) See Paul Goldstein, Copyright’s Highway: From Gutenberg to the Celestial Jukebox (Palo Alto: Stanford University, 2003).
specific customs, and by political superiors, that is distinctly situated in a time and place, and usually consists of codes, statutes, and regulations that may be tracked historically. The characterization of an artist’s right as inherent (a natural right) or manufactured and granted by the state (a positive right) is foundational. If copyright is a natural right, then it cannot be taken away from an artist, though it may be restricted and conditioned by the government. Conversely, if copyright is a positive right, then this right may be shaped, altered, or even withdrawn by a government and its agencies.

During the early modern period, efforts to control the production and dissemination of knowledge proliferated contemporaneously with the spread of reason and education. Throughout, the concept of “authorship” was explored, challenged, and defined as creators fought for recognition of a property right in their creative work. Before the seventeenth century, ideas were not thought of as property, partly because the authors of ideas were not seen as the owners of these ideas, and the prohibition of private ownership of ideas was practically universal. Knowledge was received from God, and the author/artist was merely a conduit for the transmission of divine wisdom.

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8 Garner, 1200.
Artists were socially elevated during the Renaissance, but their “genius” was still widely attributed to a divine gift rather than the product of skill or labor. Historian Carla Hesse has identified this attachment to divine inspiration as a “theologically informed moral revulsion to the idea of an individual profit motive in the creation and transmission of ideas.” As humanism developed, the notion that an individual could originate and own his or her thoughts was embraced, but the source of the individual’s property right continued to be contested. In the eighteenth century, as literacy expanded rapidly, authors endeavored to claim greater economic remuneration for their efforts, which required increased legal control over their output.

By the nineteenth century, various property myths were consolidated in the character of the “romantic author” – an individual genius whose capacity for intellectual order and emotional inspiration provided needed harmony in a rapidly changing world that was no longer centered on religious belief. This construction contributed to the further development of the natural rights model: although divine inspiration gave way to individual genius, creativity was still assumed to be innate and pre-existing, as was a

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11 Ibid.
12 Ibid., 29.
14 Jaszi, “Is There Such a Thing as Postmodern Copyright?,” 415.
right to creative profit. But the myth of the romantic author also contributed to the development of positive law by creating an individual rightsholder to whom economic rights could adhere and benefits could flow. As parallel visions of artistic property developed in American and European jurisdictions, international copyright treaties revived tensions between natural and positive interpretations of copyright.

Contemporary American copyright can be understood as a palimpsest built from myths, metaphors, and legal rules imported from scientific property, real property, and literary property. The first copyright laws were based on (but also reacted against) the positive rights established by British common law. American rights in creative property flow from the Copyright Clause of the Constitution, which refers exclusively to “authors” and “writings.” Visual artists and artworks slowly gained protection through adaptations of these categories.

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16 Ibid.
17 The Berne Convention, signed by ten countries in 1888, aimed to harmonize copyright laws, affording identical treatment to artists in member countries. In 1990, the United States passed the Visual Artists Rights’ Act, which extended “moral rights,” a class of rights that enable artists to further control the disposition of their works, exclusively to visual artists. The history of moral rights is fascinating, but outside the scope of this dissertation. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as amended Sept. 28, 1979, 828 U.N.T.S 221.
19 U.S. Const. art. I, § 8, cl. 8.
The first American intellectual property legislation, passed in 1790, covered only books, maps, charts, paintings, and drawings, and granted rights to “print, reprint, publish, copy and vend.”\textsuperscript{20} Subsequently, judges and lawmakers, interpreted the meanings of “authors” and “writings” to extend to painters and paintings, even though there was little constitutional, statutory, or historical support for these extensions.\textsuperscript{21} Thereafter, courts began to interpret “writings” and “authors” quite broadly, which afforded protection for non-traditional artworks and new media including, most significantly, photography, which was often contested, in law and art critical circles alike, as insufficiently original to be considered “art.”\textsuperscript{22}

Throughout the twentieth century, film, radio, television, and Xerox technology afforded new modes of expression and dissemination of creative works, and the adoption of technological advances by visual artists generated predictable conflicts with copyright law.\textsuperscript{23} These rapid advances in technology challenged existing definitions of

\begin{footnotesize}
\begin{enumerate}
\item Act of May 31, 1790, 1 Stat. 124. The act was modeled on the English Statute of Anne (1710), which granted similar rights for similar media. Statute of Anne, 1710, 8 Anne, c. 19.
\item Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).
\end{enumerate}
\end{footnotesize}
“authorship” and “writings,” while artists challenged established definitions of “artwork” and “artist.”24

Yet, despite advances in fair use jurisprudence since 1990, such as the introduction of transformative use, copyright law has only scratched the surface of appropriation art and judges have opined on only a fraction of the many styles and types of appropriation. The most prominent and influential cases have involved Jeff Koons and Richard Prince, both of whom are wealthy white male artists affiliated with powerful gallerists, who were predictable high-profile targets for litigation. However, their artworks and practices are not necessarily representative of most appropriation artists, and their perceived power to pay and negotiate for use of copyrighted material is not representative of artists generally.25 Others such as Andy Warhol, Robert Rauschenberg, Shepard Fairey, and Barbara Kruger have also been party to legal disputes about their work, but most of these disputes have been settled privately and therefore did not add to fair use jurisprudence.26

Thus, efforts to improve fair use predictability have been based on a handful of cases that address appropriation directly (notably cases concerning the artworks of Koons and Prince) and such efforts are thus hampered by the paucity of guidance. Other fair use cases that concern musical works, literary works, and technology are necessarily used as legal precedent in court opinions, as prior cases have created and defined legal rules about the application of fair use. But understanding how these cases apply to appropriation art requires the assistance of a legal expert who specializes in understanding how a case about a parodic contemporary version of a sixty year-old novel may affect a collage made by an artist out of photographs taken last year.\textsuperscript{27} Thus, opinions that address musical works, literary works, and technology offer little predictive assistance to non-experts, while legal opinions that specifically address appropriation art offer little guidance to the diversity of artists and artworks grouped under “appropriation.”\textsuperscript{28} We might say that legal discourse around copyright consistently strives to narrow, limit, and clarify, while art critical discourse around appropriation art continues to enfold, embrace, and complicate.

\textsuperscript{27} This form of analysis is performed in the third section of Chapter 1, which applies Suntrust Bank v. Houghton Mifflin Co., 252 F. 3d 1165 (11th Cir. 2001) to a photographic series.

\textsuperscript{28} The reader will observe that in the main text I concentrate copyright cases that concern visual art, but he or she can find references to cases concerning a wide variety of media in the footnotes.
 Appropriation is a broadly inclusive term that describes a plethora of practices. For example, in art discourse, the word appropriation has been used as a catchall for collage, readymades, détournement, pastiche, rephotography, simulation, parody, scavenge, replication, remixes, simulation, adaptation, bricolage, mimesis, recycling, and montage. Appropriation only became a common term in art historical discourse in the late 1970s, when curator and art historian Douglas Crimp identified appropriation as a commonality in the work of five artists: Jack Goldstein, Troy Brauntuch, Sherrie Levine, Robert Longo, and Philip Smith.29 In the 1980s, the highly cerebral “Pictures Generation” (a term that emerged from Crimp’s Pictures exhibition of 1977) expanded to include conceptual and appropriation artists such as Sarah Charlesworth, Louise Lawler, Allan McCollum, Richard Prince, Cindy Sherman, and Laurie Simmons, among others.30 Throughout the 1980s and 1990s, appropriation art was touted as a shattering redirection of artistic practice and a form of artmaking “after art.”31 This disruption heralded “the postmodern turn” that had been ushered in by the introduction of

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31 “After art” refers to the crisis perceived by many art historians in the 1970s, when it appeared that traditional art forms such as painting were no longer primary methods of artmaking, and it became very difficult to create borders between “art” and “non-art.” Jonathan Fineberg, Art Since 1940: Strategies of Being (Upper Saddle River, NJ: Pearson, 2010), 389.
poststructuralist theories and critiques of representation and epistemology in the late 1960s and throughout the 1970s.

The art of the Pictures Generation was a perfect match for the theory industry that arose during the 1980s; the massive amount of critical literature produced during this era often referenced these artists, ensuring that the Pictures Generation was closely identified with the term, even though their work remains a narrowly circumscribed form of appropriation. But the methods and goals of this small set of artworks were extrapolated yet further to a much broader band of artists, both prospectively and retroactively. This extrapolation is partly attributable to a critical desire to classify appropriation as an avant-garde practice and identify its aesthetics and politics as socially transgressive. However, efforts to distinguish late twentieth-century and early twenty-first century appropriators from their precursors made the practice harder for lawyers to explain and defend, as these distinctions provoked questions about whether appropriation art can be considered “art.”

In the 1980s and 1990s, art critical theory began making its way into law review articles and jurisprudence in defense of postmodern artistic practices, as scholars and judges attempted to provide alternative models for fair use determinations that adapted the doctrine for changes in technology and avant-garde art. But the formal qualities of appropriation artworks could not be readily understood as fair use and the testimonies
of appropriation artists confused judges. Historically, courts evaluating works of visual art have put significant weight on an artist’s testimony and the formal relationship between a work of art and its source material. Artistic purpose was assumed to be communicable via formal choice and verbal or written explanation. To identify purposes that were not easily explained by formal analysis and artistic testimony, lawyers began to introduce theories of appropriation art informed by Roland Barthes and Michel Foucault, two French theorists whose work had an immense impact in the art world of the 1970s and 1980s, which rejected the artist’s testimony as the final determinant of meaning and proposed the possibility of multiple meanings.

The emphasis on a viewer’s role in the creation of meaning was a conceptual hurdle for judges leery of the “dangerous undertaking” of aesthetic analysis. Thus, these theories were uneasily absorbed into legal opinions; alternative critical approaches to appropriation art were too impractical for most courts to consider. Judicial unwillingness to address the kind of dialectic identified by Barthes and Foucault was demonstrated in Rogers v. Koons (1992). In this case, the Second Circuit considered String of Puppies (1988), a wooden sculpture manufactured for Jeff Koons in Italy, that

32 Rogers, 960 F. 2d at 304; Cariou, 784 F. Supp. 2d at 348; Cariou, 714 F.3d at 707.
34 Rogers, 960 F. 2d at 309; Cariou, 784 F. Supp. 2d at 349.
35 Rogers, 960 F. 2d at 308.
was modeled on a black-and-white photograph by Art Rogers that had been made into a postcard. The court, clearly befuddled by Koons’ testimony, the work itself, the explanations offered by Koons’ counsel, and the expectations established by precedent, decided that Koons’ sculpture was an infringing derivative of Rogers’ photograph.

Afterwards, the concept of “transformative use,” developed by Judge Pierre N. Leval in 1990, but not introduced into copyright jurisprudence until 1994, gave courts a new framework to evaluate appropriation art with greater sensitivity, but judges struggled to find the requirements established by transformative use – the addition of “new information, new aesthetics, new insights and understandings” – in the art theoretical explanations provided by counsel for appropriation artists. In response to art theoretical explanations that seemed to require copyright reform (such as the re-characterization of photographs as uncopyrightable expression), judges overdeveloped emphasis on formal analysis by exaggerating relations between source material and meaning, but undervalued artists’ writings as a source of information about an artwork. Thus, while transformative use and late twentieth-century art critical theory were born

37 The court could not understand how to interpret Koons’ artwork as any form other than a parody. Rogers 960 F.2d at 301, 307-8, 310.
39 Traub; Rogers, 960 F. 2d at 306.
from the same political, social, and historical context, contemporaneity did not always produce complementarity. Philosophical differences between art critical theory and transformation were sometimes difficult to resolve.

First, transformative use seeks to identify progressive artistic activities that have broad social benefit and absolve these activities of their illegality. As such, the doctrine is difficult to reconcile with art critical theories that reject ideas of genius, originality, and progress. As Leval explained:

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test...If, on the other hand, the secondary use adds value to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.40

Second, authors of art critical literature often described its objects as revolutionary and unprecedented, which seems an obvious fit for the “new” or postmodern qualities required by Leval’s definition of transformation. In fact, late twentieth-century art theory correctly framed

40 Ibid., 1111.
appropriation art as providing “new information, new aesthetics, new insights and understandings,” but such theories offered little help in characterizing artistic gestures as advancing the “enrichment of society,” since ideas of coherent social progression were often (thought not uniformly) rejected and devalued by theorists and postmodern artists.

As a result, when presented with arguments that questioned traditional understandings of progress and the legitimacy of authorship, courts shifted back and forth on the questions of stable meaning and authorial control. Sometimes a court embraced the possibility of multiple and contested meanings and distributed responsibility for the production of meaning beyond the artist’s sole control, but, in other cases, courts remained loyal to traditional and stable interpretations of meaning and authorship. This disorganization has resulted in nearly three decades of confusion about the transformative qualities of appropriation art.

Ultimately, the twenty-first century judicial approach to appropriation art, as demonstrated by differences between Blanch v. Koons (2006), Cariou v. Prince (2013), Seltzer v. Green Day (2013), and Kienitz v. Sconnie Nation, LLC (2014) remains uneven and requires further development. In fact, few scholars embrace transformative use without reservation and some courts have criticized the doctrine. Additionally, some scholars and judges have suggested that the doctrine should be thrown out completely, and they are predictably

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41 Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006), Cariou, 714 F. 3d 694; Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013); Kienitz v. Sconnie Nation, LLC, 766 F 3d 756, 758 (9th Cir. 2014).
dismayed by the outcomes of fair use cases in which transformative use played a major role.\footnote{Kienitz, 766 F 3d 756, 758 (9th Cir. 2014); Matthew D. Bunker and Clay Calvert, “The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years after Campbell v. Acuff-Rose Music,” Duke Law & Technology Review 12 (2014): 92-128 (criticizing the ambiguity of the test and advocating for reduced prominence in fair use analysis).}

Transformation is not perfect, but it changed the way appropriation art was adjudicated by providing judges a lens through which to approach fair use determinations for conceptual artworks. It gave judges a means to evaluate the challenges of appropriation art, as it better described what appropriation artists actually do when making artworks, and gave judges a vocabulary to describe the value and significance of operations performed on pre-existing, copyrighted material. In responding to the need for further development, the discussions to follow propose readings of appropriation art and interpretations of transformative use that allow for varied and multiple forms of appropriation, while proposing solutions for evaluation that fit within the contours of twenty-first century copyright law. The dissertation also distinguishes transformative use from fair use, and differentiates fair use from ethical use, identifying conceptual overlaps that contribute to confusion. Finally, it seeks to establish legal and extralegal pathways for resolution of disputes over the reuse of pre-existing material by appropriation artists.

The dissertation is divided into four chapters. The first three chapters each approach appropriation art from a different theoretical perspective: law, art history, or
economics. The concluding chapter imagines an ethically-grounded future for fair use and appropriation art that prioritizes artistic responsibility. In each chapter, I demonstrate the illusory nature of certain tensions between copyright law and appropriation art, and discuss possible solutions for the reduction of real tensions, most of which do not require lawyers and courtrooms. Throughout, I establish the need for art criticism that embraces copyright law as a normative, historically grounded artistic constraint to which appropriation artists respond productively. Simultaneously, I validate the role that artists’ writings and art critical literature can play in the formation and evolution of copyright law and policy concerning visual art.

Chapter 1 describes the development of fair use jurisprudence in the 1990s, and sites it within artistic, political, and theoretical shifts during this decade. Since 1990, courts have attempted to clarify fair use for visual artists through the doctrine of transformative use. The heuristic provided by this doctrine reframed the judicial approach to appropriation art, enabling judges to use interdisciplinary perspectives to evaluate conceptual artworks that cannot always be understood via formal analysis. But judges have applied the doctrine of transformative use incoherently, largely because doing so requires a level of expertise that cannot be demanded of judges without considerable assistance. In courtrooms, images are treated alternately as wholly truthful or wholly opaque, but neither polarity can characterize a form that often negotiates the
very nature and existence of truth through simulacra, allegory, and repetition. Legal scholars have provided little practical help for artists, instead pushing for doctrinal developments that improve outcome predictability through bright-line rules, stricter definitions, and precise legal tests. Recommendations that have responded to the perceived incoherence of Koons’ and Prince’s oral and written testimonies have often downplayed the role of the artist, overemphasized formal analysis, promoted confusion about the role of artistic intent, and created uncertainty about the proper determination of meaning. As incorporated into judicial opinions, this redirection of transformative use has left the doctrine with outstanding gaps that must be addressed, but which cannot be resolved with legal theory alone and demand recourse from art criticism and theory. Judges rely on expository material and expert analysis in many situations when specialized knowledge of science or industry is required; thus, the evaluation of art should not be treated as an impossibly difficult area of inquiry, but rather one that requires the assistance of art experts. This chapter opens a discussion on the ability of judges to evaluate appropriation artworks through the discussion of important fair use cases concerning appropriation art, and imagines an assessment of Carrie Mae Weems’ *From Here I Saw What Happened and I Cried* (1995) under the existing framework for analysis of transformative use. I conclude that future fair use cases concerning appropriation art must incorporate expert analysis, that multiple transformative
meanings must be admitted, and that artists’ statements and writings should contribute to the formation of these meanings.

Chapter 2 focuses on the establishment of the art historical understanding of appropriation, tracks the use of this term in art critical discourse, and explains the importance of this history to legal discourse. In art discourse, the word appropriation has been used to describe a wide range of artistic forms and contemporary practices. In many cases, the term may have been historically accurate, but is no longer apposite. The over-inclusion of artworks under the umbrella of appropriation has led to widespread confusion about appropriation art, with real consequences. Overuse has led to discord, which is largely due to (i) the importation of terms from adjacent fields and (ii) the assumption of an antagonistic position vis-à-vis another artist, artwork, institution, tradition, or concept. First, terms imported from literary theory and property law create expectations that appropriation artworks cannot and should not fulfill. Second, artists working in a wide variety of genres copy, reproduce, quote, and reuse pre-existing materials, but only a limited subset of contemporary artists copy aggressively in order to directly critique other artists, institutions, the circulation of images, or art theory. To address questions raised in the preceding chapter about the value of artistic intent and the possibility of a single meaning, the discussion here narrows to twentieth and twenty-first century theories of the production of meaning, examining the shift from artistic
intent to viewer participation. To chart the institutional and critical establishment of the dominant art historical narrative of appropriation art, I examine key texts and important art exhibitions. This chapter addresses the critical need for the term appropriation, but imagines a future for twenty-first century avant-garde and conceptual art in which appropriation artworks are discussed with greater flexibility and precision, and with attention to overlooked aspects of these artworks including desire, attraction, and intention. A selection of works from Richard Prince’s *Canal Zone* series (2007-2008) is reconsidered in light of assertions about transformation and intention made in the first and second chapters. I conclude that artists’ writings and statements enhance, rather than detract from, forms of art critical analysis that have previously excluded these resources.

Chapter 3 examines the impact of economic analysis on legal evaluations of appropriation art and recommends a reconsideration of the relations between key actors. This chapter identifies and describes the impact of traditional economic analysis on copyright law and scholarship in the late twentieth and early twenty-first centuries, and explains how this variety of theory often mischaracterized the nature of artistic creativity, the structure of markets for contemporary art, and relationships between artists. This chapter also recuperates issues de-emphasized in scholarship and jurisprudence informed by traditional economic analysis by exploring customs-based
efforts to resolve tensions between copyright and appropriation art, including the
College Art Association’s Code of Best Practices in the Visual Arts.\textsuperscript{43} The discussion opens a
conversation on ethical use and aware appropriation, highlighting proposals that may
positively influence legal and art historical treatments of appropriation art and
transformative use. In response to issues identified in the proceeding chapters, I
advocate for an ethically-informed model of “aware appropriation.” Christian Marclay’s
The Clock (2010) is considered in light of assertions made in the first, second, and third
chapters. I conclude that the future of fair use lies in understanding appropriation as a
form of market enhancement as well as market harm, and suggest models for the
improvement of inter-artist relations.

Chapter 4, the concluding chapter, provides a critical appraisal of appropriation
art in the twenty-first century. I argue that musician Kanye West’s adaptation and
appropriation of artist Vincent Desiderio’s painting Sleep in West’s 2016 video Famous
provides a model example of transformative, ethical, and aware appropriation.
Furthermore, the final chapter offers a new framework for making, understanding, and
evaluating appropriation art.

\textsuperscript{43} College Art Association, “College Art Association Code of Best Practices in Fair Use for the Visual Arts,”
Methodology

Interpreting cultural developments through close attention to concomitant legal developments is not a particularly common method in art historical literature, but there are several notable examples that support its validity. Martha Buskirk’s *The Contingent Object of Contemporary Art* identifies precedents for contemporary appropriation art in pop art and readymades, and considers the effects of intellectual property rights and other regulations affecting commodity production on artists.44 Nancy J. Troy’s *The Afterlife of Piet Mondrian* and *Couture Culture: A Study in Modern Art and Fashion* explore the development of artists’ careers and “brands” through careful deployment of their intellectual property rights.45 Lisa Pon’s *Raphael, Dürer, and Marcantonio Raimondi: Copying the Italian Renaissance Print* is a deep history of the first intellectual property dispute between visual artists.46

Important interdisciplinary models from other fields that inform the following discussions begin with Rebecca Tushnet’s rigorous interdisciplinary research on free speech, copyright law, and transformative works, which helped me refine my

methodological approach and negotiate a vast field of resources. Susan Bielstein’s direct and clear explanations of copyright law and permissions culture inspired the simplicity of the interdisciplinary translations I attempt herein. The interviews, analysis, and results from Peter Jaszi and Patricia Aufderheide’s development of a code of best practices for the College Art Association undergird my arguments for extralegal solutions that can help evolve copyright policy and inform appropriation art practices.

Valuable interdisciplinary models from other fields include Rosemary Coombes’ *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*, Adrian Johns’ *Piracy: The Intellectual Property Wars from Gutenberg to Gates*, Mark Rose’s *Authors and Owners: The Invention of Copyright*, Martha Woodmansee’s *The Author, Art, and the...* 

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51 Rose.

Literature in the Field

Copyright law, appropriation art, and the history of art markets have independently generated massive corpora of scholarship in a range of fields. A dissertation that addresses the academic history of these interrelated subjects necessarily relies on a diverse and extensive body of literature from art history, law, history, economics, communications and media studies, and philosophy.

In law, the importance of Rebecca Tushnet’s work on the intersections between free speech, fair use, and transformative works cannot be overstated. James Boyle’s The Public Domain and Shamans, Software, and Spleens, Lawrence Lessig’s Free Culture and

54 Woodmansee and Jaszi, The Construction of Authorship.
57 Vaidyanathan.
58 See note 81.
Remix,\textsuperscript{60} William Patry's Moral Panics and the Copyright Wars and How to Fix Copyright,\textsuperscript{61} and David Lange and Jefferson Powell's No Law: Intellectual Property in the Image of an Absolute First Amendment provide historically grounded legal scholarship on the intersections between copyright law, free speech, fair use, and creative works.\textsuperscript{62}

In art history, the historical role of artists' writings, acknowledged in Theories and Documents of Contemporary Art (1996, 2012) by Kristine Stiles and Peter Selz, has been central to understanding appropriation art; and Stiles also provided a needed balance to an art historical discourse that often overemphasizes powerful critics and art institutions at the expense of artists.\textsuperscript{63} John Welchman's Art After Appropriation: Essays on Art in the 1990s opened the door to an interpretation of appropriation beyond deconstruction and other critic-focused theoretical frameworks.\textsuperscript{64} Nicolas Bourriaud’s theories of postproduction, altermodernism, and navigation inform my arguments for a redirected use of the term appropriation and the critical application of better descriptors for

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\textsuperscript{60} Lawrence Lessig, Free Culture; Lawrence Lessig, Remix: Making Art and Law Thrive in the Hybrid Economy (New York: Penguin Press, 2008).
\textsuperscript{64} John C. Welchman, Art After Appropriation: Essays on Appropriation in the 1990s (Amsterdam: G+B Arts International, 2001).
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artworks that creatively reuse pre-existing material.\textsuperscript{65} Leo Steinberg’s brief but impactful essay, “The Glorious Company,” is an acutely insightful treatise on the vocabulary of appropriation art.\textsuperscript{66} Finally, Johanna Burton’s essay “Subject to Revision” exemplifies what I herein refer to a “synthetic approach”; Burton’s skillful update to poststructuralist evaluations of appropriation art inspired me to look at and approach these critical texts and artworks differently myself.\textsuperscript{67}

In economics, Hans Van Miegroet and Neil De Marchi’s interdisciplinary research has demonstrated that understanding of the modern origins of appropriation are shallow, which may contribute to misunderstandings about the nature and function of appropriative practices and the market roles of appropriator and appropriatee.\textsuperscript{68}

\textsuperscript{65} Nicolas Bourriaud, The Radican (Berlin: Lukas & Sternberg, 2009); Nicolas Bourriaud, Altermodern (London: Tate Publishing, 2009); Nicolas Bourriaud, Postproduction (Berlin: Lukas & Sternberg, 2007); Nicolas Bourriaud, Relational Aesthetics (Dijon, France: Les Presse Du Reel, 1998).
Kelvin Lancaster’s approach to consumer theory is essential to understanding how works of appropriation art and nearly identical pre-existing works are differentiated by buyers.69 Research on contemporary and historical art markets better explains the idiosyncratic behaviors of art markets, which I argue should bear significantly on the interpretation of “market harm” in fair use analysis.70 The work of Herbert Simon, Bruno

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Frey, David Galenson, Bruce Weinberg, Olav Veltuis, Françoise Benhamou, Victor Ginsburg, Patrick Legros, Christiane Hellmanzik, and Ruth Towse, was essential to the formation of this perspective. Finally, Lewis Hyde’s *The Gift* and *Common as Air*\(^\text{71}\) provided unexpected pathways to a reconsideration of Adam Smith’s *The Theory of Moral Sentiments*.\(^\text{72}\)

An academic discussion of the theorization of appropriation also requires considerable attention to philosophy. The theories of Roland Barthes, Michel Foucault, and Walter Benjamin are addressed, as each exerted considerable influence on theorists of appropriation and copyright.\(^\text{73}\)

Finally, the core idea of this dissertation can be attributed to digital visionary, virtual reality pioneer, musician, computer scientist, and polymath Jaron Lanier.\(^\text{74}\) Every sentence that follows is an answer to Lanier’s call for a connected, empathic future for appropriation art that recuperates artistic responsibility for the consequences and obligations inherent in the use of another artist’s work.

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Contributions of the Dissertation

Since the late twentieth century, numerous scholars in a variety of fields have attempted to resolve the tensions between copyright and cultural production. A few anthologies on copyright and art have recently been published, but none offers a unitary perspective on the interrelated histories of these fields. A massive amount of scholarly literature in academic journals, especially legal journals, exists on the difficult relationship between copyright and visual art. Yet, to date, there has been no synthetic analysis of the interrelations between appropriation art and intellectual property regulations by a scholar formally trained in both law and art history. Further, very few scholarly treatments that have addressed appropriation art with attention to legal theory and art theory have also accounted for economic theory, which has influenced copyright theory and jurisprudence since the 1980s. Perhaps because no prior treatment has approached the subject this comprehensively, no prior scholar has yet identified art critical definitions of appropriation as a significant – but resolvable – problem in the development of a coherent judicial approach to appropriation art. Copyright and appropriation art can coexist, but appropriation must first be described differently, so

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that it becomes possible to distinguish irresolvable tensions and resolvable issues, and apply attention to areas where resolution is needed and change can take place.
1. LAW: Problems of Observation

In legal academic literature, artist Sherrie Levine’s *After Walker Evans:* 4 appears in nearly every article on appropriation art, serving as both an emblem and a device.¹ (Fig. 1) Authors use it to briefly explain the principles of interpreting a work of appropriation art, and recite critical interpretations rejected by Levine herself, often without citation, as if this reading is unquestioned and, for legal purposes, required for its categorization as appropriation art. For example:

The term “appropriation art” is thus used for those works that comment on questions of authorship through appropriation. Most famous of these is Sherrie Levine’s 1981 work *After Walker Evans,* in which she copied well-known photographs by Walker Evans and displayed the copies as her own work. Such works are defined as appropriation art since they directly comment on issues of authenticity, ownership, and reproducibility.²

This is not an inaccurate statement, per se – appropriation art is widely associated with issues of authenticity, ownership, and reproducibility – but it is not

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necessarily correct. The treatment of this mode of interpretation as canonical requires that a work of appropriation art must meet a narrowly circumscribed art critical definition in order to be defined as a work of appropriation art.

This overly narrow interpretation may be attributable to the hegemonic, if clandestine, presence of the “romantic author” in copyright discourse. To chart the judicial emphasis on the legal person of the author, who justifies the creation, provision, and extension of a property right for a creative work, the “romantic author” theory recognizes authorship as “a culturally, politically, economically, and socially constructed category rather than a real or natural one” and identifies the author as a legal fiction.³ Scholars of law and literature, most notably Peter Jaszi and James Boyle, posit that the historical construction of the romantic author was the most forceful and consistent factor in the development of contemporary copyright law.⁴ Scholarship on the history of authorship and copyright law unites poststructuralist analysis of the system of copyright law, and the historical figure of the romantic author (as identified by literary scholars, and close readings of copyright opinions).⁵

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³ See generally Jaszi, “Towards a Theory of Copyright: The Metamorphoses of ‘Authorship.’”
⁵ Woodmansee and Jaszi, The Construction of Authorship; Boyle, Shamans, Software, and Spleens; Rose, Authors and Owners; Coombes, The Cultural Life of Intellectual Properties.
This line of scholarship descended from Critical Legal Studies, a movement inaugurated in the 1970s by a group of scholars who were politically involved with 1960s and 1970s civil rights and antiwar movements, and were dismayed by the “interdeterminacy of legal rules and doctrine.”\(^6\) The movement used historical materialism to reveal the patterns of injustice and dominance in the social hierarchies, power imbalances, and legal fictions that form our system of justice.\(^7\) As the organized version of Critical Legal Studies declined in the early 1990s, the group’s preference for targeted interventions waned and individual scholars influenced by Critical Legal Studies began applying its methods to much broader intellectual endeavors such as the study of law and aesthetics.\(^8\) Many of these scholars were influenced by postmodern and poststructuralist philosophy; in the area of intellectual property, French philosophers Roland Barthes and Michel Foucault were particularly prominent. Theorists informed by Barthes’ and Foucault’s poststructuralist logic rejected the testimony of the artist/author as the final determinant of meaning and proposed the possibility of multiple meanings.

\(^{\text{7}}\) Ibid.
In “The Death of the Author” (1968), Barthes explains that an author is better understood as a historical construct than an actual person with singular control over the meaning of a text that he or she produces. He argues that giving a text an author closes its opportunities for signification, advocates for “the removal of the Author,” and redefines the role of the critic, who, as the reader of the work, supplies its meaning. Barthes’ assignment of responsibility for interpretation is zero-sum: “The birth of the reader must be at the cost of the death of the Author.”

A year later, Foucault published his response to Barthes, “What is an Author?” Foucault questioned whether an author can be outside and antecedent to text. For Foucault, the necessary question was not only “what is an author,” but also ‘what is a work?’; ‘where does an author’s work begin or end?’; and ‘what are the delimitations?’ He suggests that an “author” is simply a “functional principle” by which a culture “limits, excludes, and chooses” what is and is not part of a text. Foucault asserts that “the task of criticism is not to bring out the work’s relationship with the author, nor to reconstruct through the text a thought or experience, but rather to analyze the work

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9 Barthes, 145-147.
10 Ibid.,
11 Ibid., 148.
12 Foucault.
13 Ibid.
14 Ibid., 221.
through its structure, its architecture, its intrinsic form, and the play of its internal relationships.”

The 1990s witnessed the wholesale adaptation of Barthes’ and Foucault’s theories of authorship to a critique of originality, affording a stronger role for the viewer. The identification of authorship as a constructed, unstable, and historically determined concept allowed Jaszi, Boyle, and others to begin dismantling the established narrative of copyright as a property right based on natural rights. Their theoretical perspective overlapped with the changing philosophies of originality, authenticity, and recombinant creativity employed by appropriation artists and their critics. The identification of these issues has fostered many productive conversations around copyright theory and policy, especially concerning the late twentieth-century expansion of intellectual property rights, restrictions on fair use, and threats to the public domain. This chapter

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15 Ibid., 207.
18 These conversations have been formalized in the creation of academic centers of knowledge that continue to support and produce scholarship on issues in intellectual property rights. For example, the Berkman Klein Center for Internet and Society at Harvard University, founded in 1998 (https://cyber.harvard.edu/); The Berkeley Center for Law and Technology, founded in 1995 (https://www.law.berkeley.edu/research/bclt/); and Duke University’s Center for the Study of the Public Domain, founded in 2002 (https://web.law.duke.edu/cspd/).
builds from prior studies of authorship, but recognizes the limitations of this approach in the study and adjudication of visual art.

One of the most important limitations is a reduced emphasis on artistic agency. When emphasis is shifted away from the process of the artwork’s creation to the reception of the artwork, the possible meanings for an artwork are multiplied and often greatly enhanced. But theories of authorship that emphasize the role of the viewer tend to surreptitiously relieve the appropriation artist of responsibility for his or her decision to appropriate. If the artist has no role in the creation of meaning, then his or her choices are irrelevant to the meaning of the artwork. Thus, attention is redirected away from the artist’s approach to both the borrowed material and the artist from whom he or she borrows, and considerations of responsibility and obligation are eliminated from the conversation.

Second, like art theory, legal theories of authorship tend to erase the author in ways that may not contribute to the understanding of why appropriation art is progressive and deserving of special protection. Treating authors as fictions rather than persons can diminish the importance of artists’ intentions, writings, and statements in establishing purpose and meaning, which are essential to understanding works of appropriation that are not critical or deconstructive. Historically, courts evaluating works of visual art have put significant weight on an artist’s testimony and the formal
relationship between a work of art and its source material. Artistic purpose was assumed to be communicable via formal choice and verbal or written explanation, but works by appropriation artists such as Jeff Koons complicated this direct approach, because the formal qualities of their works could not be readily understood as fair use and their testimonies confused judges. Poststructuralist theories of authorship and representation began making their way into law review articles and copyright jurisprudence in the late 1980s and 1990s, as scholars and judges attempted to provide alternative models for fair use determinations that adapted the doctrine for changes in technology and conceptual artworks such as those made by Koons.

Third, like art critical theories of authorship and originality, the romantic author theory is generally diagnostic: it isolates and explains a problem with fair use jurisprudence, but does not usually explain how to rectify the problem. These scholars identify a lack of recognition for multiple and distributed authorship, but generally fail to provide a plan for alternative forms of authorship.

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19 See Jasiewicz, 145.
20 Rogers, 960 F. 2d at 304; Cariou, 784 F. Supp. 2d at 348; Cariou 714 F.3d at 707.
21 See for example Peter Jaszi, “Is There Such a Thing as Postmodern Copyright,” and Brad Sherman, “Appropriating the Postmodern: Copyright and the Challenge of the New,” Social Legal Studies 4, no. 1 (March 1995): 31-54. Please note that some legal scholarship uses the term “postmodern” where I use the term “poststructuralist.” Poststructuralism is more precise and deliberately less inclusive term.
22 A notable exception is the establishment of Creative Commons, a nonprofit that provides alternative, flexible licenses for creative works, is a notable exception. Creative Commons was founded in 2001 by scholars James Boyle, Lawrence Lessig, and Hal Abelson.
Finally, historical evidence for the romantic author theory was founded almost exclusively on literary history, yet the theory spread almost immediately to include media beyond books and manuscripts. Legal theories of authorship have often ignored the history of visual art or, when they did account for it, mapped literary theory onto visual art practice without evidence for clear parallels between writers and artists.

The current Copyright Act does not distinguish between texts and works of visual art. Rules created for texts tend to be applied to visual art, as well, but it remains unclear as to whether the American legislature or courts have ever felt comfortable applying the concept of “authorship” to visual artists. The development and professionalization of the artist was a longer, more illogical, and less linear process than historical narratives of authorship suggest. Of course, the current Copyright Act and legal precedent require a certain amount of fealty to pre-existing rules established

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23 The early foundations of this critical theory spoke of “literary and artistic culture,” applying the history of books to the history of visual media. Jaszi, “Metamorphoses of Authorship,” 455.
24 Except in the case of U.S. 17 §106(a), which provides a limited type of visual artworks additional rights usually referred to as moral rights.
25 Susan Bielstein, Permissions: A Survival Guide (Chicago: University of Chicago Press, 2006): 18-19; Deborah R. Gerhardt, “Copyright Publication: An Empirical Study,” Notre Dame Law Review 87, no. 1 (November 2011), 159-163 (explaining that “publication” is routinely applied to visual art and music, even though the concept was designed for texts, and even though only one-third of all publication cases deal with texts).
27 “Elements of the ‘author-genius’ and the ‘craftsman’ running side by side from Renaissance times until the present day, so much so that a clear conclusion as to the origin of the concept of authorship in copyright law can hardly be drawn.” Ibid., 160.
for music, books, or other art forms; but attention to the specific function of reuse in visual art would greatly benefit fair use jurisprudence in disputes concerning appropriation art.

This chapter addresses the intersection of authorship, transformative purpose, and artistic intent in fair use cases concerning appropriation art. The first section of the chapter describes fair use analysis and the role played by the doctrine of transformative use in this analysis. The second section addresses important legal cases concerning appropriation art since 1990, describes how “transformation” factored into the outcome of each decision, and assesses the uses of artists’ statements and writings in judicial reasoning. The third section explores outstanding questions about the establishment of transformative meaning in fair use cases concerning visual art and suggests that art theory, rather than legal theory, holds answers to these questions. Carrie Mae Weems’ 1995-1996 series *From Here I Saw What Happened and I Cried* is explored as a transformative work of appropriation art that yields multiple transformative meanings, requires attention to expert analysis and the artist’s intentions, and poses complex ethical problems that cannot and should not be addressed by fair use. The conclusion asserts that future fair use cases concerning appropriation art must admit multiple meanings and employ both artists’ statements and expert analysis, then opens a
conversation on the differences between transformative use, fair use, and ethical use, which are not identical.

1.1 Fair Use

Transformation has proven to be a powerful justification for fair use, but transformation is not synonymous with fairness. And legal fair use is not synonymous with ethical use. The doctrine of transformative use, introduced into fair use jurisprudence in the 1990s, has encouraged specialized attention to the purpose of the appropriating artist’s use. Transformative use allows for increased flexibility in interpretation by encouraging judges to contemplate the possibility of multiple meanings and “recognize the relevance of interpretive communities” in the creation and reception of appropriation art.28 Assessment of transformation also requires a judge to ask how the appropriating artist engaged with the preexisting material, then assess the merits of this engagement in promotion of the Constitutionally-prescribed goal of copyright: “progress of science and the arts.”29 But transformation is only one way to look at the purpose driving the reuse of pre-existing material, and purpose is just one element in the multi-factor balancing test at the center of the fair use doctrine. And fair

28 Tushnet, “Content, Purpose, or Both?,” 881.
use is just one small area of the vast set of creative property protections afforded by copyright law.

Per the United States Constitution:

“Congress shall have power… to 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.”

This clause conferred on the legislature the power to enact federal laws that define and protect creative expression. The statute currently in force, the Copyright Act of 1976, protects “original works of authorship fixed in any tangible medium of expression.” Works created after 1978 are protected for the life of author plus seventy years, or, in the case of works owned by a corporation, for up to one hundred and twenty years. A “copyright” is not a single right, but actually a bundle of six rights reserved exclusively to the copyright holder: (i) the right to reproduce the copyrighted work; (ii) to prepare derivative works based upon the copyrighted work; (iii) the right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (iv) the right to perform the copyrighted work

30 Ibid.
publicly; (v) the right to display the copyrighted work publicly; and (vi) the right to perform the copyrighted work publicly by means of a digital audio transmission.33

One of the most important conditional limitations to these otherwise-exclusive rights is “fair use,” a doctrine permitting limited use of copyrighted material without permission from the copyright holder, for uses that the state deems salutary to the public. Fair uses – including commentary, criticism, research, scholarship, teaching, and libraryarchiving – are considered an integral part of copyright law, and are almost as old as copyright itself.34 Thus, fair use may be understood as a formal recognition of the public, shared characteristics of otherwise copyrightable property.

Fair use was designed as a case-specific, fact-intensive inquiry, and its contours are deliberately flexible, much more so than most legal doctrines. Since fair use cases often address cutting-edge art forms and technologies, and require courts to address the social progress occasioned by unanticipated leaps of the human imagination, this flexibility is imperative.

33 17 U.S.C. §106 Section 106(a) (1990), also known as the Visual Arts’ Rights Act of 1990 or VARA, affords additional rights to the producers of some works of visual art. These rights, which are further described in Chapter 3, are not limited by fair use.
In the twenty-first century, creative work is easily understood as property. Yet, the characterization of knowledge and expression as property is historically grounded, and was not an inexorable eventuality. Personal expression is not an obvious candidate for characterization as legal property in the manner of a tract of land, an article of clothing, or an automobile. Multiple theories have emerged within scholarly circles to explain the logic of property rights over expression and justify the fair use doctrine. One of the most prominent strands, which best justifies the need for a doctrine of transformative use, concerns the uncomfortable overlaps of copyright law and free speech doctrine.\footnote{David Lange and H. Jefferson Powell, \textit{No Law: Intellectual Property in the Image of an Absolute First Amendment} (Palo Alto: Stanford Law Books, 2009), 97-100.} The First Amendment prohibits Congress from enacting laws that limit freedom of speech, but copyright bounds speech by assigning exclusive property rights over expression.\footnote{Jed Rubenfeld, “The Freedom of Imagination: Copyright’s Constitutionality,” \textit{Yale Law Journal} 112, no. 1 (October 2002): 3-60.} As law professor Jed Rubenfeld explains, copyright law “routinely produces results that would, outside copyright’s domain, be viewed as gross First Amendment violations.”\footnote{Ibid., 3.} Thus, fair use is intended to permit the coexistence of these seemingly antagonistic laws. Its aim, in the words of law professors David Lange
and H. Jefferson Powell, is to recognize that “imitation and appropriation can be fully as important as originality to freedom of expression.”

The doctrine of fair use seems to have initially emerged in nineteenth-century England, out of concern for the right of the public to appropriate part of a copyrighted work for incorporation into a later work that united the appropriated part with original material. The property rights conferred on early modern creators were more limited than those granted today; terms were much shorter, and variations on works were unlikely to be covered.

Most histories of fair use treat Folsom v. Marsh (1841) as the first fair use case in the United States. Justice Story, author of the opinion, described the parameters for fair use of a copyrighted work and set forth the four-factor analysis still in use today:

If he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy…In short, we must…look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

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38 Lange and Powell, 98.
39 See generally Sag, “The Pre-History of Fair Use.”
Throughout the nineteenth century, when limitations on intellectual property rights had a common law basis, interpretations were substantially more expansive than those handed down by courts today. Fair use was sometimes recognized as matter of public interest and treated as a categorical imperative; at other times, fair use was recognized as an economic precept, and the answer to market failure.\textsuperscript{42} Sometimes, fair use seemed purely arbitrary.

The Copyright Act of 1909, although passed thirty years after \textit{Folsom v. Marsh}, contained no specific provisions for fair use.\textsuperscript{43} Thus, throughout the twentieth century, the availability of a fair use defense was notoriously difficult to predict, and no one was certain precisely what the defense did or did not cover.\textsuperscript{44}

Finally, the 1976 General Copyright Revision codified existing common law understandings of fair use and imposed procedural discipline.\textsuperscript{45} Section 107 incorporated Justice Story’s four-factor balancing test:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

\textsuperscript{44} Vaidhyanathan, 26-28, 79-80.
\textsuperscript{45} See Jessica D. Litman, “Copyright Compromise and Legislative History,” \textit{Cornell Law Review} 72, no. 5: 857-904.
(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 for or value of the copyrighted work.46

The four factors may appear straightforward, but judicial application of the balancing test varies quite widely, because the Copyright Act is a hybrid statute that both ‘delegates’ and ‘micromanages.’47 The Act contains many strict definitions of the micro-managerial type, but the fair use provision is a delegated type.48 Thus, Congress delegated to the courts further interpretation of the four-factor test (e.g., definitions of terms, weight of each factor, interrelationships between factors) with inevitably diverse results.

Since the passage of the 1976 Copyright Act, outcomes in fair use cases remain uncertain, but the characterization of certain aspects of fair use are predictable because they follow standard legal procedure. Procedurally, fair use is an affirmative defense to a claim of copyright infringement and, as such, arises at a specific time and manner in a legal proceeding.49 An affirmative defense is “an assertion of facts or arguments that, if

49 Some courts have described fair use as an inalienable right. In 2015, the Ninth Circuit explained fair use as an exception to the exclusive rights of the copyright holder. However, as explained above, this characterization of fair use is limited in its application: only the Ninth Circuit and the courts below it within its jurisdiction are bound to this advice. It is merely persuasive in other jurisdictions, which may consider
true, will defeat the plaintiff’s…claim, even if all the allegations in the complaint are true.” As it arises in a court, fair use does not consider a right or public benefit; instead, it may seem more like an excuse for violating another’s copyright. However, the procedural posture of fair use is a technical fact that does not affect its status as a fundamental right. In fact, many assertions of fundamental rights, including free speech rights, self-defense, entrapment, and insanity, are procedurally organized as affirmative defenses.

Before fair use is asserted by a defendant, the plaintiff must first prove (i) his or her ownership of a valid copyright and (ii) that the defendant copied the protected material without the plaintiff’s authorization. To show ownership, the plaintiff must establish a minimal degree of creativity – a “spark” of originality – and confirm that he or she created the work independently. If these facts are established, the burden of proof then shifts to the defendant (who intentionally or unintentionally copied the plaintiff’s work) to present a fair use defense. To assess the merits of this defense, a judge uses the four-factor balancing test to determine whether the defendant’s work

this interpretation of copyright law, but are not bound to follow it. Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015).


qualifies as a fair use of copyrighted material, which can exempt the defendant from copyright infringement.

The four-factor balancing test proceeds as follows:

(1) The purpose and character of the artist’s use.

The doctrine of transformative use provides an answer to the question posed by the first factor: “What is the purpose of the use?”

Other recognized fair use purposes include: “criticism, comment, news reporting, teaching, scholarship, and research.”

With respect to criticism and commentary, fair use has often required a finding of direct rather than indirect commentary or criticism on the pre-existing material. For example, parodies, which are understood to comment directly on the pre-existing work for the purposes of “comic effect or ridicule,” are considered fair use, but satire, which uses a pre-existing work to comment on something other than or in addition to the pre-existing work, has been distinguished. The distinction between parody (direct commentary or criticism) and satire (indirect commentary or criticism) can be subtle.

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53 Due to the emphasis accorded to this factor in recent decisions, Peter Jaszi has described transformation “kind of metaconsideration arching over fair use analysis.” I discourage this interpretation, and am not sure he meant this positively, either. Jaszi, “Is There Such a Thing as Postmodern Copyright?,” 413, 420. 2011).


55 Rogers, 960 F. 2d at 310.

56 Campbell, 510 U.S. at 580.

57 Ibid., at 580-581.
Artist Tom Forsythe’s photographic series *Food Chain Barbie* (1997), which juxtaposed Barbie dolls with kitchen appliances, was fair use because the artworks were held to “parody Barbie and everything Mattel’s doll has come to signify.” However, Jeff Koons’ polychromic sculptural satire of Art Rogers’ black-and-white photograph, which was held to comment on society at large rather than the specific photograph, was not considered fair use.

Transformative use, a heuristic that can assist in determining the purpose of artist’s use of pre-existing material, is a relatively new addition to the copyright doctrine that originated in academic theory. In 1990, Judge Pierre N. Leval published “Towards a Fair Use Standard” in the *Harvard Law Review*; it quickly became one of the most influential pieces of legal scholarship ever written. (As of August 2016, “Towards a Fair Use Standard” has been cited in seven hundred eighty-eight subsequent articles published in law journals.) Four years after the article’s publication, the Supreme Court used Leval’s definition of transformative use to determine that a musical rap parody could make fair use of a pop ballad. In this way, transformative use was incorporated into the doctrine of fair use.

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58 Mattel, Inc. v. Walking Mt. Prod.s, 353 F.3d 792, 802 (9th Cir. 2003).
59 Rogers, 960 F. 2d at 309-310, 314.
60 The *Campbell* court did not rule that 2 Live Crew’s “Pretty Woman” was fair use; it remanded the case to the lower court. Instead, it ruled that it could be, which lower courts interpreted as an invitation to rule that
In “Towards a Fair Use Standard,” Leval emphasized social benefit and de-emphasized the fourth factor of the balancing test, the market element, which had previously been regarded as the most important part of analysis. Leval also moved away from the practicalities of productivity and towards the poetry of the “new.” He exhorted his fellow judges to focus on “whether the challenged use is transformative” by looking for “value” added to “raw material” and determining whether such material was “transformed in the creation of new information, new aesthetics, new insights, and new understandings” that contribute to the “enrichment of society.”

In Campbell v. Acuff-Rose (1994), the Supreme Court applied the lens of transformation to a parodic song by rap group 2 Live Crew that incorporated a substantial amount of musical and lyrical material from Roy Orbison’s song “Pretty Woman.” The Court employed Leval’s recommendations, weighting the “social benefit” of the rap parody’s commentary on an earlier work against the economic impact of reuse, finding that the “parody has an obvious claim to transformative value...Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding similar parodies and appropriation could be – and were – fair use. Campbell v. Acuff-Rose Music 510 U.S. at 589.

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62 Ibid., 1111. (Emphasis in the original.)
63 Campbell 510 U.S. at 573.
light on an earlier work, and, in the process, creating a new one.”64 Subsequently, courts have used this rule to confer “transformative value” on many other forms of art, including appropriation art, thereby greatly expanding the range of media that may be deemed fair use.65

The foundations of many legal doctrines can be traced to academic research, and much legal scholarship prescribes new directions for the legislature or judiciary, but it is rare for a court – especially the Supreme Court – to seize an idea directly from an academic article and create new law on this basis. However, the adoption of transformative use in fair use jurisprudence may be due to the Court’s familiarity with a similar doctrine. Some would argue that transformative use is not “new law” at all, but rather a restatement of the pre-existing doctrine of “productive use,” which describes a new use of old material that adds to public knowledge.66 Leval alluded to productive

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64 Ibid., at 579.
65 Rogers, 960 F. 2d 301; Cariou, 714 F.3d 694.
use in his definition of transformative use, but did not describe transformative use as an evolution of productive use, either in “Towards a Fair Use Standard” or in later comments on the article.\textsuperscript{67} Furthermore, Justice Souter made no explicit reference to the pre-existing doctrine in \textit{Campbell v. Acuff-Rose}. Absent commentary on the matter, I cannot assume that either Leval or Souter meant to link the two doctrines. However, seeing transformative use as an evolution of productive use only serves to strengthen the merits of the doctrine: productive use dates back to the nineteenth century and cases emphasize the same kind of socially beneficial uses that inspired Leval.

After \textit{Campbell v. Acuff-Rose}, purpose, rather than market effect, has often been described as the most important of the four factors, and transformative use has been further confirmed as a recognizably fair use purpose.\textsuperscript{68} Courts usually undertake the assessment of purpose in two parts: (i) was the purpose commercial or non-commercial and, (ii) was the purpose transformative?\textsuperscript{69} A commercial purpose weighs against a defendant, but a transformative purpose will weigh heavily against commerciality.\textsuperscript{70} However, even if a defendant establishes a transformative purpose, a fair use defense must still address the other three factors, and if the other factors weigh in favor of the

\begin{itemize}
\item \textsuperscript{67} See Leval, “Toward a Fair Use Standard” and Leval, “Fair Use Rescued.”
\item \textsuperscript{68} \textit{Cariou}, 714 F.3d at 708, citing \textit{Campbell}, 510 U.S. at 584.
\item \textsuperscript{69} Ibid.
\item \textsuperscript{70} “The more transformative the new work, the less will be the significance of other factors, like commercialism.” \textit{Campbell} 510 U.S. at 515.
\end{itemize}
plaintiff, the defendant may fail the balancing test. Thus, a finding of transformation is weighty, but not dispositive.\textsuperscript{71}

A persistent concern in a court’s assessment of transformation is the perceived overlap between transformative uses and derivative works, one of the six exclusive rights of a copyright holder.\textsuperscript{72} The Copyright Act defines a derivative work as a “form in which a work may be recast, transformed, or adapted.”\textsuperscript{73} Derivative works may include translations, musical arrangements, dramatizations, and other reinterpretations. But, given that the word “transformed” is included in the statutory definition, derivative works may be understood to preclude transformative uses.\textsuperscript{74} Thus, when angry copyright holders and their attorneys characterize unauthorized reuses, they often describe them as “derivative.”\textsuperscript{75}

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\textsuperscript{71} “The existence of any identifiable transformative object does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner.” Leval, 1109. The other relevant factors are discussed below.

\textsuperscript{72} Cariou, 714 F.3d at 708 citing Campbell, 510 U.S. at 592, NXIVM Corp. v. Ross Inst., 364 F.3d 471, 481-82 (2d Cir. 2004), Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc., 150 F.3d 132, 145 (2d. Cir. 1998).

\textsuperscript{73} Copyright Act of 1976, 17 U.S.C. 17 § 101. (Emphasis mine.)

\textsuperscript{74} Jasiewicz, 152.

For example, when sculptor Lauren Clay experimented with small versions (Fig. 2) of David Smith’s monumental stainless steel Cubi (Fig. 3) in the traditionally feminine, craft-based medium of marbled paper, the Smith estate claimed that Clay’s paper sculptures were unauthorized derivatives copied from Smith’s oeuvre. Clay was quickly embraced by the art press, which connected her with pro bono representation, which helped her navigate and settle the dispute quickly. In the meantime, commenters used the dispute as a hypothetical and divided.

Art lawyer Nicholas O’Donnell stated that, “[T]he Clay [sculpture] seems more derivative than transformative. If I sold a ¼ scale Andy Warhol poster that was originally a silkscreen, I would hardly expect to get away with it.” Artist and law professor Sergio Sarmiento opined that “it doesn’t really look like Clay made much of a transformation, but rather a derivative work” based on his reading of current case law.

But artist and copyright lawyer Alfred Steiner felt differently, offering a straightforward explanation of the transformative qualities of Clay’s work:

The sculptures shown are made by a woman, from materials (paper) and using techniques (e.g., marbling) traditionally associated with “craftiness”

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76 Boucher, “David Smith Copyright Dispute Delays Brooklyn Artist’s Show.”
77 Lauren Clay in discussion with the author, May 28, 2015.
and femininity. They are based on sculptures made by a man from a material (stainless steel) traditionally associated with masculinity, using techniques also traditionally associated with masculinity (welding). At least that aspect of the commentary is clear. Who knows what else might be contained in the work. Smith’s estate is harmed in no way – nobody would buy one of these instead of a Smith. These works also clearly figure into the artist’s broader practice, which does not appear to involve copying. Not allowing her some room to play with art history would be chilling and not worth the trivial (assuming it exists at all) effect that the works might have on the market for derivative works based on Smith sculptures. When you balance cultural value of allowing artists room for free play with the market harm to the copyright owner, there really is no question. Not only should fair use apply here, but as unique works, they should be protected by a safe harbor to prevent harassing claims from overzealous copyright owners.80

This example illustrates that a derivative work and a transformative work are perhaps best characterized as two sides of a coin. The doctrine of transformative use determines the outcome of the coin flip: if a work of appropriation art merely supplants the original that it reproduces, it will likely be considered a derivative work. But if the work is determined to add something “new” and socially useful to the prior work, something that is perceived to “promote progress,” then the work will likely be deemed transformative and a fair use.81

80 Comment on Ibid. The comments on this post contain a fascinating discussion between Steiner and Sermiento about the definition of “new” commentary and criticism. In case it was not already perfectly obvious to the reader already, I side with Steiner.
81 Campbell, 510 U.S. 569; Cariou, 714 F. 3d 694; Blanch, 467 F.3d 244.
Because of seemingly arbitrary judicial outcomes, detractors argue that the doctrine of transformative use is a confusing addition to fair use jurisprudence.\textsuperscript{82} However, those who support the doctrine find that it produces the correct outcomes, but often through poorly reasoned means.\textsuperscript{83} Most supporters have devoted their attentions to fixing transformation’s flaws by prescribing ways to patch or prod the doctrine into a more agreeable shape.\textsuperscript{84}

(2) \textit{The nature of the appropriated artwork.}

This factor assesses the kind of copyrighted work appropriated. Generally, the appropriation of material from factual works like biographies or dictionaries is more acceptable than copying from fictional works such as novels or films.\textsuperscript{85} Additionally, a finding of fair use is more likely for a published work than an unpublished work, as the artist has a right to decide when and where the work is first seen, and appropriation of an unpublished work may first present the work at an unintended time or in an unintended venue.\textsuperscript{86} In almost any case, nature weighs for the plaintiff if the work appropriated is copyrightable subject matter and published.\textsuperscript{87}

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\textsuperscript{82} See for example Bunker and Calvert.
\textsuperscript{83} See for example Tushnet, “Judges as Bad Reviewers.”
\textsuperscript{84} See for example Tushnet, “Copy This Essay.”
\textsuperscript{85} Patry \textit{Patry on Copyright}, § 10.138-10.140 (2015).
\textsuperscript{87} Ibid.
(3) The amount and substantiality of the material taken from the appropriated artwork.

Courts consider both the literal amount used and which part of the work was taken. The acceptable amount varies, and there is no percentage threshold. As the Second Circuit explained in Cariou v. Prince (2013), “The law does not require that the secondary artist may take no more than is necessary.”\(^8\) Quality and importance of the raw material is also central to the inquiry and even if a taking is minimal, it can weigh heavily against a defendant if the portion taken is considered to be the “heart of the work.”\(^9\) On the other hand – as amount may relate to purpose – a work of appropriation art “must be [permitted] to ‘conjure up’ at least enough of the original to fulfill its transformative purpose.”\(^9\) Of course, in a work of visual art, the appropriator often takes the full measure of the prior work, as images are not quoted, paraphrased, or excerpted in the ways that music or text are.

(4) The effect of the appropriator’s use on the real or potential market for the appropriated artwork.

The market effect factor assesses the real and potential deprivation of income for the copyright holder. Beginning in the 1980s, courts began to contemplate and weigh

\(^{8}\) Cariou 714 F. 3d at 710, citing Campbell, 510 U.S. at 588; Leibovitz, 137 F.3d at 114.
\(^{9}\) Cariou 714 F. 3d at 710, citing Campbell, 510 U.S. at 588; Leibovitz, 137 F.3d at 114.
damage to potential, as well as actual, markets.\textsuperscript{91} In deciding whether or not a new work is better characterized as a derivative work, courts focus on the likelihood of substitution for the original or usurpation of the market for the original.\textsuperscript{92} As Steiner noted of Clay’s sculptures, above, the likelihood of substitution or usurpation by a work of appropriation art is almost inconceivable; most collectors buy artworks based on the appeal of the artist and the success of his or her career as a whole, not an individual artwork.\textsuperscript{93} In all cases, the effect of real or potential market harm is weighed against the appropriation artwork’s purpose. Thus, the balance between purpose and market effect usually determines the outcome of the matter.

\textbf{1.2 Transformative Artworks in the Courts, 1990-2016}

In the late 1980s and early 1990s, multivalent appropriation artworks used pre-existing material to make insightful, delicate, and painful commentaries on prior works, personal traumas, and society at large – sometimes, all at the same time. At the time,

\begin{itemize}
\item \textsuperscript{91} Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
\item \textsuperscript{92} “the application of this factor does not focus principally on the question of damage to Cariou’s derivative market…our concern is not whether the secondary use suppresses or even destroys the market for the 18 original work or its potential derivatives, but whether the secondary use usurps the market of the original work.” Cariou, 714 F. 3d at 708. “‘[t]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original,’” even though “the fair use, being transformative, might well harm, or even destroy, the market for the original.” Castle Rock Entertainment Inc. v. Carol Publishing Group Inc., 150 F.3d 132 (1998) at 145.
\item \textsuperscript{93} See generally Galenson, \textit{Artistic Capital}. The improbability of market harm by an appropriation artist is discussed at length in the third chapter.
\end{itemize}
these artworks had no obvious legal characterization in existing copyright
jurisprudence, despite their obvious social value, because their reuses of pre-existing
material challenged the most basic tenets of copyright.94 In 1988, before actual cases hit
the courts, lawyer and professor John Carlin predicted that appropriation art would
frustrate attempted applications of the four-factor analysis (as put forth by the 1976
Copyright Act) and provoke challenging clashes between artists.95

This section explains why the introduction of transformative use was so
important to improving the adjudication of appropriation art in copyright infringement
cases.96 Before the advent of transformative use, judicial attitudes towards appropriation
art were, at best, avoidant because the progressive social value of appropriation
artworks did not clearly fit into existing precedent for fair use purposes. As a fair use
purpose, transformation established the opportunity for judges to take a more nuanced
approach to appropriation art, as it gave them a guide for seeing and a vocabulary with
which to discuss what they saw in an image. Transformative use directs a judge’s

95 Ibid. After Rogers v. Koons was decided, further clashes were predicted in E. Kenly Ames, “Beyond Rogers
Lynne A. Greenberg, “Puppies, Piracy, and Postmodernism,” Cardozo Arts & Entertainment Law Journal 11,
96 In this section, I focus closely on the handful of cases that have directly addressed appropriation art;
precedent cases that address literary works, music, and software are found in the footnotes, but not
discussed at length. This close focus is based on scope of this dissertation, which is limited to appropriation
art, and on the problems of interpretation that plague rulemaking by analogy.
attention to the relationship between the source material and the appropriation artwork, and allows the terms of the relationship between the prior and secondary artworks to be interpreted expansively. In fact, recent case law has dramatically expanded the reach of transformative use and today, transformation may simply mean that an appropriator has a “different interpretive or communicative project” than the creator of the pre-existing material employed in his or her work of appropriation art.\footnote{Tushnet, “Content, Purpose, or Both?,” 872, 878. Many scholars would disagree. Melville and David Nimmer “respectfully submit[s] that correction is needed in the law” and predict a “corrective descent of “transformativeness” from the apogee that it achieved in Cariou.” Nimmer, Melville B. and David. Nimmer on Copyright (New Providence, NJ: Lexis-Nexis, 1978-2016). (New Providence, NJ: Lexis-Nexis, 1978), §13.05[b][6] 13-224.20 and §13.05[C][1] 13-224.23.} This permissiveness is exactly what helps transformation characterize conceptual forms of contemporary art such as appropriation.

Artist Glenn Ligon’s Notes on the Margin of the Black Book (1991-93) (Fig. 4, Fig. 5) provides a straightforward example of the kind of criticism imagined by transformative use, a legal characterization unavailable to Ligon at the time of the artwork’s production. As art historian Martha Buskirk explained in 1992, much appropriation art was too “subtle or oblique” to be understood as the kind of direct commentary envisioned as fair use by judges in the early 1990s.\footnote{Martha Buskirk, “Art and the Law: Appropriation Under the Gun,” Art in America 80 (June 1992), 37.} Before appropriation art was adjudged a transformative use in cases including Blanch v. Koons (2006) and Cariou v. Prince (2013),

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appropriation art was unlikely to be seen as a legitimate form of fair use “criticism” or “commentary” because it was too indirect, multifaceted, and elusive to be easily understood as such. To understand the difference made by a characterization as “transformative use” rather than commentary or criticism, it may be helpful to look at and think about a work of appropriation art from the early 1990s that would almost certainly be considered transformative today, but which would have been met with great resistance at the time of its creation, largely because transformation was not available to characterize its purpose.

Ligon is an African-American artist who frequently takes race, identity, and individuality as his subject matter. Ligon’s work often comments on the construction of identity, the relationship between the self and the collective, and the roles played by race, gender, sexuality, and language in the development of the self and social norms. _Notes on the Margin of the Black Book_, which was exhibited in the 1993 Whitney Biennial, determined Ligon’s career and it remains one of his best-known artworks.

_Notes on the Margin of the Black Book_ is based on photographer Robert Mapplethorpe’s _The Black Book_ (1989), which presents a selection of Mapplethorpe’s idealized photographs of nude black men. The publication followed from a

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Mapplethorpe exhibition titled *Black Males*, shown at Galerie Jurka in Amsterdam in 1980 and Rome’s Galleria Il Ponte in 1982. Mapplethorpe’s espoused aim was the depiction of the male black body as a Platonic ideal, but the work was widely criticized as exploitative.

In *Notes on the Margin of the Black Book*, Ligon magnified the ninety-one images from Mapplethorpe’s book against the corner of a wall, creating an installation that asked the viewer to experience the subject physically. Ligon filled the interstices between the framed images with seventy-eight commentaries from prominent art critics and historians, supplying a range of additional criticism. These critical texts and personal responses create a vortex of analysis that leaves the viewer ambivalent as to the import of Mapplethorpe’s work. *Notes on the Margin of the Black Book* preserves the formal beauty of Mapplethorpe’s photographs, but asks the viewer to scrutinize the allure of this beauty by contextualizing its creation in issues related to racism.

101 There is rampant misinformation regarding the timeline of the exhibition and the book’s publication. This date is taken from the Mapplethorpe estate’s official exhibition listing on the Cheim Read website. “Robert Mapplethorpe – Exhibitions,” Cheim Read http://www.cheimread.com/artists/robert-mapplethorpe/exhibitions.

The inserted texts are the product of extensive academic and personal research by Ligon, collected as he sought to understand *The Black Book* and the controversy it generated:

I started reading hundreds and hundreds of articles about Mapplethorpe, about the issues around censorship and homophobia that his work generated, scholarly commentary. I did interviews with people in bars that I met and showed them copies of *The Black Book* and asked them what they thought.103

*Notes on the Margin of the Black Book* was first shown at the Whitney Museum of American Art’s 1993 Biennial, when a storm of controversy already swirled around Mapplethorpe’s photographs. Throughout the 1980s and 1990s, Mapplethorpe was identified as conservative North Carolina Senator Jesse Helms’ favorite example of the kind of art that American taxpayers should not underwrite. Helms’ condemnations of Mapplethorpe both drew on and fueled fears of homosexuality, HIV/AIDS, and interracial relationships. Helms’ fervent, polemical critiques were often fantastical in nature, but his position as a senator made his narrow and punitive attitude towards contemporary art a real and present concern to contemporary artists, who stood to lose opportunities in galleries and museums, grant funding, and their rights to free expression.

Helms’ attack on Mapplethorpe reached a pinnacle in Congress in 1989, resulting in the Corcoran Gallery of Art in Washington D.C. cancelling The Perfect Moment, a large, posthumous retrospective exhibition of Mapplethorpe’s work.\(^{104}\) Barely a month later, Helms rushed an amendment to a Senate appropriations bill through Congress that restricted the use of funds from the National Endowment for the Arts to individual artists.\(^ {105}\) In this overheated atmosphere, art historians carefully redirected attention to the aesthetic, historical, and political value of Mapplethorpe’s oeuvre.\(^ {106}\) Mapplethorpe was quickly drawn into the art historical canon via a cultural counter-offensive in which art historians de-emphasized potentially pornographic elements of Mapplethorpe’s photographs of men in favor of the intellectual and technical elements of all of his work.\(^ {107}\) Indeed, as Ligon was assembling Notes on the Margin of the Black Book, rather than focusing on the racial divide between the white photographer and his black

\(^{104}\) Immediately after the cancellation of the exhibition at the Corcoran, the board of The Washington Project for the Arts, an alternative space then directed by Jock Reynolds, voted to take the exhibition, which was immediately put on display for twenty-one days, just blocks from the White House and the Capital. Some 50,000 people lined up to see the show during that short period. See Deborah A. Levinson, “Robert Mapplethorpe’s Extraordinary Vision,” The Tech Online Edition 110, no. 31 (August 31, 1990): http://tech.mit.edu/V110/N31/mapple.31a.html


\(^{107}\) Reid-Pharr.
subjects, critics, including the distinguished, black, British art historian Kobena Mercer, were celebrating Mapplethorpe’s illumination of gay desire and focusing on his homosexuality, an aspect of identity that Mapplethorpe shared with his nude male subjects.¹⁰⁸

Thus, *Notes on the Margin of the Black Book* is the record of Ligon’s powerful intellect wrestling with the uncomfortable balance between attraction and repulsion, and the challenge of negotiating with the dichotomy provoked by this tension.¹⁰⁹ As he noted:

I remember having very ambivalent feelings about it, partially because the representations of the men were very de-contextualized. You had no sense of their social lives or histories, you just have a sense of them as objects for Mapplethorpe’s camera. But at the same time, I thought the photographs, as a way of seeing black men, were important on some level.¹¹⁰

Ligon was not just attempting to arrive at his own personal understanding of *The Black Book*; he also demanded acknowledgement of and attention to the broader implications of the racial, sexual, and politic foundations of individual subjectivities and responses.¹¹¹ *Notes on the Margin of the Black Book* diverted attention from Helms’ prurient interest in Mapplethorpe’s work and the groundswell of critical support for the artist,

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who had been singled out by the dogmatic senator. Ligon refocused attention on the content of Mapplethorpe’s work by literally creating space around the images for an alternative commentary that required the viewer to acknowledge and consider the racial tensions in *The Black Book*.

It is hard to imagine how a court could have characterized *Notes on the Margin of the Black Book* as fair use in 1992, when *Campbell v. Acuff-Rose* had not yet been decided by the Supreme Court and parody was likely the only fair use characterization strong enough to overcome the substantive amount of material reused.\(^{112}\) To review the four factors of fair use: the *nature* of Mapplethorpe’s published and copyrighted work was obviously creative, so his originality would weigh against Ligon; the *amount* of material taken would also weigh against Ligon, as he used a substantial number of entire images from *The Black Book*; and while there was no actual *market harm* to Mapplethorpe’s estate (at least not through direct market usurpation, as the works clearly do not substitute for each other, though collectors of both Ligon and Mapplethorpe overlap today) a court might have considered the loss of potential licensing revenue to weigh against Ligon (as the early 1990s was a period of exceptional strength for arguments around potential licensing markets, and it is easy to imagine a court deciding that the Mapplethorpe

estate had lost out on an obvious licensing opportunity). Determination of the remaining factor to consider, purpose, would have been difficult to predict in 1993. Notes on the Margin of the Black Book is ambiguous in its approach to its source material and, per Martha Buskirk, too “subtle” and “oblique” to be easily understood as direct commentary or criticism.\footnote{Sony, 464 U.S. 417 (1984).}

A court might have tried to characterize Ligon’s Notes on the Margin of the Black Book as a parody, since “a parody entitles its creator under the fair use doctrine to more extensive use of the copied work than is ordinarily allowed.”\footnote{Buskirk, “Art and the Law: Appropriation Under the Gun.”} But the Second Circuit’s definition of parody in Rogers v. Koons, which was decided during the creation of Notes on the Margin of the Black Book, does not describe Ligon’s work at all:

Parody or satire, as we understand it, is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original.\footnote{Rogers, at 310.}

Additionally, if subjected to the “conjure up” test for parodic works, which requires that a parodist use no more than necessary is to make the point of his parody recognizable to the audience, the artwork would almost certainly have failed because it

used substantially all of The Black Book. But, more importantly, hindsight proves that, rather than comedic, Ligon’s installation was touching, disturbing, and far too complicated and poignant to be described as parody. To class it this way is to miss its point entirely. The purpose of the work was deliberately ambiguous, but certainly not funny.

Ligon’s commentary on Mapplethorpe’s work relies on diverse quotes sourced from others that form an internally contradictory web of meaning. Ligon critiqued Mapplethorpe, but also the art historians and art institutions that supported Mapplethorpe, as well as the broader history of art and culture that makes of the black body a fetish. All of this would have created a complex problem of interpretation, as it is difficult to discern a single, unitary meaning in Notes on the Margin of the Black Book. After Cariou v. Prince (2013), the requirement of unitary and direct interpretation has diminished considerably, opportunities for inquiry into meaning beyond the formally obvious have expanded, and the requirements of minimal taking have lessened considerably, but this was not the case in the early 1990s.

But Ligon’s work was never tested in court. It would be Jeff Koons who became the first appropriation artist to defend himself in a high-profile case in 1992. Koons had charted a seemingly unstoppable artistic trajectory in the 1980s. His works in series emphasized the hypnotic qualities of everyday objects, and he was immediately embraced by the art cognoscenti. In 1988, he launched Banality, a simultaneous three-city exhibition at the Sonnabend Gallery’s New York, Chicago, and Cologne locations, and created a sculpture series that blended the languages of Hummel figurines, Rococo statuary, celebrity, and pop flotsam. The fascinating and repellent results found acclaim among both critics and collectors. The creators from whom Koons sourced his materials were less supportive.

In 1989, photographer Art Rogers learned that Koons had based one of the Banality sculptures on his photograph Puppies (Fig. 6) and sued Koons and Sonnabend for copyright infringement. The district court ruled for Rogers, explaining that Koons’ sculpture could only be understood as a “derivative work” – a type of adaptation reserved for copyright holders. Koons appealed. Both the district and appellate courts

119 Gallerists may be liable for infringement under secondary liability, a common law form of liability that arises when a third party materially contributes to, facilitates, induces, or is otherwise responsible for directly infringing acts carried out by another party. Sony, 464 U.S. 417.
120 “Under the plain wording of the statute, Koons’ sculpture is a derivative work based upon Rogers’ photograph; and Rogers as copyright owner had the exclusive right to authorize derivative work.” Rogers, 960 F.2d 301 at 8.
focused heavily on Koons’ process, which they found frustratingly non-traditional (even though anyone familiar with pre-modern workshop practices would find Koons’ process definitively traditional).\textsuperscript{121} Many of Koons’ sculptures are made by others, either in his New York City studio or, in the case of \textit{String of Puppies} (Fig. 7), in Italy by Demetz Studio, a group of polychromists who customarily produced religious figurines.\textsuperscript{122} The choice of Italian polychromists linked \textit{String of Puppies} not only conceptually, but also manually, to its antecedents, adding a layer of historical resonance and conceptual and associative depth to the sculpture. Yet, the court treated Koons’ faxed instructions to Demetz as evidence of his guilt, with italicized emphasis pointing as if to a smoking gun in the artist’s hand:

In his “production notes,” Koons stressed that he wanted “Puppies” copied faithfully in the sculpture. For example, he told his artisans the “work must be just like photo – features of photo must be captured;” later, “puppies need detail in fur. Details – Just Like Photo!;” other notes instruct the artisans to “keep man in angle of photo – mild lean to side & mildly forward – same for woman,” to “keep woman’s big smile,” and to “keep [the sculpture] very, very realistic;” others state, “Girl’s nose is too small. Please make larger as per photo;” another reminds the artisans that “The puppies must have variation in fur as per photo – not just large area of paint – variation as per photo.”\textsuperscript{123}

Ironically, as journalist James Traub later explained, “Koons’ instructions were in

\textsuperscript{121} Rogers, 960 F. 2d 301 at 304.
\textsuperscript{122} Traub.
\textsuperscript{123} Rogers, 960 F. 2d 301 at 305. (Emphasis supplied.)
fact a guide to the way that an art form based on appropriation actually works.”

The Second Circuit engaged in some analytical slippage, seeking the isolated genius in Koons’ process, but valuing the “efforts” of Rogers and the role such effort played in his livelihood. The existence of collaborators seemed to downgrade Koons’ status as an artist, which is inexplicable, given that many, if not most, successful artists, especially artists making working in editions, have worked in workshops, or at least employed assistants, and copying of elements, themes, or entire works was the primary pursuit in these environments. The idea of art as a solitary activity is a nineteenth- and twentieth-century fiction, and this is an instance of the imaginary roles and patterns identified by critics of the romantic author theory. Here, Koons did not typify the solitary genius, but rather the head of a workshop. Artmaking as a collective, but directed, process predated the norm of the solitary artist in his studio. But instead of characterizing Koons’ appropriative or collaborative practices as normative, even his own attorneys characterized the artist and his production process as new and exceptional.

124 Traub.
125 Rogers, 960 F. 2d 301 at 307.
127 Ibid.
To support a fair use defense, Koons’ legal team argued that the purpose of his work was commentary on the postcard, because the postcard was a physical embodiment of the kitsch culture he was criticizing. For Koons, the postcard was merely a data point – an *idea* rather than an *expression* – and the emphasis of the defense was not the necessity of Rogers’ photograph to Koons’ commentary and criticism, but an argument for the validity of appropriation art itself. The “idea/expression dichotomy,” or “idea/expression divide,” is another legal heuristic that judges have used to limit the scope of copyright protection. Ideas (facts, concepts, and certain background elements that are considered universal) are not copyrightable subject matter, while expressions (the communications or manifestations of ideas) are protectable subject matter.

Koons’ legal team seemed to believe that the court might consent to seeing Rogers’ photograph as an idea rather than an expression, something more like a data point than an artwork. Thus, Koons’ defense focused on what they considered Rogers’ minor creativity, as demonstrated in the photograph (a “completely accurate and literal depiction of two real people holding eight puppies belonging to them”), and the importance of flexibility in the fair use doctrine, so that it could “encompass” the work of postmodern artists. As attorney John Koegel argued:

For the first time, this court must attempt to reconcile the fair use doctrine

\[128\] Traub.
with various widely recognized elements of what is called the post-modern art movement. More so than their traditional forebears, post-modern artists incorporate in their works existing art and commercial images, thereby putting these artists on an apparent collision course with the Copyright statute. Appellants submit that whereas here it is widely recognized that the artist has an identifiable critical purpose for using existing images in his works of art and transforms those images so as to effect that purpose, the fair use doctrine must be flexible enough to encompass and thereby not discourage these new and legitimate art forms.129

This argument was not well received, as the court declined to develop a framework for interpreting postmodern art.130 Instead, the Second Circuit found that Koons had copied the idea of Rogers’ photograph, as well as the “charming and unique character” of its expression (namely the very element Koons meant to undermine and attack).131 Nor was Koons’ assertion that a parody of a signified (i.e., the kitsch culture represented by Rogers’ photograph) was as parodic as a parody of the sign itself (i.e. the particular photograph). Instead, the court focused on understanding why, among all the kitschy postcards in the world, Koons chose the one with Rogers’ photograph on it.132 Ultimately, the court affirmed the district court ruling against Koons, and determined that String of Puppies was not fair use because it was not a parody, the only existing fair

129 Ibid.
130 Rogers, 960 F. 2d 301 at 307.
131 Ibid., at 308.
132 “It is the rule in this Circuit that though the satire need not be only of the copied work and may, as appellants urge of “String of Puppies,” also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.” Rogers, 960 F. 2d at 310.
use category under which Koons’ work seemed to fit. Finally, the court required that Koons turn over the final, unsold copy of *String of Puppies* to Rogers.\footnote{Rogers, 960 F. 2d at 310.} After Rogers *v.* Koons, Koons was successfully challenged by other creators from whom he appropriated for the *Banality* series.\footnote{The district court ordered the final copy, an artist’s proof, turned over. Koons instead shipped it to Germany for an exhibition at the Hamburger Bahnhof. It was returned and remains in a New York warehouse, the property of Art Rogers. Traub.} Notably, none of these cases acknowledged appropriation art as a legitimate art form, despite a wealth of support from Koons’ legal team, an extant body of art historical literature, and a strong exhibition history for the medium.\footnote{United Feature Syndicate, Inc. *v.* Koons, 817 F. Supp. 370 (S.D.N.Y. 1993), and Campbell *v.* Koons, no. 91 Civ. 6055, 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).} However, the Second Circuit did concede that Koons was an artist, and accepted the lineage provided by his attorneys:

Koons…asserts to support that proposition that he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it. These themes, Koons states, draw upon the artistic movements of Cubism and Dadaism, with particular influence attributed to Marcel Duchamp, who in 1913 became the first to incorporate manufactured objects (readymades) into a work of art, directly influencing Koons’ work and the work of other contemporary American artists. We accept this definition of the objective of this group of American artists.\footnote{Ibid.}
They did not, however, embrace him as an *appropriation* artist. In fact, the word “appropriation” never appears in the opinion. The art world soon feared that “copyright might replace Jesse Helms, the Senator from North Carolina who hounded artists in what came to be called the ‘culture wars,’ as the bugaboo of avant-garde art.”  

Fourteen years later, Koons appeared before the Second Circuit again for having incorporated several photographs sourced from fashion magazines to create the large-format collage painting *Niagara* (2000) (Fig. 8) for his *Easyfun-Ethereal* series. Among these appropriated works was the photograph titled *Silk Sandals by Gucci* (Fig. 9), taken by commercial photographer Andrea Blanch and published in *Allure* magazine. This time, in *Blanch v. Koons* (2006), the Second Circuit dispensed with many of its own prior requirements for appropriation, finding that Koons’ did not need to comment specifically on Blanch’s photograph, prove the necessity of Blanch’s image to *Niagara*’s purpose, or characterize his work as parody.

What happened in the interim? How could the same court rule so differently on the same artist? Were *String of Puppies* and *Niagara* so fundamentally different from each other that one instance of copying was obviously a derivative work while the other was

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a fair use? Peter Jaszi claims that Blanch v. Koons was the first “postmodern decision,” by which he means that the Second Circuit used “an approach that distributes attention and concern across the full range of participants in the processes of cultural production and consumption.” Jaszi finds the explanation that transformativeness was responsible for the distinctions “technical” and insufficient. I disagree – Rogers v. Koons and Blanch v. Koons are interlocking, not distinct, interpretations. I believe that the Blanch v. Koons court sought the romantic author described in Jaszi’s prior work – and found it. Koons and appropriation art fit the genius model in 2006, but not in 1992. The doctrine of transformative use gave Koons, and the Second Circuit, a framework on which to construct the idea of the act of appropriation as an act of genius.

As previously discussed, by 2006 Koons had become an established artist and appropriation art had become a pervasive medium. Rapidly arrogating and cycling connections and mutations were normative practices afforded by the Internet. Important scholarly works on recombinant creativity, including Lawrence Lessig’s Free Culture and James Boyle’s Shamans, Software, and Spleens, had been published and their ideas were repackaged in widely-read articles. But, for the purposes of a legal decision, none of

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139 Peter Jaszi, “Is There Such a Thing as a Postmodern Copyright?,” 420-421.
these cultural shifts offered an opportunity to consider appropriation art under a new framework. After the Supreme Court’s 1994 landmark decision *Campbell v. Acuff-Rose Music*, which introduced transformation to copyright jurisprudence, the Second Circuit had recourse and a mandate to follow a legal framework that allowed enough flexibility to discuss the possibility of appropriation art as a progressive mode of artmaking that contributed positively to the development of art and ideas.

Although transformative use generally improved the judicial approach to appropriation artworks, it remained nebulous enough to permit some fairly disturbing interpretations. Superficially, prominent fair use disputes, including *Fairey v. Associated Press* (2009) and *Cariou v. Prince* (2013), both to be discussed immediately below, have only appeared to increase confusion, and scholars have responded with manifold prescriptions for the future of the doctrine. Some of the criticisms were apposite: at times, transformative use has acted as a “fifth factor,” achieving nearly dispositive weight in fair use cases, a result never intended by its architect.

Although artist and designer Shepard Fairey’s conflict with the Associated Press never made it to a court, it had a substantive impact on the popular perception of

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141 *Campbell*, 510 U.S. 569.
142 *Fairey v. Associated Press*, no. 09-01123 (S.D.N.Y. 2010); *Cariou*, 784 F.Supp.2d 337; *Cariou*, 714 F. 3d 694. See also Fisher et al., “Reflections on the Hope Poster Case.”
143 *Kienitz*, 766 F 3d 756, 758 (9th Cir. 2014).
appropriation. In late 2007, in anticipation of Senator Barack Obama’s presidential run, Fairey contacted Obama’s campaign, asked to create a campaign poster, and received permission.¹⁴⁴ The wildly popular design, now commonly known as the *Hope* poster (Fig. 10), was based on a photograph that Fairey retrieved from Google Image Search and was inspired by prior presidential portraits.¹⁴⁵ The design recalls both Social Realist predecessors and Andy Warhol’s silkscreened portraits from the 1970s. *Hope*’s fusion of politics and glamour made it the most iconic image from the 2008 presidential campaign.¹⁴⁶ The original was donated to the National Portrait Gallery.¹⁴⁷ Fairey originally screenprinted three hundred and fifty copies of *Hope* for sale, but by the time President Obama was elected, Fairey had printed two hundred thousand *Hope* posters and half a million stickers.¹⁴⁸ Fairey estimated that profits from his sales of the image had exceeded four hundred thousand dollars, all of which he donated to the Obama

¹⁴⁴ Fisher et al., “Reflections on the Hope Poster Case,” 249. Although I have taken issue at other points in this dissertation with the language of “Reflections on the Hope Poster Case,” it is an incredibly well-researched and fascinating read.
¹⁴⁵ Ibid.
¹⁴⁷ Ibid.
campaign. The image was also quickly replicated in numerous formats and contexts by parodists and copyists.

When a reporter tracked down the original image, which was taken by Associated Press photographer Mannie Garcia, the Associated Press contacted Fairey regarding his lack of permission and payment for use of the photograph. Fairey contended that his use was fair and filed suit against the Associated Press for a declaratory judgment. In a declaratory judgment, a determination is made as to the rights of the parties involved, but without an award of damages or other direction. This strategy is sometimes used when an appropriator wants clarification about fair use, but it is relatively rare, as it requires the time and expense of a legal proceeding.

As the parties prepared for trial, numerous issues and questions were raised. Mannie Garcia claimed that he, not the Associated Press corporation, held the copyright to the image. Also, in an argument that recalled Koons’ descriptions of his sources’ photographs, Fairey claimed that he had not used Garcia’s protected expression.

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152 Ibid.
153 Ibid.
154 Fisher et al., 258.
Ultimately, Fairey chose to settle the case when it came to light that he had destroyed critical evidence, leaving these issues unaddressed.\footnote{Ibid., 256.}

In 2007, photographer Patrick Cariou learned that appropriation artist Richard Prince had used numerous images from his book \textit{Yes, Rasta} (2000) in a new series of large-format multimedia works titled \textit{Canal Zone} (2008) via the display of Prince’s work at Gagosian Gallery in New York City.\footnote{\textit{Cariou}, 714 F. 3d 704.} At trial, Prince’s legal team revived Koons’ argument from \textit{Rogers v. Koons}, suggesting that Cariou’s works were more like factual ideas than creative expression, and thus Cariou’s photographs were not protected by copyright law because they were “mere compilations of facts concerning Rastafarians and the Jamaican landscape, arranged with minimum creativity in a manner typical of their genre.”\footnote{\textit{Cariou}, 784 F. Supp. 2d at 346, 349.} Prince also asserted a fair use defense.\footnote{Ibid., at 354.} In his deposition testimony, Prince stated that reusing images helps him “get as much fact into [his] work and reduce[] the amount of speculation.”\footnote{Ibid., at 349.}

The district court took this statement to mean that:

[Prince] chooses the photographs he appropriates for what he perceives to be their truth – suggesting that his purpose in using Cariou’s Rastafarian portraits was the same as Cariou’s original purpose in taking them: a desire

\begin{footnotesize}
\begin{enumerate}
\item Ibid., 256.
\item \textit{Cariou}, 714 F. 3d 704.
\item \textit{Cariou}, 784 F. Supp. 2d at 346, 349.
\item Ibid., at 354.
\item Ibid., at 349.
\end{enumerate}
\end{footnotesize}
to communicate to the viewer core truths about Rastafarians and their culture.\footnote{160}

The district court determined that Prince had no transformative purpose, no meaning or message to convey, and included no discernible commentary on Cariou’s photographs. The court ruled that every work in the Canal Zone series infringed Cariou’s copyrighted photographs. Significantly, the court also gave Cariou leave to have Prince’s artworks, as well as all copies of the exhibition catalog, impounded and destroyed.\footnote{161} Section 503 of the Copyright Act provides for the impoundment and destruction of infringing copies; impoundment is not uncommon, but a provision for destruction is very rare, and seemed excessively punitive. Prince’s espoused intentions, or lack thereof, may have played a role in the district court’s desire to make an extreme example of him.

In 2013, the Second Circuit conducted a de novo review of Prince’s appeal with a panel of three judges.\footnote{162} The opinion that followed, which largely reversed the district court’s decision, was intensely critical of the lower court’s approach to Prince’s artworks. The Second Circuit specifically criticized the lower court’s definition and interpretation of transformation, explaining that a requirement of direct commentary on

\footnote{160}Ibid.

\footnote{161}Ibid at 355-6. See also 17 U.S.C § 503 (1976).

\footnote{162}De novo is a legal standard of review in which no deference is given to the decision of the lower court and the issue at hand is reviewed “as if new.” A three-judge panel is common in appellate cases,
or criticism of the prior work was an inaccurate reading of the law. The court explained:

The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute.

This was an exciting expansion of the boundaries of the doctrine of transformative use and, had the Second Circuit stopped here, Cariou v. Prince might have been celebrated rather than sharply criticized. But the court introduced further guidance in the form of the “reasonable observer” test, requiring that the “transformativeness” of appropriation art must be established by the viewer. As the court concluded:

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 instead examine how the artworks may “reasonably be perceived” in order to assess their transformative nature.

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163 Cariou 714 F. 3d at 705-6.
164 Ibid., at 706.
165 Ibid., at 707.
166 Ibid.
The reasonable observer test drew from theories of authorship that have been frequently recirculated in art critical literature on appropriation art, but the very same reasonable observer test flattened these intricate theories of authorship, intentionalism, reception, and participation in order to clarify the rules of fair use. The court suggested that “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.”\textsuperscript{167} This assertion recognizes the role played by the viewer in the establishment of meaning in contemporary art, and made a subtle reference to (or accidentally drew upon) theories of reception and participation.\textsuperscript{168} But the court did not explicitly address the introduction of a viewer’s perspective in its opinion, or explain what weight the viewer’s interpretation should be given vis-à-vis the artist’s, or describe the means by which the viewer establishes meaning.

The court failed to explain how the reasonable observer was to proceed with identifying the transformative qualities of an artwork. In this way, the opinion was reductive and confusing, and suggested that formal analysis was the sole mode of

\textsuperscript{167} Cariou, 714 F.3d at 707.

\textsuperscript{168} “Reception theory refers to the way an audience actively decodes a work of art and helps to define and explore the meaning of the cultures we live in today.” Tate Glossary of Art Terms, http://www.tate.org.uk/learn/online-resources/glossary/r/reception-theory. Participation “describes a form of art that directly engages the audience in the creative process so that they become participants in the event.” Tate Glossary of Art Terms, http://www.tate.org.uk/learn/online-resources/glossary/p/participatory-art

interpretation to be used by the reasonable observer, an assertion that would provoke significant disagreement from artists and art experts.\textsuperscript{169} Furthermore, the court did not explain whether the observer was an expert or an untrained eye, a crucial distinction when predicting what a viewer would say about a work of conceptual art because much of the interpretive material needed to understand conceptual art is “contingent,” meaning that it is unavailable via formal analysis, and requires a trained eye and mind to perceive.\textsuperscript{170}

By including the reasonable observer test, the Second Circuit meant to establish a legal rule. An effective legal rule statement is “a formula for making a decision”; it is crafted to help future parties predict the outcome in situations with similar fact patterns, and it should identify exceptions to the rule.\textsuperscript{171} But when academic theories are translated into legal rules, the nuances and complexities of these theories are often lost. Here, confusion over the process by which the reasonable observer identifies meaning reflects longstanding disagreements in art critical discourse over the process by which a viewer establishes meaning. Rules that translate critical theory, such as the reasonable

\textsuperscript{169} Cariou, 714 F.3d at 707-708; 710-711.
observer test, may be peculiar or difficult to understand because they are incomplete translations.

In response to this problem of translation, legal scholars, practitioners of law, and members of the art world suggested that the reasonable observer test must be performed from the perspective of a trained art expert, either through consultation of the writings of experts or the inclusion of expert testimony at trial. I concur with other scholars that the reasonable observer must be an expert, but I am wary of proposals that give the reasonable observer, even an expert observer, hegemonic power over interpretation of transformativeness in fair use determinations because of the potential elimination of artistic obligation and responsibility through (i) the further devaluation of the artist’s testimony and writings, and (ii) the critical interpretations most likely to be proffered in future trials, which privilege the meaning created by a viewer over the meaning intended by the artist, and which often make appropriation art harder, not easier, to understand.

First, when the observer’s perception of the artwork is elevated, the artist’s own writings, statements, perceptions, and intentions are given less weight. Although an emphasis on reception and observation may alleviate the problems of exposition that

have plagued artist-defendants like Jeff Koons and Richard Prince, the reasonable observer standard threatens to legally codify the power that art critics already hold in academic, museum, and market settings. While an artist cannot have total control over the meaning of his or her artwork, it is erroneous to assert that his or her own thoughts, feelings, statements, writings, and theories have no significance whatsoever in the production of meaning in the work, especially in the selection and incorporation of pre-existing material.

Second, the critical interpretations likely to be offered at trials are nuanced and complicated, and do not suit efforts to streamline legal rules or make brisk determinations. Furthermore, the interpretative methodologies most often repeated by legal scholars and judges are generally twenty to thirty years old and, consequently, fail to accurately communicate the goals, purpose, or importance of appropriation art made by twenty-first century artists.\textsuperscript{173} Furthermore, these older interpretations have often been rejected by the artists they purport to describe.

Returning to the case, the wildly different treatment of the same artworks in the district and appellate court decisions in \textit{Cariou v. Prince} has been cited as evidence of the “unpredictability” of transformation.\textsuperscript{174} But the district court spent very little effort

\textsuperscript{173} See Jasiewicz 167-168 and Adler 589-599 for representative examples of legal writing that draw on art theory from the 1980s and 1990s and ignore subsequent developments in art critical discourse.

\textsuperscript{174} Adler, 559-626.
on finding the transformative qualities – or lack thereof – in Prince’s Canal Zone. In fact, its analysis, which extended for four pages, contained absolutely no description of the artworks. Criticism of the Second Circuit’s own internal unpredictability in its decision to opine on twenty-five works and remand five, is more pertinent. Cariou v. Prince advanced judicial analysis of appropriation by criticizing the overly narrow and outrageously punitive opinion of a lower court. The opinion clarified some areas of confusion, including the lack of a requirement for direct comment on or criticism of a prior work. But other sections of the analysis remained confusing. The determination of transformative qualities and fair use might be said in the end to justify the means, but prior cases have left four important questions about the analysis of transformative purpose unanswered. Subsequent cases, whether addressed to appropriation art or to other media, have failed to answer these questions. Each question is addressed in turn below.

(1) Must a court find the transformative meaning or will a transformative meaning suffice?

On behalf of Richard Prince, The Andy Warhol Foundation submitted an amicus brief to the Second Circuit that described the importance of multiple meanings and

175 Cariou 784 F.Supp.2d at 347-351. See also Bunker and Calvert.
176 Kienitz, 766 F.3d 756; Seltzer v. Green Day, Inc. 725 F.3d 1170 (9th Cir. 2013); Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014); Authors Guild v. Google, Inc., 804 F. 3d 202 (2d. Cir. 2015);
contextualization. The brief is an image-rich tour de force of art historical explanation, and appears to have been directly inspired by John Berger’s *Ways of Seeing* (1972). The brief lines up nine color reproductions by artists Max Ernst, John Heartfield, Eudoard Paolozzi, Richard Hamilton, Robert Rauschenberg, Andy Warhol, Martha Rosler, and Romare Bearden without supporting commentary, then avers:

These examples demonstrate that collage and other appropriation strategies may communicate a wide array of messages, subject to multiple and varying interpretations. These works may be understood to address a particular political agenda, question consumerism, oppose war, investigate the function of popular media, or explore gender or racial identity – often simultaneously.

The Foundation encourages the reader-judge to do what Justice Holmes always warned against: look and attempt to understand. In doing so, the brief subtly promoted the inevitable on a three-judge panel: multiple interpretations. The brief continued:

In still more recent years, artists have continued to appropriate imagery, often to ends that may not be immediately discernible to every viewer. That does not make these works any less meaningful to the significant audiences that do apprehend their new meanings, any more than a particular viewer’s failure to understand Goya or Manet meant those artists had nothing to express.

179 Warhol Foundation, 9-18.
180 Ibid., 21.
The last line recalls Justice Holmes’ warning that “it may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.”

As Prince appealed the district court’s pronouncement of non-transformativeness, it was unclear whether appropriation could be appreciated by the judiciary without some relaxation of the search for a single, fixed meaning. Such moderation could be best achieved by less emphasis on artistic intent. If the artist’s explanation does not establish a transformative meaning, it does not follow that a transformative meaning does not exist. Yet, this transformative meaning, as described by the Foundation above and illustrated by the case studies that follow, may not be immediately, or even visually, accessible.

Of all the outstanding questions, this is the most important, but also the easiest to answer. There can be no single transformative meaning, and there need not be. If a transformative meaning can be found, then this ought to suffice, and often does. Some might argue that a search for “a,” rather than “the,” transformative meaning sets the bar

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181 Bleistein v. Donaldson 188 U.S. 239 (1903).
183 “It is impossible in most cases to speak of the particular “idea” captured, embodied, or conveyed by a work of art because every observer will have a different interpretation.” Mannion v. Coors Brewing Co., 377 F.Supp.2d 444 (S.D.N.Y. 2006).
too low and that any manner of borrowing can thereby be described as transformative. Anything can be described as such by a defendant, but the provision of the argument does not guarantee that a judge will deem every work to be transformative. Furthermore, not every work deemed transformative will also be declared a fair use. As Leval explained, “The existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use. The transformative justification must overcome factors favoring the copyright owner.”

(2) What is the proper role and weight of formal analysis?

Formal analysis is the evaluation of the forms, color, structure, and other visual elements used in the formation of an artwork. It is, furthermore, the intricate assessment of what one sees upon viewing an object. Such analysis would again appear to invite the kind of aesthetic analysis against which judges were warned by Justice Holmes, and which judges presumably avoid with care. Yet, as legal scholars Rebecca Tushnet, Christine Haight Farley, and Alfred Yen have persuasively argued, judges participate in aesthetic inquiry even as they purport not to do so. Additionally, the research of law professors Neil Feigenson and Christina Speisel on digital visual technologies on court...

proceedings has described many judicial adoptions and aversions as habitual rather than purposeful.\textsuperscript{186}

First, Tushnet’s valuable work on the judicial approach to images has demonstrated a “oscillation” between the dichotomies of opacity and transparency.\textsuperscript{187} In courtrooms, images are treated as alternately wholly truthful or wholly opaque by judges.\textsuperscript{188} But neither polarity can characterize a form such as appropriation art that often negotiates the very nature and existence of truth through simulacra, allegory, and repetition. When asked to review an image, a judge will either accept it as interpretable, universal, and possessed of singular meaning or impervious, individual, and impossible to define.\textsuperscript{189} Thus, judges tend to either “deny that interpretation is necessary” or “deny that interpretation is possible.”\textsuperscript{190} Tushnet argues that this bifurcated approach derives from basic legal training, which focuses on textual interpretation.\textsuperscript{191}

Second, Farley and Yen have also identified significant trends in the judicial treatment of images. Farley has tracked the ways in which judges avoid attending to images themselves, and recommends more transparent discussions of aesthetic

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\textsuperscript{187} Tushnet, “Worth a Thousand Words,” 687.

\textsuperscript{188} Ibid.

\textsuperscript{189} Ibid.

\textsuperscript{190} Ibid.

\textsuperscript{191} Ibid., 734.
\end{small}
discourse.\textsuperscript{192} Yen has identified an unwillingness to acknowledge the pervasiveness of aesthetic theory in copyright decisions, and recommends that judges openly admit to aesthetic reasoning, with greater awareness of their own biases.\textsuperscript{193}

Ultimately, the ‘truth’ of images is determined via aesthetic analysis, whether or not judges openly acknowledge their engagement with aesthetics. Rather than overtly acknowledge the unavoidability of aesthetics, many courts simply displace aesthetic analysis, choosing to focus elsewhere or redirect attention. Farley has identified the primary diversions: (i) attempting to decide fair use cases with recourse to parody, (ii) issue substitution, (iii) attribution to a different concern, (iv) addressing the weight of the evidence rather than addressing the evidence itself, and (v) reaching a conclusion without supporting analysis.\textsuperscript{194} While Justice Holmes cast reasonable aspersions on the ability of a judge to evaluate avant-garde art, which is admittedly difficult to understand even for highly trained experts, there is no realistic alternative available. The Copyright Act demands a degree of aesthetic inquiry. However, it must be acknowledged that much contemporary art, including most appropriation art, is very difficult to understand via formal analysis alone because of the conceptual contexts and metaphors

\begin{footnotesize}
\begin{enumerate}
\item Farley, 851-854, 857-858.
\item Yen, 298-302.
\item Farley, 836-838.
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\end{footnotesize}
often at play in such works. Although visual analysis is an obvious first step in any assessment of transformation, it cannot be the alpha and omega of judicial analysis.

When judges have applied the doctrine of transformative use incoherently, it has been because doing so requires a level of expertise that cannot be demanded of judges without offering them considerable assistance. Yen, for example, explains that the “irrelevance” of aesthetics to copyright jurisprudence is presumed, but any distinction between the two is “illusory.”195 The argument and protest that judges cannot and must not make aesthetic determinations may continue, but adjudication of fair use necessarily involves some degree of aesthetic inquiry. As Yen has demonstrated at length, it is quite impossible to divorce any inquiry into the availability of the copyright of an artwork, or the fair use eligibility of an artwork, without some degree of aesthetic analysis.196 Nor is it desirable for judges to pretend that aesthetic inquiries and judgments can be isolated or dismissed, as “the analytical premises of copyright opinions are practically identical to those of major aesthetic theories.”197 Further support, whether from the artist, art historians, curators, and other art experts, or additional supplemental resources, is absolutely necessary, and is both utterly plausible and normative in other complex areas of inquiry. Case briefs routinely include expository material intended to help a judge

195 Yen, 249.
196 See generally Yen.
197 Ibid., 250.
understand the subject matter of the case, amicus briefs from industry experts are routinely accepted, and expert witnesses are often admitted to help clarify complex material.

Finally, in their research on the impact of digital visual technologies on court proceedings, Neil Feigenson and Christina Speisel suggest that courts tend to see images as “truthful” because judges are unaware of their fealty to the “habits” of “naïve realism.”¹⁹⁸ The first habit is biologically driven: because vision is the primary sense through which one experiences the world, and the brain processes sensory input more quickly than language-based input, things one sees may register as “transparently obvious and completely ‘natural’” rather than as mediated information.¹⁹⁹ Text, by contrast, is perceived as mediated and seen more skeptically.²⁰⁰ The second habit is learned: representations are likely to be treated as reality, because the act of looking at a representation may seem like looking directly at what it represents, and many everyday experiences support a belief in the veracity of a representation as a depiction of an external reality.²⁰¹ When a judge is guided by naïve realism, images may be treated as “transparent,” requiring no further interpretation.²⁰² Alternatively, a judge may

¹⁹⁸ Feigenson and Speisel.
¹⁹⁹ Ibid., 8-9.
²⁰⁰ Ibid., 8.
²⁰¹ Ibid., 9.
acknowledge the framing that precedes and conditions all representations and assume that the image is a construct with no fixable meaning. In these situations, the image is considered too indeterminate to be understandable.

(3) What is the proper role and weight of an artist’s testimony?

Recent scholarship on this issue has roundly condemned judicial emphasis on artists’ statements and testimony. For instance, law professor Amy Adler claims:

Visual artists, even more than other creators, may be particularly ill-suited to articulating their intent about their work, or they may be particularly driven to resist the requirement to do so. Second, regardless of whether an artist can articulate it, intent is simply irrelevant to what her work “means.” To the extent courts search for artistic intent to evaluate “meaning” and “message” in fair use, they are searching for a measure of meaning that has been rejected as meaningless in contemporary art.

However, these assertions are misleading, if “contemporary art” is understood to mean objects made by individuals who produce, write about, display, and sell artworks today.

Adler quotes from artist Marcel Duchamp’s “The Creative Act” to support her claims: “All [the artist’s] decisions…rest with pure intuition and cannot be translated into a self-analysis, spoken or written, or even thought out.” Using an artist’s writing

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203 Feigenson and Speisel, 25.
204 Tushnet, “Worth a Thousand Words,” 702.
205 See for example Bunker and Calvert.
206 Adler, 584.
make the assertion that artists’ writings have no value in the determination of meaning is an illogical deduction that requires corrective analysis.

The unabridged sentence from Duchamp’s essay reads: “All his decisions in the artistic execution of the work rest with pure intuition and cannot be translated into a self-analysis, spoken or written, or even thought out.” Here, Duchamp does not claim that artists cannot explain their intent or the meaning of their artwork subsequent to its creation; instead, his description of the “mediumistic role” of the artist is limited to the process of making art. He never disavows an artist’s ability to assign or explain meaning subsequent to this process, and the very fact of the essay’s existence supports a visual artist’s ability to describe his or her creative act in words.

Duchamp further explains that the difference between “unexpressed by intended and the unintentionally expressed” can be defined as an “art coefficient,” but this calculation literally accounts for the existence, value, and necessity of intention. The spectator is important, for he completes (or at least amplifies) the process of meaning-making. But the spectator is not, for Duchamp, the sole producer of meaning.

Rebecca Tushnet also worries that “dependence on an artist in a given case means that results may be unpredictable or idiosyncratic.” Here it might be more

208 Stiles and Selz, 972. [The author’s emphasis.]
appropriate to suggest that dependence on Jeff Koons and/or Richard Prince’s testimony may be unpredictable or idiosyncratic. For instance, explanation of intent, avowal of authorship, evidence of originality, and precision of meaning are extremely problematic demands for an artist like Prince, who often takes the possibility of originality as his subject, disavows the role of ‘author’ (except when he chooses to embrace it), and routinely plays with the notion that objects and images have a stable meaning. Yet, the questions raised by Prince’s relationship to legal testimony cannot be extrapolated to all contemporary artists.

Artists, particularly contemporary artists, are commonly required to explain their work, as neat stacks of artists’ statements at gallery and museum reception desks can attest. Moreover, since 1945, writings by artists have increased in volume, range, and clarity. Students earning the Masters in Fine Art are required to write artists’ statements, and learn how to do so in courses and for exhibitions. Thousands of guides to writing such statements are available in print and online. But, as with all professional

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210 “Prince is known for making things up, especially about himself, in his writing and in interviews, possibly to make himself or the world seem more interesting, mysterious, or full of dark possibility — he calls it ‘wild history.’” Carl Swanson, “Is Richard Prince the Andy Warhol of Instagram?,” New York Magazine, April 18, 2016, http://www.vulture.com/2016/04/richard-prince-the-andy-warhol-of-instagram.html. For a very direct quote from Prince on his role in the construction of authorship, see Allen, 217-218, also discussed below.

211 See generally Stiles and Selz.
writing, these statements vary in quality and length, employ a lot of jargon, and, since the 1990s, consist of increasingly self-conscious text imitating or annexing critical theory.

In 2013, artist David Levine and doctoral student Alix Rule published a trenchant and funny study of the idiosyncrasies of this style, which they termed a “language” named “International Art English.”

Art critical discourse, which is related to but different from the market-driven vocabulary and syntax of International Art English, can be similarly opaque and impenetrable. Such writing can be particularly frustrating and incompatible with the emphasis on “plain meaning” in judicial review if a judge reads an artist’s statement with the same straightforward approach he or she brings to a statute. Not all artists write in such an opaque style. Unfortunately, Koons and Prince are known for their verbal acumen, insistence on nuanced meaning, and refusal to state their points in what the courts may consider “plain English.”

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213 See Kristine Stiles’ discussion of artists, who take recourse in such “theory-speak,” and who “are also often those who consider their work to be “transgressive,” as well as the pressure on artists to “do theory,” which often flattens out creative ideas into parroted philosophy, in Stiles’ “I’m Ready. ’Thinking About Artists’ Writings in a Global Context,” in Helen De Prester, ed. *Not a Day Without a Line. Understanding Artists’ Writings* (Ghent, Belgium: Academia Press, 2013): 177-203.


215 Swanson.
Yet, even if an artist expresses him- or herself as obliquely as Prince, the impenetrability of his or her language need not be an insurmountable impediment to judicial review. Nor should professional discourse, even jargon, degrade the importance of an artist’s statement in a copyright dispute. If courts can decipher testimony heavy with economics theory in antitrust cases and testimony heavy with scientific theory in patent cases, then they can manage the difficulties presented by the linguistic refinements of artists and other art professionals. Moreover, should a court need some help with translation, the entire academic field of art history is devoted to explicating images, artist’s writings, and the conditions of an artwork’s production. Its erudite members are eager and always available to help artists and their legal representatives explain artworks.216

Finally, disallowing or discounting artistic testimony furthers the stereotype of the incoherent artist. Over the last few centuries, particularly in the United States, artists have been subjected to comparisons with children, the insane, and the intellectually handicapped; judgments that they have not only sometimes embraced but also encouraged, making the issue even more complicated.217 That said, such comparisons in

216 For a specific explanation of the permissibility and mechanics of expert testimony in copyright cases concerning appropriation art, see Jasiewicz 171-177.
a court of law must be seen as unhelpful when it comes to copyright jurisprudence and to determining the merit of artistic work and appropriation. But in this regard, judges must acknowledge that artists’ writings, opinions, and explanations are exceedingly revealing and helpful aids to establishing transformation because they are creative, often poetic, philosophical, and thoroughly inventive, refusing to follow common and ordinary forms of expression.218

(4) Is the reasonable observer an expert or ordinary observer?

The “reasonable observer” is a hazily defined heuristic. The Second Circuit claimed that it originated from the Supreme Court and appellate precedent, but I want to suggest that its resemblance to a First Amendment test and its resonances with important theoretical debates must not be ignored.

First, the basis of the “reasonable observer” test is similar to that of the Spence test, which is used to determine whether or not symbolic speech is protected under the First Amendment. In Cariou v. Prince, the Second Circuit embraced a standard similar to the second half of the Spence test, which establishes that a defendant cannot claim First Amendment protection unless the intent to convey a specific message is affirmed.

218 Richard Prince’s deposition, which has inspired vicious criticism of artistic testimony, evinces a sharp intelligence and clarity of thought. While his fantastical foundations for Canal Zone are difficult to follow, his responses to questions about his production process, sales, and limited understanding of copyright law are extremely precise and logical. See Greg Allen, ed., The Deposition of Richard Prince in the Case of Cariou v. Prince et al. (Zurich: Bookhorse, 2013).
and “the likelihood was great that the message would be understood by those who viewed it.”219 I point to the Spence test because its shares a common problem with the reasonable observer standard: both are unlikely to identify significant artworks as sufficiently expressive to deserve protection. The Supreme Court has acknowledged this problem with the Spence test, and future courts must do so with the reasonable observer test.220 Like the Spence test, the reasonable observer asks the viewer to determine whether or not one work transforms another, but the practical exigencies of this exercise often require that the reasonable observer determine whether or not the second work is actually art. For this very central reason and request for determination of the identity of a work of art, the reasonable observer cannot be ordinary and must be defined as an art expert.

Stanley Fish described an “interpretive community” as a group that can approach a text and come to substantial agreement on its meaning.221 It is difficult to imagine how a work of contemporary art, particularly conceptual art, could be fairly

221 Stanley Fish, Is There A Text in This Class: The Authority of Interpretive Communities (Cambridge, MA: Harvard University Press, 1980), 147–174. Numerous scholars disagree strongly with the concept. For a thorough review of Fish’s impact on copyright theory and the views of his detractors, see Patry, Patry on Copyright, §2.24.
adjudicated by an “ordinary observer” who is not part of the interpretive community established by contemporary artists and art professionals. Take, for instance, conceptual art which in many cases does not visually appear to be art at all but rather a map, a text, or a social document. What of an ephemeral, transient, or invisible object such as Robert Barry’s *Inert Gas Series/Helium, Neon, Argon, Krypton, Xenon/From a Measured Volume to Indefinite Expansion* (1969)? Here, Levine and Rule’s comments on “International Art English” are again useful. Levine and Rule identify the use of International Art English as the expressions of this interpretive community; the complex syntax and vocabulary of International Art English interpellates an individual as “a member of a common world” and understanding (or misunderstanding) of the language identifies the individual as “someone who does or does not get it.”

Not all judges can be expected to “get” art critical discourse, or scientific discourse, or any other discipline’s precise discourse, any more than artists or scientists can necessarily be expected to “get” the intricacies of copyright law. But when educated authorities, such those from The Andy Warhol Foundation, explain the intricacies of art and its art historical theories to judges, judges can be expected to view artworks through a different lens. In certain circumstances, particularly when approaching works by

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222 Levine and Rule overstate the complexity and depth of International Art English. It does not bear the features of a true language. “Dialect” is perhaps more appropriate.
artists who take truth, authorship, and originality as their subjects, an artist’s explanation may require translation, or the artist and artwork may require a degree of contextualization before the work may be understood as transformative (or, in some cases, as art).

Second, in Cariou v. Prince, the Second Circuit effectively acknowledged that the viewer’s interpretation of an artwork is as important, or probably more important, than the creator’s interpretation.\(^\text{223}\) In so doing, the court elevated the position of the interpretive viewer to that of one able to take a position in both legal and aesthetics debates. In the law, arguments over the proper way to interpret a statute are, broadly speaking, divided between those who believe that a statute must be interpreted according to its “plain meaning” (with recourse to the words alone) and those who believe that the establishment of “plain” meaning is an “interpretive act.”\(^\text{224}\) Over the last quarter-century, this debate has been informed by the work of Foucault and Barthes, but a persistent problem with both Barthes’ and Foucault’s theories of authorship, in particular, is inattention to the identity of the viewer and his or her competency for interpretation, even though that interpretation is given over to the reader/viewer.\(^\text{225}\)

\(^{223}\) Cariou 714 F.3d 707.

\(^{224}\) Patry, Patry on Copyright, § 2.10 (2012). For an erudite and bitinglly funny account of academic debates around the effect of literary criticism on statutory interpretation, see Patry, Patry on Copyright, §2.24 (2012).

\(^{225}\) Ibid., §2-24 (2012).
While the author is represented as a historically grounded, effectively fictional construct,226 the reader is treated as an ideal participant in the construction of meaning. The questions that these theories raise, but do not address, might include: How is the viewer any less fictional than the author? How can he or she be any better able to supply meaning than the author? For readers are presumably looking for or operating on something that pre-exists their interpretations. The imposition of a “reasonable observer” on copyright cases reveals the instability created by giving total control of interpretation over to the generalized reader/viewer urged by Barthes and Foucault, as the identity, education, and experience of this individual will likely alter the reading/viewing significantly. Again, the presumption of a “reasonable observer” supports his or her identification as an expert able to read/view a work of art that is informed by an artist whose education and expertise in his or her field will differ dramatically from that of an observer who has not been similarly educated, or who lacks similar experience.

Subsequent copyright cases have done little to clarify these questions. In *Morris v. Guetta* (2013), artist Thierry Guetta (aka Mr. Brainwash) was sued for his use of a photographic portrait of Sid Vicious. The court flatly rejected Guetta’s fair use argument, with little useful commentary on transformation. In *Kienitz v. Sconnie Nation, LLC* (2014), a case in which activist t-shirt producers were sued for the use of a photographic portrait of Madison, WI’s mayor, the design was deemed fair use, but the court’s commentary on transformative fair use was broadly critical of *Cariou v. Prince*, simply asserting that derivative and transformative works are not distinguishable, and thus providing no further guidance on the questions above. Two cases concerning the scanning books for search purposes, *Authors Guild v. HathiTrust* (2014) and *Authors Guild v. Google, Inc.* (2015), hold great promise for further definition of transformative use, but neither spoke directly to the questions of observation, the production of meaning, or the role of expertise.

To consider what might happen when an arguably transformative work is described with the kind of analysis provided by experts, we turn to four images from Carrie Mae Weems’ series *From Here I Saw What Happened and I Cried* (1995). The

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228 Ibid.
229 *Kienitz*, 766 F 3d 756.
230 Ibid., at 758.
231 *Authors Guild*, 755 F.3d 87; *Authors Guild*, 804 F. 3d 202.
appropriated images in the case study were nearly litigated in the period after Rogers v. Koons (1993), but before Blanch v. Koons (2006), during an indeterminate time when transformative use had become part of fair use jurisprudence, but not yet been used to characterize appropriation art in a court. Weems’ transformations of the pre-existing photographs illustrate the need for multiple meanings, methodologies beyond formal analysis, attention to artists’ statements, and the guidance of an expert observer. Therefore, this case study considers the formal qualities available to an ordinary observer, but also considers artists’ statements and alternative references, and provides the depth available only to an expert. The result is multiple meanings that ought to be considered transformative under law, as well as the differentiation between uses that are legally fair and those that are ethically correct.

1.3 Carrie Mae Weems, From Here I Saw What Happened and I Cried (1995)

Carrie Mae Weems is an African-American artist who, in her own words, thinks of herself as “a communal voice, a voice of a group, a voice of a class.” She is best known for her photography, but her work also incorporates text, audio, fabric, installation, and film. In a variety of mediums, Weems confronts social, political, and personal issues, often by layering narratives and influences to provide a multi-

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dimensional examination of an understudied historical moment or human experience. Weems’ work has been celebrated for its depiction of the experience of African-Americans, particularly African-American women. Yet, her interests are equally universal and humanist, and her work connects emotionally and intellectually with viewers from diverse backgrounds. “Pre-existing” is Weems’ preferred descriptor for her source material, which is often problematic and painful because of its representation of racial content. But she is not afraid to use the word “appropriated,” either. And, in this series, Weems aimed to “make clear that this was taken from something else, that this was lifted.”

In 1995, Weems was invited by the Getty Museum to respond to its exhibition *Hidden Witness: African-Americans in Early Photography*, curated by attorney and collector Jackie Napolean Wilson and Weston Naef, the Getty’s curator of photographs. The exhibition title was taken from the nickname applied to a black servant in the background of a nineteenth-century photograph in Wilson’s collection.

Weems was ambivalent about the exhibition; it took several meetings for Naef to convince her to participate at all. In preparing her response, Weems aimed to create a

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235 Ibid.
contrast between Wilson and Naef’s narrative and her own. Her response came in the form of a series, From Here I Saw What Happened and I Cried, comprised of thirty-three toned prints. Each print reinterprets a pre-existing image from the past that is enlarged, tinted, and overlaid with glass on which Weems sandblasted short texts. When the show opened, she said to the Los Angeles Times, “Hidden Witness will be very demure and quiet...My show will be screaming and red.”236 She described a plan to “implode Weston’s show, add a different level of experience and issues of race and gender. Everything will get turned upside-down.”237 In her own words, she “had to think about what kind of relationship [she] could have with an institution that has positioned itself on a hill.”238

The most famous images from From Here I Saw Happened and I Cried are four nineteenth-century daguerreotypes “lifted” from the archives of another institution on a metaphorical hill: Harvard University. A few years earlier, Weems had visited the university’s Peabody Museum of Archeology and Ethnography. Before she could access the material she sought, Harvard required Weems to sign a contract, which she did, prohibiting her from using images from the archives without the Peabody’s

236 Ibid.
237 Ibid.
238 Ibid.
permission.239 Disregarding this agreement, Weems photographed fifteen of the
archive’s daguerreotypes, four of which appear in From Here I Saw What Happened and I
Cried (Fig. 11, 12, 13, 14). The daguerreotypes were commissioned from photographer
Joseph T. Zealy by Harvard professor Louis Agassiz in 1850, and were made with the
assistance of paleontologist Robert Gibbes.240 The images are highly detailed side and
front views of male and female slaves, mostly naked, photographed with detached,
scientific precision.

As curator Brian Wallis has argued, the Agassiz photographs served a dual
purpose: they may have been originally produced as scientific studies to document the
physical differences between whites and blacks, but they were also intended to provide
evidence for the superiority of the white race and “thus, they help discredit the very
notion of objectivity and call into question the supposed transparency of the historic
record.”241 Agassiz was an esteemed glaciologist and zoologist, but also a racial
polygenist who attempted, sometimes successfully, to convince his abolitionist friends
that blacks were an inferior species created separately from whites.242 Weems, who is not

239 Yxta Maya Murray, “From Here I Saw What Happened and I Cried: Carrie Mae Weems’ Challenge to the
Harvard Archive,” Unbound: Harvard Journal of the Legal Left 8, no. 1 (2013), 2. The legality of this contract is
questionable, as explained below.
240 Brian Wallis, “Black Bodies, White Science: Louis Agassiz’s Slave Daguerreotypes,” in Coco Fusco and
Brian Wallis, ed.s, Only Skin Deep: Changing Visions of the American Self (New York: International Center for
Photography/Harry N. Abrams, 2003), 165.
241 Ibid., 165.
242 Wallis, 165; Murray, 12-13.
only an acclaimed artist but also a professor at the School of Visual Arts, was intimately familiar with Agassiz and the history of these images. Before incorporating the Agassiz daguerreotypes into *From Here I Saw What Happened and I Cried*, she had previously lectured on the photographs in her classes and had also appropriated the images for her *Sea Island Series* (1991-1992) (Fig. 15).

Of the thirty-three images *From Here I Saw What Happened and I Cried*, all appropriated from various sources, only Harvard University threatened to sue Weems. Harvard ultimately declined to file suit, but requested payment for every work that Weems sold.244 Then the university bought the four reworked images, which now hang in the Harvard Art Museums.245 However, twenty years after the creation of *From Here I Saw What Happened and I Cried*, Harvard continues to have a complicated relationship with the images “lifted” by Weems and has continued to strictly limit the display and reproduction of the Agassiz photographs, offering confusing explanations for its policies.246 I will further explore Harvard’s relationship with the Agassiz photographs, as

243 Murray, 21, note 121.
244 Murray, 21.
245 Ibid. See also Carrie Mae Weems, “You Became a Scientific Profile / A Negroid Type / An Anthropological Debate / & A Photographic Subject,” *Harvard Art Museums*, http://www.harvardartmuseums.org/collections/object/166668?position=7
well as Weems’ ethical failure to honor her contract with the university, at the end of
this case study. First, I turn to the series itself.

To review the four-factor test: First, the nature of the Agassiz images, which were
originally intended to be primarily documentary photographs, weighs in favor of
Harvard, but only slightly. They are copyrighted images but, as “scientific images,” they
are thus minimally creative, yet certainly enough so to merit copyright protection.\textsuperscript{247}
Second, the amount taken by Weems likely weighs in favor of Harvard, as she took
substantially all of each image.\textsuperscript{248} Third, the market effect weighs in Harvard’s favor, as
photographs of the daguerreotypes had been previously licensed, so evidence of actual
market harm existed.\textsuperscript{249} Thus, the availability of a fair use defense would likely turn on
the question of transformativeness, and an analysis of Weems’ reuse of Harvard’s
images demonstrates how transformation can be so helpful to the judicial assessment of
appropriation art.

\textit{From Here I Saw What Happened and I Cried} performs multiple functions at once.
Weems herself suggests that “three narratives are working simultaneously.”\textsuperscript{250} Each
narrative, I would argue, ought to be considered transformative under twenty-first

\textsuperscript{247} Cariou, 714 F.3d at 710, quoting Campbell, 510 U.S. at 586 and Blanch, 467 F.3d at 256.
\textsuperscript{248} Ibid., at 710.
\textsuperscript{249} Blanch, 467 F.3d at 257.
\textsuperscript{250} Murray, 50.
century jurisprudence, but a fair use determination would have been less assured at the time of the series’ creation.

A first reading of any one of the thirty-three images in From Here I Saw What Happened and Cried can be summarily explained as transformative of the preexisting material it employs. Basic formal analysis of the four Harvard images suggests that Weems copied the four daguerreotypes in order to transform the images’ meanings by altering the daguerreotypes’ contexts. How so? First, Weems renders the tiny daguerreotypes accessible to ordinary vision, illuminating details that are difficult to see in the originals. The originals measure only three by four inches and must be viewed by one person at a time, at intimate proximity.\textsuperscript{251} Weem’s prints are seven times larger. The increased legibility affords scrutiny of details, such as folds on fabric, which suggest forced stripping to some viewers.\textsuperscript{252} The red tint suggests blood and with it, violence. The glass overlay directs the viewer to acknowledge Weems’ image and Agassiz’s image as constructed spaces. The text mediates the image, inserting Weems’ Getty assignment, “response” to nineteenth-century photographs of African-Americans, into the visual field. These formal alterations recontextualize the Agassiz photographs, re-purposing

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Murray, 50.
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Ibid., 49-50. (“You can see in the pulled and yanked fabric the forced evidence of their disrobing.”)
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them for Weems’ argument, which differs dramatically from Agassiz’s original purposes.

In 2001, the Eleventh Circuit decided Suntrust v. Houghton Mifflin, a case that deemed Alice Randall’s The Wind Done Gone ("TWDG"), a literary parody of Gone with the Wind ("GWTW") that foregrounded and critiqued the racism of Margaret Mitchell’s original.253 The court found Randall’s parody to be transformative:

TWDG is more than an abstract, pure fictional work. It is principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of GWTW. Randall’s literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War.254 Like Randall’s comedic parody, which the court further described as a “general attack on GWTW” that “sets out to demystify GWTW and strip the romanticism from Mitchell’s specific account of this period of our history,”255 Weems photographic series is a general attack on the Agassiz images and their romanticized version of the history of anthropological and biological sciences in the American antebellum south. Differently, From Here I Saw What Happened and I Cried is altogether serious, which means it cannot fit the definition of parody, and is not strictly comparable to Randall’s The Wind Done Gone in its transformative operations.

253 Suntrust, 252 F. 3d 1165.
254 Ibid., 1235.
255 Ibid., 1271.
Yet, as Allan Sekula explains, the meaning of a photograph is “subject to cultural
definition,” but a photograph tends to “manifest an illusory independence from the
matrix of suppositions that determines its readability.”\textsuperscript{256} Thus, the photograph both
appears “truthful” in its independence and the initial interpretation is determined
primarily by its cultural context.\textsuperscript{257} By extracting the Agassiz daguerrotypes from the
hallowed Peabody archive and presenting them without identification, Weems denies
the photographs the comfortable bias afforded by their prior categorization as “science”
or “documentary.”\textsuperscript{258} She takes advantage of the photographs’ dislocation and, by
planting them in a new context, shifts the viewer’s attention.

Agassiz’s context for the photographs was entirely scientific: the presentation of
a person-specimen as a racial type cannot admit individuality. Yet, when confronted in a
museum gallery, rather than a scientific journal or a museum of anthropology, the
viewer first sees the photographic subject as a fellow human, noticing the faces of
photographic subjects Jack, Delia, Renty, and Drana. Then, if familiar with the visual
conventions of nineteenth-century photography and slave portraiture, may recognize
these humans as slaves, and may then inquire into the conditions of the photograph’s

\textsuperscript{257} Ibid.
\textsuperscript{258} Wallis, 163.
production. Weems’ formal alterations immediately force a different interpretation that implicitly criticizes Agassiz and Zealy’s dehumanization of their ‘scientific subjects.’

Taken alone, this commentary ought to meet the bar for transformation.259 However, Weems’ reframing and recontextualization of the Agassiz images may produce other “new insights,” as well.260

A second reading of the series that employs critical analysis establishes another layer of meaning that also qualifies as transformative because Weems not only criticizes the images and image-makers directly, but gives the pre-existing works an entirely new identity. Weems suggests that the formal alterations were intended to give the works new meaning because “they look very different once they’re behind glass because the glass and the text becomes really, really important to how the audience is being asked to engage with the photographs.”261 The intended engagement may promote a critique of the images and Agassiz, as described above, or it may be something constructive rather than deconstructive.

259 Campbell 510 U.S. at 577.
260 “The artist aims to restore a level of humanity and dignity to these men and women who have historically had no voice.” Kathryn E. Delmez, ed., Carrie Mae Weems: Three Decades of Photography and Video (New Haven and London: Frist Center for the Visual Arts and Yale University Press, 2012), 132.
Writing for *Art in America* in 1999, curator and critic Ernest Larsen saw Weems identifying with the subjects of the Agassiz photographs, but not as a descendant. In the same year, *Art Papers* identified a “strategy of resistance” in the series: by treating the viewer as part of the collective “you” identified in the sandblasted text, Weems “turns each photograph into a mirror, thereby making everyone who sees the exhibition a participant in the story.” Brian Wallis described the recontextualization more poetically: as a transformation of the Agassiz photographs from “representatives of some typology” to portraits of “living, breathing ancestors.”

Writing from a distance of two decades, scholars have ascribed even more profound intent to Weems. Art historian Claire Raymond asserts that Weems acts as an unsentimental, “ethically complex” witness who “enacts justice by transfiguring, bravely and fiercely, the meaning of [Agassiz’s] images.” Law professor Yxta Maya Murray extends the importance of witnessing further, arguing that the witnessing function of works of appropriation art like *From Here I Saw What Happened and I Cried*...
deserve special treatment under law, because “such borrowings illuminate how the violent past informs contemporary political practices.”

Again, Suntrust v. Houghton Mifflin offers guidance. The court understood Randall’s novel to entirely reimagine Gone with the Wind’s black characters, and understood this reimagination as highly transformative:

In TWDG, nearly every black character is given some redeeming quality - whether depth, wit, cunning, beauty, strength, or courage - that their GWTW analogues lacked…Her work, TWDG, reflects transformative value because it ‘can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.’

Similarly, the alteration of meaning afforded by Weems’ interpretations, in which Agassiz’s “scientific” photographs are reconstructed as historic artifacts, portraits, or testimony, are transformative in their physical and conceptual recontextualization of the originals. The new functions for the photographs are also transformatively imaginative, as well, and fulfill the requirement for “a further purpose or different character,” and manifest the “entirely different aesthetic” described in Cariou v. Prince.

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266 Murray, 6.
267 Suntrust, 252 F. 3d 1165 at 1271.
268 Campbell, 510 U.S. 569 at 579.
269 Cariou, 714 F.3d at 706.
A third reading, which includes expert analysis and expands interpretation beyond formal elements and meanings derived from Weems’s input, provides a meaning that demands fair use protection. Yet, such protection would have been unavailable then and would be still questionable today, but it is the most important reading, and the one that demands fair use protection because, under this reading, the photographs are absolutely necessary to the project and permission would have been impossible to obtain.

When the historical conditions of the series’ production are fully explained, it becomes clear that the Agassiz photographs were necessary to From Here I Saw What Happened and I Cried, that Harvard would never have granted permission for the Weems’ intended use, and that the result of Weems’ appropriation is precisely the kind of speech that fair use was developed to protect. I read From Here I Saw What Happened and I Cried as a critique of the institutions that have produced, circulated, conserved, and safeguarded images of brutality against African Americans. As Weems has explained, there are multiple narratives to be found in From Here I Saw What Happened and I Cried, but the foundational narrative is arguably an institutional critique.

Weems begins by confronting the Getty, the “institution on the hill” that dared to use slavery as a “subtext” in its exhibition of nineteenth-century images of African
Americans. But all of the institutions and collections from which she “lifts” her material are also implicated in this critique, including the Peabody Museum of Archaeology and Ethnology and its parent institution, Harvard University. This reading requires considerable attention to both the situational context of Weems’ appropriations and the responses to her appropriations.

Weems claims to have been surprised by Harvard’s response to her unauthorized reproduction of their photographs, despite signing a contract that clearly notified her of prohibitions against copying the images. Prior scholars have also treated the controversy as a byproduct rather than an expected and desired result. Weems may have assumed that Harvard would not sue; after all, she had used the same photographs in Sea Islands Series without comment from Harvard. She subsequently stated, “I wasn’t looking for a fight. Not that kind of a fight...It was sort of the unintended consequences of my actions.” But when Harvard threatened to sue, Weems’ response was quite strong:

I think that I don’t really have a legal case, but maybe I have a moral case that could be made that might be really useful to carry out in public. And so after worrying about it and thinking about it, I called them up and said


Conversation with the author. Annual Rothschild Lecture, Nasher Museum of Art, Durham, NC March 6, 2014. Recording on file with the Nasher.
I think actually your suing me would be a really good thing. You should, and we should have this conversation in court.272

I expect that the institution’s response was both highly predictable and central to Weems’ artistic goals. Furthermore, I think Weems well understood the consequences of her “lifting” and welcomed the controversy. Weems’ prior use of reproductions of Harvard’s archival material in Sea Island Series went unchallenged, which may be due to Harvard’s ignorance of the use. Or perhaps Weems’ prior breach of contract in her reproductions for Sea Island Series was left unquestioned because the images were presented in a straightforward manner, without an overlay of text or other mediating visual elements. Weems may not have been feeling pugilistic when she began work on the series, but I read From Here I Saw What Happened and I Cried as being, ultimately, a provocative response to the means by which institutions such as Harvard and the Getty sustain privilege and power over time: the careful maintenance of narrative orders. From Here I Saw What Happened and I Cried critiques the existence and production of Agassiz’s daguerreotypes, but also sharply criticizes the contemporary ownership, conservation, and dissemination of these images by their owner, Harvard. Thus, Weems criticizes the

images and the image-makers, but also the current owners of the images, for which transformative use provides no obvious precedent.

What could Weems have found so objectionable about Harvard’s treatment of the Agassiz daguerreotypes? Weems has never fully described her visit to the Peabody, when she broke her contract and photographed the daguerreotypes. But in 2012, law professor and novelist Yxta Maya Murray repeated Weems’ visit to the Peabody, was granted access to the photographs, and wrote an account of the visit that is profoundly disturbing: she described the “gilt-framed” daguerreotypes in “exquisite red-velvet covered hinged boxes” as “both as bijoux as Cartier and the worst things I had ever seen.”

The unveiling of the images affected her greatly:

I could not read them apart from their context, which was as the well-tended wards of the ‘richest university in the world.’ The atrocity that led to their making almost submerged beneath the joaillier’s unveiling ritual, a ceremony that spoke to their rareness, their expensive perfection, then to pain and trespass. I fear they have become luxury items.

As Murray was looking at the daguerreotypes, a young and “spectrally-pale” archivist-in-training offered her opinion on the objects:

“I love the boxes,” one of the archive-studies trainees suddenly said in the hush. The girl admired the ingeniously crafted velvet and leather pyx that housed the daguerreotypes. She moved her hands together, pretending to handle the frames. “I love things that fit together.”

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273 Ibid., 49.
274 Ibid., 50.
275 Ibid., 49.
The young archivist saw the daguerreotypes as parts of beautiful objects, not records of abuse. I believe that this aestheticized approach to the images, which is fostered by the conditions of preservation and presentation described by Murray, is what Weems intended to critique in *From Here I Saw What Happened and I Cried*. In the situation described by Murray, images of cruelty and violence have been conserved and safeguarded by an “institution on a hill,” where they have been aestheticized and sanitized to the point that their intrinsic horror is no longer noticed, even by archivists who should be expected to understand and respect the history and implications of these objects.

By reframing the images in a “screaming and red” series, and placing directive text between viewer and the image, Weems negates the possibility of unblemished admiration. The texts, “YOU BECAME A SCIENTIFIC PROFILE,” “A NEGROID TYPE,” “AN ANTHROPOLOGICAL DEBATE,” “& A PHOTOGRAPHIC SUBJECT,” tell the viewer how the photographic subjects were seen by those who made these daguerreotypes, but also imply the boundaries of their permitted uses and interpretations, which have long been determined by their owner, Harvard.

Necessity is the subtextual foundation of the most compelling arguments for transformative purpose. Even the most conservative copyright theorists and attorneys
admit the value of necessity as a justification for appropriation. Appropriation is most likely to be sanctioned by a court when the “raw material” is deemed a necessary element of the second work, something that could not be created afresh by the appropriation artist and sustain the same effect. It is also likely to be seen in a positive light when the copyright holder is unlikely to give permission. In *Suntrust v. Houghton Mifflin*, the Eleventh Circuit explained that

> The Mitchell estate seems to have made a specific practice of refusing to license just the sort of derivative use Randall has undertaken -- a factor that further undermines [the estate’s] copyright claim.277

If criticism of Harvard was Weems’ object, then appropriating the images was absolutely necessary to the creation of *From Here I Saw What Happened and I Cried*. Weems was not only criticizing slave photography in general, she was criticizing Agassiz’s images and Harvard’s treatment of these images quite specifically. To make this criticism, it was necessary to use the photographs, or else dilute the critique to a point of unrecognizability. Slave photographs from any other collection could not be perceived as indictments of the Harvard photographs, and images would not indicate a critique of Harvard’s right to own, display, and control the interpretation of Agassiz’s images. Harvard’s response to the series, and its responses to others who have asked to

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\text{\textsuperscript{277} Suntrust, 268 F.3d at 1257.}
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use the images for critical purposes, support the assertion that permission for use would never have been granted to Weems.

Therefore, a reading of *From Here I Saw What Happened and I Cried* that includes formal analysis, the artist’s own statements, and contextual evidence of the kind supplied by art historical analysis demonstrates that the Agassiz photographs would have been otherwise available to Weems through the customary channels of permission or licensing. Not only did Weems criticize the images, and the makers of the images, she strongly criticized the owner of the images from whom she would have required permission. Her criticism of the images and the institution that continues to safeguard them is the kind of commentary that a critical object, in this case Harvard, typically endeavors to suppress.278 But, as the Eleventh Circuit explained in *Suntrust v. Houghton Mifflin*, “copyright does not immunize a work from comment and criticism.”279

This is exactly the kind of use that the fair use doctrine has protected most consistently.280 And yet, to say that Weems’ use should be deemed a legal fair use is not to say that it was ethical.

First, prior interpretations that describe Weems as a witness or ancestor are beautiful, if generous, interpretations of *From Here I Saw What Happened and I Cried* that

278 Ibid., at 1265. (Emphasis in original.)
279 Ibid.
280 *Campbell*, 510 U.S. at 524 (1994).
overlook or excuse a key fact of Weems’ appropriations: the recirculation of images of brutality. If Weems is criticizing Harvard for aestheticizing and recirculating images that were made in a context of trauma, subjugation, and dehumanization, then how is she not complicit in the same? Although its content is painfully difficult to navigate, From Here I Saw What Happened and I Cried is also, formally, an exquisitely beautiful work of art. When the series debuted at the Getty, journalist Andrea Liss asked if it was possible “to represent the victim without re-victimizing the victim.”\textsuperscript{281} Art historian Cherise Smith has criticized Weems for reproducing the instant of the subjects’ debasement.\textsuperscript{282} Biology and gender studies professor Anne Fausto-Sterling, who has explored some of the most haunting ‘scientific’ images ever made,\textsuperscript{283} and who explicitly refused to reprint images of Saartje Baartman (“the Hottentot Venus”) in a 2000 essay on Baartman, argues that the recirculation of these images promotes the continued re-victimization of photographic subjects.\textsuperscript{284} When Weems detected a latent censorship in the Peabody’s permitted uses and established narrative for the Agassiz daguerreotypes, she “lifted” the redacted material from its gilt frame, blowing up the marks of cruelty, violence, and

\textsuperscript{282} Raymond, 30-31.
\textsuperscript{284} Fausto-Sterling, “Gender, Race, and Nation,” 203.
torture that might be hard to perceive at three inches by four inches. She tinted them, added text and glass, and put them on display.

One can argue that, in order to criticize Harvard’s treatment of these images, it was necessary to reprint, enlarge, and recirculate them. Weems is not Fausto-Sterling; her medium is not the academic text. But surely Weems was aware of the possibilities that inhere in recirculation, including the “risk of a possible sadistic bent” and scopophilic pleasure in a contemporary viewer raised by Claire Raymond. The conceptual obstacle presented by the fact of recirculation modifies scholarly support for Weems’ appropriations as reimagined portraits, efforts to restore dignity to the photographs’ subjects, or acts of witnessing the subjects’ traumatic experience.

Second, Weems broke her contract with Harvard when she reproduced the images. One can argue that the contract was of questionable validity: the contract viewed by Murray during her visit to the Peabody did not explicitly mention copyright in the photographs; instead, it deployed the kind of “property talk” that is often used by museums to create copyright-like conditions that limit visitor access to and reproduction

285 Raymond, 39.
287 Raymond, 26, 35, 40.
of artworks in the public domain. Harvard probably threatened to sue Weems for breach of contract and copyright infringement, but neither Weems nor Harvard has explicitly described the terms of the threat. However, subsequent reproductions indicate that Harvard claims copyright over the daguerreotypes. In a press release for Weems’ 2014 retrospective at the Guggenheim, the copyright notice for “AN ANTHROPOLOGICAL DEBATE” describes Harvard’s assertion of an intellectual property right: “From an original daguerreotype taken by J.T. Zealy, 1850. Peabody Museum, Harvard University. © Copyright President & Fellows of Harvard College, 1977. All rights reserved.”

Why is 1977 the copyright date for a photograph made in 1850? The daguerreotypes were purportedly found in the Peabody’s attic in 1975 or 1976.

288 “The agreement required me to promise that no photographs I took at the Peabody would be exhibited except in connection with university teaching, or in unpublished documents, unless I obtained prior written permission from the Peabody and Harvard University. The contract specifies that if I breach it, I will owe ten thousand dollars in liquidated damages.” Murray, 49. See also Robin J. Allan, “After Bridgeman: Copyright, Museums, and Public Domain Works of Art,” University of Pennsylvania Law Review 155, no. 4 (April 2007), 961, 980.
289 Murray states that “its administrators argued that Weems had freebooted their copyright to the Agassiz daguerreotypes and that she also violated her contractual promise not to use images taken in the Peabody without Harvard’s permission” and cites a telephone conversation with Dr. Pamela Gerardi, Director of External Relations, Peabody Museum of Archaeology and Ethnology. Murray, 5.
291 “Guggenheim Museum Presents Carrie Mae Weems: Three Decades of Photography and Video,”
Agassiz’s son, Alexander, is believed to have given the daguerreotypes to the Peabody in 1935. Or they may have been included in a collection of specimens donated by Agassiz himself in 1859. Or they may not have been given to Harvard at all. In fact, it is wholly unclear when and under what conditions the daguerreotypes were given to the Peabody. The imprecise history of Harvard’s acquisition raises questions about clear title and valid copyright, and it thus uncertain whether or not Harvard’s copyright in the photographs is valid.

If the works were copyrighted by Agassiz (or another copyright holder) in 1850, the copyright would have run out by 1878. If the works were by copyrighted by Agassiz (or another copyright holder) before the Copyright Act of 1976 took effect, then the copyright should have expired sometime in the middle of the twentieth century. The only possible explanation for a Harvard copyright over the Agassiz photographs valid in 1995 is a twentieth-century publication date. If daguerreotypes were indeed unpublished when they were found in a Peabody attic in 1976, then copyright would have vested in the copyright holder, presumably Harvard, on the date of first

293 Murray, 51.
294 Ibid., 51-52.
295 Ibid., 51.
296 Ibid., 48-52.
297 Copyright Act of May 31, 1790, 1 Stat. 124.
publication, and a 1977 copyright would extend into the twenty-first century. But no publication history supports this explanation.

After Harvard’s discovery of the images, they were exhibited by the Peabody in From Site to Sight: Anthropology, Photography, and the Power of Imagery in 1986, and one of the daguerreotypes was featured on the cover of the exhibition catalogue. In 1992, all fifteen daguerreotypes were loaned to the Amon Carter Museum for an exhibition titled Photography in Nineteenth-Century America. Harvard has authorized reproductions for scholarly works, including Brian Wallis’ article “Black Bodies, White Science” and its numerous reprints. But Harvard has been less supportive of more overtly critical approaches to Agassiz. In 2012, a Peabody employee explained to Murray that Weems’ use was denied because “the university doesn’t want to be associated with exploitation.” In the same year, Swiss historian Hans Fässler curated Glaciologist, Racist: Louis Agassiz (1807-2012), an exhibition that documented and refuted Agassiz’s

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299 17 U.S.C. § 303(a)
300 Murray, 26.
304 Ibid., 50.
racial theories. Fässler sought permission from Harvard to reproduce the slave
daguerreotypes and a Harvard-owned portrait of Agassiz When Fässler contacted the
Harvard Art Museums for permission to reproduced a portrait of Agassiz, he was told
that the institution found “some of the language in [Fässler’s] exhibition materials,
although interesting, aggressive towards Agassiz, who was a very influential figure at
Harvard.” Fässler eventually received permission for the portrait, but not the
daguerrotypes, and the director of communications for the Harvard Art Museums
explained that the original permissions decision was made by “a very new, temporary
employee” who “was acting in good faith but made the wrong decision” in the absence
of customary oversight. Refusal of permission for the daguerrotypes was, according to
the Peabody:

Based on a current blanket museum policy that covers all images of nudes
in the Museum’s collection taken by any photographer at any period in an
exploitative manner (which includes other images besides those
commissioned by Agassiz). This policy does not focus on Agassiz or his
beliefs.

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305 Rentyhorn Petition, http://www.rentyhorn.ch/
306 Carmichael.
307 Ibid.
308 Ibid.
309 Jessica Desany Ganong, imaging services coordinator of the Peabody, quoted in Ibid.
Yet, Harvard features ten of the fifteen Agassiz daguerreotypes on its own Weissmann Preservation Center web site, five of which feature bare-breasted female subjects. A thirtieth-anniversary edition of the From Site to Sight exhibition catalogue will be published in 2017, and the new edition features a restored Agassiz daguerreotype on its freshly redesigned cover (Fig. 16). Reviewed together, rather than as independent replies to singular requests for access or reproduction, the responses of Harvard administrators evince a desire to control the circulation, reception, and meaning of the daguerreotypes.

Regardless, when Weems signed the contract with Harvard, she made an agreement, which she later explicitly broke, with no notification to the institution. When contracts are made, there is a presumption that both parties intend to keep the promises therein. Without this presumption, there is little incentive to make agreements. Absent problems with the contract, such as a lack of true ownership or undue influence, Weems determined her contractual commitment to Harvard to be less important than her reuse of the images, which carries a weight of moral and legal obligation.

\[30\] “Joseph T. Zealy,” Daguerrotypes at Harvard, accessed September 13, 2016, http://preserve.harvard.edu/daguerreotypes/browse-studios.shtml Thumbnail versions are accessible to the public, but full-size images are limited to members of the Harvard community. This restriction may reflect the policy of curtailing access to “exploitative” images. But it also supports the assertion that Harvard wishes to control interpretation of the images, because “drag and drop” copying would make the images available for use in lectures, on blogs, or appropriationists.

From Here I Saw What Happened and I Cried raises the point that fair use and ethical use are not synonymous: just because a work should be seen as a legal fair use does not mean that it should not be questioned on other grounds. A disturbing trend in recent legal scholarship uses debates about the definition and utility of transformative use to thinly veil hidden agendas about the expansion and strengthening of fair use and free speech rights and the concomitant contraction of the copyright holder’s power.312 As Tushnet explains, “most debates about the proper meaning of transformative use are really about this larger shift towards more robust fair use.”313 Attempts to merge the two in order to criticize both lead to rhetorical confusion and allow assertions that failings in the sub-doctrine of transformation undermine the doctrine of fair use.314 Instead, transformation must be discussed as the limited, specific doctrine that it is: a justification for an artist’s fair use purpose in the use of a reproduction.

Transformation may not be an apposite heuristic for songs, books, feature films, software, databases, or many other forms of copyrightable subject matter. It may not be the right heuristic ten, twenty, or fifty years from now. But, for the first twenty-five years of its existence, transformation was the right heuristic for contemporary art

Transformative use changed the way appropriation art was adjudicated by providing

312 Rebecca Tushnet, “Content, Purpose, or Both?,” 870.
313 Ibid.
314 Ibid., 874.
judges with a lens through which to approach fair use determinations for conceptual artworks. It gave judges a means to approach the challenges of appropriation art, as it better described what appropriation artists actually do, without importing a term from another discipline and creating unreasonable expectations for artwork.
2. ART: Problems of Interpretation

Philosopher Noël Carroll has called for the recuperation of intention in the reading of contemporary art, characterizing the production of meaning as a “conversation” and instructing that in interactions, it is necessary to consider others’ intentions in order to ascertain their meaning. Carroll explains that Roland Barthes’ theory of authorship, briefly discussed in Chapter 1, makes a distinction between ordinary and aesthetic language.¹ When parsing aesthetic, rather than ordinary, language, it is possible to create a distinction that divorces art from acting directly on reality.² When art no longer acts on reality, he argues, “the conceptual pressure to make sense of it in the light of authorial intent dissolves, and the reader can explore it for all its potential meanings and associations.”³ But Carroll sees no such distinction between the aesthetic and the ordinary:

“When we read a literary text or contemplate a painting, we enter a relationship with its creator that is roughly analogous to a conversation…and conversations, rewarding ones at least, involve a sense of community or communion that itself rests on communication.”⁴

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² Ibid., 162.
³ Ibid.
⁴ Ibid., 174.
To be properly understood as transformative, some works of appropriation art, such as Richard Prince’s *Canal Zone* series, must be understood as conversations that are intimately personal approaches to source material, and which are often complimentary, rather than critical. Trying to understand such artwork as deconstructively critical of something external to the artist only renders it inscrutable. Modes of interpretation that dismiss artists’ statements and overemphasize the viewer’s production of meaning tend direct interpretation away from areas of inquiry that may be critical to understanding a work of appropriation art as transformative.

Analysis of appropriation art often focuses on its pre-existing content, for obvious reasons: formally, these artworks are mostly, and sometimes entirely, composed of pre-existing content. When formal analysis is complete, but pre-existing content needs to be better understood before the artwork can be fully interpreted, the observer is typically presented with two paths forward: (a) investigate the artist’s choices in selection and assembly, or (b) investigate the pre-existing content and make one’s own decisions about the meaning produced by the presence and juxtaposition of the components. Of course, there is also option (c), synthesis of both interpretative models. This is the path less taken by critics of appropriation art, and the approach advocated by this chapter.
Art critical discourse often describes appropriation art as a critique of authorship, authenticity, ownership, and reproducibility. One may argue that authorship, authenticity, ownership, and reproducibility must be central concerns in a form of artmaking dependent on the reuse, recycling, and adaptation of copies. But this is not necessarily true of all appropriation artworks. These issues are not always central concerns of artists in the twenty-first century; instead, such concerns are often imposed by viewers and critics. Such impositions are not necessarily inaccurate. However, when authorship and originality are foregrounded, other aspects essential to the interpretation of an artwork’s transformative meaning may lose force, or may be neglected altogether.

Theories that focus on authorship and originality, and legal arguments that rely on these theories, emphasize a competitive relationship between an appropriation artist and the artist from whom he or she appropriates. Such analyses often neglect consideration of more personal, intimate reasons for reuse that better establish transformative purpose. Appropriation artworks may be driven by ideas and motives derived from consideration of and investment in themes of identity, gender, race, and sexuality or exploration of the specific psychology and experience of an individual artist. Such approaches can be highly transformative, but understanding of these works is often frustrated because they are instead explained in terms of authorship and
originality, even when the personal aspects of appropriation art often hold the key to its transformative qualities.

In the twenty-first century, critical discourse devoted to appropriation has steadily developed in the direction of hybridity, identity, relations, and ethics. This shift in direction embraces the facts of easy reproduction and high accessibility, focusing on how artists copy, under what circumstances, and with what effects. Some of the most interesting inquiries take these effects to be relational, producing connections between objects and people. This renewed attention to interpersonal relations has disinterred the presumably dead author, reviving interest in the writings and statements of appropriation artists, which seems only suitable for modes of inquiry and interpretation that treat appropriation as a strategy of construction or an examination of the artistic self.

Art critical discourse on appropriation is sprawling and contradictory, yet legal scholars often write as if a unitary critical perspective on appropriation can be identified. Legal discourse tends to import terms and concepts from art critical discourse in ways that concretize and simplify arguments and definitions that were originally fluid and complex. For example, the definition provided by law professor William Fisher and his co-authors in the introduction to this dissertation:

The term “appropriation art” is thus used for those works that comment on questions of authorship through appropriation...[which] are defined as
appropriation art since they directly comment on issues of authenticity, ownership, and reproducibility.⁵

These flattenings are not the fault of art historians or critics; when any discipline borrows the language of another, complex theories are often translated in reductive ways. However, such arrogations are especially problematic in the case of appropriation art because art critical discourse on the subject of appropriation is often itself appropriated from other disciplines. The result of all these importations is an arcane, often inscrutable vocabulary that can be extremely difficult to understand, and is unsuited for the specificity and clarity needed for legal rulings.

In the case of appropriation art, art critical interpretations that take race, gender, class, sexuality, psychology, and other forms of personal identification and experience seriously have often been dismissed as less deserving of critical and theoretical attention. This is because, when assessing works of appropriation art, extrinsic motivations are often prioritized over intrinsic motivations for taking and incorporating a reference. Extrinsic factors that inform the appropriation artist’s experience and artwork may give rise to, for example, political and social commentary and criticism. In such cases, the thing is taken or copied to make a critique of the thing, and the recognition of the thing/copy is understood as necessary so that the artist’s critique may

⁵ Fisher et al., 280.
be understood by the viewer. As described in the last chapter, Carrie Mae Weems needed Harvard’s daguerreotypes to criticize Harvard, just as Glenn Ligon needed Robert Mapplethorpe’s images to explore the web of scholarly and critical woven around The Black Book; any substitute would have rendered the critique incomprehensible.

By contrast, desire, attraction, repulsion, frustration, and curiosity are intrinsic motivations for taking and using an image. Ligon’s commentary on Mapplethorpe’s images was extrinsically and intrinsically motivated: he wished to address his physical attraction to the men in Mapplethorpe’s photographs and understand the ambivalence that this attraction produced. Notes on the Margin of the Black Book is, as its name overtly declares, about The Black Book; no other images could substitute because sexual attraction is personal, unpredictable, and specific. This requirement is not easily explained by extrinsic motivations, but by the intrinsic propulsion of desire. Yet, absent Ligon’s statements on his attraction to and ambivalence towards The Black Book, how could a court, or any viewer, be expected to incorporate the intrinsic, personal aspects of the artwork’s creation into an interpretation that explains why The Black Book was an essential part of Notes on the Margin of the Black Book? In fact, it is difficult to imagine how personal and intrinsic motivations can possibly be understood without recourse to an artists’ statements.
Viewing twenty-first century appropriation artworks exclusively through the lenses of authorship, authenticity, ownership, and reproducibility can lead to peculiar and unhelpful interpretations—especially when the transformative purpose of a work of appropriation art is at issue in a copyright infringement dispute. Richard Prince is a significant example: Prince rejects theories of his work that focus on authorship and originality, and it is difficult, if not impossible, to understand why works such as the Canal Zone series should be understood as transformative fair uses of pre-existing material through an interpretive lens that requires appropriation art to critique these issues.

In the last chapter, I explained why, in cases like Cariou v. Prince that concern works of appropriation art, multiple meanings must be admitted, formal analysis is insufficient to establish meaning, artist’s writings and statements are critical to the establishment of transformative use, and the only “reasonable observer” of appropriation artworks is an expert observer. This chapter turns to the language used by “experts”: art historians, critics, scholars, and other art professionals.

The first section of this chapter provides an overview of art historical definitions of the term “appropriation,” explains why definitions that accrete vocabulary from other disciplines create unhelpful expectations for visual artworks, and suggests that art
historical discourse shape a vocabulary for appropriation art that relies less on borrowed terms.

The second section offers a cursory history of the theoretical understandings of authorship, representation, and originality with which appropriation art is most often identified. This first half of this section explores how art historians, curators, and art critics have theorized the ways in which appropriation fits into a linear history of art, and how shifts from artistic intent to viewer interpretation have developed. I suggest that, in the future, lawyers, judges, and legal scholars should rely less on these interpretations to assess transformativeness and fair use. I also suggest that the revisionist history of The Metropolitan Museum of Art’s 2009 exhibition *The Pictures Generation: 1974–1984* effaced the plural history of writing on appropriation artists such as Richard Prince, Sherrie Levine, and Cindy Sherman. The latter half of this section explores how art historians, curators, and art critics have addressed appropriation artworks with synthetic approaches that combine poststructuralist analysis with artists’ writings, and suggests that lawyers, judges, and legal scholars should rely more on these synthetic interpretations when expertise on appropriation art is required to assess transformativeness and fair use. I also propose that the Whitney Biennial of 1993 greatly troubled linear approaches to the theorization of art history and opened the door to more heterogenous understandings of appropriation art that also attend to the roles of
identity, gender, race, sexuality, and psychology. Finally, I explain why synthetic interpretations better explain twenty-first century works of appropriation art that do not necessarily take authorship, representation, and originality as their subjects.

The final section draws upon a selection of artworks from Richard Prince’s 2008 series *Canal Zone* to apply an interpretive model that demonstrates why artist’s writings and statements are required references for the interpretation of appropriation art. Here, I revive the discussion of differences between fair use, transformative use, and ethical use, explaining why Prince’s use of Patrick Cariou’s photographs, like Weems’ use of Harvard’s archival material, was fair and transformative, but not necessarily ethical. I conclude that theories of appropriation that incorporate, or at least allow for, an artist’s intentions in the establishment of meaning are superior to those that wholly reject artistic purpose as meaning-determinative, especially as the legal and art critical definitions of appropriation adapt to incorporate the concept of transformation.

### 2.1 Defining Appropriation

One of the first and most important issues addressed in any legal inquiry into appropriation is the definition of the term. Thus, definitions of appropriation

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*In their appellate brief, Prince’s lawyers expended considerable effort in defining appropriation as a legitimate form of art. Joint Brief for the Defendant-Appellants, Cariou v. Prince 714 F.3d (2d. Cir. 2013) (No 11-1197) at 8-20. This may seem absurd to art historians but was probably time well spent given the district court’s derisive attitude towards the operation. 784 F.Supp.2d 337 (S.D.N.Y. 2011) at 343, 348.*
established by art critics and art historian are of significant and of timely importance to the ongoing development of fair use jurisprudence. Conversely, legal definitions have the power to alter art historical definitions, which flow between art critical discourse and legal discourse.

For example, in Cariou v. Prince, the Second Circuit adopted the Tate Glossary’s definition of appropriation: “the more or less direct taking over into a work of art, a real object, or even an existing work of art.” The court used the definition from the brief provided by Prince’s lawyers, which included a photocopy of the glossary web page, and which further defined appropriation:

The purpose of appropriation art is “to create a new situation, and therefore a new meaning or set of meanings, for a familiar image.” Art historians explain that appropriation art is important because it “questions the nature or definition of art itself” by raising “questions of originality, authenticity, and authorship.”

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8 Joint Brief for the Defendant-Appellants, Cariou v. Prince 714 F.3d (2d. Cir. 2013) (No 11-1197) at A446. The full quote from the brief begins with “In the words of one artist,” but I have excerpted this clause. The “artist” referred to by Prince’s lawyers is Sherrie Levine, and they extracted this definition from the Tate Glossary of Art Terms. It is a fiction: Levine has never described her work this way, and has refuted interpretations of work that assign this meaning. Professor Merilyn Fairskye of the Sydney College of the Arts is responsible for this quote, which she delivered in an interview in 2011. Andrew Taylor, “Appropriate Treatment Can Make a Master,” Sydney Morning Herald, October 16, 2011, http://www.smh.com.au/entertainment/art-and-design/appropriate-treatment-can-make-a-master-20111015-11qg3.html
Subsequently, the *Tate Glossary* changed its definition of appropriation, incorporating the influence of the *Cariou v. Prince* decision. It now reads:

“Appropriation in art and art history refers to the practice of artists using pre-existing objects or images in their art with little transformation of the original.”

Therefore, despite the establishment of appropriation as a recognizably transformative purpose and a fair use of copyrighted material, the *Tate Glossary’s* restatement repositions appropriation art and copyright law as oppositional. This arrogation of legal language reinterprets transformation, a legal term of art that was recently redefined to include appropriation, and redefines appropriation so that it is more likely to be excluded from recognition as a fair use. The *Tate Glossary’s* definition of appropriation art creates, rather than recognizes, an adversarial relationship between appropriation art and copyright law. Such appeals to terms beyond art discourse tend to create less precise, more problematic definitions of appropriation.

Eminent art historian Leo Steinberg has said of artistic reuse that “we have plenty of bad-mouthing caconyms for the thing under discussion, but no decent name.” Since the term appropriation came into common art historical usage in the late 1970s, its meaning has expanded to encompass nearly any use of pre-existing images

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9 “Appropriation,” *Tate Glossary of Art Terms*, http://www.tate.org.uk/learn/online-resources/glossary/a/appropriation (Emphasis mine.)

10 Steinberg, 20.
and accreted ineffectual information from fields beyond art history, which has eroded the term’s significance and diluted its meaning. In his 1978 essay, “The Glorious Company,” Steinberg explained:

The reappearance of old motifs in new art are terms of two kinds. One set of terms depersonalizes the process, negating intentionality and the variety of motivations artists bring to their tasks. A second set allows the process to be volitional, but in a reprehensible sense, as though the will involved were delinquent.11

Steinberg further notes that the first set of terms used to describe appropriation assume that artists are “inspired” by or “influenced” by prior works, and operate on a “reflex” or “involuntary response” that “suppresses the possibility of deliberateness.”12 Under this rubric, “artistic decisions are not reactions to irresistible causes; artists find serviceable material and put it to work.”13 In the second type, “not one [term] is indigenous, evolved in, or proper to the experience of art; all are fetched from elsewhere.”14 “Quotation” and “plagiarism” are taken from literary theory, while “stealing” and “borrowing” come from economics (and, I would add, law). Steinberg further explains that “the application of inappropriate terms to artistic practice has toxic side effects” because “it activates certain attitudes, censorious or defensive, which fit

11 Ibid., 20-21.
12 Ibid., 21.
13 Ibid.
14 Ibid.
only the original terms, not their new referents.”¹⁵ For example, there is no way to
“quote” an image in another image as I am quoting text from Steinberg’s essay here. But,
as described in the first chapter, the literary origins of copyright have conferred a
linguistic framework that compares the behavior of authors to artists, and readers to
viewers, on our discussion of images. “Borrow,” Steinberg claims, is yet worse, as it
implies the owner’s consent.¹⁶ These terms are inapposite, he explains, because they urge
viewers to see through the lens of analogy, which may cause them to anticipate that
artworks function as books or consumer products rather than as artworks.¹⁷

Steinberg’s analysis was published in the exhibition catalogue for *Art about Art*
(1978), curated by Jean Lipman and Robert Marshall for the Whitney Museum of
American Art.¹⁸ In this exhibition, Lipman and Marshall grouped works by theme:
“About the Artist,” “About Old Masters,” “About Modern Masters,” “About Early
American Art,” and “About Recent Art.” The show included works by an array of artists
including Saul Steinberg, Andy Warhol, Tom Wesselmann, Robert Rauschenberg,
Joseph Cornell, Audrey Flack, Robert Colescott, and Masami Teroka. In the exhibition
catalogue, Lipman and Marshall’s introductions to each theme address copying and

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¹⁵ Ibid., 24.
¹⁶ Ibid., 24.
¹⁷ Ibid., 22-23.
reuse as routine in the histories of art, explaining differences in the past and present as “the contemporary artist encourages, and in fact expects, the viewer to be aware of his subject and his deliberate restyling.” Steinberg’s essay and the exhibition itself made a persuasive case for reuse, recycling, copying, and incorporation of pre-existing images as artistic activities that have been normalized over centuries of repetition.

Steinberg never identifies the right term for describing appropriation. Instead, he describes artworks by Michelangelo, Rembrandt, Raphael, Currier and Ives, and Charles Addams, among others. Instead of using the shortcuts made possible by terms like “appropriation,” “borrowing,” and “copying,” Steinberg describes artworks and the material they repurpose lavishly, with a munificent attitude toward artists who work with pre-existing material, illustrating what he calls “the range of incentives, the hospitableness, and the wit that induces artists to join other art to their own.” Freed from the expectations imposed by borrowed vocabularies, the works can be perceived differently, and more generously.

Many definitions of appropriation published by dictionaries, art textbooks, and critical texts recirculate the problematic terms identified by Steinberg. Dictionary definitions cannot be the sole source of meaning, as language changes too quickly,

20 Ibid., 9-10.
21 Steinberg, 25.
especially in a context of semiotic play, which frequently informs appropriation art. But
definitions do provide some idea of the understanding of the term as it is used inside
and outside the borders of art discourse. Merriam-Webster states that to appropriate is “to
take exclusive possession of...to set apart for or assign to a particular purpose or use...to
take or make use of without authority or right.”22 The Oxford English Dictionary
establishes this definition: “To make (a thing) the private property of any one, to make it
over to him as his own; to set apart.”23 Permission. Possession. Authority. Privacy. Each
dictionary definition presupposes an individual property right and implies a form of
transgression. It is all highly reminiscent of the definition provided by Black’s Law
Dictionary: “The exercise of control over property; a taking of possession.”24

The definitions encountered by students of modern and contemporary art are
similarly straightforward, if less attentive to transgressions of property. Art historian
Marilyn Stokstad avers that “appropriation is the representation of a preexisting image
as one’s own.”25 To say “one’s own” is inapposite, as the obviously alien nature of the
preexisting material is an important element in many artworks. For example, artist Sarah
Charlesworth is obviously not a publisher of newspapers, and her Modern History series

24 Garner, 110.
of 1978-1980, which comprised altered photographs of newspaper pages, would be less powerful if she presented the photographs as her own. (Fig. 17) The series asks significant questions about the way readers observe images in the media, and Charlesworth’s commentaries on the design of the front page, the prevalence of men in the news, and the drama of photojournalism would be lost if she presented the newspaper as something that she created rather than a real thing drawn from the quotidian experience of reading the newspaper that she and the viewer presumably share. Art historian H.H. Arnason defines appropriation as “the tactical borrowing and recontextualization of existing images.” As Steinberg explained, borrowing assumes a participant owner, which raises the specter of property, permission, and transgression. In his influential survey of post-1945 art, art historian Jonathan Fineberg writes that appropriation is the act of “taking something wholly formed already and making it your own,” as well as “the new critical language of the last quarter of the century.” To “make” one’s own seems more precise, as this formulation does not imply the kind of deceit that Stokstad suggests, and points to the appropriation artist’s own input and operations on the image, which, incidentally, is also what transformation seeks to identify.

27 Fineberg, 389.
Other authors focus on the legality of appropriation, relying on terms beyond the field of art to characterize appropriation as an artistic decision. Art historian David Evans, in his edited edition on appropriation, distinguishes between forms of reuse and suggests that appropriation proper has a “distinctive emphasis on unauthorized possession.” 28 Emphasis on “possession” and “authorization” is overtly legal and inappropriately describes the many artworks that include material with permission or material that belongs to the public domain.

In *Practices of Looking: An Introduction to Visual Culture*, visual studies professors Marita Sturken and Lisa Cartwright define appropriation as “the act of borrowing, stealing, of taking over others’ works, images, words, meanings to one’s own ends.” 29 Again, borrowing raises issues of property and legality, and stealing characterizes the act as transgressive and frankly illegal. Sturken and Cartwright’s definition fails to account for uses of material obtained via permission and license, material from the public domain, or fair uses.

In *Art Since 1900*, the historical overview edited by art historians Hal Foster, Rosalind Krauss, Benjamin Buchloh, and David Joselit, appropriation art is defined as the “radical refusal of traditional conceptions of authorship and originality, made

unmistakable by its position at the margins of legality.”\textsuperscript{30} Defining an artistic practice made normative over centuries as “radical” is an enormous stretch, and the overt emphasis on “legality” is, again, an inaccurate descriptor for artworks that use material from the public domain, permitted material, or material used fairly. Appropriation routinely serves as an anti-capitalist gesture in their other writings, which are addressed later in this chapter.

Finally, art historian John Welchman writes that “seen across one of the longest horizons, the term ‘appropriation’ stands for the relocation, annexation or theft of cultural properties – whether objects, ideas, or notations – associated with the rise of European colonialism and global capital.”\textsuperscript{31} Welchman’s heavy-handed assignment is replete with property metaphors and attaches tremendous social, political, legal, and economic significance to artistic recycling of images.

Other texts do not define the term. Janson’s \textit{History of Art} does not define appropriation as either a style, strategy, or shared form.\textsuperscript{32} Instead, the editors give detailed descriptions of the development of photography in the work of Cindy Sherman,

\begin{quote}
\textsuperscript{30} Hal Foster, Rosalind Krauss, Benjamin Buchloh, and David Joselit, eds., \textit{Art Since 1900: modernism, antimodernism, postmodernism}, 2nd ed. (New York: Thames and Hudson, 2011), 48. Note the resemblance to the definition provided by Fisher et al. in Note 3 supra.
\end{quote}
Laurie Simmons, Louise Lawler, Barbara Kruger, and Richard Prince; and the development of deconstruction in the paintings of Sigmar Polke; and sometimes use the term as a verb. Such an open attitude toward appropriation is preferable to descriptions that rely on literary, economic, or legal terms like “borrowing” and “stealing.” Nevertheless, the absence of a definition does not help generate a concrete understanding of the term.

Art historian Eleanor Heartney’s *Art and Today* characterizes art that is usually deemed appropriative and artists that use appropriation as either a negotiation of the legacy of Marcel Duchamp’s readymades or influenced by Andy Warhol’s impact on art and popular culture. Instead of defining appropriation as a term or a style, Heartney identifies the creation and reception of works by Sherrie Levine, Barbara Kruger, Haim Steinbach, Jeff Koons, Jean-Michel Basquiat, Keith Haring, and others over two chapters that are dense with description and history. Heartney understands Warhol to be the intellectual progenitor of a line of artists who focus on celebrity and the “play of symbols,” which she observes as negotiating Warhol’s elisions of “high” and “low art.”

Set apart are artists who address the question “what is art?,” which she sees as problematizing distinctions between art and everyday life as well as the role played by

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33 Janson, 1077, 1099, 1096-1097, 1077,
34 Heartney, 16-36 and 40-62.
35 Ibid., 16-36
context in the formation of meaning.\textsuperscript{36} Julian Schnabel, the Young British Artists, Maurizio Cattelan, Ed Ruscha, Richard Prince, Robert Longo, Rachel Harrison, Inka Essenhigh, Jean-Michel Basquiat, Keith Haring, Raymond Pettibon, Barry McGee, Margaret Kilgallen, Jack Leirner, Tom Sachs, Sylvia Fleury, and John Baldessari belong to Warhol.\textsuperscript{37} Sherrie Levine, Ashley Bickerton, Haim Steinbach, Allan McCollum, Tony Cragg, Jessica Stockholder, Sarah Sze, Peter Fischli, David Weiss, Jason Rhoades, Ronald Jones, Sarah Lucas, Arte Povera, the Nouveau Réalistes, Cornelia Parker, Dario Robleto, Tom Friedman, Tara Donovan, Doris Salcedo, Mona Hatoum, Gabriel Orozco, Liza Lou, Andreas Slominski, Katharina Fritsch, Josiah McElheny, and Charles Ledray are said to exemplify Duchamp’s influence.\textsuperscript{38} The effect is uncomfortably reminiscent of a paternity or custody battle, and the categorization recalls Steinberg’s first set of unhelpful terms (“inspiration,” “influence”), which strip agency away from artists, as Heartney does not discuss whether these artists identify with their assigned parentage. But the overall impact of her deep descriptions is a vast improvement over the terse definitions provided by other texts.

Similarly, art historian Terry Smith divides the familiar appropriation artists under either “Retro-Sensationalist Art” or “Critical Postmodernism,” and he chooses not

\textsuperscript{36} Ibid., 40-62.
\textsuperscript{37} Ibid., 16-36.
\textsuperscript{38} Ibid., 48-93.
to define appropriation as a style or practice. The first group is analogous to Heartney’s heirs to Warhol: Smith describes Jeff Koons and the Young British Artists as seeking a “brandlike effect.” The second group identified, whom Smith argues “took up the analyses of media rhetoric by philosophers such as Roland Barthes and devised ways of turning them into different kinds of critical countermedia,” includes Jenny Holzer, Barbara Kruger, Cindy Sherman, Tony Oursler, Thomas Lawson, Lorna Simpson, Gary Hill, Glenn Ligon, Carrie Mae Weems, David Hammons, and Kara Walker (among others), has considerable overlap with Heartney’s Duchamp descendants. Like Heartney and Steinberg, Smith describes rather than defines. Smith’s description suggests that appropriation may be too pervasive and normative to be summarily defined, but still brings us no closer to a working definition of the term “appropriation.”

Other definitions describe appropriation explicitly, and without characterizing it as transgressive, but these are sparse. David Evans breaks appropriation into categories including “Precursors” (which distinguishes between traditional and modern copies); “Agitprop” (which historicizes the dissemination of Communist ideas through propaganda); “The Situationist Legacy” (which assigns a Situationist parentage to contemporary appropriation); “Simulation” (which ties the theories of Jean Baudrillard

40 Ibid., 66.
41 Ibid., 58.
to the Pictures Generation and which Evans calls “closest to the popular understanding of appropriation art”); “Feminist Critique” (which addresses feminist responses to the gendered foundations of genius myths and theories of authorship); “Postcolonialism” (which explores cultural appropriation); “Postcommunism” (which includes Boris Groys and Walter Benjamin); “Postproduction” (which focuses on Nicolas Bourriaud’s theories of appropriation as a form of artistic editing); and “Appraisals” (which focuses on the writings about 1980s artworks)42

These categories are obvious attempts to describe appropriative practices as intersectional with other concerns, foregrounding the motivation behind an artist’s decision to appropriate or the context in which appropriative choices are made. However, the overall effect is confusing, and relies on describing contemporary appropriation through its links to a small set of modern predecessors rather than siting it in the whole of art history. Evans’ opposition between contemporary appropriation and its modern predecessors presupposes a rupture that treats appropriation as exceptional rather than normative, as it identifies postmodernism as a stark break with history.43

42Ibid.
43 This reading of history may be true for modernism generally, but I argue that it is not true for artistic appropriation, which predates modernism by centuries. For a general discussion of the historical ruptures posed by modern art practices, I refer the reader to Marshall Berman, All That Is Solid Melts into Air: The Experience of Modernity, 2nd ed., (London: Penguin, 1988).
Evans’ edited collection serves as an excellent guide to finding consequent writing about appropriation, but unfortunately accretes the material rather than synthesizing it.

Art historian and curator Johanna Burton, who has written extensively on appropriation, defines it as “the borrowing and recasting of existing cultural objects.”

Although I continue to find the term borrowing mildly objectionable for the reasons enumerated above, Burton’s use of “recasting” is productive, as its linguistic roots provoke useful associations: to “recast” a play is to change its actors; to “recast” a sculpture is to make a copy for unknown ends; to “recast” a sentence is to rearrange words in a way that alters meaning but preserves the content of the original. These are evocative associations that do not carry legal intimations or judgments.

Curator Nicolas Bourriaud states that “appropriation art is most often used, in English at least, to describe artistic practices based on the staging of a preexisting work or product.” Bourriaud’s definition guides the rest of this chapter because is descriptive; uses no literary, legal, or economic language; and remains open and flexible enough to nearly any possible reuse, whether transgressive or permitted. “Staging” assigns a high degree of agency to an appropriation artist and directs our attention to his

or her choice, arrangement, and presentation of the preexisting material. It is rich in potential for attention to, per Steinberg, “the range of incentives, the hospitableness, and the wit that induces artists to join other art to their own.”

### 2.2 Authorship, Originality, and Alternatives

If such flexible definitions for artistic appropriations exist, how did variations on the term that rely on literary, legal, and economic language come to dominate discussions of appropriation, as they arguably did? In part, because art theory written in the 1970s and 1980s adopted the term “appropriation” to describe a range of artistic practices that staged pre-existing works or products – but also described this staging as politically and socially significant, and inextricably tied to issues of authorship and originality.

In 1977, *Pictures*, the landmark exhibition of photography organized by curator and art historian Douglas Crimp opened in New York City at Artists Space. Crimp featured five artists: Troy Brauntuch, Jack Goldstein, Sherrie Levine, Robert Longo, and Philip Smith. His approach was inspired by “Walter Benjamin, the German literary critic,” and the practices “of Roland Barthes and other French theorists; and of those writers, most of them British, who were applying the analytic methods of structuralism

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46 Steinberg, 27.
and semiotics to the study of film.” Crimp later asserted that *Pictures* “offered a kind of theoretical discussion” in a milieu wherein “people didn’t have a strong sense of a movement because there were many different things going on.”

Crimp later retheorized the meaning of the terms “picture” and “postmodernism,” explaining that the first “can refer to a mental process as well as the production of an aesthetic object.” Further, he claimed that “if postmodernism is to have theoretical value, it cannot be used as merely another chronological term; rather, it must disclose the particular nature of a breach with modernism.” Thus, “pictures” were no longer objects but also ideas, and “postmodernism” was not a new historical era, but a political/critical position held by the artists assembled by Crimp, who were described as new, disruptive, and specifically oriented against their predecessors.

If Lipman and Marshall’s *Art About Art* suggested that appropriation was instead a similarity found in critical grouping of artists and artworks, then Crimp’s *Pictures* negotiated the role played by appropriation in the establishment of a distinction between modernism and postmodernism. Two nearly contemporaneous exhibitions – *Pictures* and *Art About Art* – appropriation in very different terms. For Lipman, Marshall, and

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50 Douglas Crimp, “Pictures,” *October* 8 (Spring 1979), 75. (Emphasis in original)
51 Ibid., 87.
Steinberg – well-established art professionals – appropriation was traditional and conventional. *Art About Art* focused on an established group of artists who had been working with pre-existing material for many years, and skirted a challenge to the prevailing mode of art criticism by simply ignoring it.

But for Crimp – then an established critic, but also still a graduate student – appropriation, especially recent appropriation, was new and deserved special consideration. Unlike *Art About Art*, *Pictures* focused on young, unknown artists working in idioms that troubled received wisdom about the “impurity” of artworks that played with copies, figures, “low” forms of art, and the boundaries between media. Crimp’s approach was, in part, a reaction against forms of modernist criticism that pushed for clear rules.\(^52\)

The rules in question were established by Clement Greenberg, a vastly influential art critic who published his most well-known criticism in the 1960s, strove to understand art as a logical progression of actions and reactions that constituted a self-referential, and, perhaps, self-absorbed progression forward.\(^53\) Artists were limited to acceptable formal gestures that could be identified on the surface of the artwork;

\(^{52}\) Fineberg, 149.

attention to subject matter, figural representation, or narrative was prohibited. Greenberg was ruthless; as Fineberg explains, “Subject matter was irrelevant, illusion forbidden, and anything that did not fit Greenberg’s logic was dropped from his definition of modernism as if it had never existed.” Greenberg declared that all art must be entirely self-referential, and the best art must be self-critical:

The task of self-criticism became to eliminate from the effects of each art any and every effect that might conceivably be borrowed from or by the medium of any other art. Thereby each art would be rendered “pure,” and in its “purity” find the guarantee of its standards of quality as well as of its independence.

By Greenberg’s standard, appropriation art, which is based on constant, unrepentant borrowing from diverse sources, is both impure and not at all self-critical.

Greenberg’s students, among them esteemed historians Michael Fried and Rosalind Krauss, created a “network of influence” that stretched beyond their mentor. Fried’s criticism remained closely affiliated with that of his mentor, and his writings have continued to focus on the formal qualities of an artwork and the exclusion of contextual information in interpretation. Krauss’ criticism retained Greenberg’s

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54 Ibid., 775-776.
55 Fineberg, 149.
56 Greenberg, “Modernist Painting,” 775.
57 Fineberg, 149.
emphasis on historical progression, but troubled and complicated her mentor’s formalism, instead emphasizing the interpretation of an artwork as a response to historical or cultural issues.\textsuperscript{59} Her students and collaborators redoubled these complications, generating scholarship that celebrated complex and transgressive artworks, which was often published in \textit{October}, the critical journal co-founded by Krauss and Annette Michelson. \textit{October} was an early adopter of “new historicism” and poststructuralist theory. However, although Krauss’ divergence from Greenberg opened new avenues for interpretation, her criticism remained wedded to Greenberg’s doctrine of progression, and to the illusion of a grand narrative of one artistic movement that follows the next. In the 1970s and 1980s, the Greenberg network used appropriation art to substantiate the development of the phase beyond modernism: postmodernism.

Crimp’s \textit{Pictures} exhibition, as well as his identification of appropriation as a postmodern “breach with modernism,” is part of this critical lineage, which remains strongly attached to interpretations of appropriation art in the twenty-first century. Today, the art criticism describing appropriation art is generally (but not entirely) founded in theoretical frameworks developed to critique prevailing orders and institutions, and to propose alternatives to social, political, and intellectual structures.

Some of these writings, built from theories of authorship developed in the 1960s to describe how “the radical” was staged, and came to characterize appropriation artworks, which, in turn, came to signify ruptures with the purist tenets of Greenbergian modernism. These interpretations relied on frameworks beyond art, particularly literary theory, to apply poststructural analysis to contemporary art and, in so doing, compounded the problems of accretion and translation identified by Steinberg in the development of a vocabulary for appropriation art.⁶⁰ Thus, just as it may be helpful to be more precise about what is meant by “appropriation,” it may be helpful to be more precise about the theories commonly used to define and explain it.

Poststructuralism, as its name implies, responds to the precedent established by structuralism, a collection of theories that attempted to uncover and explain the underlying structures on which knowledge is built through language. Structuralism originated in the work of a number of theorists, but was especially influenced by linguist and semiotic Ferdinand de Saussure’s theories of linguistics.⁶¹ Structuralist concepts have been applied to diverse fields including anthropology, sociology, economics, literary theory, psychology, architecture, art history, and art itself, disciplines that also quickly adapted poststructuralism.

⁶⁰ Steinberg, 24.
Poststructuralist literary theory, which began to gain prominence in art history in the 1970s, became more pervasive as it was applied to conceptual art. As explained in the prior chapter, Barthes’ and Foucault’s theories of authorship were adapted to a critique of originality, affording a stronger role for the viewer. Barthes’ and Foucault’s theories of authorship provided a model analysis in which the reader/viewer replaces the author/artist as the primary constructor of meaning. Barthes identified “an author” as a historical construct, rather than an actual person with a singular control over the meaning of text which he or she produces. He suggested that giving a text an author closes its opportunities for signification, advocated for “the removal of the Author,” and redefined the role of the critic, who, as the reader of the work, supplies its meaning. Barthes’ assignment of responsibility for interpretation was zero-sum: “The birth of the reader must be at the cost of the death of the Author.” Foucault’s response to Barthes questioned whether an Author can be outside and antecedent to text. For Foucault, the necessary question was not only “what is an author,” but also ‘what is a work?’; ‘where does an Author’s work begin or end?’; and ‘what are the delimitations?’.

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62 Roland Barthes, “The Death of the Author.”
63 Ibid., 145-147.
64 Ibid., 148.
65 Foucault, “What is an Author?” in Faubion: 205-222.
that an “author” is simply a “functional principle” by which a culture “limits, excludes, and chooses” what is and is not part of an artwork.66

With the decentralization of the author/artist, art criticism expanded beyond traditional interpretive modes, such as formal analysis and artists’ biographies, and began to draw from a wide array of historical, social, and culture sources to inform and establish meaning. Such an approach was not new to art history, as art historians have drawn widely from cultural production, history, and psychology since the advent of the discipline. What was different in the application of poststructuralism to appropriation art, was the focus on issues of authorship and originality.

Art history, museology, and the art market have traditionally interpreted authorship as foundational. As art historian Donald Preziosi has explained, in art critical discourse the concept of authorship is “consonant with Western philosophical and theological concepts of the individual subject and its ethical legal, religious, and political responsibilities.”67 Poststructuralist theories of the author posed a powerful alternative discourse to such assumptions, disrupting traditions, beliefs, practices, and the power of the author or artist. Moreover, many art historians, especially Jonathan Fineberg, embraced poststructuralist theories. Fineberg, conflating poststructuralism with

66 Ibid., 221.
postmodernism, argued that postmodernist art questioned “the very concepts of
objectivity, absolute truth, the monolithic authority of a mainstream, and the possibility
of fixed meaning.” Indeed, it was just this disruption in normative concepts of the
function of creativity and originality that heralded the “postmodern turn” in the visual
arts of the 1980s, which had been ushered in by the introduction of poststructuralist
theories and critiques of representation and epistemology in the late 1960s and
throughout the 1970s. Art historians clamored to explain the rapid and expansive
proliferation not only of media following the introduction of conceptual art, but also the
rampant repurposing of cultural material by appropriation art.

The “issues of authenticity, ownership, and reproducibility” identified by
William Fisher and his co-authors can be said to be present in all appropriation
artworks, because they all, in one way or another, include pre-existing material that has
been sourced from elsewhere and, very often, copied. Debates over the difference
between copies and originals date to Plato, but German theorist Walter Benjamin’s
concept of the effects of reproduction, developed in the 1930s, became a significant and
persistent touchstone in studies of contemporary art. Benjamin claimed that modern art

68 Fineberg, 353.
69 See Ibid., 353, 360, 363, 389 and Stiles and Selz, 1-5.
70 Fineberg, 353.
71 Singerman, 60-61; Anders Stephanson, “Interview with Craig Owens,” in Craig Owens, Beyond
lost its ritual and traditional functions through technological reproduction, which drained the unique art object of its “aura” – the effect produced by the singular presence of an artwork in time and space.\textsuperscript{72} The distinctiveness established by an object’s aura is key to its appreciation by a viewer because detachment from the object promotes contemplation.\textsuperscript{73} Aura is related to authenticity because it inheres in the singular object, which exists in a specific time and space, and aura does not transfer to reproductions.\textsuperscript{74} Furthermore, reproduction can diminish the aura and appreciation of the original.\textsuperscript{75} But, positively, Benjamin claims that an artwork liberated from aura is also freed from ritual and tradition and can be inserted into new social and political contexts by viewers.\textsuperscript{76} Benjamin’s aim to emancipate art from ritual so that it could become political complicated established understandings of originality, and set the stage for later interpretive models that would deny the possibility of originality altogether.

The early application of theories of authorship and originality to postmodern art, which led to the interpretation of artworks as mutable with multiple meanings, shifted in the mid-1980s. Art historian James Elkins has identified two kinds of postmodernism

\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid., 24.
\textsuperscript{75} Ibid., 22.
\textsuperscript{76} Ibid., 25.
in art critical writing that differ in how they construct relations between modernism and postmodernism.

The first describes postmodernism as “a condition of resistance that can arise wherever modernist ideas are in place,” and is identified with the editors of and contributors to the journal *October*, described above.\textsuperscript{77} For Elkins, this form of postmodernism almost certainly co-exists with modernism and postmodern artists championed by *October* critics and are understood as participants in “a form of resistance that takes place within modernism” or “a condition of resistance that can arise whenever modernist ideas are in place.”\textsuperscript{78} This designation/identity has no temporal or subject requirements and is, therefore, potentially contiguous and coterminous with modernism, but opposed to its goals and tenets.

Elkins’ second type of postmodernism is a chronological category, namely “a period that has more or less definitively ended,” and whose rupture can be located “at the moment it became possible to call nearly anything art.”\textsuperscript{79} Elkins idiosyncratically associates this second form with Thomas McEvilley, Donald Kuspit, Robert Rosenblum, and Leo Steinberg.\textsuperscript{80} These individuals have been largely ignored by legal scholars,

\textsuperscript{78} Ibid., 85, 89.
\textsuperscript{79} Ibid.
\textsuperscript{80} Ibid., 86.
while the *October* group has had an important impact on legal theorization. Therefore, I will return to *October* and focus on this line of thought.

For a journal with a small, academic circulation, *October* has had an outsized impact on the legal profession, even prior to the advent of *Cariou v. Prince*. Between 1975 and 2017, Krauss was cited in forty law review articles (twenty-three of which address copyright law); Hal Foster in one hundred and seventeen (forty-five of which address copyright law); Benjamin H.D. Buchloh in thirty (fifteen of which address copyright law); Martha Buskirk in thirty-five (thirty-three of which address copyright law); Craig Owens in thirty-one (eleven of which address copyright law); and Douglas Crimp in ninety-six (nineteen of which address copyright law).

In “The Originality of the Avant Garde,” first published in *October* magazine in 1981, Krauss analyzed the notion of originality and deemed it a modernist myth. Dismantling the fiction of originality was essential to the breakdown of the oligarchic power of patriarchy in every corner of the art world. Krauss’ attack on the presumption of originality and its connections to individual genius would eventually be used by very different critics, not associated either with Krauss or *October*, to buttress the incursions of

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81 This point is discussed in detail later in this chapter.
82 By contrast to other authors discussed in this chapter, Leo Steinberg was cited in twenty-two law review articles (only seven of which address copyright law), Johanna Burton in seven (only three of which actually discuss her writing); Isabelle Graw in six; John Welchman in two; and Lisa Philips in two.
83 Krauss, “The Originality of the Avant-Garde,” 162.
feminist, queer, and minority artists. Krauss’s attack on originality was, for a time, understood to upend the entrenched system of valuation derived from the nineteenth-century codification of connoisseurship, which attached value to an art object based on the art object’s perceived attachment to its creator, even when said creator was physically separated from the object. Krauss’s declaration of originality as a fiction also contributed to destabilizing the economic structures on which the art market is founded, making any artwork to which it was applied appear resistant to the forces of capitalism. Krauss’ students and collaborators blended her ideas with theories of originality and authorship to formulate a theoretical framework for a politically-driven postmodernism that could succeed modernism, which was perceived to have been “thoroughly institutionalized” by the 1970s. The foregrounding of context in the interpretation of art was one of the signal contributions of this new form of criticism. Krauss further argued “In the Name of Picasso” (1985) for a history of art that addressed an object in “transpersonal terms: ways that involved questions of period style, of shared formal and iconographic symbols that seems to the function of larger units of history than the restricted profile of a merely private life.” But Krauss saw “an art history of the proper

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84 Evans, 14.
name” – a history based on the artist’s biography – as the antithesis of transpersonal art history.86

Indeed, appropriation artists were routinely excluded from contributing to the interpretation of their own works, even when they forcefully rejected critical readings of their artworks. For example, by 1986 Sherrie Levine had openly rejected the dominant interpretations of her work:

Almost all the reading of my work was coming from a leftist, academic reading of it. I was very appreciative, even collaborative. But at some point I began to feel boxed in. It had gotten to the point where people couldn’t see the work for the rhetoric.87

Art historian Howard Singerman has explained of Levine’s career that

“postmodernism as defined by October [writers] provided the sense of Levine’s rephotographs, a voiceover that they were never really without.”88 Singerman’s 2012 book, Art History After Sherrie Levine, laid bare his ambivalence towards the kind of arid, poststructuralist writing that served as a “voice-over” for his subject.89 He suggested that essays by Krauss, Crimp, and art critic Craig Owens gave Levine’s work a historicity and theoretical grounding that made her appropriation “necessary.”90 The obligation to

86 Ibid.
87 Marzorati, 95. This is puzzling, because October has published numerous interviews and roundtables with artists.
89 Ibid., 56.
90 Ibid.
explain Levine’s “necessity” was part of a larger narrative about the status of painting and photography in the 1970s that was extremely influential at the time. But the fact of this influence does not explain why these theorists continued to speak for Levine, her contemporaries, and indeed, much of appropriation art. The historical and theoretical significance of these art historians’ contributions to appropriation art is well-known and respected, but they must be understood to be historically situated, and their commentary to be applicable to some, but certainly not all, appropriation art. Instead, the authorship-centric ideas of art critics, especially those often published in October are too often treated as the standard by which a work is classified, or not classified, as appropriation.

The influence of this line of thought waned as alternative approaches to appropriation developed in the late twentieth- and early twenty-first centuries. Then, in April 2009, The Pictures Generation, 1974-1984, curated by Douglas Eklund, opened at the Metropolitan Museum of Art in New York City. Eklund’s exhibition drew its name from Douglas Crimp’s landmark 1977 exhibition, Pictures, described above. Pictures

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91 Ibid., 57-58.
included work by only five artists. Eklund’s exhibition expanded Crimp’s theoretical interpretation of the original five to a group of thirty.

Eklund’s approach would have been merely an interesting historical take on 1970s-1980s appropriation art, but for the accident of its timing. Eklund’s exhibition, and its revival and expansion of earlier interpretive models, is important because it was one of the most widely available examples of critical interpretation of appropriation art available to the public when Cariou v. Prince (filed in December 2008) and Fairey v. Associated Press (filed in March 2009) were under discussion in the news, and when lawyers for these artists were identifying the resources for the arguments and briefs that they were scheduled to present in the United States District Court for the Southern District of New York, located just seven miles south of the museum. The exhibition’s prominence – displayed at one of the most important art institutions in the world, well attended, and written about in numerous newspapers and magazines – made Eklund’s historical background for Prince and Fairey, and appropriation art in general, an important resource for understanding this form of artmaking in the twenty-first century, even though the exhibition considered artworks made in the 1970s and 1980s.

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93 Crimp, “Pictures.”
Unfortunately, Eklund’s revisionist history revived and reinscribed earlier, narrowly defined representations of appropriation that centered on authorship and originality, extrapolating these interpretations to a much broader group of artists. This matters because the questions posed by Eklund, and the answers returned in his exhibition and catalogue, re-emphasized authorship and originality at a moment when synthetic, artist inclusive explanations were most needed to explain twenty-first century appropriations such as Prince’s Canal Zone and Shepard Fairey’s Hope poster, neither of which take authorship and originality as a central concern.

Prince has often refuted the applicability of art critical theories focused on originality and authorship to his artworks, but Eklund’s revisionist revivals of old arguments suggested that these arguments still applied to Prince and other members of the Pictures Generation who are still actively making art. Eklund described Prince’s discomfort with theories of authorship in the exhibition catalogue:

In the mid-1980s, Prince sought to distinguish his own view of what he did from that of the critics who, he thought, put his work all too neatly in the “death of the author” theory, which holds that authorship in the realm of the arts is a mythological construction (the great author as the bearer of the singular, original text) designed to embed all kinds of ideological imperatives in texts and images that are meant to seem natural but are just tissues of quotations that bolster rhetorical goals. “There was a whole lot of authorship going on,” said Prince darkly, and while it may be a colossal misunderstanding to see his position and that of his critics as not really in opposition, it gets, in a roundabout way, to the heart of Prince’s art. He gives himself over to a little bit of a disease in the form of an inoculation to avoid succumbing finally to the zombification of total withdrawal; the
serum he puts in his veins consists of the chronic dissatisfaction and wishing to be someone else that is the media’s secret weapon in triggering consumption both on a mass scale and one individual at a time.94

Multiple, and even antithetical, meanings for contemporary artworks can and should be acknowledged. Thus, Eklund does not propose “a colossal misunderstanding” in suggesting that Prince’s position can exist with antithetical critical positions about his work. However, Eklund’s theory of Prince’s “inoculation” fails because it inaccurately diagnoses Prince.95 Prince definitely experiences “chronic dissatisfaction and wishing to be someone else,” but his desire and dissatisfaction are not necessarily driven by the media or capitalism, at least not in the generalized way identified by Eklund. As discussed at length in the third section of this chapter, Prince’s recent artworks have little to do with the media or consumption. To foreshadow: he is little concerned with extrinsic factors, and his focus is intensely personal.

Returning to the exhibit. Eklund suggested that the primary question driving the Pictures Generation was “what constitutes an artist?” But his answers to this question were remarkably confined and, again, focused on the extrinsic allure and pressures of

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95 Also, Eklund’s failure to acknowledge the medical framework for appropriation developed by Johanna Burton in her 2004 essay, “Subject to Revision,” discussed later in chapter, is unfortunate. See Burton, “Subject to Revision,” 205-213.
critical theory. His presentation of the question and its possible answers depended largely on semiotics, artistic materials, and the operation of choice, rather than the artist. Other influences were marginalized or excluded entirely. Eklund’s revival of older theoretical models for appropriation encouraged appreciation of the stylish, urban aspects of Pictures Generation photographs, but diminished – or, in some cases, entirely denied – the works’ imbricated, political, and personal content.

For example, in his exhibition catalog, wall texts, and remarks at the opening, Eklund gave a limited interpretation of the role of feminism in artworks by members of the Pictures Generation. Eklund suggested that Cindy Sherman, Laurie Simmons, and Sarah Charlesworth were practically post-feminist, despite their staunch feminist positions and visual references to feminist issues. Instead, he announced, “Sherman and Charlesworth’s analyses alluded to the serial progressions of Minimalism and the assembly line of manufactured identity in mass culture.” Eklund failed to understand that Charlesworth and Sherman were blending these influences with feminist thought, and dispensed with such a notion of interdependent concerns, writing:

To say you were a feminist woman was for them redundant…Rather, the terms of the debate had shifted after Conceptualism and early feminism to an interest in how ideology is concealed within the texts and images of

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96 Eklund, 29.
97 Ibid., 145.
everyday existence and in the structures of narrative and representation where they are embedded.98

Yet, he cites neither Sherman, Simmons, or Charlesworth for these assertions and quotes not one female artist in his extended discussion of the absence of feminist concerns in Pictures Generation art.

At the opening, Crimp picked up on and criticized the revisionism of wall text that read “[feminism] made it possible for women artists to define themselves as artists who happened to be women.”99 Crimp recognized that critique of originality is a feminist critique,100 and that critiques of authorship and feminism cannot be disentangled – even though Crimp himself has attempted to do so in the past:

I think that’s NOT the lesson of feminism. The lesson of feminism is in the kind of art that’s being made and the kinds or propositions that were being made through the art – the critique of originality, for example, which is something I already argued for early on with respect to Sherrie Levine and Cindy Sherman. I think that’s a feminist perspective and that is a crucial aspect of this formation of artists. I didn’t recognize that at the time. I don’t think that the work of Louise Lawler – probably the artist I feel closest to, in relation to my subsequent work – can be understood without taking account of second-wave feminism.101

98 Ibid., 144.
100 Crimp has documented his resistance to the purism of older ideas about artists in The Pictures Generation: 1974-1984 in Douglas Crimp, “Getting the Warhol We Deserve,” Social Text 59 (Summer 1999): 53.
101 Douglas Crimp, quoted in Rosenbaum.
Here, Crimp acknowledged that, in appropriation art, concerns about authorship and gender are intersectional, not parallel to each other. Thus, *The Pictures Generation: 1974-1984* carried Crimp’s late-1970s theories about appropriation into the twenty-first century, but in a way that even Crimp himself could not fully support.

Interpretations of appropriation art that focus exclusively on its theoretical possibilities and intellectual aims, although extremely worthwhile, cannot fully describe every appropriation artwork. Some appropriation artists reuse pre-existing material in ways that are apolitical, emotional, and complimentary rather than political, cerebral, or critical. Sometimes, many influences are operating simultaneously and ambiguously. Approaches such as Eklund’s are too reductive, privileging some influences over others and excluding key factors that alter the artwork’s significance. Some authors, including Crimp and Craig Owens, have subsequently addressed this problem, even when it arose in their own prior works.

For example, in “The Discourse of Others” (1983), Owens reconsiders his own work on allegory in the performances of Laurie Anderson, which he characterized as an “eagerness to rewrite Anderson’s text in terms of the debate over determinate or indeterminate meaning.”

The analysis is driven by quotes from feminist appropriation

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102 Ibid., 69, 79-80. Despite Owens’ criticism of his attention to appropriation as a form of allegory, this mode of poststructural interpretation holds potential for the interpretation of twenty-first century appropriation
artist Martha Rosler, who “challenges the critic’s substitution of his own discourse for the work of art.” The essay embraced both the critical exposure of power relations that de-authorize representations by minority groups and women, and the “insistent feminist voice” that “theories of postmodernism have tended to either to neglect or repress.”

Owens’ emphasis on gender recognized that the pictures addressed by appropriation artists are not simply mass-produced images, but often mass-produced images of women, to which male and female artists may attend differently, and to which male and female viewers may react differently.


In the rewriting of the *Pictures* essay [subsequent to the exhibition] it seemed to me that I had to make a case for the historical necessity of that art and how it followed in a particular canonical lineage. And now I’ve given up the sense that the way you judge a work of art is through a particular historical narrative, the Greenbergian idea of a historical necessity. The art world was really small then, you could actually have the idea that I did, that you could figure it out and you could say, this is the right narrative, and now I don’t think you could do that because it’s so vast,

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104 Ibid., 83.
105 Ibid., 83.
there’s so much. It makes me realize that even back then it couldn’t have been as comprehensible as I believed it was. Your relation to what is offered to you in the world is precisely relational.107

Twenty-first century art historians, who addressed older works with fresh eyes, have revisited, questioned, and improved prior interpretations of appropriation art with more holistic, synthetic approaches to the subject. These historians and critics have recognized that, while examples of politically motivated and critical appropriation art exist (such as Carrie Mae Weems’ From Here I Saw What Happened and I Cried, described in the prior chapter), appropriation in art is not intrinsically political either in content or form, and not all of these types of artworks can be understood as socially and politically deconstructive. Postmodern art has focused on authorship and originality, but has equally incorporated consideration of and investment in themes of identity, gender, race, and sexuality and, sometimes, explored the intimate, specific psychology and experience of an individual artist. The rest of this section highlights art critical theories and interpretations of appropriation art that focus on issues beyond authorship and originality, which have given serious attention to hybridity, identity, and intention, encouraging viewers to revisit appropriation artworks and to revise the narratives built around them.108


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This selection begins with curator Helen Molesworth’s flexible and generous reading of Barthes’ theory of authorship, which might serve to guide future uses of his theory, as it does not jettisons the author entirely:

Barthes argued that the artist’s intentions number as one among many sources of meaning, emerging in a dialogic relation with the viewer and contingent on the shifting historical, institutional, and economic contexts of both the object and the viewer.109

In Molesworth’s reading of Barthes, the reader/viewer relationship is no longer zero sum; the birth of the reader does not demand the death of the author. Both can co-exist and both can contribute meaning. Alternative approaches to the history, meaning, and interpretation of appropriation art do not follow narratives of authorship and originality, as moving beyond the interpretive borders of authorship and originality requires stepping into a chaotic, fractious, sometimes contradictory discourse. However, the effort to understand art criticism that troubles neat histories – such as those told by Eklund – is worthwhile. Synthetic approaches that united critic-driven theories with attention to artists’ writings have added depth and breadth to prior discussions of appropriation artwork. The new facets added by these writings were often based on the understanding afforded by the artist’s perspective, and many reconsidered prior

attempts at historicizing appropriation art. The discussion to follow is not organized chronologically, but thematically, as twenty-first century discussions of appropriation have not proceeded in a linear fashion. These texts often revisit arguments made decades prior or apply a different lens to a subject that may have seemed previously exhausted. They appear intermittently in exhibition catalogues, books, and art magazines, often without an obvious temporal trigger.

In 1992, Lisa Phillips wrote in her introductory essay for the exhibition catalogue that accompanied Richard Prince’s retrospective at the Whitney Museum of Art:

Prince is obviously concerned with the crisis of authorship, exploring where the artistic subject is located and how identity is formed, circumscribed, and validated by the politics of representation, which culturally defines gender and class roles. But this does not mean, however, that he eradicates subjectivity, expression, or originality. He just redefines and mythologizes them, showing that the personal and social are necessarily intertwined.”¹¹⁰

Phillips’ take on Prince’s career acknowledged theories of authorship that had been applied to his work, but embraced Prince’s discomfort with these theories, and opened up new perspectives on his oeuvre.

A year later, Phillips participated in the curation of the 1993 Whitney Biennial, a “reviled” exhibition that was horribly misunderstood when it opened, but which shifted

the approach to contemporary appropriation art. First, rather than asking “What is an author?” the 1993 Whitney Biennial asked “Who is an author?” In answering this question, the curators shed light on the oppositional situations produced by race, gender, sexuality, class, and politics that produced repression and prevented female, minority, and queer artists from gaining deserved notice. Second, the curators treated appropriation as normative rather than exceptional, and carefully attended to the artists’ choices of pre-existing material. Ultimately, the exhibition addressed the self, personal experience, and the generation of meaning through emphasis on the highly personal nature of artists’ interactions with appropriated images.

In her contribution to the exhibition catalogue, the Cuban-American artist Coco Fusco explained the link between the appropriation strategies of the artists featured in the 1993 Whitney Biennial and copyright law, assessing the way in which Jeff Koons’ 1992 legal battle asked to whom the image in question belonged, and inserting this question into a broader series of questions about identity, difference, and values. Whitney executive director David A. Ross explained in his introduction to the exhibition catalogue, titled “Know Thy Self (Know Your Place),” why the 1993 biennial deliberately challenged the stereotype of the museum as a “place of sanctuary,” because

112 Ibid.
these institutions had for too long been places of exclusion, where community was defined by strict boundaries and rules.\textsuperscript{113} The 1993 Whitney Biennial celebrated the role of identity in the creation and reception of artworks, fully recognizing the ways in which artists from different backgrounds may attend to works differently, and to which viewers from different backgrounds may receive works differently. The show was extremely heterogeneous and this made it markedly different from prior Whitney biennials; the press made much of Elizabeth Sussman’s role as sole curator, a change from the typical committee model.\textsuperscript{114} However, she was assisted by curators Thelma Golden, Lisa Phillips, and John Hanhardt in the selection of eighty-two artists, nearly half of whom were women, representing an unprecedented range of ethnicities, sexualities, and other markers of identity.

Despite the heterogeneity, one common thread is clearly seen with hindsight: appropriation. Although the 1993 Whitney Biennial was not specifically focused on appropriation, it was saturated with appropriation art, and represents a turning point in the creation, exhibition, reception, and interpretation of appropriation. Appropriation


was part of so many artworks, in such a variety of media, that the word no longer seemed to describe any specific approach, suggesting that Steinberg’s description of appropriation as normative and pervasive was, indeed, apt. In her catalogue essay, Phillips wrote that, “appropriation, much of it from the lowliest sources, continues to inform much of this art.”¹¹⁵ The curator further suggested that appropriation, as used by Sue Williams, Mike Kelley, Raymond Pettibon, Suzanne McClelland, Simon Leung, Bruce Yonemoto, Miguel Gandert, Guillermo Gómez-Peña and Coco Fusco, Jack Pierson, Lari Pittman, and other artists represented in the exhibition, “deliberately renounces success and power in favor of the degraded and dysfunctional.”¹¹⁶

Popular critics, who should have been able to connect to the works on some polite level, were confused, enraged, and dismissive. Michael Kimmelman, critic for The New York Times, stated flatly, “I hate the show.”¹¹⁷ The Washington Post’s Richard Paul wrote:

Its single theme is Victim Chic. Its message is insistently, trendily political. Its artists – there are 82 – all feel themselves aggrieved. And here they come in noisy droves, those martyrs of the margin, the lesbians, the gays, the inhabitants of barrios, the sufferers from AIDS. Their exhibition snarls.¹¹⁸

¹¹⁶ Ibid., 53.
¹¹⁷ Kimmelman, “Sound, Fury, and Little Else.”
Many other serious critics of contemporary art, whether progressive, postmodern, or otherwise labeled, displayed great discomfort with the personal and intimate nature of 1990s appropriation and the queer, female, minority, and otherwise historically marginalized experiences that these artworks described. Christopher Knight, critic for *The Los Angeles Times* said, “Artistically, it’s awful.”119 August philosopher Arthur Danto stated, “I can’t imagine ever wanting to have had anything to do with the 1993 Whitney Biennial exhibition.”120 The *Wall Street Journal* called it “a theme park of the oppressed.”121 Roberta Smith of the *New York Times* was kinder, asserting that “with its persistent references to race, class, gender, sexuality, the AIDS crisis, imperialism and poverty, the work on view touches on many of the most pressing problems facing the country at the dawn of the Clinton Administration and tries to show how artists are grappling with them.”122 But she also accused it of being “a pious, often arid show that frequently substitutes didactic moralizing for genuine visual communication”123

119 Christopher Knight, “Crushed by its Good Intentions Under the Banner of Opening Up the Institutional Art World to Expansive Diversity, the Whitney Biennial has in Fact Perversely Narrowed its Scope to an almost Excruciating Degree,” *Los Angeles Times*, March 10, 1993, 1.
123 Kimmelman, “Sound, Fury, and Little Else.”
Academic writers were also disappointed and confused. A roundtable devoted to the 1993 Whitney Biennial was published in October in the Autumn 1996 issue.\textsuperscript{124} Rosalind Krauss found the work one-dimensional, while Hal Foster observed a lack of connection between political content and form. Benjamin Buchloh and Foster determined that the subject of identity was central, but not the critique of identity.\textsuperscript{125} Buchloh said:

I’m not sure that the project is to critique identity. That’s not the project of these artists. They would much rather be associated with a project of affirming and constructing identity. The articulation of the work is an act of empowerment, of inscription, of coordinating identity.\textsuperscript{126}

In the same roundtable, artist Silvia Kolbowski observed dismissively that “there’s a return to artists speaking about their work.”\textsuperscript{127} Art historian Miwon Kwon responded that:

I also think that it is assumed that the artists are very theoretically engaged, and that their work is incredibly difficult material, and that in order the audience to get it – which is not necessarily to engage it critically – the artists must speak.”\textsuperscript{128}

\begin{flushleft}
\textsuperscript{125} Ibid., 7.
\textsuperscript{126} Buchloh in Ibid.
\textsuperscript{127} Kolbowski in Ibid., 6.
\textsuperscript{128} Kwon in Ibid., 7.
\end{flushleft}
Kwon believed that statements made by artists “deflated the work.” Kolbowski derided the Whitney’s efforts to explain the artworks to be public, which she believed reduced “direct communication” with the viewer. In response Buchloh raised the following point:

“Some authors now have understood that this presumed capacity to read the aesthetic experience is not at all universal, but is highly overdetermined in terms of class, race, and gender, and that a concept of universality can be highly privileged.”

Why explain the artworks to the public? Because “aesthetic experience is not at all universal,” as was soon proven by an unexpected reaction to the 1993 Whitney Biennial. And because the impenetrability of such criticism was making appropriation art more, rather than less, difficult to understand.

The conversation around the biennial might have remained confined to the art world, but veteran telejournalist Morley Safer devoted significant attention to the Whitney’s 1993 exhibition lineup, filming the confused reactions of conservative-looking visitors in the galleries for a 60 Minutes feature on contemporary art titled, “Yes, But Is It Art?” that focused on the 1993 biennial, a retrospective of Jean-Michel Basquiat’s works that had directly preceded the biennial at the Whitney, and recent stratospheric sales for

129 Ibid.
130 Ibid., 14.
131 Ibid.
132 Ibid.
contemporary art. Safer called artworks featured in the 1993 Whitney Biennial “worthless junk” destined for “the trash heap of art history,” picking up the banner for anti-intellectualism in twelve practically parodic minutes devoted to skewering contemporary art and artists.

“Yes, But Is It Art?” might have remained the lonely rant of an irritated individual, but a few weeks later, Arthur Danto, David Ross, and artist Jenny Holzer joined Safer on Charlie Rose’s eponymous program for a roundtable discussion on contemporary art. This discussion reviewed an important key to understanding the reception of appropriation of the 1993 Whitney Biennial. For this reason, the assertions made by Safer, and the rebuttals presented by Danto, Ross, and Holzer deserve serious consideration within this chapter.

On Charlie Rose, Safer admitted that he was an amateur before experts, but he did not back down from his adversarial and dismissive positions. But “artspeak” – the kind of dense critical language characterized by so much writing about appropriation art, defined as “International Art English” by Levine and Rule, and criticized at points in this dissertation – was central to Safer’s concerns about the state of contemporary art.

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133 “Yes, But is it Art?,” 60 Minutes, September 12, 1993, http://www.cbsnews.com/videos/yes-but-is-it-art/
Safer compared dense art critical language to Sanskrit and decreed that art criticism was a merely veil of pretension which dealers and critics wrapped around meaningless objects to enhance their value and make them attractive to collectors.\textsuperscript{136} Safer argued that the furious responses of artists and art professionals to his comments “confirms the fragility of belief in much of the material we talked about” and supports the “assumption that art is what artists can get away with…kind of a sham, promoted by people marketing products.”\textsuperscript{137} Art criticism, in his assessment, was merely advertising language.

Safer was particularly dismissive of painter and appropriation artist Jean-Michel Basquiat: he labeled Basquiat’s artwork as “giant, childishly-wrought graffiti” and described Basquiat as a charlatan who pretended to be a “poor black kid…discovered on the street by Andy Warhol,” but who really “came from an upper middle class suburban family” with a “keen eye for the marketplace,” whose “career was saved [when] he died of a drug overdose.”\textsuperscript{138} For the 60 Minutes segment, Safer showed a group of African-American children Basquiat’s paintings, which frequently incorporate recognizable, pre-

\begin{footnotes}
\footnote[136]{“Most of the art of the ‘90s would be worthless junk without the hype of the dealers and, even more important, the approval of the critics. They write in language that to this viewer anyway sounds important but might as well be in Sanskrit.” Ibid.}
\footnote[137]{Ibid.}
\footnote[138]{Safer, “Yes, But is it Art?” Basquiat is usually described as a painter rather than an appropriation artist, but art historian Jordana Moore Saggesse explains why he must wear both labels in Jordana Moore Saggesse, \textit{Reading Basquiat: Exploring Ambivalence in American Art} (Los Angeles: University of California Press, 2014): 60-108.}
\end{footnotes}
existing symbols from hip-hop, punk, and street art cultures. Safer then asked the youths if they thought Basquiat’s work was “art” and if they could make better artworks. The children asserted that they could: “Yeah, I could do that!” This prompted a response to Basquiat’s paintings that can be interpreted in two ways: as a dismissal of the quality of Basquiat’s artworks or an expression of connection with Basquiat’s artworks.

Safer’s intention was not to establish a connection between the students and the artist, but to puncture the bubble that he perceived Basquiat’s reputation to be. Safer interpreted the children’s reaction as a rejection of Basquiat as an artist, but he could instead have interpreted their reaction as an identification with Basquiat. Saying “I could do that” was not a dismissal of Basquiat’s talent – it was an embrace of a shared language, which had been recognized by a major museum as fine art. Identification can demarcate a self that exists apart, but identification may also demonstrate a connection with. “I could do that” is not always an expression of derision, but instead of curiosity and wonder, a sentiment more clearly expressed as “I could do that too.”

Artists in the 1993 Whitney Biennial negotiated issues of authorship that arose from their identification with their source material, and the ambiguities that follow this

I would love to describe the paintings shown to the children to the reader, but Safer kept the camera focused on himself and the youths. Only fragmentary glimpses of details from the paintings, such as fried eggs, which are a repeating motif in Basquiat’s artworks, can be seen.
identification. As Lisa Phillips wrote, “Pictures are a personal guide to finding orientation in life, whether physical, psychological, political, or sexual.”¹⁴⁰ This is not the same as questioning someone else’s authorship, or originality generally; instead, it is a self-oriented inquiry. Writing in 2016 with two decades of hindsight, art critic Jerry Saltz said of these intersectional questions:

To be sure, this new transformation had roots going further back than the 1990s, especially among artists, who for decades were actively preoccupied with politics, black power, women’s liberation, gay liberation, and more. The transformation unleashed by the culture wars is not just about representation, diversity, numbers, and good little humanists wagging self-righteous fingers. It’s about the way culture is formed, how art is made — and what counts as art. For the first time, biography, history, the plight of the marginalized, institutional politics, context, sociologies, anthropologies, and privilege have all been recognized as “forms,” “genres,” and “materials” in art. Possibly the core materials. That shift put the artistic self front and center, making it perhaps the primary carrier of artistic content since the 1990s.¹⁴¹

If appropriation is the medium that united so many artworks in the 1993 Whitney Biennial, then the vigorous assertion of “the artistic self” — a constructed, authored self built through the accretion of images and phrases that attract and repulse, with which artists identify, and against which they resist – is the purpose that ties the works in the 1993 Whitney Biennial together. The curators understood appropriation as

¹⁴¹ Saltz and Corbett.
both a deconstructive method of interrogating antecedents, structures, and norms, as well as a constructive method of self-creation. The formal material of these artistic projects was accreted from extrinsic sources, but the organization of the material was understood be intrinsically determined by the artist’s desires, dislikes, personal history, and life experience. Found materials were the bricks, but the artist’s interest in and juxtaposition of these elements was the mortar.

To consider the mortar, it was necessarily to give the artist back some measure of influence in the meaning of the artwork. Art historians Isabelle Graw and Nate Harrison have recognized an artist subject who was, in fact, central to theories that were previously understood to marginalize artists and their statements on their work. Graw has identified the definition and understanding of appropriation developed in the 1980s as specifically Marxist. Themes of dispossession, expropriation, and disruption of property rights undergird these interpretations, characterizing artistic appropriation as a counter-measure against capitalist appropriation that imbues the medium with “socio-political power” as a “legitimate and necessary method; a kind of self-defense.” Graw identifies a flaw in postmodern assessments of appropriation that depend on the erasure of authorship, arguing that critics consistently sought to identify an “affirmative or

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critical intention” in the act of appropriation that cannot be found without an artist subject. Furthermore, for Graw, the best works were those that appropriated with critical intent, withstood alienation, and imbued the appropriated object with new meaning. The Marxist approach to pre-existing material, according to Graw, requires “a powerful artistic subject” that resists consumerism, private property, and capitalism by deploying its opponent’s own methods in a struggle for dominance.”

Harrison defined such a powerful artistic subject in his re-reading of the work of artists from the “Pictures Generation,” including Sherrie Levine and Richard Prince, which he argued adopted rather than rejected paradigms of authorship. Harrison explained that, rather than undermining any romantic notion of authorial originality in a culture of the copy, “the works reasserted the very productive core of the romantic authorial mode – one premised on private ownership through labor.” Writing later on Prince’s reuse of barely-altered Instagram images, Harrison boldly re-assigned a level of thoughtful responsibility to the artist/author:

Artists are obligated to the images they re-use. It’s important that they do critical things with them, and not merely reproduce cultural and

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143 Ibid., 216.
144 Ibid.
146 Ibid.
economic capital for the one percent while feigning comradeship with the social media masses.\textsuperscript{147}

Harrison further suggested that these artists did not eliminate the author function, but rather reinscribed and strengthened it.\textsuperscript{148}

Additionally, Graw has suggested that critical resistance to an artist-driven definition of appropriation is due to “the fact that the artist might not have an entirely critical and detached view of the originals,” which does not support the main presumption of many theories of appropriation art: that appropriation itself is, per se, critical.\textsuperscript{149} Moreover, such a statement also suggests that theorists are capable of being “detached,” which, obviously they are not.

Noël Carroll has suggested that the exclusion of the artist’s voice enabled critics to use “the avant-garde artwork rather in the way that a ventriloquist uses a dummy.”\textsuperscript{150} Through this ventriloquism, theory aggressively seized a position superior to art, and the critic assumed a position of power over that of the artist.\textsuperscript{151} As art historian Kristine

\begin{flushright}
\textsuperscript{149} Graw, 214.
\textsuperscript{150} Noël Carroll, \textit{On Criticism (Thinking in Action)} (London: Taylor and Francis, 2009), 79.
\textsuperscript{151} Stiles, “Introduction,” in Stiles and Selz, 5.
\end{flushright}
Stiles has observed, the silencing of artists was required to achieve the alternative hierarchy of theory, which replaced or ignored artists’ own points of view:

Neglect is one of the most powerful, and nearly invisible, forces for maintaining authority...When authority itself is denied, then the competition for the most artful narrative is a competition for authority over the text and the work of art. In other words, critics may retain the authorial voice.¹⁵²

Stiles further observes that “it is a paradox of intellectual history that theory gained such hegemony precisely during the period when authority was written out of authorship.”¹⁵³ In other words, in the practical application of art critical theory, particularly with regard to theories of authorship, the contradiction took place in the slippage that critics permitted themselves, namely to operate as both author and viewer in the absence of, or absenting, the artist him- or herself. Such theories of authorship and reading are presented as if neatly mapping onto the practices of an artist’s work. A critic’s usurpation of the artist’s authority does not occur, however, when two authors are acknowledged: the artist in the role of originating author, and the critic as a secondary author. But empowered by Foucault and Barthes’ theories, the critic’s assertions permit art historians the pretense of cool, detached objectivity and an unprecedented degree of control over the interpretation of an artwork. The maintenance

¹⁵² Stiles and Selz., 6.
¹⁵³ Ibid., 4.
of this delicate balance between authorial/artistic authority and critical/critic’s authority requires a measure of distance that begins to account for much writing on appropriation art.

Art historian John Welchman’s 2001 book, *Art After Appropriation*, was one of the first texts to recuperate attention to artists’ writings, statements, and interpretations. He claimed that “the status of the ‘deconstruction’ argued for prior scholars and others is crucial, and problematic” because most prior authors “fail to make good their claims to deconstruct authorship.” Welchman here distinguished the actions undertaken by appropriation artists such as Sherrie Levine, Cindy Sherman, and Barbara Kruger from “the textualist deconstruction practi[c]ed by Jacques Derrida” because “taking and reframing an image cannot be determined as an act of deconstruction either on its own recogni[z]ance, or when accompanied by brief critical ‘assistance.’”

Welchman distinguishes the identification of appropriation artworks as “sites of destruction,” but suggests that this approach is equally flawed. He has suggested that there is also a significant, but often unacknowledged, difference between

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154 Welchman, 12-14.
155 Ibid.
156 Ibid.
deconstruction, which concerns “difference and imbrication” and appropriation, which concerns “sameness and implication.”

To be different is to “unlike in nature, form, or quality; not of the same kind; dissimilar.” Imbrication,” describes an “overlapping” of concepts, like the arrangement of tiles on a roof. “Deconstruction,” in the standard usage, is “the action of undoing the construction of a thing.” “Sameness” describes an “absence of variety” or “uniformity, monotony.” Implication, a much richer and more complex word, identifies “the action of involving, entwining, or entangling; the condition of being involved, entangled, twisted together, intimately connected or combined,” or “the action of implying; the fact of being implied or involved, without being plainly expressed; that which is involved or implied in something else,” or “what is implied though not formally expressed, by natural inference.”

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157 Ibid., 14.
None of these terms express the precise meaning for difference or deconstruction for philosopher Jacques Derrida. Stated broadly, his use of difference – or *différance* – describes the “difference and deferral of meaning,” and relates to both difference and imbrication. His *différance* describes meaning that is produced by juxtaposition.\footnote{163 Jacques Derrida, *Margins of Philosophy*, trans. Alan Bass (Chicago: Chicago University Press, 1982), 5-27.} Derrida explains that no word or sign can, by itself, fully determine its own meaning; instead, each is defined through an appeal to another word or sign, from which it differs.\footnote{164 Ibid.} Meaning is thus produced by opposition, and by the space that exists between things in opposition. Deconstruction is the task of identifying and problematizing these oppositions.\footnote{165 Jacques Derrida, *Of Grammatology*, reprint edition, trans. Gayatri Chakravarty Spivak (Baltimore: Johns Hopkins University Press, 2016), 347-366.} The word or sign is analyzed in all its manifestations, as are its oppositions, and the meanings and values established by these oppositions in discourse is tracked and critiqued.\footnote{166 Ibid.}

The forms of deconstruction and difference/différance identified by Derrida are not the subjects of, or frameworks for, artwork made by most appropriation artists. Such meaning can be assigned by the viewer or critic, per the formulations of Barthes and Foucault, but, to restate my point again, it is not *necessary* to see a work of appropriation
art through this lens, and doing so may make the transformative qualities of such artworks harder to identify.

Welchman suggests that the “possibilities for deconstruction seem stronger when the singular images and collateral sequences of artists that appropriate are read against their statements, brief essays, and other writings, which simultaneously situate, extend and, perhaps, confound them.”167 Here, Welchman describes an approach towards the interpretation of appropriation that I have previously identified as synthetic. As explained earlier, a synthetic approach to interpretation unites attention to both extrinsic and intrinsic motivations. It incorporates both a critic’s reading of pre-existing material and an artist’s explanation of her selections and arrangement.

The Deconstructive Impulse: Women Artists Reconfigure the Signs of Power, a 2011 exhibition curated by Nancy Princenthal and Helaine Posner for the Neuberger Museum of Art at Purchase College, State University of New York and the Nasher Museum of Art at Duke University, manifested Welchman’s recommendations. Posner described The Deconstructive Impulse as “a revisionist show” that explained how feminist theory adapted the deconstruction of Derrida and Barthes.168 She and Princenthal sought to illuminate the motivations behind deconstructionist and appropriationist artworks by

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167 Ibid., 16.
female artists in the 1970s and 1980s, artists who had been characterized as theoretically
driven and gender-blind, including Cindy Sherman, Sherrie Levine, Sarah
Charlesworth, and Barbara Kruger. 169 Although the title was borrowed from Craig
Owens’ “The Discourse of Others,” in which he coined the term “deconstructive
impulse,” the curators suggest that the theoretical frameworks developed by
Baudrillard, Derrida, Foucault, Barthes, Lacan, Foster, Crimp, and Owens were
influential, but not central, to art made by female appropriation artists in the 1970s and
1980s. Psychoanalysis, art history, media studies, sexuality, domesticity, motherhood,
and melodrama were all areas of knowledge considered and incorporated in these
artists’ oeuvres.170 The Deconstructive Impulse united the postmodern and the personal,
presenting these concerns as complementary rather than competitive. Questions of
authorship were treated as highly individualized inquiries rather than a confrontation
between the tenets of modernism and postmodernism. Pleasure and desire were
reintroduced as motivational and deserving of inquiry and sustained attention, which
could comfortably coexist with feminist critique and conceptual rigor.171

171 Ibid., 19.
In *This Will Have Been* (2012), organized by Helen Molesworth for the Museum of Contemporary Art Chicago, desire was again foregrounded. Appropriation was deliberately avoided as either a chronological reference or key term in an effort to complicate the “dominant art historical terms of the day.” Instead, Molesworth embraced the heterogeneous, sprawling quality of the 1980s that so many prior curators and critics had attempted to tidy through theory. Similar to *The Deconstructive Impulse*, Molesworth’s *This Will Have Been* placed feminism at the center of its inquiry, suggesting discourses that developed around the art of the 1980s were more deeply informed by feminist thought than previously acknowledged. She treated desire as an “organizing principle,” and embraced recent criticism that has “begun to reassess the psychic dimension of appropriation, seeing it as riddled with ambivalence and desire.”

The roles of desire, pleasure and ambiguity in appropriation were also addressed by art historian and critic Burton in 2004, when she used Ligon’s *Notes on the Margin of the Black Book* to launch an investigation of 1980s appropriative strategies in *Artforum*. Burton described *Notes on the Margin of the Black Book* as an “amendment” to Mapplethorpe’s photographs and suggested that *Notes on the Margin of the Black Book* is

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172 Molesworth, “This Will Have Been,” 15.
173 Ibid., 15-16.
174 Ibid., 39.
175 Johanna Burton, “Subject to Revision,” 205-213.
an investigation into Ligon’s own identity. Using Ligon’s work as a springboard, Burton reconsidered the history of writing on appropriation, explaining that the dominance of attention to the role of appropriation in critiques of the media, art institutions, or structures of signification eclipsed personal explorations of subjectivity and identity that coexisted in these artworks. She explained Notes on the Margin of the Black Book in terms of desire and ambivalence: “[Ligon] claimed a space in which his own ambivalent desires, identifications, and resistances might circulate among the desires, identifications, and resistances of others.” Burton suggests that the concerns of race, gender, and sexuality were written out of 1980s interpretations, along with appropriation’s connections to Pop art, in favor of a more philosophically-driven definitions of appropriation with “an overly political bloodline.” Burton asserted that appropriation is more ambivalent than described by prior authors, and offered a new metaphor for the operation: homeopathy, “which treats diseases by administering small doses, as remedy, of what could otherwise be lethal” and, in for the purposes of visual art, “to render its symptoms visible, manipulable.”

176 Ibid, 205.
177 Ibid., 206-208.
178 Ibid., 205.
179 Ibid., 207.
Burton’s medical framework was more successful than Eklund’s. Eklund’s choice of “serum” and “veins” call up the imagery of addiction to street drugs, and his framework suggests that Prince intends to conceal an addictive relationship with consumption. By contrast, Burton’s holistic paradigm, which requires the manifestation of symptoms in visual form, seems much more apposite for the ambiguously exhibitionistic Prince, who puts his insecurities and fantasies on full, lurid display in his artworks. Prince intakes and transforms pre-existing material that makes him feel profoundly insecure, consuming it, fantasizing about it, and strengthening himself through this roleplay.

Burton has also described appropriation as interlocked with artistic interests and projects that were previously seen as parallel or contiguous. For the Hammer Museum at the University of California in Los Angeles, Burton and co-curator Anne Ellegood organized Take It or Leave It: Institution, Image, Ideology (2014), another revisionist exhibition that took the position that appropriation is necessarily a form of institutional critique that embraces critical practices by “challenging the dominant culture and creating a space for debate.” Burton explains that appropriation is commonly understood as an “operation,” while institutional critique is understood as an

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“articulation.” She interprets these forms as having vied for critical status in the past, but explains that they are more properly seen as complementary and interdependent. One of Burton’s foundations for this reconsideration is artistic intent. She notes, “It’s been some time since advanced discussions of art culminated with arguments about the faith – good or otherwise – of artists, here such motivations are taken to be key.” For her part, Ellegood identifies in appropriation a “position of shared authorship” that is simultaneously “ideological and conceptual.” She notes that collaboration is a form of resistance against entrenched notions of authorship, and alludes to the idea that appropriation may be a form of unauthorized collaboration. Ellegood relies on the writings of Andrea Fraser and Douglas Crimp to suggest that all art making is collaborative, each object and image built as a palimpsest of reference and influence that is “derived from a shared collective field.”

Ellegood and Burton’s combined emphasis on identity, interaction, sharing, and collaboration in twenty-first century texts and exhibitions suggests a renewed, yet redirected, attention to the artist, and declares that interactions between artists have

184 Ibid., 22.
185 Ibid., 18.
186 Anne Ellegood, “Mourning in America,” in Burton and Ellegood, 27.
187 Ibid.
188 Ellegood writes that postmodern theorization includes an effort to identity this collaborative impulse, but her analysis overrelies on Craig Owens’ “The Discourse of Others,” discussed above. Ibid., 28.
assumed a new importance. When copying and reuse is accepted as normative, and the
why of copying can be established through the theoretical frameworks and resources
described above, then the how of copying can be foregrounded.

A reconsideration of appropriation as an operation that is constantly interwoven
with other concerns has been a theme throughout this chapter. It is a productive
direction for new ways of thinking about and framing appropriation, because this
perspective allows a critic to apply theories developed for “other” forms of artmaking,
such as institutional critique or relational aesthetics, to appropriation, and the results of
these applications tend to be useful for thinking about appropriation art as
transformative.

Following Burton and Ellegood, but moving in a slightly different direction, I
find it helpful to reconsider appropriation as complementary to and interdependent
with relational aesthetics, postproduction, and altermodernism, modes of artmaking
identified by Nicolas Bourriaud in the late twentieth and early twenty-first centuries.
This form of art critical theorization, which was not explicitly designed to assess
appropriation may hold the key to explicating appropriation art in a way that is
compatible with the guidance established by transformative use, and may direct
appropriation artists to uses that are transformative, fair, and ethical.
In *Relational Aesthetics* (1998), Bourriaud identified a new form of subversion in an art based in human relations, interpersonal engagements, and ethics. Bourriaud further developed his ideas on sharing, collaboration, and information-driven art making practices in *Postproduction* (2002) and in *The Radicant* (2009), as well as in exhibitions including *Altermodern* (2009). Although he aims to identify practices that exist parallel to appropriation, Bourriaud’s work is well suited to explicating modes of constructive appropriation, and is foundational to the prescription for what I will advocate is an ethically-guided form of appropriation, which I will introduce and discuss in the final chapter.

Bourriaud describes relational aesthetics as “a set of artistic practices [that] take as their theoretical and practical point of departure the whole of human relations and their social context, rather than an independent and private space.” Bourriaud’s understanding shifts emphasis from the traditional ideas of individually-held artistic property defined in the first chapter to human interaction. Bourriaud defines “art” as “an activity consisting in producing relationships with the world with the help of signs, forms, actions, and objects.” The artist’s “practice” and “behavior” are paramount in

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191 Ibid., 107.
his discussion because “what [the artist] produces, first and foremost, is relations
between people and the world, by way of aesthetic objects.”\(^\text{192}\)

Bourriaud does not describe such artists as appropriators. However, the
framework that he establishes can describe the constructive, even collaborative, activity
that characterizes many artworks that are deemed appropriative and transformative of
pre-existing material. He theorizes contemporary art as “a linking element,” defines an
artwork as “a dot on a line,” and explains how a viewer may conceive of an artwork as a
node in a network.\(^\text{193}\)

This is a more sophisticated version of the argument that Jeff Koons’ legal team
made in Rogers v. Koons (1992), when they claimed that Art Rogers’ photograph, which
would ordinarily be considered a copyrightable expression, had become an
uncopyrightable idea when reused by Koons in Koons’ own artistic expression. An
artwork can be both idea and expression simultaneously: as explained in the prior
chapter, when Rogers took his photograph, Puppies, he created an artistic expression. But
Bourriaud’s evaluation helps us understand that when Puppies was used as the pre-
existing material in Koons’ sculpture String of Puppies, the same photograph that was an
expression for Rogers acted as a “dot” or “node” in a network and was comparable to an

\(^{192}\) Ibid., 42.
\(^{193}\) Ibid., 20. I would extend this to suggest that a contemporary work of appropriation art can instead be
categorized as both (i) a node in a network and (ii) a network in and of itself, but Bourriaud stops here.
idea for Koons. The second artwork (Koons’ *String of Puppies*) formed links between the
pre-existing artwork (*Puppies*) and other concepts and acted as a connective tissue; this
connectivity can be understood as an imaginative, transformative expression. (In this
example, *String of Puppies* connected the “dot” of Rogers’ photograph to other “dots”
including theories of kitsch and early modern workshop practices.) The trouble with this
analysis is that, while the “dot” of pre-existing material serves as the appropriator’s
idea, it remains, by law, the prior artist’s expression. Thus, the distinction between
expression and idea, and how an artwork is characterized in a given situation, is
arguably at the core of every dispute over fair use.

Bourriaud further defined appropriation and networking more specifically in
*Postproduction* (2002), describing artists as “semionauts” who “produce original
pathways through signs,” producing or imagining “links” and “likely relations.”
For him, appropriation is a form of reuse characterized by selection, arrangement, and,
mostly importantly, the forging of connections. Appropriation becomes “navigation
within the meanderings of cultural history, navigation which itself becomes the subject
of artistic practice.” Bourriaud distinguishes the new form of appropriation from older
forms:

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195 Ibid.
The artists’ intuitive relationship with art history is now going beyond what we call “the art of appropriation,” which naturally infers an ideology of ownership, and moving towards a culture of the use of forms, a culture of constant activity based on a collective ideal: sharing.\textsuperscript{196}

The artist’s special role in this collective utopia is based on choice and agency.

“Appropriation,” Bourriaud continues, “is indeed the first stage of postproduction: the issue is no longer to fabricate an object, but to choose one among those that exist and to use or modify these according to a specific intention.”\textsuperscript{197} The quality of a work is determined not by its technical excellence, or its beauty, or even its concept. Instead, it is judged by the connections that the artist creates through his choices and associations.\textsuperscript{198}

In \textit{The Radicant} (2009), Bourriaud addresses the environments in which artists create such connections, and describes their relations and interactions with pre-existing images. Following Jean Baudrillard’s theories of simulacra, Bourriaud declares that “signs are no longer anything more than cultural referents, no longer linked to a reality.”\textsuperscript{199} Instead, these signs act as “cultural rain”:

If culture is a form of merchandise that is “distributed” by corporations and institutions, then individuals move in a “veritable rain of forms, images, objects, and discourses, a rain around which are organized both (creative) activities and (consumption-oriented) traffic.”\textsuperscript{200}

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\begin{itemize}
\item \textsuperscript{196} Ibid., 10.
\item \textsuperscript{197} Ibid., 25.
\item \textsuperscript{198} “The quality of a work depends on the trajectory it describes in the cultural landscape. It constructs a linkage between forms, signs, and images.” Ibid., 40.
\item \textsuperscript{199} Bourriaud, \textit{The Radicant}, 49.
\item \textsuperscript{200} Ibid., 143.
\end{itemize}
Bourriaud returns immediately to a discussion of the artist, foregrounding the individual, and making connections to and between the flood of images.²⁰¹ “Radicant artists” are the semionaut navigators who set down roots gradually as they grow and “elaborate themselves as subjects” in the process of making artworks.²⁰² He states:

The figure of the subject defined by the radicant resembles that advanced by queer theory, which views the self as constructed out of borrowings, citations, and proximities, hence as pure constructivism.²⁰³

Bourriaud’s approach is not without its flaw and detractors. Art historian Claire Bishop’s criticism of relational aesthetics, published in October in 2004, became nearly as famous as Bourriaud’s own work.²⁰⁴ Bishop suggested that Bourriaud misinterprets theories of authorship, and “redirects the argument back to artistic intentionality rather than issues of reception.”²⁰⁵ I would argue that Bishop has misinterpreted Bourriaud, as she continues to seek what he repeatedly rejects: binary opposition between artist and viewer, interpretive frameworks that assign greater power to the viewer, and an emphasis on product rather than the process. Bishop points out that “the quality of the relationships in ‘relational aesthetics’ are never examined or called into question” and

²⁰¹ Ibid., 51-52.
²⁰² The term radicant artist is drawn from radicant plants (such as ivy) that form roots in this way. Ibid., 513.
²⁰³ Ibid., 55.
²⁰⁵ Ibid., 62.
asks “if relational art produces human relations, then the next logical question to ask is what types of relations are being produced, for whom, and why?” While excellent questions, Bishop’s response calls for a warm embrace of “antagonism” and “impossible resolution,” and fails to demonstrate the superiority of direct antagonism over the subtle relations celebrated by Bourriaud. Bishop’s argument, like many academic responses to constructive theorizations of appropriation, seems designed to reaffirm the superiority of the critic and her ability to identify critical engagement with art history, political resistance, and other forms of opposition in appropriation artworks. Rather than recognizing existing forms of opposition, activism, and resistance rooted in perspectives antithetical to, or at least outside of, art critical theories of authorship and originality, appropriation art continues to be reinterpreted through this narrow lens.

Relational aesthetics is typically discussed as form of artmaking that exists parallel to or alongside appropriation. But I suggest that we see appropriation and relational aesthetics as imbricated or intersectional, as Burton and Ellegood suggested of appropriation and institutional critique. Bourriaud’s theories provide a productive direction for future discussions of appropriation that do not center on authorship and originality. For Bourriaud, appropriation is a mode of connection and construction. Rather than describing artists using appropriation as deconstructionists who identify hidden structures in order to sneer at them, Bourriaud characterizes appropriation as a
way to rehabilitate the contemporary world, beginning from the artist and extending outwards. This approach, which describes appropriation as personal, connective, and productive – as well as deconstructive, political, and concerned with issues of representation – permits more nuanced and complex interpretations of appropriation.

The next section offers such an interpretation.

2.3 Richard Prince, Canal Zone (2007-2008)

Curator Lisa Phillips has explained that Richard Prince’s work cannot be understood as “motivated just by a deconstructive impulse.” Instead, she recommends attention to “expressions of fears, desires, and obsessions, not to mention the experience of visual pleasure.”

Prince’s work is rarely seen this way, and to do so requires investigation into his intentions, preferences, and pleasures. Using Phillips as a guide invites a very different reading of some of Prince’s most difficult works: the five artworks isolated by the Second Circuit Court as uncertainly transformative.

As discussed in the last chapter, one of the most confusing aspects of the Second Circuit’s ruling in Cariou v. Prince (2013) was its remand of five works to the district court. Patrick Cariou described his work, Yes Rasta (2000) as “extreme classical

207 Cariou 714 F.3d 699, 711-712. See Adler, 579; Jasiewicz, 165; Bunker and Calvert, 128.
photography [and] portraiture” not “pop culture at all.” The court described Cariou’s photographs as “serene and deliberately composed,” while describing Prince’s collaged paintings were “crude and jarring” and “hectic and provocative.” Ultimately, the court described these twenty-five works as “collages on canvas that incorporate color, feature distorted humans and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs” as sufficiently visually different to be declared transformative. Of the thirty works under review, only Meditation (Fig. 18), Canal Zone (2007) (Fig. 19), Canal Zone (2008) (Fig. 20), and Charlie Company (2008) (Fig. 21), and Graduation (Fig. 22) were deemed exempt from a determination of transformativeness and thereby not fair use. The Second Circuit failed to describe why these five works were so difficult to assess, or why the lower court, which had so abysmally failed to properly adjudicate Canal Zone the first time, would be better qualified to do so with new and oblique instructions.

208 Ibid.
209 Ibid.
210 Ibid.
211 “In some works, such as Charlie Company, Prince did not alter the source photograph very much at all. In others, such as Djuana Barnes, Natalie Barney, Renee Vivien and Romaine Brooks take over the Guanahani, the entire source photograph is used but is also heavily obscured and altered to the point that Cariou’s original is barely recognizable...Graduation, Meditation, Canal Zone (2008), Canal Zone (2007), and Charlie Company do not sufficiently differ from the photographs of Cariou’s that they incorporate for us confidently to make a determination about their transformative nature as a matter of law.” Cariou, 714 F.3d at 710.
Acting as the “reasonable observer,” the Second Circuit documented numerous physical “alterations” and “differences” in the images, but did not perceive these distinctions as meaning-rich. Law professor Amy Adler has forcefully criticized the Second Circuit for “repeatedly [invoking] aesthetics and side-by-side comparison” and called this approach “the art-law equivalent of Zombie Formalism” – a shorthand reference to Greenbergian formalism. While the court’s mode of analysis bears little resemblance to Greenberg’s, but I agree that emphasis on the appearance of the Prince artworks left the panel with very little information about the artworks’ transformative qualities. The Second Circuit’s formal analysis of Prince’s work adopted a perspective that must be categorized as that of the “ordinary” observer, leaving much to be desired. The Second Circuit used only the tools available to an ordinary observer, rather than an expert observer, which is, in Prince’s case, unreasonable. The artworks in Canal Zone are practically inaccessible without knowledge of Prince’s biography, career, and studio

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212 Adler, 35.
practice, as the series only reveals its depths only when viewer sees the paintings within the context of their creation.

The court’s reluctance to opine on the five artworks above derived from the quality and complexity of Prince’s transformations. The court was also undermined by a lack of specific precedent for artistic transformation that is constructive rather than deconstructive, imaginative rather than critical, and allegorical rather than direct. Here a fifth gap in the doctrine, less easily resolved than the four questions addressed in the last chapter, arises: despite its stated emphasis on progress, the “new,” and the public good, fair use determinations are overwhelmingly awarded to works of adverse criticism that look backwards rather than forwards.214 However, many significant works of appropriation art are transformative because they are forward looking, because they are constructively critical.

A review of the five works remanded will demonstrate why transformativeness must embrace imaginative uses that celebrate prior works in ways that can be justified as fair use, and recourse to the personal, intimate kinds of interpretation used by art historians such as Singerman, Molesworth, Burton, Welchman, and others is required.

214 This assertion deserves its own empirical study, which remains to be written.
Meditation, The Canal Zone (2007), Canal Zone (2008), Charlie Company, and Graduation, share some basic features. The Second Circuit’s straightforward analysis acknowledged tinting, focus, lozenge shapes painted over the human figures’ eyes and mouths, enlargements of features (such as hands), additions of objects (such as guitars), and inversion. But the court’s interpretations were shallow and meaningless. For example, the lozenges were interpreted to “make the subject appear anonymous, rather than as the strong individual who appears in the original,” rather than acknowledged as historical referents rich in significance. Marks made by Prince’s hand (“alterations of some of those photographs limited to lozenges or cartoonish appendages painted or drawn on”) were seen as less transformative than combinations of elements copied by two or more photographers, but no justification for this imposition of value was proffered. Additionally, the Second Circuit’s formal reading seems to establish that transformation is found when an artist “combines divergent elements”—and the more, the better. But the inclusion of additional elements has little or no predictive effect on the progressive qualities of appropriation art.

215 *Cariou*, 714 F.3d at 711.
216 Ibid.
218 Though, as explained in the next chapter, it was probably inspired by the work of Richard Posner and William Landes. *Cariou*, 714 F.3d at 710.
219 *Cariou*, 784 F. Supp. 2d at 348.
Formal analysis yields little useful information. The Canal Zone works combine black-and-white images of Rastafarians and Jamaican culled from Cariou’s Yes Rasta, which have been magnified and pasted onto canvas, with black-and-white photographs of nude women by photographers Eric Kroll and Richard Kern. Appended to these photographs are musical instruments, enlarged hands, and oval “lozenge” shapes that obscure the eyes and mouths of the human figures. The collaged materials are overpainted with heavy swashes of chalk white, orchid, Pepto pink, maroon, and goldenrod. The combinations are discordant and confusing. The overpainting is sloppy and drippy, even for Prince, who often lashes his canvases with washy color. The overall effect is not conventionally beautiful. However, given Prince’s ability to find and exploit majestic beauty in the most pedestrian places, this ugliness seems deliberate and important.

During Prince’s deposition, he described formal elements such as the lozenges in great detail, but his testimony was largely ignored by the court. This may have seemed to favor Prince, given that, in the lower court opinion, the judge focused on Prince’s lack of an espoused message. When Prince stated, “I don’t really have a message,” which the lower court interpreted this to mean that Prince “did not intend to comment on any

aspects of the original works or on the broader culture.” But the court overlooked the second discussion of message in the deposition, which appears towards the end:

Brooks: “Is there a message?”
Prince: “There is a certainly a message.”
Brooks: “What is the message?”
Prince: “The message is to make great art that makes people feel good. That’s my message. Now I know it might not be someone else’s, but I believe that’s also the way I’ve always defined art.”

“Great art that makes people feel good” is not an identifiably transformative purpose, but perhaps it should be. If, as Duchamp has explained, the creative act is “mediumistic,” then perhaps transformation happens in a space that is unencumbered by rational thought, and in which valuable social messages are created in intensely personal inquiries that may be difficult to justify through intention alone.

On the occasion of Canal Zone’s debut at Gagosian, before Cariou filed suit, journalist Glenn O’Brien asked Prince how he ‘got into’ Rastas. Prince replied “I loved the look, and I loved the dreads, so I just started fooling around with this book, drawing it like I did with the de Kooning paintings. I did some collages.” He was fooling around with similar books, too: the photographs of nude women that appear beside the Rastas were not drawn from pornographic magazines, but from art monographs

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221 Ibid.
222 Ibid., 195.
published by Taschen. Did Prince intend to create social commentary while scribbling in his copy of Yes Rasta? Did he plan to create a critical work of self-reflection while using a squeegee on blown-up copies of Cariou’s photographs? Perhaps not. He was, according to his testimony, otherwise concerned with making art.

In 1968, conceptual artist Henry Flynt invented a new word, *brend*, to describe “the conditions for the production of aesthetic pleasure.” Flynt’s *brend* may otherwise be explained as “the cultivation of one’s own individual idiosyncracies and preferences.”

When you write with a pencil, you are rarely *attentive* to the fact that the pencil was produced by somebody other than yourself. You can use something produced by somebody else without thinking about it. In your just-likings, you *never* notice that things are not produced by you. The essence of a just-liking is that in it, you are not aware that the object you value is less personal to you than your very valuing.

Flynt merges self and object in *brend*, requiring a cessation of the evaluative faculty: “[I]n the case of your just-likings, it is not appropriate to distinguish the objects valued from your valuings.”

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224 The Taschen monographs were by Eric Kroll and Richard Kern. Allen, 125-126.  
228 Ibid.
In his testimony, Prince explained that he pays little attention to copyright, and believes artists should be as “free as possible” when “in their studios.” Prince liked the images in Cariou’s book, and in ways he found difficult – or unnecessary – to describe. He just liked them.

Brooks: Did you like the pictures?
Prince: Yes.
Brooks: In the book?
Prince: I liked the pictures.
Brooks: You liked them a lot?
Prince: I liked them, yes…

Brooks: What did you mean by that?
Prince: What do you mean by what do I mean by that? I just said it. I love the look and I love the dreads.
Brooks: What do you love about the look?
Prince: I love the way they looked.
Brooks: How so?

Prince liked the images in a way that was intensely, specifically, personal:

Prince: I don’t know how to answer that question, how so. I mean, that’s usually I get – that’s how I respond to images. I think maybe I liked the way that they were so different.
Brooks: Than what?
Prince: Than myself. I don’t have dreads. I wish I could. I mean I think that was some of the thinking or some of the – perhaps it goes back to the girlfriends. The reason why I took the girlfriends is I wanted to be a girlfriend. I think some of the attraction that I had to some of these people who looked like Rastas in St. Barth, hanging out at bars, I said to myself,

Allen, 57.
Ibid., 97.
Ibid., 120.
Ibid., 120.
Ibid., 190-191.
gee, I wish I could look like that some day. So if I can’t look like that, maybe I should paint them. Maybe that’s a way to substitute the desire. I mean that’s the only way I can answer that love question.233

And an important part of Prince’s liking was the photographs’ publication format. Prince sees himself as “deejaying photographs.”234 He cuts them up, recombines them, and reorganizes them. Prince creates his images by combining material from his environment and generating meaning through references and combinations; and Prince’s collages often stem from his intense interest in books such as Yes, Rasta.

Prince: I’m a bibliophile. I collect books. At any one time I have 20, 25 different types of books laying about the studio. Sometimes I pay attention to them. Sometimes I don’t. I’m always ripping them up.235

Prince is a “manic” and “obsessive” bibliophile, with a personal collection of “manuscripts and first editions of contemporary American authors on a scale that is unrivaled,” accordingly to John Bidwell, the curator of printed books for the Morgan Library & Museum.236 On the occasion of Prince’s retrospective at the Guggenheim in 2007, New Yorker art critic Peter Schjeldahl struggled to give Prince’s practice an explanatory title, trying “magus of contemporary American culture,” “artist as

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233 Ibid., 191-192.
234 Ibid., 207.
235 Ibid.
anthropologist,” “artist as irreverent art critic,” finally settling on “the exiguous zeal of obsessive collecting.”  

*Canal Zone* is a highly personal allegory by an obsessive collector. It dives deeply into Prince’s “just-likings,” explores his insecurities, and builds a metaphor-rich narrative for his transition from unknown outsider artist to international art star. It is a story that he wrote for himself – literally, as he wrote a screenplay to accompany the paintings – but also figuratively, because the process was mostly lonely and private:

> It sort of becomes an allegory. It’s just something I needed to get out of my system. The pictures are very quickly done – they’re not really thought about—and there’s a collage element to them that’s very primitive. Paste-up, cutting with scissors, and squeegeed on with paint. It’s something that I can do myself, and I like that aspect of it. I don’t need assistants. I don’t need anybody. 

Allegory was born from classical philosophy. Oxford Art Online defines allegory as a “means of making the ‘invisible’ visible” and describes it as “a method of expressing complex abstract ideas” through “combinations of personifications and/or symbols, which, on the basis of a conventionally agreed relation between concept and representation, refer to an idea outside the work of art.” The structure afforded by allegory’s extended metaphors were popular throughout the medieval and early

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238 O’Brien.
239 Ibid.
modern periods, but fell out of artistic favor in the nineteenth century. Allegorical forms were recuperated in postmodern criticism, most notably by Craig Owen and Benjamin Buchloh, who built their theories of contemporary appropriation on Walter Benjamin’s theory of allegory. Owens explained that “allegorical imagery is appropriated imagery: the allegorist does not invent images but confiscates them and the work thus created is a ‘palimpsest’ in which “one text is read through another.” Owens further explains that contemporary allegory in appropriation art replaces one meaning with another.

This may have been true of early work by Prince, but it is not convincing when applied to the replacement function in Canal Zone. Prince supplements, but does not supplant. He appends, but does not supersede. The myth of the Rasta is ever-present in Canal Zone, seen through the prism of Prince’s own desires and insecurities. But the locus of Cariou’s offense to Prince’s use of his work is identified in Owens’ analysis: Prince may not have intended to supersede the meaning of Cariou’s photographs, but “what is ‘merely appended’ to a work of art can be mistaken for its ‘essence.’”

240 Ibid.
242 Owens, 68-69.
243 Ibid.
244 Ibid., 84
I am here distinguishing the allegorical nature of Canal Zone from the authorship-negotiation strategies described by prior critical theories of allegory and appropriation.

Prince claims that he had a strategy and was no longer interested in questions around authorship and originality. When asked by Cariou’s attorney about his role in “redefining the concept of authorship,” Prince replied:

[In the 1970s] there was that essay by Roland Barthes called Death of the Author, and it was just an issue that was going around town...all it is is philosophical...it’s sort of like someone writing a term paper, you know, it’s academic. You know, it’s something that takes place in October magazine, which I don’t particularly like, and it’s Columbia University and you know, it’s – I’m much more of a – well, I’m much more interested in trying to make art that stands up next to Picasso, De Kooning, and Warhol.

According to Prince, art isn’t a response to theory, “[A]rt comes out of a personal crisis you’re having.” Prince’s crisis in 2008 was the navigation of his transition from marginalized outsider to wealthy market artist.

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246 Allen, 217-218.

247 Swanson.
Prince was born in the Panama Canal Zone in 1949.\textsuperscript{248} His artistic career began in the 1970s, and he is frequently discussed as part of “The Pictures Generation.”\textsuperscript{249} Importantly, Prince was not included in Douglas Crimp’s original 1977 exhibition, but was central to Douglas Eklund’s 2009 exhibition. In between, Prince spent the 1980s living in shabby apartments in the East Village, enjoying critical success, but failing to connect with collectors.\textsuperscript{250} In 1994, unable to achieve the material success enjoyed by peers like Koons, Sherman, Levine, Longo, Kruger, and Lawler, Prince left New York City for upstate New York and was ready to give up art making entirely.\textsuperscript{251} Then collector Charles Saatchi bought six paintings.\textsuperscript{252} Prince said, “Just when I thought I was out, they pulled me back in.”\textsuperscript{253} In 2003, he created the Nurses series, for which he finally received attention from collectors and financial rewards to match his critical acclaim.\textsuperscript{254} Two years later, “Untitled – Cowboy” (1989) sold at Christie’s for $1,248,000, making it the most expensive photograph ever sold at auction.\textsuperscript{255} From there, Prince’s career

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\textsuperscript{250} Swanson.
\textsuperscript{252} Ibid.
\textsuperscript{253} Ibid.
\textsuperscript{255} http://www.vanityfair.com/news/2007/12/prince200712
\end{flushleft}
skyrocketed, and he returned to the city from upstate, buying neighboring townhouses on the Upper East Side for $11.5 million and $13.75 million each. Yet, despite his success, Prince has remained something of an outsider. He “do[esn’t] operate very well out in the real world” because he is extremely shy, can be very awkward, and remains devoted to his self-image as a punk and troublemaker. With this personal history in place, let us turn back to what Prince saw in *Yes Rasta*.

Prince’s approach to his personal crisis resulted in a distortion and refraction of Cariou’s “extreme classical photography.” Jamaican film director Perry Henzell’s essay in *Yes Rasta* describes the opposed societies of “Zion” and “Babylon.” Zion, “where almost everything is free, the air is pure, the earth is rich, the rainfall is abundant” is opposed to rich Babylon, “where nothing is free or unpolluted”:

> Babylon was where mankind first stopped roving and a built a city. Babylon, between the two rivers on a plain, was where man first accumulated more than he could carry. Babylon was where owning more than you could move led up to a pile of such treasures for the rich, such a display of wealth and force to protect it...Babylon doesn’t produce anything natural; it only uses up what’s there, and as it reaches further and further into the natural world, more and more of those who used to live in Zion starve. So where do they go? They go into Babylon as refugees, to a life they never planned for, to a life they don’t understand, swelling Babylon, making it more desperate and greedier than ever.

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256 Swanson.
257 Ibid., Daly, Schjeldahl.
258 *Cariou*, 714 F.3d at 699.
259 Ibid.
According to Henzell, the Rastas “projected the humility of the social outcast but bore the high stride of a visionary on the move.”

I read *Canal Zone* as a personal allegory about an outsider cult hero who mourns the purity of his lost culture amid the rise of an impure and destructive civilization that simultaneously celebrates and rejects the hero, glorifying the hero type but never acknowledging the individual who performs the type. Rather than critiquing vague philosophical concepts such as the “author,” Prince critiques the Babylon he inhabits: the galleries in which *Canal Zone* hung, the buyers who purchased the paintings, the economic system that enables the art machine, and himself, a willing, fascinated, and well-remunerated participant.

As Judge Pierre Leval asked in “Towards a Theory of Fair Use,” is Prince’s deeply personal allegorical narrative “the type of activity that the fair use doctrine intends to protect for the enrichment of society”? There is no precedent for allegory as a transformative use. However, there is no precedent that precludes it, either. Allegory can have social value and qualify as transformative, and whether the artwork was intended to be a personal gesture or social commentary matters not. The proper question

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is: Does allegory constitute the “creation of new information, new aesthetics, new insights and understandings”?  

Canal Zone's social value demands an overdue reconsideration and expansion of transformative purpose that fully recognizes the potential of fair use “commentary.”  

Recall that fair use exists to balance the restrictions on speech necessarily imposed by the provision of property rights over expression to private individuals. As described above, First Amendment doctrine does not explicitly define art as protected speech and it is thus unclear why art is shielded by the First Amendment. Most approaches try to answer this question through appeals to the democratic value of art or the importance of autonomous self-expression. However, as constitutional law professor Jed Rubenfeld explains, “freedom of imagination” is the core of First Amendment protections for art. Such freedom applies to works both “great” and “futile,” and “no one may be penalized for what he dares to imagine” – not even by a copyright holder. Rubenfeld questions the expansion of the derivative works right, which is so often used to characterize works

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262 Cariou, 714 F.3d at 706.  
264 Ibid., 35.  
265 Ibid., 36-7
that may be transformative, and carefully distinguishes imaginative uses from mere
piracies.266

In distinguishing piracies and fair uses, courts are disposed to look for critical,
deconstructive artistic approaches that respond aggressively to the prior work through
protected forms of expression like political speech, parody, or criticism of a prior work.
Commentary on a prior work is also a fair use purpose recognized by the Copyright Act,
but a positive commentary is less likely to be deemed fair use than a negative
commentary.267 Celebratory imaginative uses are less likely to be found protected speech
and are instead deemed derivative works.268 When one is inspired by something, when
one likes something, one is expected to imitate it or “work up something fresh.”269 There
is little legal allowance for the desire to use the thing itself. But there should be, because
laudatory reuses can also be perceived as offensive. Sometimes, a prior creator is just as
likely to deny permission for a sweetly celebratory use as a bitingly critical one. For
example, when rapper Biz Markie approached singer-songwriter Gilbert O’Sullivan to

266 Rubenfeld explains that when courts inquire into the content of two different works to determine
similarity, copyright becomes a content-based, and thus constitutionally unacceptable, regulation. He argues
that “perfect reproductions” are obvious piracies without need for inquiry into content. Of course, there are
exceptions to every brilliant analysis: Sherrie Levine’s rephotographs would likely be deemed piracies
rather than exercises of imagination without substantive inquiry into content. Ibid., 48-43.
267 Absence must prove the rule: there is little precedent to cite for celebratory fair uses of visual art.
268 See Rebecca Tushnet “Legal Fictions” and Tushnet, “Payment in Credit,” 135-174.
269 Campbell, 510 U.S. at 580.
license a sample of Sullivan’s song “Alone Again, Naturally” for his rap song, “Alone Again,” Sullivan listened to Markie’s work, then flatly refused permission:

Biz Markie and they [Cold Chillin Records] approached us and said, this was in 1990, that we would like to sample your song and use it on a track. So we said okay, and if we like it we’ll see where we go from there. They sent it over and what they had done was sampled the intro and then he rapped over it...But then we discovered that he [Biz] was a comic, a comic rapper, and the one thing I am very guarded about is protecting songs and in particular I’ll go to my grave in defending the song to make sure it is never used in the comic scenario which is offensive to those people who bought it for the right reasons. And so therefore we refused. But being the kind of people that they were, they decided to use it anyway [without permission] so we had to go to court.270

With the support of his label, Warner Bros. Records, Markie used the sample without permission and O’Sullivan sued.271 In an astonishing opinion that cited no legal precedent, the Southern District of New York ruled for O’Sullivan. The case had an immediate and long-lasting effect on music, as it opened the door for a wave of similar lawsuits, encouraged record companies to avoid litigation by developing a culture of licensing, and promoted the popular misunderstanding that all musical borrowings require permission.272

O’Sullivan’s copyright allowed him to squash an imaginative reuse of “Alone Again, Naturally” because he did not like its tone. As I explained at length in the first chapter, this is exactly the kind of behavior and use of copyright as tool of censorship that fair use ought to prevent. The question is not why should an imaginative work such as Canal Zone or “Alone Again” be deemed fair use, but why shouldn’t it be? As Rubenfeld explains:

To imagine is to form an idea that goes beyond – that introduces something new to – what the mind has heretofore seen, heard, thought, or otherwise sensed. Imagination is the faculty by which the mind presents to itself what isn’t actually present and what has never been actually present to it.

Freedom of imagination must be understood as central to the First Amendment and, in the context of art, an artist’s “brend,” should be considered a transformative purpose. Artists like Prince or Biz Markie must have free play to undertake the “creative act,” which is often without specific strategy, purpose, or intent, for it is in the exercise of imagination that transformation truly takes place.

In her treatise on getting “lost,” writer Rebecca Solnit writes that “the things we want are transformative, and we don’t know or only think we know what is on the other side of that transformation.” This is as true of progressive artworks as it is of life.

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273 The reader may recall from the prior chapter that, a decade after Grand Upright Music, Ltd was decided, a different court frankly criticized such behavior. Suntrust, 268 F.3d at 1257.
274 Rubenfeld, 37.
experiences. It is impossible to predict in advance what transformations an artist like Prince will provide. He can only be given the flexibility and freedom to do what he needs to do as an artist, and then make an effort to understand what has happened after the creative act occurs. Finally, the best person to ask about that process is, of course, an artist like Prince.

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When asked why he did not go to Jamaica and take photographs of Rastafarians himself, Prince replied:

Everybody creates their own artificial reality when making art. And mine gets made in the studio. I’m the king of my castle in my studio. I don’t operate very well out in the real world.  

Relational aesthetics proposes a highly extroverted form of engagement by artists. Not everyone connects in this way. Some appropriations, like those performed by Prince in Canal Zone, may be read as the gestures of connection by more introverted artists. Prince is in conversation with his materials, and with the creators, like Patrick Cariou, who made them. Sometimes the conversation is not terribly polite. Nevertheless, this relation should be characterized as a conversation, not a theft. Furthermore, it is a conversation that Prince invites the viewer to join, but he or she has to negotiate the

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276 Allen, 207.

ambiguity and discomfort of a conversation. To understanding what Prince means, the
viewer has to approach his work with the generosity shown to ordinary, rather than
aesthetic, language. The viewer has to assume that Prince intended to mean something,
and attempt to connect with this meaning. Prince uses “artspeak” against those who
would apply it to him, and thus resists the imposition of meaning on his work. Such
impositions can be made, but will only identify a member of the art world “in crowd” as
outside, rather than inside, Prince’s interpretive community.

For the last three decades, interpretations of appropriation art that focus on the
artist’s choices in selection and assembly have been less popular than interpretations
that focus on the critic’s decisions about pre-existing material. The former are arguably
incomplete: when a work of appropriation art incorporates reference material with its
own interpretive possibilities, multivalent interpretations beyond the artist’s own can
and should be admitted. But the latter are also incomplete: critic-focused interpretations
frequently discount artists’ own statements, interviews, and theoretical writings in favor
of an author’s own ideas and interpretation of critical theory, especially when an
appropriation artist’s views conflict with the critic’s own position.

Such a disregard for artists’ concepts has increasingly been adopted by legal
scholars and judges in papers and opinions that propose greater emphasis on the
production of meaning by viewers and critics. The recognition of multiple meanings is
an important step in the right direction for copyright law. Yet, the simple, unquestioned acceptance of multiple meanings by courts will not solve the problem of confusion about appropriation art, because critic-focused interpretations that encourage multiple meanings also tend to be poststructuralist interpretations that emphasize authorship and originality in the service of politics and social criticism. This works out well when the artworks under review are exegetic. This focus leads to confusion when the artworks under review are constructive or complimentary.

However, even though Prince’s artworks were transformatively constructive, and he clearly entered into a conversation with Cariou’s artwork, Prince’s failure to enter into conversation with Cariou was arguably unethical, because Prince treated Carious differently than the other photographers whose images were incorporated into Canal Zone.

In 2014, after the Second Circuit reversed the district court’s punitive decision in Cariou v. Prince and deemed most artworks from Prince’s Canal Zone series to be both transformative and fair use, Gagosian Gallery exhibited the series again. The 2014 press release featured a discursive text by Prince that focused on the biographical and psychological foundations of the artworks. In the press release Prince identified the origins of the female figures, but not the Rastafarians:

The repros of women were supplied from friends. Dian Hanson, John McWhinnie, Richard Kern. One repro came from Eric Kroll. I gave each of
them a small study in return for their giving. I don’t want to talk about where the Rastas came from.278

In other words, the other photographers from whom Prince appropriated were notified and paid for their contributions, but Cariou was not. Prince’s decision to exclude Cariou was not illegal, but certainly suggests unfair, and possibly unethical, treatment. Recognition and remuneration of an appropriation artist’s sources should not be this arbitrary. This behavior is too closely reminiscent of the power held by copyright holders described in Chapter 1 who refused permission based on unflattering reuses.

This coda to the story of Cariou v. Prince suggests that Cariou was indeed harmed when Prince appropriated his photographs. This harm was not necessarily financial, though a “small study” by Richard Prince could represent a valuable trade. Nor was the harm necessarily as clear-cut as a missed licensing agreement and permission fee. Instead, the lost prospect was something ineffable, but perhaps equally, if not more, important to a little-known photographer: recognition and inclusion. The next chapter takes up issues of harm and ethics, asks questions about the relationships between appropriation artists and the artists from whom they source images, and encourages appropriation artists to be responsible and thoughtful towards the creators of their source materials, even when appropriators are on the right side of the law

3. MARKETS: Problems of Interaction

In Campbell v. Acuff-Rose Music (1994), Justice Souter introduced a helpful guide to balancing the concerns of commerciality and commentary in fair use:

[When] the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.¹

“The drudgery of working up something fresh” has been repurposed to describe the assumed laziness of appropriators. For example, when a critic determines that

“Prince was using Cariou’s photos as raw materials to ‘avoid the drudgery in working up something fresh’ rather than building upon them seems readily apparent.”² Or it can be inferred when opposing counsel asks Richard Prince perplexing questions such as,

“Why didn’t you get on an airplane and take pictures of Rastafarians?”³

The difference between drudgery and creativity is rarely “readily apparent” in appropriation art. First, it is not the avoidance of “drudgery” that prompts Prince to use Cariou’s images. Prince could have taken his own images, but that was not the point: he

¹ Campbell, 510 U.S. at 580.
³ Allen, 207.
liked Cariou’s images, and his own recreations would be no substitute for the real thing. Sometimes, it is simply impossible to be creative without a highly specific, personally significant prompt, which Cariou’s photographs served for Prince in his creation of *Canal Zone*, described in the last chapter. Prince is not the first to respond to another artist’s work with a need for the specific, unsubstitutable object.

In 1953, Robert Rauschenberg approached abstract painter Willem de Kooning to ask the elder artist for a special favor: he wanted one of de Kooning’s drawings. Even though they shared many friends and connections through Black Mountain College and the downtown New York art scene, the younger artist was very nervous about approaching de Kooning. But Rauschenberg mustered his courage, and, with a bottle of Jack Daniels under his arm, knocked on the door of de Kooning’s apartment. As he waited, Rauschenberg “prayed the whole time that [de Kooning] might not be home.”

But de Kooning was home, and he asked Rauschenberg in. They shared the whiskey, and, at some point in the evening, Rauschenberg asked de Kooning for both a drawing – and for his permission to erase it. de Kooning was a bit uneasy about the idea, but Rauschenberg convinced him that his desire to eradicate de Kooning’s work was rooted

\[\text{\textsuperscript{5}}\] Ibid.  
\[\text{\textsuperscript{6}}\] Ibid.  
in curiosity, respect, and admiration. Finally, de Kooning said, “OK, I don’t like it, but I’m going to go along with it because I understand the idea.” de Kooning handed over a drawing that Rauschenberg would find “very difficult” to obliterate. It took Rauschenberg a month of considerable effort and delicate work to eradicate the charcoal, pencil, and grease of de Kooning’s drawing. When he was finished, Rauschenberg placed the erased page in an ornate gilt frame, with the label “ERASED de KOONING DRAWING, ROBERT RAUSCHENBERG, 1953.”

Spending a month erasing another artist’s drawing may be characterized many ways – brilliant, crazy, innovative, oedipal – but the act cannot be described as an avoidance of “drudgery.” But what kind of creativity was this? Some art historians have characterized *Erased de Kooning Drawing* as a rebuke of the modernist ideal of originality. Others have described it as a work of appropriation art. Art historian Barry Schwabsky

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called Rauschenberg’s procedure “an act of copying in reverse.”¹¹ A Rauschenberg monograph describes *Erased de Kooning* as “a landmark of postmodernism because of its subversive appropriation of another artist’s work.”¹² Many years later, art historian Vincent Katz explained that “what [Rauschenberg] was smashing was not de Kooning; he was using an artist he admired to smash given ways of working.”¹³ Katz found *Erased de Kooning Drawing* multivalent and complex because “it was a performative act – the erasing is the important part of it – resulting in a conceptual work (you have to know that there was an actual de Kooning that was erased, with the artist’s consent, to have full understanding of it).”¹⁴

Thinking back to definitions established in the second chapter, how is this an act of appropriation? Rauschenberg obtained the drawing in a wholly legal manner by explicitly asking for permission for a specific use from the originating artist, de Kooning. In fact, Rauschenberg actually asked for two things from de Kooning. First, he requested the physical drawing, which is a form of real property. But possession of the real property did not necessarily grant Rauschenberg the right to mess with de Kooning’s

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¹⁴ Ibid.
drawing. In 1953, de Kooning’s work was probably not protected by a federal copyright. At the time, copyrightability depended on publication and a notice of copyright, and Rauschenberg’s story suggests that the de Kooning drawing was an unpublished work.\textsuperscript{15} However, because copyright today applies from the moment a work is “fixed in a tangible medium,” we understand that Rauschenberg made a second request: permission to alter – or, more specifically, to eradicate – de Kooning’s intellectual property.\textsuperscript{16} And de Kooning’s response was “OK, I don’t like it, but I’m going to go along with it because I understand the idea.”\textsuperscript{17}

An authorized use with a highly transformative character, such as Rauschenberg’s, raises questions about the role of permission in appropriation. Unauthorized takings – like those made by Carrie Mae Weems or Richard Prince, as described in the first and second chapters – are those that commonly appear before judges, but, as established in the second chapter, art historical understandings of appropriation art do not require unauthorized takings. Appropriation art is not required, from an art historical perspective, to be deconstructive, critical, or derogatory. Sometimes, as in the case of Erased de Kooning Drawing, appropriation art is quite

\textsuperscript{17} Krulwich.
constructive, complimentary, and celebratory. Even when it obliterates its subject matter.

Early on, and until the end of his life, Rauschenberg denied interpretations of *Erased de Kooning Drawing* that described the act as in any way destructive. Rauschenberg explained that during his original conversation with de Kooning, “the idea of destruction kept coming into the conversation, and I kept trying to show that there wouldn’t be destruction”\(^{18}\) Rauschenberg argued that erasure was not contemplated as an aggressive or patricidal gesture, insisting instead that “it’s not a negation, it’s a celebration. It’s just the idea... It’s a very positive gesture.” Rauschenberg insisted.\(^ {19}\) Rauschenberg’s treatment of the artwork supported this sentiment, as the erased drawing hung in Rauschenberg’s studio on a “muse wall,” on which Rauschenberg grouped other works that formed the “core of an attitude” that he felt could have been done by no other person than himself.\(^ {20}\)

Critical commentaries on pre-existing material by appropriation artists – such as Jeff Koons’ reuse of Andrea Blanch’s photographs, or Weems’ reuse of Harvard’s daguerreotypes, or some aspects of Glenn Ligon’s analysis of Robert Mapplethorpe’s *The Black Book* – are today amply covered by existing law (even if they may not have been at

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\(^{18}\) Calvin Tomkins, “Profiles: Moving Out,” *New Yorker*, February 9, 1964, 66. (Emphasis in original.)

\(^{19}\) Robert Rauschenberg, SFMOMA video interview.

\(^{20}\) Ibid.
the time of their creation, as discussed in prior chapters). But predicting a judge’s response to appropriation artists’ uses of copyrighted material that are not openly critical – such as Prince’s Canal Zone paintings or Shepard Fairey’s Hope poster – is much more difficult. There is little precedent on which to base such a prediction. Positive, complementary uses are less often litigated, and when suits are filed, such cases are usually settled.

It seems pointless to recommend asking when an artist wants to criticize pre-existing material in a commentary or criticism – such as Lauren Clay’s paper sculptures or Sherrie Levine’s re-photographs – because there is plenty of evidence to suggest that the creator or owner of the pre-existing material will try to suppress this critique by refusing permission. The tendency of creators and owners to use copyright as a tool of censorship has been acknowledged.21 But what of the uses like Rauschenberg’s, which aim to compliment their source material? Let us assume, for a moment, that Rauschenberg could have obtained de Kooning’s drawing without asking. If Rauschenberg’s use of de Kooning’s drawing would be considered fair under copyright law, did Rauschenberg still need to ask de Kooning for permission to alter the drawing?

21 Suntrust, 268 F.3d at 1257.
If not, did Rauschenberg have an ethical obligation to ask, or at least notify de Kooning of the reuse? Perhaps.

Going forward, appropriation artists may be better served to consider their relationships with the producers of their source material, especially if said producers are also artists, rather than focusing on whether or not their uses are perfectly in line with the ever-changing, unpredictable tenets of fair use doctrine.

Let us reconsider the story of Rauschenberg and de Kooning as a parable of good faith in fair use. The story of Erased de Kooning can serve as a fable for ethically-oriented, aware appropriation, in which an appropriator (Rauschenberg) appreciates a work and surmounts the hurdles of access and fear to ask another artist (de Kooning) from whom he wishes to acquire material for permission in a way that promotes exchange of ideas, sharing of materials, and significant “progress” in the arts, the espoused goal of copyright protection. How can more artists working with appropriation be encouraged to ask for copyrighted materials from other artists with the courage and respect shown by Rauschenberg? How might more artists be persuaded to provide said source material as generously as did de Kooning? And why do these questions belong in a chapter on “markets”? Because markets are, ultimately, composed of people.

This chapter examines the impact of economic analysis on legal evaluations of appropriation art. It recommends a reconsideration of the relations between artists based
on interdisciplinary research on historical art markets, and assesses the practicality of extralegal guidance on reuse of copyrighted materials, such as professional codes and best practices.

The first section describes the impact of economic analysis on copyright law and scholarship in the late twentieth and early twenty-first centuries. This section asks whether traditional economic principles can be applied to appropriation art. I suggest that future economics-based approaches to copyright for visual artworks incorporate interdisciplinary research on historical art markets and explains how behavioral and cultural economics more carefully approach structures of markets for contemporary art, relationships between visual artists, and the balance between intrinsic and extrinsic motivations that prompt artists to make artworks. Research on historical art markets suggests that the fourth factor of the fair use analysis, effect on the market for the copyrighted work, must be reconsidered for certain artworks, because market harm – in the sense of market usurpation, substitution of goods, or lost revenue from licensing – is extremely unlikely in the case of appropriation artworks because there is little likelihood that an appropriation artwork will act as a substitute for the pre-existing artwork.

The second section turns to literature on creativity, customs, and codes of best practices to identify guides and models for the development of legal, fair, and ethically-guided forms of reuse by appropriation artists. I introduce literature from psychology
and economics that complicates the incentive-based reasoning too often relied upon in theories of copyright. This section explores community-oriented, customs- and ethics-based efforts to resolve tensions between copyright and appropriation art, including the College Art Association’s *Code of Best Practices in the Visual Arts*, as these efforts will be more effective in the reduction of tensions between artists than legislative efforts to reform copyright law.\(^2\) Such guidelines can infuse fair use with the spirit of respect in instances of appreciative use, when the use is transformative and payment is not required; encourage extralegal resolutions that have positive outcomes for both the appropriating artist and the artist from whom material is sourced; and make these exchanges more predictable, so that artists will feel confident in asking.

The third section addresses Christian Marclay’s *The Clock* (2010), and explains why, despite its extraordinarily broad reuses of hundreds of clips from films made by major movie studios – copyrighted material with a well-established licensing market – Marclay was not sued for infringement. It addresses the positive response to Marclay’s film and questions whether or not Marclay behaved ethically. Finally, the conclusion asserts that the development of community standards and the embrace of personal responsibility on the part of appropriators can create a true culture of sharing and reuse.

3.1 Economic Theories of Copyright

The Constitutionally mandated goal of copyright is to “promote progress in science and the arts.”\(^{23}\) Beyond this maxim, further justifications for legal regulations that protect creative works often aim to establish a relationship between promotion of progress in the arts (a public benefit) and the provision of property rights over creative material (a private benefit). Succinctly, some private ownership is considered a necessary incentive to induce individuals to create artworks for the public’s benefit. As the Supreme Court has explained, “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”\(^{24}\) The Court has repeatedly ruled that creators are motivated by such rights and determined that the connection between the promise of remuneration and creative output is causal.\(^{25}\) As law professor Jeanne C. Fromer explains:

> Copyright law provides the incentive of exclusive rights for a limited duration to authors to motivate them to create culturally valuable works. Without this incentive, the theory goes, authors might not invest the time, energy, and money necessary to create these works because they might be copied cheaply and easily by free-riders, eliminating authors’ ability to profit from their works.\(^{26}\)

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\(^{25}\) “The economic philosophy behind the [Copyright] [C]lause . . . 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.” *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003).  
Legal academic discourse around copyright law often centers on the merits of incentive theory, assessing whether the current copyright regime offers sufficient and appropriate incentives to creators. At its root, incentive theory suggests that the benefits to society occasioned by artistic creation are offset by the costs incurred by limited monopolies. In American copyright, this incentive takes the form of a state-granted stronghold over a form of creative expression.27 Such monopolies are granted for “a limited duration,” which is arguably not particularly limited, as the term of copyright ownership extends for the life of the creator plus seventy years, or in the case of works owned by a corporation, can extend to one hundred and twenty years.

Incentive-based theories of copyright proceed from the assumption that when creators are given incentives in the form of legal regulations that establish and protect creative properties, then creators are more likely to invest their time and resources in producing creative works.28 These theories suggest the societal benefits occasioned by artistic creation (in the form of paintings, books, plays, movies, and other cultural wonders) offset the costs incurred by extending exclusive property rights over expression to artists (in the form of lengthy time- and use-based prohibitions on others’

imaginative uses of these paintings, books, plays, movies, and other cultural wonders).

Thus, incentive-oriented thinking suggests that a fashion photographer will buy camera equipment and spend her time taking fashion photographs if she can be assured that the resulting photographs can be sold, and her investment recompensed. But if our hypothetical fashion photographer is not protected from copyists who might reproduce the photographs and sell them without her permission, then she will decline to invest her time and resources in photography and photographic equipment and choose to be, for example, a lawyer. To get to this conclusion, one must make questionable assumptions about the motivations driving creative labor. Traditional economic analysis generally makes a lot of questionable assumptions about artists’ motivations. Fashion photographer Andrea Blanch sued Richard Koons for reusing her photographs without a license and lost. Twelve years later, Blanch remains a successful fashion photographer. Clearly, one unauthorized copying did not end her career.

Theories that connect incentives to creative production, are intended to predict how artists will behave in the “marketplace” for images, in which authors imagine appropriation authors sourcing pre-existing, copyrighted images for use their works of appropriation art. But this foundational assumption of rational behavior in a single

29 Ibid.
marketplace often conflicts with the realities of artmaking and the impact of art on society. Yet, such formulations of creative activity remain attractive to scholars of economics and law because they translate decisions about creative labor into cost-benefit analyses that make for flexible argumentative frameworks that produce tidy results.31

For example, in his influential article “Copyright, Borrowed Images, and Appropriation Art: An Economic Approach,” economist William A. Landes explained that “fair use limits the rights of the copyright holder by allowing unauthorized copying in circumstances that are roughly consistent with promoting economic efficiency” when “transaction costs would prevent an otherwise beneficial exchange from taking place.”32 A “transaction cost” is any cost involved in an economic exchange.33 In neoclassical economics, transaction costs are defined as “the costs of exchanging well-defined property rights.”34 In a “property-rights approach,” transaction costs are the costs of defining and enforcing property rights.”35 The latter approach is generally used by legal scholars.

34 Ibid., 894.
35 Ibid., 893.
Landes later joined federal judge Richard A. Posner in writing the influential book *The Economic Structure of Intellectual Property Law*. While the book is an excellent resource for thinking about intellectual property in economic terms, Posner and Landes inadvertently demonstrate how inapposite a traditional economic approach to appropriation art can be, as it consistently assumes rational behavior from artists. Landes and Posner assume that asking permission and paying for a license are reasonable expectations of an artist, when these requirements are often not actually reasonable at all. First, asking a copyright holder for permission to reuse a work is not like asking to borrow a cup of sugar. For example, as described in the first chapter, Harvard was extremely unlikely to grant Weems permission for such a critical use of the Agassiz daguerreotypes. The context of the reuse matters in ways that are dissimilar to others. Second, artworks can function as commodities, but an artwork has qualities that complicate its commodity status. For example, as art critic Boris Groys explains, art is also “a statement in a public space” and “is made and exhibited for people who do not intend to purchase it – indeed, they constitute the overwhelming majority of the audience for art.”

37 Landes and Posner.
Also, Landes and Posner suggest that “the law should be more sympathetic to artists who borrow from multiple sources” because acquiring material from multiple parties raises transaction costs. Yet, many of the most impactful works of appropriation art, such as Sherrie Levine’s rephotographs, or Marcel Duchamp’s *L’H.O.O.Q* (1919), or Andy Warhol’s *Brillo Box* (1964) have relied on only one source. If the espoused purpose of copyright is to ‘promote progress,’ it is not clear that works of appropriation art that reuse material from multiple sources will contribute more substantively to the progress of arts. Also, the muddled formal analysis in *Cariou v. Prince* demonstrates the erroneous direction of this suggestion: the court determined that five images that relied exclusively on Cariou’s images (rather than mixing Cariou’s with other pre-existing material) were less evidently transformative. But the court did not provide any sound reasoning for this assertion. The use of more images from more sources does not necessarily make a work better. Furthermore, artists simply do not think about artmaking in this explicitly rational way.

Instead, as legal scholar James Boyle has explained, behavioral economics has demonstrated that many actions are not rational and will not follow the predictive model established by traditional economics, and those interested in predicting creators’

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39 Ibid, 268.
40 *Cariou*, 714 F.3d at 711.
behavior would do well to drop the assumptions made by traditional economic frameworks and seek patterns elsewhere.\textsuperscript{41} Behavioral economics, a subfield developed in the mid-twentieth century, was designed to account for, even embrace, the irrationality of human behavior. Drawing insights from the field of psychology, behavioral economists think in terms of “bounded rationality,” a term developed by economist and psychologist Herbert Simon to describe the complex web of rational and irrational factors that drive humans’ decision processes.\textsuperscript{42} “Framing,” or the conditions under which alternatives are presented, is recognized as being as important as the alternatives themselves. Seminal papers in the field demonstrated that changes in framing alter a person’s perception of risk and reward, and these changes in perceived risk can lead to different decision outcomes.\textsuperscript{43}

Cultural economics applies economic analysis to the arts, and, like behavioral economics, complicates assumptions made in prior studies. This subfield draws from a range of methodologies, including traditional and behavioral economics, and is sometimes distinguished by its approach to individual decision-making. For most

\textsuperscript{41} Boyle, \textit{The Public Domain}, 230-231.
cultural economists, decisions are conditioned by a combination of extrinsic and intrinsic factors, as well as the shared values and beliefs of groups (i.e., “culture”). Economists including Victor Ginsburgh, Françoise Behamou, Patrick Legros, and Ruth Towse have contributed substantively to more flexible and realistic interpretations of the use of copies and reproductions by visual artists.

I suggest that copyright scholars and art historians turn to hybrid models from the interdisciplinary study of historical art markets, which use newer economic models to illuminate and explicate the “irrational” behaviors of appropriation artists in ways that more traditional economic models do not. Concepts from these studies can help scholars, legislators, and judges better understand the motivations of appropriation artists and better predict their behavior, partly because these studies do not assume that artists behave like rational actors. Interdisciplinary studies that blend economics and art history preserve the valuable models and methodologies of traditional economics, but incorporate models from psychology and behavioral economics, and further address limitations with information from art history. This multi-faceted approach may help copyright scholars remedy “blind spots” in copyright discourse, including (i) erroneous beliefs about incentives that promote visual artists’ creativity, (ii) the reality of plural

45 Benhamou and Ginsburgh; Legros; Towse.
markets for art, and (iii) the assumption of market harm in discussions of market effect. These blind spots are discussed below.

First, there is little evidence that visual artists create more artworks when provided with government-sponsored monopolies, such as copyright protection. Studies by psychologists and economists indicate that creativity is a form of problem solving that is not motivated by external rewards. Management studies have suggested that monetary incentives do not promote creativity, and in fact have deleterious consequences, including diminishing performance, less innovation, and unethical behavior. Despite much argument about precisely what motivates artists to make art, scholars across disciplines can agree: financial incentives are poor spurs to individual creativity. This is especially true of appropriation artists because their artworks receive less protection than more “original” artworks. Works of appropriation art are covered only by a “thin copyright,” meaning that an appropriation artist holds copyright only over the additions he or she appends to the reused material. For example, Fairey only holds copyright over his additions to the Hope poster (Fig. 10), which may be limited to its coloration: he does not have a copyright over the underlying image of Barack Obama, the presidential campaign logo, or the word “hope.” Thus, it is difficult to know what

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46 Fishman, 1343-1345; Fromer 1444, 1458-1459.  
48 Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003).
motivates appropriation artists to create, but such artworks are made despite the lack of customary protections and, thus, the lack of incentive. Despite low level of protection, Glenn Ligon made the *Notes on the Margin of the Black Book*, Lauren Clay made paper sculptures after David Smith’s steel versions, and Sherrie Levine made the series *After Walker Evans*.

Second, there is no “art market.” There are many markets for contemporary art. Appropriation artists and the artists from whom they appropriate generally do not sell to the same collectors in the same market. During oral arguments in *Cariou v. Prince*, when Patrick Cariou’s counsel asserted that the market for Cariou’s photographs had been harmed by Prince’s appropriations, Judge Barrington Daniels Parker, Jr. replied:

> Bringing up the market is a clear loser for you…You sold to a totally different audience, you’ve admitted that not many of the books were sold, you sold them out of a warehouse in Dumbo, and that the book was out of print. Prince was selling to a wealthier crowd, and on this side of the river.⁴⁹

Judge Parker voiced a little-understood fact that deserves further attention from scholars, artists, and courts, which is that there is no unitary “art market.” This observation is foundational to the study of early modern art markets, but the contemporary art market is still generally discussed by scholars, journalists, gallerists,

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and artists as if it is a monolithic entity. But instead of an art market, there are many art markets, which may be distinguished by geography, artists, and mediums. In economic studies of art markets, differentiation between markets is treated as both positive and necessary. It is understood that region, medium, price, and subject matter are all important market factors that determine the inclusion or exclusion of economic actors in certain markets. Attention to the parameters that determine inclusion or exclusion in a given market can help illuminate (or even predict) the choices made by artists.

Markets can be divided and characterized in many ways. For example, sociologist Olav Velthuis divides contemporary art markets into primary/secondary, local/global, and cultural. The first distinction is driven by data: data on the primary market (i.e., first sales made by artists or by gallerists representing artists) are practically non-existent, whereas secondary market sales data (i.e., resales by auction houses and galleries) is more available. The second opposition is both geographic and cultural:

50 The “art market” to which most journalists refer is the tiny constellation of auction houses, galleries, and fairs at which a handful of extreme wealthy collectors buy and sell artworks. See James Tarmy, “How is the Art Market Really Doing?” Bloomberg.com, https://www.bloomberg.com/news/articles/2016-02-29/how-is-the-art-market-really-doing (advising that art price databases are too limited in scope); For exemplary discussions of art markets in the early modern period, see De Marchi and Van Miegroet, “The History of Art Markets,” and De Marchi and Van Miegroet, eds., Mapping Markets for Painting in Europe 1450-1750.
51 De Marchi and Van Miegroet, “History of Art Markets,” 86-96 (establishing the existence of distinct markets through differences in regulations).
galleries within major capitals represent a group of globally distributed artists, selling their work to a similarly dispersed clientele, while locally oriented artists produce for and sell to a proximate clientele. Exchange between art markets has been true to some extent since the early modern period, but a globalized market with no discernible regional root appeared in the late 1990s.54

In her article “Fair Use and the Future of Art” (2016), legal scholar Amy Adler drew from economic research to outline an argument for renewed emphasis on the fourth factor of the fair use test: market harm.55 Adler correctly asserts that “there is no possibility of market substitution of one artist for another given the current preferences of the art market.”56 Adler primarily pulls from the work of economists William Baumol and David Galenson to assert:

First, the value of art is no longer tied to its visual appearance; just as I earlier explained that art’s meaning has become divorced from aesthetics, so too art’s market price is equally unmoored from the visual. Second, and related to the first, because value is no longer to be found in the visual, it has come to reside almost completely in the reputation or “brand” of the artist, a standard that is policed by the market’s emphasis on authenticity.57

54 Ibid., 39.
55 Ibid., 621-625.
56 I take the term “the art market” to mean the major auction/fair/gallery circuit. Adler, 621.
57 Ibid., 622.
Both assertions are true, but using Baumol and Galenson’s research for support requires further discussion.\textsuperscript{58} Within art markets, collectors are less attracted to specific artworks than to specific artists. Baumol explains that “widely known paintings and sculptures are unique, and even two works on the same theme by a given artist are imperfect substitutes.”\textsuperscript{59} Baumol here speaks of differences between artworks by the same artist, not identical or virtually identical artworks by an appropriator and an appropriatee. As he explains, “A single image, even if it is not an artist’s best work, can share in the value of his or her work as a whole.”\textsuperscript{60} But that requires attaching the name – otherwise, the work must stand on its own.

Adler’s use of Galenson is more problematic, as Galenson’s methodology and data set, which concern modern art, cannot be directly exported to contemporary art without some modification. Adler suggests that, for contemporary art, “the value of art is no longer tied to its visual appearance,”\textsuperscript{61} and explains that since “value is no longer to be found in the visual, it has come to reside almost completely in the reputation or

\textsuperscript{58} Adler cites generally to David Galenson’s \textit{Artistic Capital} to substantiate the claim that aesthetics do not drive collectors’ purchases, but Galenson does not make this assertion therein. Ibid., 621.


\textsuperscript{60} De Marchi and Van Miegroet, “Pricing Invention,” 47.

\textsuperscript{61} Ibid. 622.
‘brand’ of the artist, a standard that is policed by the market’s emphasis on authenticity.”

In *Artistic Capital* (2006), Galenson establishes a link between the academic perception of artistic innovation for modern artists, prices paid for artworks through an artist’s appearances in art historical texts and prices paid at auction for that artist’s works. Galenson’s research demonstrates that “for modern artists, importance is primarily a function of innovation.” To restate: Galenson concludes that innovation is a key predictor of high prices for modern artists. I emphasize that the artists cited were considered “modern” because Galenson’s study does not include contemporary artists: the artists in his sample were born and died between 1830 and 1987. Whether an artist is innovative has “nothing to do with its aesthetic value or coolness or hipness and everything to do with the fact that historians agree that Warhol with this work influenced art history.” By “art history,” Galenson means “perceived impact on peers”:

> Whatever the nature of an artist’s innovation, in the long run its importance has been determined primarily by its influence on other artists. The more widespread the adoption of an innovation by other artists, the more important its creator.

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62 Ibid.
64 Ibid. 7.
65 Ibid., 7-8.
66 Ibid., 4.
67 Stewart.
68 Ibid., 8.
Psychological research on creativity supports this assertion, purporting that “what is new and appropriate is what the audience deems new and appropriate.” In this case, Galenson takes the “audience” to be a highly informed observer, as impact on peers is traced through the narratives established in art history textbooks.

Galenson’s framework for evaluating innovation and its impact on pricing would seem to fit contemporary markets, as well. However, there is less art historical writing available on emerging artists, and it can take many years for contemporary artworks to be resold at auction. Thus, the data set for studies of contemporary art is much smaller and less reliable. Galenson’s model can be exported to contemporary art to assess the market placement and performance of contemporary artists, but not without altering the data set. For instance, it may be more appropriate to assign the role of convincing collectors of contemporary artists’ value to dealers rather than art historians. Adding the influence of dealers, who help shape public perception of emerging and established artists supports the transposition of Galenson’s methodology for modern artworks to the study of contemporary artworks.

Third, if there is no unitary art market, then assumptions about the likelihood of

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70 Galenson, 4-5. 
market usurpation, or other forms of market harm, need to be revisited. To review, the fourth factor in the fair use analysis is “the effect of the use on the potential market for or value of the copyrighted work.” Nowhere does this require attention to market harm. It easily could be read to require equal attention to market enhancement. However, market harm is usually the assumption and the focus of a fair use inquiry. Furthermore, when assessing market harm in a fair use case, many judges have elected to assess potential, as well as actual, market harm. These predictions of harm usually take the form of potential licensing losses: for example, a court may find that a use creates market harm when the appropriation foreclosed a possible licensing opportunity. Such predictions may be appropriate for standardized transactions of substitutable goods, but have little value in fair use cases that concern visual art, in which the market factor can promote imaginative thinking among judges. For instance, when the district court assumed that Patrick Cariou’s few past sales of Yes Rasta (which was out of print at the time of Prince’s use) held any likelihood of a future for the series, despite the fact that Cariou never have been previously licensed the images or shown them in a gallery.

74 Rogers, 960 F.2d at 304.
75 Cariou, 784 F. Supp. 2d at 344.
Additionally, in economic research on art markets, the terms “substitution” and “substitutability” are not interchangeable. In economics, a substitute or substitute good is a product or service that the buyer sees as the same or similar to another product. In the formal language of economics, $x$ and $y$ are substitutes if the demand for $x$ increases when the price for $y$ increases, or if there is a positive cross-elasticity of demand. The relation between the desired object and the substitute can be close or further apart, and there are different degrees to which products can be defined as substitutes. Where artworks are concerned, a substitute is a replacement for an unavailable object, or an object that is priced beyond the collector’s resources. As Velthuis explains, although unique objects may be perceived as heterogeneous, “invariably some degree of substitutability does exist.”

“Substitutability” thus describes the process by which the constituent elements that make a good desirable can create a substitute.

Kelvin Lancaster’s theory of consumer demand explains that an item, for our purposes an artwork, can be perceived as a bundle of characteristics rather than a unitary good, entity, or object. Conventional understandings of economic concepts such as price, taste, and value may be altered when an artwork is viewed this way;

76 Ibid.
77 Ibid.
78 Lancaster.
furthermore, the hypotheses, analyses, and conclusions provoked by this form of assessment often differ from studies conducted with more traditional means. Lancaster’s method allows us to posit that an artwork may be tangibly unitary, but it is not so in the mind of a buyer. Buyers are looking for specific features, which may all be represented in object A, while some are perceived in object B, but none are seen in object C. Is it often assumed that, for purposes of consumption, a good is an attempt on the part of an artist to satisfy the demand of a potential buyer. But how does the artist predict what the buyer will want? Lancaster’s method supposes that the buyer maps desired elements onto an object, not the artist. The artist may not have intended to offer the desired traits, but the buyer perceives them nonetheless. This revised perspective allows a researcher to recognize substitutes, and substitutability, in situations where substitution may be otherwise difficult to perceive.

Let us revisit Sherrie Levine. For instance, if an art collector walks into a gallery seeking a Sherrie Levine photograph and finds only a Walker Evans photograph, the collector will not buy the work – even if they are absolutely identical. Walker Evans was a twentieth-century photographer and photojournalist who redefined the art of photography by combining precise compositions with attention to the everyday. Sherrie Levine is a photographer, painter, and conceptual artist best known for feminist recontextualizations of male photographers’ images that formed critiques of authorship,
originality, and the market. Their artworks may, at times, look identical, but the conceptual content and meaning are dissimilar.

Herbert Simon has demonstrated that buyers engage in “satisficing” – the process of sorting through alternatives until an acceptable substitute is met. Adler explains that a Levine collector who wishes to purchase After Walker Evans: 4 (Fig. 1) probably will not buy Alabama Tenant Farmer Wife (Fig. 26), an identical photograph by Evans. I would extend this to explain to the reader that, per Galenson and Baumol, a Levine collector who wishes to purchase After Walker Evans: 4 (Fig. 1) is more likely to buy Levine’s Broad Stripe: 6 (Fig. 27) than Alabama Tenant Farmer Wife (Fig. 26). In such a case, the heterogeneity depends not on aesthetic differences, but on the differentiation between artists and their prestige in the art world and standing in art history (e.g., their artistic “brand”), and the meanings attached to the artworks. Superficially, the substitute may not appear to be a substitute at all. Thus, substitutability in artworks is more likely when branding is more important than the object or when enjoyment is derived from the aesthetics of the object itself. It all depends on what suffices for the buyer.

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79 The word is a combination of “satisfy” and “suffice.” Simon, “Rational Choice and the Structure of the Environment.”
80 This is purely hypothetical; no collector can buy After Walker Evans: 4. Levine’s rephotographs of Evans’ work were acquired by his estate, which was acquired by the Metropolitan Museum of Art after Evans’ death. Reena Jana, “Is it Art or Memorex,” Wired, May 21, 2001, https://www.wired.com/2001/05/is-it-art-or-memorex/
Another key concept that deserves attention from the legal community is attributability.\textsuperscript{81} Economist Neil De Marchi and art historian Hans Van Miegroet have established that, for early modern works, “differences which the eye couldn’t discern nonetheless made a difference in price.”\textsuperscript{82} Like substitutability, attributability is related to, but not the same as, attribution. Attributability describes a buyer preference for an identifiable \textit{subject} or \textit{style}, while attribution describes a specific connection to specific artist (often in the form of a signature). Attributability links an artwork to a range of content-based and stylistic influence, but does not falsely assign authorship.

Adler gives an example: when she purchased a fake Richard Prince, the artwork’s falsity was part of its allure. She explains, “I bought an obviously bootlegged, pixelated copy of a Richard Prince copy of a Marlboro ad. To me, in all its artifice, it’s the perfect Richard Prince.”\textsuperscript{83} Adler knew that the copy was not a Prince, but in this case, Prince was not the artwork’s author but its \textit{subject}. The joke produced by this transposition – Prince, an appropriator, has here been appropriated – is part of the artwork’s charm.

\textsuperscript{81} The word “attributability” never actually appears in “Pricing Invention,” but its meaning can be deduced from the discussions of “subject-based inventorship” and “attribution” on pages 44 and 47.
\textsuperscript{82} De Marchi and Van Miegroet, “Pricing Invention,” 38.
\textsuperscript{83} Adler, “Fair Use and the Future of Art,” 613.
Understanding attributability and using this concept to explore appropriation artworks may help address conflict, as it better differentiates what happens when an artist links his work to a predecessor artist in a situation where the levels of mediation and distinction are obvious to potential buyers. Let us revisit Levine and Evans once more. *Alabama Tenant Farmer Wife* is a photograph by Evans made in 1936. (Fig. 26) *After Walker Evans: 4* (Fig. 1) is a re-photograph made by Levine in 1981 from the aforementioned photograph by Walker Evans. Formally, the two works are precisely identical, but they are conceptually dissimilar, which means that, for the buyer of art, their subject matter is actually wholly different. Evans’ image is a portrait of “tenant farmer wife” Allie Mae Burroughs: its subject is Allie Mae Bourroughs, and the political and economic conditions affecting tenant farmers and their families. The subject of Levine’s image is not the same: her subject is Walker Evans and the conditions of contemporary image-making. When Levine altered the original context of Evans’ portrait, she attached new theoretical, social, and political significance to the image. Without any formal alterations, Levine gave Evans’ photograph a new meaning. In such situations, market usurpation is extremely unlikely: the buyer of the Evans is not likely to be the buyer of the Levine and vice versa, because buyers are interested in an artist’s *brand*, per Galenson, which is partly identified by subject matter, per DeMarchi and Van Miegroet. Thus, market harm is unlikely. This is further supported by Adler’s example
of her bootlegged copy of a Prince, in which Adler was never in the market for a Prince. While the appropriated image in her “bootleg” deliberately references and quotes the “original” Prince, the work of appropriation art (the bootleg “Prince”) does not likely substitute for the pre-existing original (Prince’s Cowboy) because the subject matter and artist are not the same.

Recall the example given in the first chapter of an ephemeral, transient, or invisible object such at Robert Barry’s Inert Gas Series/Helium, Neon, Argon, Krypton, Xenon/From a Measured Volume to Indefinite Expansion (1969). The subject matter in contemporary art cannot always be seen with the naked eye. As Galenson explained, “The value of art is no longer tied to its visual appearance” and the innovation, or invention, perceived by buyers is often of the conceptual kind. 84 How can we reconcile the assertion that subject matter is important to buyers if Galenson and Baumol demonstrated that art’s value is tied to the reputation of the artist?

Here again, it is useful to discuss an additional pair of terms: “invention” and “inventiveness.” De Marchi and Van Miegroet explain that “invention,” a rhetorical term employed by art critics and theorists, was recognized in seventeenth century as a distinct economic entity treated as apart from size, materials, subject, and other

84 Adler, 622.
considerations that informed pricing. Invention functioned primarily as a distinction between master and assistants in an otherwise fluid hierarchy, but its influence “tended to get mixed up with other factors contributing to value: scarcity, authorship, and reputation.” Invention thus became associated with originality and creativity.

Like substitutability and attributability, “inventiveness” is related to, but not identical to, invention. A contemporary analogue might be “inspired by,” but this term fails to communicate the precise meaning of “invention” or “inventiveness.” Invention relates to “concept, design, and composition” and describes an original artwork, while inventiveness could arise at any stage of production and is connected to both originals and copies. Inventiveness is not associated with genius, which did not affect normal pricing. Instead, “unusual payments” are associated with genius. “Originals” are often “trivial re-workings of borrowed ideas and compositions.”

To see how the concepts of substitutability, attributability, and inventiveness worked together in the early modern period, we turn to what De Marchi and Van Miegroet identify as the category of “phantom copies,” writing:

A clever copyist might make his or her own originals and attribute them to a master whose work is widely known and in demand. Such originals

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85 De Marchi and Van Miegroet, “Pricing Invention,” 28, 52.
86 Ibid., 28.
87 Ibid., 30.
88 Ibid., 31-32.
89 Ibid., 50.
behave as copies, even though no original ever existed.\textsuperscript{90}

Thus, the phantom copy is an example of the kind of fluidity used to characterize artistic originality and authorship before the imposition of strict intellectual property regulations. A phantom copy is a work of art that successfully imitates the \textit{invention} – the “concept, design, and composition” – of a (usually well-known) artist, but is not actually a copy of an existing artwork. Generally, these originals were made by little-known young artists in the style of recognizable masters, and produced as low-cost prints by well-established publishers. Phantom copies were not mere forgeries because they did not attribute the work to the master, per se, but some carried references, which are better understood as citations that establish attributability rather than true attribution. For example, in the corner of “Big Fish Eat Little Fish,” (Fig. 28) an engraved print made in 1556 from an original drawing by Pieter I Brueghel (before he became famous in his own right), engraver Pieter van der Heyden and publisher Hieronymus Cock are noted, as is “Hieronijmus. Bos. inventor,” but Breughel, who drew the image, appears nowhere on this manifest of participants.\textsuperscript{91} The original drawing by Brughel carried his name, which is here supplanted by that of Bosch.\textsuperscript{92} Then, in later editions of

\textsuperscript{90} Ibid., 43.  
\textsuperscript{91} Ibid., 45-46.  
\textsuperscript{92} Ibid.
the print, Brueghel’s name is substituted for Bosch’s name with “P. Breugel, inven.” How can Bosch’s name be used in place of Brueghel? And why would Bosch’s name later be replaced with Brueghel’s? How can Bosch and Brueghel both be the “inventor”?

A contemporary lawyer might immediately wonder why publisher Hieronymus Cock was not guilty of fraud, or why “Big Fish Eat Little Fish” is not a forgery. In the twenty-first century, “a painting, sculpture, or any product of art is a forgery if it has been made with the intention of passing it off as the work of a different hand or in a different period.” This is true even when the artwork “may have been merely an innocent imitation of an admired master of the style, which has subsequently been passed off by a third party as a creation of precisely that master or period.” As De Marchi and Van Miegroet explain, “Hieronijmus. Bos. inventor” suggests to the twenty-first century viewer that “Big Fish Eat Little Fish” must be a copy of a pre-existing artwork by Bosch, but no such original has ever been found. There was no fraud because there was no original, and no early modern viewer would have understood this image as a form of passing off.

In 1556, the term “inventor” did not have the same strict meaning that we assign an artist’s signature today. However, an early modern viewer would not necessarily

93 Ibid., 46.
94 Merryman et al., 1055.
95 Ibid.
have assumed an original to exist because such a viewer would have understood attribution differently than viewers do today. In 1556, “inventor” recognized Bosch’s invention as defined above, which is to say Bosch’s creation of a unique and recognizable style. “Inventor” did not attribute the print to the person of Bosch specifically, but to Bosch’s role as the creator of the image’s subject matter. Brueghel was ignored because, although he may have drawn the image, he did not invent the subject matter; that was attributable to Bosch. The shift from Bosch to Brueghel’s name happened later when tastes shifted and buyers were more interested in works by Brueghel than Bosch. Thus, when Brueghel’s name was more desirable, his labor was recognized and his name was substituted for Bosch’s. The existence of phantom copies suggests that content was more important to the early modern collector than the artist’s name. However, the printer’s reassignment of names also suggests that authorship and invention were “important and valued.”

When visual artists were characterized as “authors” and included under intellectual property regulations, they may have gained incentives to create artworks.

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96 Ibid., 46-47. De Marchi and Van Miegroet acknowledge that an original Bosch may exist, but evidence suggests that this is not the case.
97 For examples of early modern problems of attribution that are more akin to what we today deem forgery and fraud, see Lisa Pon’s account of the disputes between Albrecht Dürer and Marcantonio Raimondi. Pon.
98 De Marchi and Van Miegroet, “Pricing Invention,” 44.
99 Ibid.
But the provision of rights required that visual artists be characterized as creators analogous to book authors, and required that the language of intellectual property, which was originally developed for texts and authors, be applied to artists and artworks. The fluidity observed in the example of “Big Fish Eat Little Fish,” with its multivalent understandings of creative ownership, slowly calcified into the binaries such as original/copy, as established by literary language. However, linguistic changes do not mandate changes in practices; some of the behavior seen today among appropriation artists corresponds with their early modern predecessors. Artistic practices were retained, but the words to describe these practices were lost.

De Marchi and Van Miegroet’s early modern terms – “attributability,” “substitutability,” and “inventiveness” – restore some of this lost fluidity to the vocabulary of artistic practice. Thus, when conversations about appropriation art move away from the specifics of attribution, such as the assignment of an “original” expression to a specific copyright holder, or the substitution of an equal good, or the binary of original invention/unoriginal copy, we can better characterize appropriation artworks and better understand their impacts in art markets. Restoring fluidity to conversations around visual artists and visual artworks restores flexibility that was lost when models of textual authorship were imposed on visual art by intellectual property laws.
For example, the phantom copy can serve as a useful inverse model for transformative use, meaning that it describes exactly what transformative use is not. Phantom copies reproduced the style and feel of works that were unaffordable or otherwise unavailable to early modern buyers, and can thus be characterized as attempts to usurp part of an existing market. In the sixteenth century, the phantom copy was intended to be a substitute in both appearance and meaning, able to occupy the potential market that an existing artist (or his estate) had not yet exploited. Thus, phantom copies, even though they did not reproduce an extant work, were intended to capture market share from an existing artist. Since copyright law is premised on the act of copying an existing work, contemporary American legal doctrine has no parallel concept for the phantom copy. Derivative works or substantially similar works are possible comparisons, but neither truly works.

First, as previously discussed, derivative works are “based on or derived from one or more already existing works” and may include a “new edition” of a pre-existing work that includes revisions or annotations.\textsuperscript{100} To revisit an example from the first chapter, Lauren Clay’s small, paper variations (Fig. 2) on David Smith’s monumental steel sculptures (Fig. 3) were characterized by the Smith estate as derivative works. As

described above, a buyer seeking a tabletop-sized David Smith probably would not consider a tabletop-sized Lauren Clay to be a substitute; small, paper sculptures by a then-unknown young artist are obviously not substitutes for massive, metal sculptures by a world-famous minimalist master. Nor are Clay’s paper versions likely to infringe on any potential market for derivative versions of Smith sculptures. A collector of Smith’s sculptures wants a Smith, no matter its size. A more general collector of modern and contemporary sculpture might purchase both, but in such a situation, Clay’s sculptures do not act as substitutes for Smith’s sculptures, but rather as complements. Clay’s work comments on and extends Smith’s legacy. In this case, a tabletop copy of a Smith is, in fact, no substitute for a Clay.

Second, the standard of substantial similarity, which aims to describe indirect, inexact infringement that violates the exclusive right of reproduction, is the second closest analogue.\(^{101}\) Substantial similarity recognizes that it would be unfair to limit the definition of infringement to exact copies, and that often the more economically harmful copy is the one that is not an exact reproduction. But in all cases, an original must exist. As previously discussed, in a copyright infringement suit, the copyright holder must first prove (i) his or her ownership of a valid copyright and (ii) that the alleged infringer

\(^{101}\) Sid & Marty Krofft Television v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977).
copied the protected material without authorization.\textsuperscript{102} Since a phantom copy has no original, it cannot be characterized as a substantially similar infringement. But phantom copies and substantially similar works are likely to capture market share; they are likely to be invented for this very purpose, or they may reduce opportunities for artists to capitalize on their prior work and professional reputations. For example, when filmmaker Matthew Fulks sued singer Beyoncé Knowles in 2016 for copyright infringement, he cited substantial similarities between his short film Palinoia and Knowles’ “visual album” Lemonade.\textsuperscript{103} The lawsuit was dismissed, but still provides an illustrative example of a perceived lost opportunity.\textsuperscript{104} Little-known director Fulks was not claiming that the world-famous Knowles captured part of his market share. He was suggesting that, if Knowles wanted a video that looks like Palinoia, Knowles should have hired the director of Palinoia to make it rather than hiring a different director to copy it.

Transformative works, by contrast to derivative works or substantially similar works, do not attempt to capture the market of a prior work. A transformative work refers to a specific work or artist, but does not attempt to usurp that the prior work or

\textsuperscript{102} \textit{Feist}, 499 U.S. 340, 361.
that artist’s existing market. In transformative works, instead of functioning as a form of usurpation, the attribution functions as a linking mechanism, recognizing the innovation or inventiveness of the artist from whom material is sourced and linking the appropriation artist to this artist and his or her innovation. The connection can be a negative, critical link, as in Koons’ use of Rogers’ Puppies or Weems’ reuse of Harvard’s archival material. Or this linkage can be positive, as provided by the Rauschenberg/de Kooning model, or in the case of fan fiction. Or appropriation can also be as multi-faceted, as in Prince’s use of Cariou’s images of Rastafarians and Ligon’s inquiry into Mapplethorpe’s The Black Book.\textsuperscript{105} But whether negative, positive, or ambiguous, these examples represent efforts by appropriation artists to link their work to that of prior artists; not to capture share from these artists’ market, but rather to question the value of the prior material or the values of its creator. Or, in other cases, such as the Erased de Kooning, for an artist to tie himself to the innovation or invention of an admired master. These linkages should not be considered harmful to market, unless the loss of potential, and often wholly imaginary, opportunities for licensing are to be held up as “harm.”

\textsuperscript{105} This paradigm does not work for openly critical artworks like those of Martha Rosler’s Bringing the War Home: House Beautiful series (1967-1972) or Jeff Koons’ Banality series (1988). There is plenty of existing guidance on such works, but little for celebratory or ambiguous forms of appropriation.
3.2 Creativity, Customs, and Codes

Theories of copyright that focus on incentives, and many of these theories’ suppositions, are limited to the consideration and cultivation of self-regard. But history shows that economic transactions are also dependent on concern for others, and future efforts to help appropriators develop best practices will be best served by cultivation of interest in others. This section turns to literature on creativity, customs, and codes to acknowledge the interpersonal qualities of economic engagements; identify transaction “costs” that are not financial, which better explain self-censorship and chilling effects among visual artists than financial explanations; and identify useful examples and suggestions that can promote better interpersonal relations among artists who reuse images from other artists. Extralegal options, such as professional codes, the development of community standards, and the embrace of personal responsibility on the part of appropriators can together create a true culture of sharing and reuse.

Efforts to reform copyright law, especially fair use, are needed to create better boundaries. But while changes in contemporary art practices are rapid and unpredictable; changes to the law are slow and attempt to be linear. Here, Gilles Deleuze and Félix Guattari’s concept of rhizome can set up a helpful dichotomy.106

As a system of organization, the law is “root-tree.” The legitimacy of any fair use case can be traced backwards from one opinion to a prior opinion to the strong “trunk” of legislative statues to the great “root” of the Constitution. By contrast, a rhizome is characterized by “ceaselessly established connections between semiotic chains, organizations of power, and circumstances relative to the arts, sciences, and social struggles.”\textsuperscript{107} The “rhizome has no beginning or end; it is always in the middle, between things, interbeing, intermezzo.”\textsuperscript{108} It presents history as a map or array of attractions, not as a chronology or organization, and is typified by nomadism.\textsuperscript{109}

A rhizome is a lot like contemporary art, which is likely to grow out, beyond, or away from reform of its regulation, dooming legal reforms to quick obsolescence. Consequently, a broad set of parameters is necessary, and, while many recommendations have been made for the reform of copyright law in the twenty-first century, but none are likely to be adaptive enough to keep pace with the growth and change that characterizes contemporary art.\textsuperscript{110}

\textsuperscript{107} Ibid., 7.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
\textsuperscript{110} This dissertation intentionally avoids making specific suggestions for legislative reforms, but some of my favorites discussions can be found in Lessig, \textit{Free Culture}, 139-147; Boyle, \textit{The Public Domain}, 135-137; and Aufderheide and Jaszi, \textit{Reclaiming Fair Use}. 
Thus, perhaps it is more helpful to see copyright as a boundary that gently constrains rhizomatic growth. Copyright law is opaque, binary, and strict, but it is not altogether unhelpful to visual artists, even appropriation artists. Obviously, copyright law prevents rampant piracy, which I define as the wholesale and non-transformative copying of a pre-existing work. Copyright law also provides a foundation and framework for the economic transactions that permit artists to receive economic remuneration for their labor. And long copyright terms recognize that the high initial investment made by visual artists is often left unremunerated for long periods, disallowing the kind of wealth conservation and reinvestment encouraged by more traditional occupations. Beyond such economic concerns, copyright may actually enhance creativity by acting as a helpful constraint that bounds and guides artistic choices.

Simon has defined creativity as expert problem solving – a way to circumvent constraints. An expert uses ordinary processes of human thought and “recognizes in the situations encountered familiar patterns.” In approaching these situations, finds satisfactory rather than optimum solutions. Creativity is incremental – the expert builds on their own creativity and that of others, and is highly organized: Simon

111 Simon, “Creativity in the arts and the sciences.”
112 Ibid., 207, 213-214.
113 Ibid., 207.
explains that accreted knowledge registers in millions of patterns that the expert has organized like “an indexed encyclopedia” in his or her memory.\textsuperscript{114}

Traditional economic models tend to focus on the incentives afforded by extrinsic motivations to explain behaviors and choices. Yet, as Bruno Frey and others have explained, motivations may be extrinsic and intrinsic.\textsuperscript{115} Most economics believe that “what matters is that changes in extrinsic motivations, and therewith in behavior, can be attributed to changes in external intervention via constraints on behavior.”\textsuperscript{116} But, for psychologists such as Teresa Amabile, extrinsic constraints and benefits must be weighed against “the intrinsic motivation hypothesis of creativity,” which posits that extrinsic motivators are detrimental during the “idea-generation stage of creativity,” but intrinsic motivators, such as personal interest, enjoyment, challenge, and satisfaction, are generative.\textsuperscript{117} By contrast, artists who are promised or given monetary rewards “seem to work harder and produce more activity, but the activity is of lower quality.”\textsuperscript{118}

In her work on fan fiction, legal scholar Rebecca Tushnet has identified

\textsuperscript{114} Ibid.
\textsuperscript{115} Frey, \textit{Not Just for the Money}; Frey, \textit{Arts and Economics: Analysis and Cultural Policy}.
\textsuperscript{116} Frey, \textit{Arts and Economics}, 141.
alternative and unexpected patterns, particularly around incentives. Her research reveals two key points: creators will create even without economic incentives, and when fan-made creations employ copyrighted material, they rarely have negative impact on the market for the original.\textsuperscript{119} Tushnet has also argued for the role played by desire in creative work, and has suggested that creativity is more pleasurable, automatic, and irrational than incentive-based theories can predict. Furthermore, she demonstrates that creativity happens even without external incentives.\textsuperscript{120} Tushnet has devoted significant time and energy to explaining the logic of “fan works” – the stories, drawings, costumes, films, and other creative activities made by fans of pre-existing creative works that would usually be characterized as “derivative works,” but which operate differently than derivative works because they are shared among fans for free, or fill gaps in the market that creators have declined to embrace.\textsuperscript{121} As Tushnet explains, “The impulse to ask ‘What happened next?’ is probably as old as the first well-told story.”\textsuperscript{122} The Internet made corporate characters such as Disney princesses, Star Trek explorers, and Marvel superheroes more accessible than ever before; access is easy, but the practice of access and reuse is often characterized as copyright infringement. Yet, especially when

\textsuperscript{119} Tushnet, “Economies of Desire,” 669-676.
\textsuperscript{120} Ibid., 513-546.
\textsuperscript{121} Tushnet, “Legal Fictions.”
\textsuperscript{122} Ibid., 652.
produced and traded for free, these practices do not harm copyright holders; in fact, they probably help bolster fan interest.

Fan communities demonstrate another key driver of creativity: membership in a like-minded group. Psychologist Dean Keith Simonton has found that creativity flourishes when an artist has a cohort: “Most creators do not function in isolation from other creators, but rather their creativity takes place within a particular artistic, scientific, or intellectual discipline.”¹²³ Economist Christiane Hellmanzik has determined that this cohort can be organized geographically, rather than by discipline. Her research on artists’ locations suggests that artist who cluster in metropolises such as New York City, Paris, or Berlin, can expect to enjoy greater professional success than artist who work outside of such centers.¹²⁴ Specifically, Hellmanzik found that “clustering” – aggregating in an area, sharing resources, and exchanging knowledge – conferred advantages on most artists in the cluster due to “spillover effects,” which describe the impact of proximity to highly innovative artists on younger or less-innovative artists.¹²⁵ Hellmanzik found that artists within the cluster enjoyed a “cluster premium” in the valuation of their artworks, and also determined that artists became innovative earlier in

¹²⁵ Ibid., 200.
their careers when working in a cluster. Proximity to innovative artworks, mentors, and peers is another extrinsic motivator for creativity, but is distinct from the influence of government-sanctioned incentive regimes such as copyright. Hellmanzik has also found that innovative creativity increases when artists work in highly democratic countries, and determined that an artists’ choice of style (conceptual, experimental, impressionist, pop) may determine the age at which he or she enjoys a career peak.

Hellmanzik’s observations on the effects of location build from Galenson and Bruce A. Weinberg’s earlier work on artists’ peak ages, which suggested that exposure to talented peers may hasten an artist’s professional growth and led to the production of his or her most valuable works, but other extrinsic factors, including shifting buyer preferences for work by younger artists, which may be affected by new directions in art criticism and gallery representation, will determine career peaks.

These influences have been interpreted positively, but can also be perceived as restrictions: if artists who live in major metropolises can expect to succeed, but those who live on rural farms cannot, then artists who want successful careers must live in cities. It is easy to imagine that unfettered creativity is preferable, and much criticism of copyright – of the kind offered by legal scholars Lawrence Lessig, James Boyle, David

\[1^{26}\text{ Hellmanzik, “Democracy and Economic Outcomes: Evidence from the Superstars of Modern Art.”}\]
\[1^{27}\text{ Hellmanzik, “Artistic Styles: Revisiting the Analysis of Modern Artists’ Careers.”}\]
\[1^{28}\text{ Galenson and Weinberg.}\]
Lange, and others – focuses on creations that might have existed, or might exist in the future, with fewer constraints. But restrictions and constraints may actually catalyze creativity. Law professor Joseph P. Fishman has suggested that creativity “thrives best not under complete freedom, but rather under a moderate amount of restriction.” He argues that copyright serves as a creative constraint that is little different from other accepted boundaries and influences on creativity. Fishman suggests that constraints are a feature, not a bug, in the system and are essential to creative work. However, creative constraints are most effective when they are “early” and “clear,” and they need to be known to and easily understood by artists early in the process of creation. Thus, if copyright is to be an effective constraint, it must be an early constraint, which is to say that its parameters must be defined and clarified.

The requirements imposed by permissions and licensing are early restraints, but not a clear restraint. The conditions around asking permission are currently too opaque, too adversarial, and too weighted in favor of the copyright holder to promote the gentle relation described in the parable of de Kooning and Rauschenberg. The subtitle of

129 Fishman, 1335.
130 Ibid., 1337.
131 Ibid.
132 Ibid.
133 Ibid., 1385-1389.
134 Ibid., 1388-1389.
Permissions: A Survival Guide, by University of Chicago editor Susan M. Bielstein, subtly suggests that asking to reuse pictures is an ordeal that requires persistence, largely because “by asking someone permission, you are granting them the right to say no.” Bielstein’s volume, which is packed with succinct explanations, explanatory tables, and illustrated examples, remains the primary guide to reuse of images for academics and artists writing about and otherwise reproducing images. Trenchant and funny, it describes the world of academic art publishing, in which the reproduction of images is essential, as bizarre and unpredictable. She details numerous intricacies of the subject that extend far beyond the confines of appropriation art discussed herein, and some of her most helpful discussions concern the impracticalities of suggestions for reform.

Bielstein ably dispatches suggestions that aim to reduce transaction costs and ease interactions among artists, such as image registries and compulsory licensing schemes. She ultimately suggests that, to create more predictability, creators and users need to be more realistic, not about the law, but about markets. Moreover, Bielstein suggests that “reproductions make art worth more, not less.” She explains that creators tend to see their material as being taken when it is actually being used, and

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135 Bielstein, 10.
136 Ibid., 89-90, 147-148.
137 Ibid., 151.
138 Ibid., 154.
“taking” and “use” are not the same thing.\textsuperscript{139} This observation promotes a different way of thinking about the advantages (rather than just the oft-repeated disadvantages) of reuse of copyrighted works. Bielstein’s final recommendation assigns responsibility to artists, museum professionals, and art educators, for improved collective action because “the discipline must take up for itself and its own expressive means.”\textsuperscript{140} Stated practically, this translates into better fair use education for artists, museum professionals, and art educators, and community consensus on fair use best practices.

Efforts to make copyright law known to and understood by various groups whose professional activities are constrained by its parameters have taken the form of numerous efforts to better educate users of preexisting material. In the late twentieth century, universities, libraries, and other institutions that make frequent use of copyrighted material began education and training programs.\textsuperscript{141} However, the fair use guidelines and checklists developed and circulated by institutions often simply restated the law.\textsuperscript{142} As research by copyright scholar and librarian Kenneth Crews has demonstrated, most of these efforts were treated as legal guidelines, even though they had no force of law and their guidance sometimes bore little resemblance to the law.

\textsuperscript{139} Ibid.
\textsuperscript{140} Ibid., 159.
\textsuperscript{141} Ibid., 938.
itself. Ultimately, most guidelines did not promote fair use, arguably because they interpreted copyright law narrowly and tended to sacrifice the flexibility essential to fair use.

In response to concerns, attention shifted from guidelines, which explained the law, to codes of conduct, which reflected the broad contours of the law but focused instead on community norms and standards. These codes, which have been primarily developed by the Center for Media and Social Impact at American University, have focused on the “consensus interpretation targeted to particular communities of practice.” The first such code was developed by documentary filmmakers in 2004. That community, which had struggled at length with permissions and fair use, worked with Patricia Aufderheide and Peter Jaszi to establish problems common to the production of documentary films and establish community norms around these routine problems. Unlike prior guidelines, which aimed to clarify copyright law through black-and-white rules tailored for communities, this code aimed to articulate what was “reasonable and normal” for a documentary filmmaker to expect when using pre-

144 Ibid., 699-701.
145 Aufderheide and Jaszi, Reclaiming Fair Use, 94.
146 Ibid.
147 Ibid., 95-107.
This distinction is subtle but important: rather than restating legal rules, the code described a set of community rules. Community rules and norms have focused on when, how, and why conflicts occur; identified patterns in these conflicts; and made behavioral suggestions based on these patterns. Even though these community standards have no legal force, they may be more predictive, and more helpful, than further clarification of legal rules.

The reports that precede the creation of these codes describe the shadowy places around copyright opinions that legal cases do not discuss, such as beliefs and misunderstandings about the law, forms of self-censorship, and successful negotiations. Additionally, the behaviors and interactions that constitute the vast majority of copyright-based interactions, like those described by Bielstein in Permissions, are identified in these reports. Thus, code guidance has flowed from these normative interactions rather than the extraordinary examples set by appellate cases like Rogers v. Koons or Cariou v. Prince.

When drafting these codes, Aufderheide and Jaszi were sympathetic to the desire for the test case to end all queries about fair use, but described this as “wishful thinking” because, despite the record established by a legal opinion, the law changes too often for

\[148 \text{Ibid., 98.}\]
one case to remain predictive for long, challenges to the case will eventually arise regardless, and no one fair use case is so easily extrapolated as to apply to all others.\textsuperscript{149} Test cases are not usually predictive; instead, they are outliers. Thus, guidelines based on restatements of law and cases are based on outliers and are also poorly predictive. However, community-oriented codes may be more helpful than traditional restatements of the law because they address what \textit{usually} happens rather than what only happens in extreme circumstances and suggest responses based not on hypotheses, but on established past successes in the same community. As Aufderheide and Jaszi explain, rights can always be contested, but if a right is assumed and the exercise of that right is assumed to carry a normative risk, then the risk may not seem like such a high deterrent. Aufderheide and Jaszi stress that behavior is actually conditioned by perceptions of normality rather than perceptions of legality:

That is why knowing what is normal makes a huge difference. People routinely decide what is reasonable and normal when exercising free speech rights. They could be liable for charges of defamation, when public speaking, or libel, in writing. They have a general sense of what is appropriate, however, and are guided by this when they speak and write. The same is true for fair use, if community practice has expressed what is normal.\textsuperscript{150}

\textsuperscript{149} Ibid., 99.
\textsuperscript{150} Ibid., 98-99.
Thus, such codes establish the “general sense of what is appropriate.” But they are also helpful because, once this sense of appropriate is established, the code describes behavioral choices that confer agency on the artists, as they can be understood in terms of personal responsibility and interpersonal interactions.

The roles of personal responsibility and interpersonal interactions for appropriation artists were foregrounded in 2012 when the College Art Association commissioned Aufderheide and Jaszi to investigate and report on the state of fair use for artists, academics, and museums and to develop a customs-based code of best practices.151 The issues report, published in 2014, identified pervasive self-censorship among artists and an attitude of “exaggerated risk” around fair use.152 Many participants “repeatedly expressed a preemptive decision not to pursue an idea.”153 Cease-and-desist letters, takedown notices, letters from rights management societies, and other forms of financial demand (legitimate or not) were likely to produce self-censorship.154 The report revealed a consistent interest in and concern for appropriate and just behavior, but a low awareness that fair use could, itself, be seen to be appropriate and just. Aufderheide and

153 Ibid., 58.
154 Ibid., 41
Jaszi proposed that the “fear and anxiety” associated with re-use could be alleviated with a code of ethics “grounded not only in the core concepts of transformativeness and appropriateness, but also in the mission of the specific community of practice” and its “vital set of reciprocal relationships.”  

The final code, published in 2015, advised artists to avail themselves of fair use in making new works, but recommended that each use be “justified by the artistic objective” and directed artists to be “prepared to explain their rationales.”  

They further recommended citation and attribution of the pre-existing material “by means such as labeling and embedding,” actions that are not required by law.  

Also, they advised artists against “suggesting that incorporated elements are original to them, unless that suggestion is integral to the meaning of the new work.”  

Thus, these recommendations defined new responsibilities for artists beyond the basic parameters of copyright law, which incorporate custom and courtesy. Finally, Aufderheide and Jaszi suggested that the community consensus offered by such codes would help users make reasoned, conscious, and common sense decisions about fair use that they trust their peers to respect.

155 Ibid., 59.
157 Ibid.
158 Ibid.
159 Aufderheide and Jaszi, Reclaiming Fair Use, 133-135.
The College Art Association’s code may dramatically improve the understanding of copyright and fair use among the artists, art educators, and art professionals to whom it is addressed. However, because its guides to norms assume membership in a shared community, it may not affect disputes between appropriation artists and artists operating outside of the scope of the College Art Association – including commercial photographers, who most often sue appropriation artists.

Consider Rogers v. Koons, Blanch v. Koons, and Cariou v. Prince. In each case, a photographer sued an appropriation artist of some notoriety. None of the photographers in these cases had gallery representation, but all of the appropriation artists did. This is easily and inaccurately written off as jealousy or targeting artists of financial means. Instead, these cases can be seen to reflect a disjuncture in the values and customs of commercial photographers and contemporary artists. For instance, in each case, the photographer in question identified a loss of income, an assertion that reflects the incentives-based descriptions provided by Landes and Posner. Additionally, in each case, the appropriating artist described the photographer’s output as a raw material rather than a similarly-situated artwork and, furthermore, attested to little or no interest

in economic incentive.\textsuperscript{161} Thanks to a lingering judicial preference for non-commercial fair uses, one would not expect an appropriation artist to claim economic incentive as a goal. Therefore, I suggest that these conflicts arose, and reached a level of discord that required litigation, because the artists in question did not share the same set of customs and values related to reuse, as conflicts between artists that must be litigated tend to occur between artists in different markets, who may be seen as members of different communities. This further suggests that, to be truly effective, the College Art Association code must be adopted by a wider range of image-producers than it initially seems to address, or that appropriation artists should be especially careful when sourcing images from artists who may not be familiar with the code or customary practices.

Previously, attention paid to distinctions between appropriation art and commercial photography has focused on the status of commercial photography as a copyrightable form. Lawyers for both Koons and Prince proposed that such images ought to be treated as raw material rather than copyrightable artworks.\textsuperscript{162} A distinction between photographs that appear in newspapers and those that appear on the walls of museums is exactly the sort of distinction that artists using appropriation often intend to probe. A distinction between news photography and fine photography might help

\begin{flushright}
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\begin{enumerate}
\item[161] Rogers, 960 F.2d; Traub; Fisher et al, 25; Swanson; Allen, 197.
\item[162] Traub; Cariou \textit{784} F. Supp. 2d 346.
\end{enumerate}
\end{flushright}
simplify copyright law, but would prove ultimately unhelpful to contemporary artists. Instead of asking what legal rights photographs deserve, the question is: What kinds of courtesies do commercial photographers deserve from artists? There is no legal requirement that an appropriation artist ask permission to use a photographer’s image, but this lack of direction or requirement does not preclude an extralegal benefit for those who do ask, or for those who attribute, cite, and promote the work of the artists and photographers from whom they source their images. Stated differently, in an ethically-motivated fair use situation, permission is optional, but acknowledgement is required.

The law could impose these requirements, but prerequisites are better enforced by artistic communities. In his book *Cosmopolis*, philosopher Stephen Toulmin explains that “the key problem is no longer to ensure that our social and national systems are stable: rather, it is to ensure that intellectual and social procedures are more adaptive.”

Law is stable, but it does not adapt to social changes with the agility necessary for a rapidly changing social sector such as contemporary art. A four-factor test for fair use is more adaptable than stable, and transformativeness is more adaptable than prior efforts to characterize the purpose of a fair use, but the institution of fair use remains bound to the strictures of the law, and the nature of legal rulemaking, which strives for clarity and

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predictably, will always encourage lawmakers to push for stability over adaptability. Beyond the imposition of codes, how can art communities encourage their members to be more respectful and treat respect as a constantly evolving adaptation?

James Boyle has argued persuasively that those who care about copyright would do well to consider the lessons of the environmental movement.\textsuperscript{164} Boyle establishes the parallels between the efforts for regulatory reform, institutional policies, and public awareness campaigns of the environmental movement and endeavors to create a culture of sharing and communal responsibility for intellectual property.\textsuperscript{165} But he rarely mentions one important factor in the success of the environmental movement, which is perhaps the most important of all: individual responsibility. No oversight group puts the bottle into the recycling bin rather than the trash. A person must decide to turn off the air conditioner and reduce CFC output, or buy organic soap that is more easily broken down in the sewers, or purchase carbon offsets when she flies on an airplane. It is a mass of small, personal decisions, some of which result from forced compliance, but many of


\textsuperscript{165} See especially Boyle, “Cultural Environmentalism and Beyond,” where this is summed up with the benefit of hindsight.
which result from the desire to change habits and behaviors to achieve a worthy goal.\textsuperscript{166}

How then, to encourage these shifts?

In \textit{You Are Not a Gadget}, his 2010 manifesto on the impact of digital design on human behavior, virtual reality pioneer, computer scientist, and musician Jaron Lanier explains that “aware appropriation and sterile denatured appropriation are opposites.”\textsuperscript{167} The distinction between the sterile and the aware is the absence or presence of the appropriator’s attempt to connect and empathize with the creator of the material he or she uses.\textsuperscript{168} In a short but persuasive explanation, Lanier bluntly and boldly advises against appropriating at all unless an artist is willing to connect, and defines meaning through connection:

\begin{quote}
Connect, understand, or empathize with the people you appropriate from, to the degree you can. It can be hard to understand or connect with other people, even in the best of circumstances: that’s the human condition. Any little of bit awareness across the mysterious interpersonal chasms that separate you from another person is a triumph, and the only source of meaning.\textsuperscript{169}
\end{quote}

\begin{flushright}
\textsuperscript{166} Which is not to say that individuals can take full responsibility, and that institutions and should not help condition behavior. For example, I put glass bottles in the recycling bin because the city gave me a recycling bin and, more importantly, \textit{I believe that the city actually recycles the bottles}. The city’s public information campaign and provision of a bin were essential to the formation of my belief and, absent this belief, I would be more likely to put the bottles in the wastebasket.
\textsuperscript{167} Lanier, 194.
\textsuperscript{168} Ibid.
\textsuperscript{169} Ibid.
\end{flushright}
Images do not talk to each other; people do. Images do not circulate freely; people copy, circulate, share, and recontextualize them. Images do not transform each other; people transform them. Images and objects do not make choices; people make choices. When choices have consequences, as they inevitably do, people bear the burden of these consequences or, at least, they should.

When an artist fails to connect, understand, or empathize, the artwork suffers and exchanges between artists can turn hostile. In 2015, artist Jamian Juliano-Villani photographed and repurposed lettering from a mural painted by artist Scott Teplin on the wall of a public school in Brooklyn.\(^{170}\) (Fig. 29) Juliano-Villani posted an image of the mural on Instagram, then repurposed the lettering in a painting titled *Animal Proverb.* (Fig. 30) Teplin was notified of the reuse by friends and was irritated by it, but not for economic reasons. Instead, Teplin was dismayed by Juliano-Villani’s commercialization of work that he had performed pro-bono for a public school. In a conversation held in Instagram comments, Teplin argued:

> I was paid nothing – I did it for free for the kids at the school. I gave the school principal the original drawing. How much of the $12,000 that Gavin Brown sold your painting for are you planning on giving to PS130? The PTA could really use it.\(^{171}\)

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Juliano-Villani replied:

I worked hard to make sure my work is at that value, it’s appropriation, what about the entire painting underneath that provides context to the text? That isn’t yours? If you wanted to talk about this you should have talked to me about it first instead of talking to the Internet, and the gallery? I think much more would be accomplished instead of me hearing about it second hand from others? And what about the typeface you used in the mural? Do those designers get credit? Or the color green? I understand where you’re coming from, but is this about ideas, or money?172

In an article on the disagreement, Artnet journalist Brian Boucher emphasized points of commonality and disconnection between the two artists. The title of the article, “When Is Artist-on-Artist Theft Okay?” alluded to the rarity of borrowing between similarly-situated artists. Teplin’s work has been collected by major museums.173 Juliano-Villani is represented by Gavin Brown’s Enterprise.174 But Teplin was 42 at the time, while Juliano-Villani was 28, and Boucher suggested that this was likely a generational difference towards copyright and reuse. Juliano-Villani cited Teplin’s influences, including the typeface designer and lyricist John Lennon, as evidence that Teplin’s work was not wholly original, either. Her position was that every image contains references, every image is essentially already in the public domain, and that anything outdoors is

172 Ibid.
especially available for the taking. She later elaborated:

It’s important to realize that all visual culture is fair game for artistic content, ‘appropriation’ isn’t a ‘kind’ of work, it’s almost all art. When making a painting or a print or a sculpture, it’s nearly impossible to make something without thinking of something else. A good reminder that when dealing with images 1) once an image is used, it isn’t dead. It can be recontextualized, redistributed, reimagined. 2) It should have several lives and exist in different scenarios.

Teplin explained, “I don’t want money from her. But this feels bad.” Teplin’s bad feeling points toward an ineffable, frustrating lacuna in copyright: what does an artist do when the trouble and expense of a suit does not feel right, but there is a perceptible wrong? Under recent case law, Juliano-Viliani’s use might have been considered a transformative fair use, but it is emblematic of the kind of “sterile denatured appropriation” described by Lanier. For example, a simple Internet search would have revealed to Juliano-Villani that Teplin designed the typeface himself. Juliano-Villani is not wrong about the pervasive nature of reuse, but her approach to her source material (and the artist who created it) demonstrated a remarkable lack of

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175 Ibid. The first assertion may be correct, but the second and third are patently false. First, if copyright exists, then not everything is public domain. Second, under the Copyright Act, photographs of buildings may be considered fair use. 17 U.S.C. § 20 (1976). However, an outdoor mural is a painting that is treated as a separable work and thus does not fall under this provision.

176 Ibid.

177 Ibid.

178 Seltzer, 725 F.3d at 1176-1178.

179 Lanier, 194.

curiosity.

Art historian John Seed has said of reuse, “If you are a visual artist today, that is part of your reality, for better and for worse.” But, as Lanier advises, this fact of contemporary art making does not mandate or authorize disrespectful behavior. Other communities have established norms that distinguish appropriate and inappropriate reuse, and have had success in internally policing norms around reuse. For example, some musicians and DJs have made a useful distinction between licit and illicit copying that has no analogue in the visual arts. Original, thoughtful, or meritorious reuse is referred to as “copying,” “sampling,” or “quoting.” By contrast, musical efforts that lack originality, thought, or merit are termed “jacking” (of beats) and “biting” (of lyrics).

Returning to Richard Prince, his 2015 series New Portraits (Fig. 31) could be seen as a form of market enhancement, or could be seen as an inappropriate “jacking” of other artists’ images. New Portraits might have proven a boon to the artists from whom

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Prince appropriated, had Prince handled the situation differently. The thirty-eight inkjet on canvas “portraits” featured blown-up images from Prince’s Instagram feed, under which Prince had added minimal, and sometimes incomprehensible, commentary. The images were drawn from the Instagram feeds of celebrities and college students, performance artists and pin-up girls. Most portrait subjects did not see this as positive attention; most saw the reuse of their images as equal-opportunity exploitation.

Prince’s explanation of his reuses recalled his deposition testimony in Cariou v. Prince: in an interview, Prince described the pull of images of young, attractive people:

> The truth is, I don’t care who they are; I care who I think they are, looking I’m not a very social person. I don’t go out at night. So maybe I wish I looked like them or I could be them.184

Yet, instead of a personal investigation or allegory, New Portraits appeared to be Prince’s most overt critique of authorship in many years. It can be read as a satire of copyright law, as well, as Prince seemed to be seeking the lowest common denominator for transformative use.

New Portraits provoked rage from critics, who called the series “cynical opportunism masquerading as a critique of authorship,”185 “cheap and

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184 Swanson.
185 Harrison, “How to Sue Richard Prince and Win.”
underwhelming,”186 and provoking “something like a wish to be dead.”187 Some artists responded quickly and with wit, despite the frustration of seeing their work debut at Gagosian in someone else’s show. Performance artist Sean Fader circulated a press release that characterized Richard Prince as the “organizer” of the Gagosian exhibit and described his own work in detail. 188 Fader wrote sarcastically of Prince:

Rather than just a replaying of that white male privilege as an attempt to stay relevant in a world he doesn’t understand, Prince’s curatorial effort represents a new turn in the form of his affectionate and deep engagement with the work of his peer, the photographer and performance artist Sean Fader.189

The Suicide Girls, a collective of “alternative” pin-ups and photographers, reprinted exact copies of Prince canvases, which were purportedly selling for $90,000 each, sold their copies for $90, and gave the proceeds from the sale to the Electronic Frontier Foundation, a nonprofit organization that defends digital civil rights.190 Other artists sued Prince.191 But one portrait subject, “nightcoregirl,” was given her print for

188 Sean Fader, “Final Week to See Sean Fader’s #wishingpelt in New Portraits @ Gagosian Gallery Organized by Richard Prince,” http://us2.campaignarchive1.com/?u=e22c7d6d89560f8f889763596&id=b5977fada7&e=63fdccdef6
189 Ibid.
free after simply asking Prince directly.\textsuperscript{192}

I believe that reactions to \textit{New Portraits} are not wholly attributable to concerns about copyrightable property and fair use. Instead, the critical disaffection and popular disdain shown to Prince in the wake of \textit{New Portraits} was multivalent; individual responses deserve to be differentiated. Prince can be generous with those who praise him, such as “nightcoregirl,” but he tends to have little patience or feeling for the mass of people from whom he sources images.\textsuperscript{193} Copyright does not distribute from the rich to give to the poor, yet many portrait subjects were concerned with the perceived financial unfairness of Prince’s use, including college student Anna Collins, who said, “I’m extremely broke, and here is a middle-aged white man making a huge profit off of my image.”\textsuperscript{194} Sean Fader was not aggrieved by a loss in licensing revenue; instead, he was frustrated that the presentation and interpretation of his artistic project in a high-profile gallery was filtered by Prince.

It flattened the work in a way that I was not thrilled about its denial. By not communicating with me, by not talking to me, he denied every level of shared authorship, or engagement, all of those things that were so important to me in the work. \(^{195}\)

Would portrait subjects such as Sean Fader or the Suicide Girls have responded in anger if Prince had notified them of the use beforehand? Would artists have sued him if they all, like nightcoregirl, were given their valuable portraits? How could Prince have treated the subjects of his portraits more respectfully – without asking permission?

As I advocated for a shift in legal thinking about transformation in the first chapter, and a shift in the critical discourse regarding appropriation art in the second chapter, here I encourage a shift in legal and economic discourses related to creative properties. Discussions of appropriation art need a specialized language that relies less on terms imported from other disciplines and takes copying as a foundational aspect of artmaking. The discourse on creative properties needs to shift in ways that prioritize relations between individuals – the moral and ethical aspects of economic transactions.

Discussing the moral and ethical aspects of economic transactions requires quick differentiation from conversations on moral rights legislation, which is prominent in Europe and appears in American law as the Visual Artists’ Rights Act of 1990.

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commonly known as “VARA.” Without such a distinction, any effort to discuss the morality and ethics of exchange in intellectual property will be likely surreptitiously colored by the long and irreversible history of “moral rights,” a form of intellectual property protection that the United States has largely rejected, and which is largely unrelated to the issues under discussion in this chapter.

VARA affords a narrow class of visual artists extended rights in their works that books, music, and other creative products do not enjoy. VARA also provides the right to claim authorship; the right to prevent the use of one’s name on any work the author did not create; the right to prevent use of one’s name on any work that has been distorted, mutilated, or modified in a way that would be prejudicial to the author’s honor or reputation; and the right to prevent distortion, mutilation, or modification that would prejudice the author’s honor or reputation. VARA is limited in its scope and provisions to inform the discussion at hand and bears little on the kinds of exchange and acknowledgments that I propose. The European models from which VARA derives give artists so much power over artworks that appropriation and fair use are easily precluded. I do not propose to discuss the ethics of reuse in the context of moral rights.

To discuss ethical issues in reuse of images without drawing on VARA or the

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197 Ibid.
history or moral rights, one must practically establish a new vocabulary for the emotional and ethical aspects of exchange. The roots of this new vocabulary are again found in the early modern European past: specifically, the writings of Adam Smith.

In his study of creative incentives, law professor Shubha Ghosh noted that “the invisible hand often provides a clever artifice to disguise the principals for whom the market serves as instrument.”¹⁹⁸ The role of the “invisible hand” in obfuscating relations among economic actors is certainly due in part to the constant misquotation of Adam Smith’s term and misinterpretation of his meaning. The “invisible hand” originates from Adam Smith’s *Wealth of Nations*.¹⁹⁹ Therein, Smith described not “the” invisible hand, which today commonly symbolizes free market capitalism, but “an” invisible hand, a rather more modest proposal that “linked personal motivations to their unintended consequences.”²⁰⁰ Economist Vernon L. Smith distills Smith’s entire oeuvre to one axiom: humans have “the propensity to truck, barter, and exchange one thing for another.”²⁰¹

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But, Vernon Smith continues, “things” cannot be limited to products, and may also include “gifts, assistance, and favors out of sympathy.”\textsuperscript{202}

*An Inquiry into the Cause and Wealth of Nations* (often referred to simply as *Wealth of Nations*), receives considerably more attention than other writings by Adam Smith, and is now a fixture in academic and popular writings on free markets. But *Wealth of Nations* is not limited to these observations; in fact, one of its main points is that a nation’s wealth must be measured by the well-being of its people. Well-being is determined by prosperity, which is produced through the peaceful exchange of goods by individuals in an orderly market. In this sense, *The Theory of Moral Sentiments* is both a necessary companion to *Wealth of Nations* and an important work that sheds light on the individuals who populate these markets – the well-being of whom determines a nation’s wealth.\textsuperscript{203} Long before the advent of behavioral economics, Adam Smith embraced discussions of psychological complexity and emphasized the roles of human feeling and social constructs in economic transactions. *The Theory of Moral Sentiments* addresses sociality and feeling among individual market participants, and explains the importance of private human interactions in trade. *The Theory of Moral Sentiments* introduces the “impartial spectator,” a role played by

\textsuperscript{202} Ibid.
\textsuperscript{203} Smith, *The Theory of Moral Sentiments*. 
every member of society, and the core of a theory that all members of society are
essentially observing each other at all times. Here, observation is neither scopophilic or
supervisory: Smith does not describe observation as a form of pleasure-seeking or a
method of control. Instead, Smith describes observation as the foundation of connection
to one’s fellow man and the beginning of community relations, for spectatorship is at the
root of feeling for others. As Smith explains:

When I endeavour to examine my own conduct, when I endeavour to pass
sentence upon it, and either to approve or condemn it, it is evident that, in
all such cases, I divide myself, as it were, into two persons; and that I, the
examiner and judge, represent a different character from that other I, the
person whose conduct is examined into and judged of…But that the judge
should, in every respect, be the same with the person judged of, is as
impossible, as that the cause should, in every respect, be the same with the
effect.204

Here Smith describes a reflexive process in which the mind undertakes regard
for the self, as well as regard for the other, and a balance between self-interest and
interest for the common good. Self-interest is evidently individual, while the contours of
the common good are found in custom.205 Custom is local, specific, and evolving, but
continuously exerts gentle pressure on every member of the community.206 We desire the
positive regard of others, and thus use custom as both a mirror and a guide.207 The

204 Ibid., 81.
205 Ibid., 136-146.
206 Ibid., 141.
207 Ibid., 80.
development of individuals and their communities is thus interwoven and inextricable.\footnote{Ibid.} Greater attention to the motivations and desires of specific principals, their atypical behavior around art objects, and the ways in which custom can guide (or change) their choices will benefit discussions around the economics of copyright law more than further musings on the abstractions of the “market.”

To proceed with a new examination of the peculiarities and possibilities of exchange among contemporary artists, I turn to philosopher Lewis Hyde. Hyde’s book \textit{The Gift: Imagination and the Erotic Life of Property} (1983) argues that “works of art exist simultaneously in two ‘economies,’ a market economy and a gift economy.”\footnote{Hyde, \textit{The Gift}, xvi.} In market economies, art objects may behave like a commodity when it is bought or traded, but the artwork behaves differently in the gift economy, even as it participates in the market economy. Hyde adapts a Marxist distinction to characterize the essential difference: commodities have “exchange-value,” while gifts have “use-value.”\footnote{Ibid., 78.} Stated differently, “a commodity has value and a gift does not. A gift has worth.”\footnote{Ibid., 77-78.} This proposes a duality that meshes well with fair use doctrine, giving a different contour to the dichotomy between the private property and public good character of every artwork. Instead, of a
public good character, Hyde identifies a “gift” character that preceded the artwork, inheres in it, and must move on from it. He says, “The only essential is this: the gift must always move…there are other forms of property that stand still, that mark a boundary or resist momentum, but the gift keeps going.”

Value, Hyde explains, is derived from comparisons of one thing with another. He says, “A thing has no value in itself except when it is in the marketplace, and what cannot be exchanged has no exchange value.” Scarcity is called rarity in art sales, but regardless of its terminology, scarcity represents a capitalist effort to limit the availability of a good so that its price may be preserved or raised according to demand. This is true of art objects, but copyright is also arguably about maintaining scarcity, especially in an age of digital artworks. Hyde recommends thinking of art objects in terms of “worth” as well as value because worth is something that continues to circulate even after a transaction that “fixes” the object on a museum wall or in collector’s a storage vault. Worth can be described as the qualities that make the artwork innovative, but without the opportunity to act on others, as described by Galenson and Hellmanzik above, the effect cannot happen. Continual movement is necessary, otherwise the

212 Ibid., 4.
213 Ibid., 78.
214 Ibid.
215 Legros, 292.
artwork’s worth will decline or perish. For example, if a collector purchases a work by Jackson Pollack and hangs it in her private home, never loaning it a museum and never inviting anyone over to see it, the work loses some of its worth.

Hyde makes this distinction between worth and value to propose that “the way we treat a thing may sometimes change its nature.” He proposes a different way to see the same object, suggesting that the way of seeing is more important than any inherent property of the object itself, or any pre-existing framework laid upon it. When relationships are prioritized, the terms of engagement and interaction change, and objects can be seen differently. “Unlike the sale of a commodity, the giving of a gift tends to establish a relationship between the parties involved.” Circulation produces “interconnected relationships” and “decentralized cohesiveness,” because people “do not deal in commodities when we wish to initiate or preserve ties of affection.” Thus, while commodities promote “alienation and freedom,” gifts establish “community and being obliged to others.” When the expressive content of artworks are characterized as gift-like, images are harder to conceive of as things that may be “stolen” from others. As

216 Ibid., 10.
217 Ibid., xvii.
218 Ibid., xx.
219 Ibid., 85.
220 Ibid., 86.
jazz great Dizzy Gillespie said, “You can’t steal a gift.”

Potential connections to intellectual property law in *The Gift* were not lost on Hyde, who published *Common as Air*, a defense of the inherently public nature of intellectual property, in 2010. Therein, Hyde suggests that cultural regulations have little to do with the eighteenth-century philosophers to whom legislators often appeal and are instead the result of historical shifts in the 1990s. He identifies the 1990s as a critical era in the expansion of intellectual property regulations, and explains this expansion as a response to the development of the “knowledge economy,” the Internet and digital copying technology, and the 1991 fall of the Soviet Union. Despite the disruptions imposed by these extraordinary historical and social changes, Hyde argues, certain Enlightenment models endure, specifically “the old republican idea of a civic or public self necessarily endures.” Hyde distinguishes between a common and an individual self which coexist in the same person much as the commodity and gift coexist in the same object. The creative aspects of the self are identified as part of the shared self.

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222 Hyde, *Common as Air*.
223 Ibid., 10-12.
224 Ibid., 187.
225 Ibid., 178.
226 Ibid., 188, 101, 201-203.
Hyde has little patience for the language of real property in copyright, explaining that “thievery” is an abstract concept that over-privileges the individual self.\textsuperscript{227} This abstraction is at the root of exalted authorship, for “the language of theft is part of a rhetorical tool kit for the creation of genius, and has in it not a little self-importance.”\textsuperscript{228} Hyde also notes that many professions which do not depend on genius and authorship have built cultures of sharing that have not economically or creatively harmed their practitioners.

Ironically, law is the most obvious of these examples, because legal writing is collaborative and law is collectively held.\textsuperscript{229} As Hyde points out, “No one has ever successfully claimed copyright infringement for the unauthorized use of someone else’s legal argument. In fact, lawyers want to have their work appropriated.”\textsuperscript{230} Lawyers intentionally repeat statutory language, quote heavily from opinions, and frequently circulate language that has previously been viewed as persuasive, as well as “boilerplate” – basic foundational material that is too tedious to work up afresh. But Hyde also reminds the reader that science, law, and software have “norms preserving

\begin{footnotes}
\footnote{\textsuperscript{227} “It is our own sorting of the world that brings thieving into being, and that in insisting on that sorting we affirm a particular image of the artistic self.” Ibid., 202-203.}
\footnote{\textsuperscript{228} Ibid., 203.}
\footnote{\textsuperscript{229} Ibid., 248-249.}
\footnote{\textsuperscript{230} Ibid., 248.}
\end{footnotes}
collectivity that do not undercut individual autonomy.” The examples of science, law, and software are given to make the following point:

Arguments over the commons, cultural or otherwise, are never simply about efficiency and maximizing wealth...they are also about ways of living, the claim being that human dignity itself demands there be limits to the commodification of many things that the commons movement has yoked together.

In creative industries governed by copyright, “permissions culture” determines ways of living, making, and interacting. The default assumption in creative reuse is that one must ask permission before she copies anything. This leads to self-censorship, as the default assumption is that the party asked will decline or charge an exorbitant fee. There is plenty of empirical evidence to sustain this assumption; for example, Aufderheide and Jaszi’s research suggests that artists and art professionals often use this assumption to self-censor.

Amanda Palmer – musician, performer, director, and fellow at the Harvard University Berkman Klein Center for Internet and Society – has explained that her function as an artist is to “connect the dots,” yet reminds those concerned with reuse

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231 Ibid., 249.
232 Hyde, Common as Air, 167-168.
233 Bielstein, 9-11, 101-14.
234 Jaszi and Aufderheide, 5, 7, 10-11.
235 Ibid., 24-30, 40-41.
that access to “dots” remains a major hurdle for many artists. But Palmer expands beyond concerns of access to explains that access is not the primary hurdle to asking.

The primary hurdle is fear. Returning to the real-life fable of Rauschenberg and de Kooning, Rauschenberg’s primary hurdles in asking de Kooning for a drawing were access and his own courage. Rauschenberg was able to access de Kooning because of shared contacts and his own established reputation as an artist. His fear, demonstrated by the whiskey he needed to approach de Kooning’s door and his quiet hope that de Kooning simply wouldn’t be home, was the bigger hurdle. Palmer describes asking as an interaction based on collaboration and respect, an interaction which is established by its terms. The permissions culture described by Bielstein, Aufderheide, and Jaszi, has terms that, paradoxically, do not actually encourage asking or conferring permission. The self-censorship described by these authors is arguably a product of the fear described by Palmer. But it does not have to be this way.

3.3 Christian Marclay, The Clock (2010)

Christian Marclay’s The Clock (2010) (Fig. 32, 33) is one of the most critically and popularly acclaimed artworks of the early twenty-first century. It is also one of the most

237 Ibid., 13.
238 Ibid., 47.
overtly “illegal” artworks ever made, as it is composed of approximately ten thousand clips from pre-existing, copyrighted films. Yet Marclay received not one objection from a copyright holder.

_The Clock_, an extended montage lasting twenty-four hours, functions both as a literal clock and as a dreamy, disorienting meditation on the passage of time. Each clip features a reference to the time of day. Some are literal, such as a shot of a clock’s face, while others are oblique, merely suggesting the unstoppable movement of hours. An exercise that could be tedious, but is, under Marclay’s direction, hypnotic. Marclay, who began his career as a deejay, stretches and bends the sounds that accompany the images. The effect is spellbinding: it is seductive, melancholic, dull, and joyful at turns. As the viewer struggles to impose a coherent narrative, the film thwarts that native impulse.

Marclay’s conditions for venues exhibiting _The Clock_ are famously strict. Among other requirements, he mandates the dimensions of the room, size of the screen, the model and quantity of white IKEA couches installed, the venue’s opening hours, and ticket admission policies. Venues are also unable to control the start and stop times of _The Clock_ because the “film” is a computer program that runs perpetually and cannot be

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paused, rewound, fast-forwarded, or stopped without Marclay’s intervention. The aesthetically transformative power of *The Clock* is established in its balance between the universal and the particular, and its evocation of an intimate relationship between Marclay and millions of individual viewers, all sharing a humorous, illuminating visual experience about the hypnotic power of cinema in a dark room, thinking about time until what time it is, is forgotten, or the artificial construction of time and what time even means.

The film, a triumph of filmic condensation and displacement, never shames the spectacular; instead, it elevates its popular content to a new level of refinement. In *The Clock*, Marclay revels in the distracting and disorienting power of cinema, requiring viewers to embrace nostalgia, beauty, and celebrity in order to understand and endure them as temporal constructions. Marclay urges comparisons and revels in the delights viewers feel in these pleasures, as they begin to notice and marvel at the familiarity of the faces, plots, and sounds, cueing them to the amount of time habitually spent before moving images. Marclay dispenses with the skepticism common to much of contemporary art. Instead, he uses suspense to draw viewers into his fantastical world of time.

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The Clock was universally praised, in no small part because Marclay’s cultural commentary was not directed towards another artist but at the viewer of montage, at the concept and visual products produced to mark time, and the experience of time. Critics called the film “a reminder of our scattered attentions, archival culture, remix culture,” 241 “as iconic as Jeff Koons’s flowering ‘Puppy’ or Damien Hirst’s taxidermied shark,” 242 and “the ultimate work of appropriation art.” 243 Museums vied to purchase the film, each spending hundreds of thousands of dollars for one of six copies. 244

The Clock is an example of an artwork that would likely be considered transformative, but might fail to pass the rest of the four-factor test. The transformative purpose of The Clock is constituted by a commentary on something broader and more ineffable than any single film fragment. The film is transformative in that it recontextualizes fragments of pre-existing material in the service of a new, ambitious work in which each fragment serves a specific and different purpose through the simple juxtaposition and edit of the filmic apparatus. The Clock appropriates and draws into conversation prior images in order to manipulate them in the service of a different,

241 Borrelli.
242 Zalewski.
creative endeavor. Moreover, Marclay’s edits are so precise and carefully chosen as to move a loose narrative of twenty-four hours forward such that it would be extremely difficult to substitute a different fragment. Each is valuable for its figurative or literal evocation of a single image of the some one thousand, four hundred, and forty minutes in a day. Finally, each fragment is evocative either in its familiarity or its unknown original filmic origin. This balance between the two, known and unknown clips, is critical to The Clock’s potent affect.

Nonetheless, The Clock may not be fair use. Here, the other factors weigh strongly. The amount of imagery appropriated from each original film is small, but in many cases, a defendant’s use of a film clip has been held to be an infringement for the appropriation of small units of copyrighted material. The nature of the prior work clearly weighs against Marclay, being creative commercial products, a point that also raises the precedent for a harmful effect on the market for film licensing, as studio motion pictures have established strong licensing schemes and requirements for their products. The Clock is the only artwork discussed herein that employs pre-existing artworks with a well-established market for licensing. Of all the works discussed, it most explicitly

245 Roy Export Co., 672 F.2d 1095, 1100 (2d Cir. 1982); Los Angeles News Service v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997); Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Cir. 1997).
uses copyrighted materials that are customarily obtained by payment of permissions fees.

Yet, not one movie studio demanded payment from Marclay, and not one filmmaker requested that his or her work be excluded from *The Clock*. This is surprising, given that movie studios file “take down” requests against anonymous YouTube users every single day.\(^\text{247}\) By 2010, when *The Clock* debuted, rightsholders had notified YouTube of over one hundred million content violations.\(^\text{248}\) Furthermore, in the fourth quarter of 2010, content providers’ monetary claims rose 200%.\(^\text{249}\) Marclay did not premiere his supercut in a period of low attention to copyright infringement.

Seen from the hermetic perspective of legal analysis, this is shocking. Attention to context reveals a simple explanation: the inclusion of each and every fragment was understood by viewers and the film industry as an homage that enhanced the reputations of Hollywood actors, directors, and studios, drawing each warmly, if briefly, into the embrace of the rarified art world, which often mocks Hollywood’s superficialities, even as its players willingly takes Hollywood collectors’ money. Marclay brought new attention to old films and drew each fragment into the welcomed

\(^\text{249}\) Ibid.
designation of high art, if only for a few seconds. The glow around Marclay’s critically and popularly acclaimed work was extended to each fragment, in a small extension of his incredible innovation that reflected positively on each filmmaker. This is an example of market enhancement.

Marclay was not surprised, as he never expected to be challenged: “If you make something good and interesting and not ridiculing someone or being offensive, the creators of the original material will like it.”250 Marclay appears to be correct: if the work is good and inoffensive to the rightsholder, an artist probably will not be challenged. The Clock is beyond “good”; it is a masterpiece. However, its ‘inoffensive’ nature may have been essential to acceptance by copyright holders. Swiss-born Marclay fits the mold of the traditional, white, male artist; one with critical acclaim, a recognizable, stylish insider with vanguard credentials, who is represented by a powerful art gallery. This stature was only immensely enhanced by his unique film; he has since been called “the most exciting collagist since Robert Rauschenberg.”251 Marclay was backed by two powerful galleries, White Cube (London) and Paula Cooper (New York), which advanced the artist $100,000 for the project.252 Marclay had been making works of

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250 Zalewski.
251 Ibid.
252 Ibid.
“collage” with sound, objects, and film for decades, and had never been challenged on a prior use.

The lack of inflammatory, or even mildly critical, response to *The Clock* has something to do with its specifically transformative effect, but the conditions of its production must also be considered. Regardless, each and every edited fragment that Marclay appropriated contributed to an entirely original work of art. One hopes that every masterpiece that repurposes pre-existing material will be received thusly.

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Speaking about the *Canal Zone* works in 2010, Richard Prince again described his reuse of Cariou’s photographs:

> Basically I like the way things look; that’s all my decisions are about – if it looks good, it is good. So anyway, unfortunately I took too many of these Rastafarian (images) from this guy and I didn’t really even think to ask. I don’t think that way, it didn’t occur to me to ask him and even if I did and he said no, I still would have taken them. I figured I’d do them and maybe if he objected I’d deal with that later.253

But Prince did not “deal with that later.” While he recognized his friends with gifts of artworks, he simply ignored Patrick Cariou.

Similarly, in 2015, an individual featured in *New Portraits* reached out to Prince

with praise, and received her portrait without cost.\textsuperscript{254} Thus, Prince effectively paid one copyright holder a $90,000 licensing fee, but ignored the rest. When copyrighted material is appropriated, recognition and, in some cases, remuneration should not be dependent on praise for the appropriation artist or his artworks.

Copyright law provides amply for the remuneration and recognition of copyright holders, but does not require attribution or payment in cases of fair use. This legally correct because the law should not police behavior at this level. But I suggest that the outrage that greets artworks such as \textit{New Portraits} is not attributable to legal concerns, but to ethical concerns. The law cannot and should not address ethical concerns around reuse, but that does mean that these concerns should go unaddressed.

To shift the way that reuses and reproductions are treated requires a shift in thought, by copyright holders and appropriations alike, towards something more expansive and relational than economic incentives. It requires something more relational and human. As Susan Bielstein explains, legal analysis often turns on questions of profit and the denial thereof, but “when the economic imperative recedes and “higher goods,” so to speak, are involved, the \textit{giving or sharing} of a copy to educate – that is, without a

thought to profit – then the law’s complexion begins to blur."

This shift requires that we think about the ethical and interpersonal components of intellectual property. Appropriation artists need to surmount their discomfort and open conversation with the artists from whom they wish to borrow, as Rauschenberg did. Copyright holders need to learn how to say, “OK, I don’t like it, but I’m going to go along with it because I understand the idea,” as de Kooning did. But artists must also be sure that if that “no” occurs, they are able to negotiate the responsibility for changing their direction or proceeding thoughtfully, with some assurance that there really is a cognizable and predictable difference between transformative and derivative uses.

The future of fair use lies in understanding appropriation as a form of market enhancement as well as harm, and in developing models for the development of inter-artist relations that promote innovation and fair dealing. Old models of incentive-based creativity, permissions and licensing, and market effect need to be reevaluated and, if need be, replaced. Copyright can be an effective and meaningful constraint, rather than a suppressive restriction, if the adaptive details of inter-artist interactions are handled in extralegal venues. New models of community-oriented, customs-based, extralegal efforts are needed to provide guidance to appropriation artists and the artists from

255 Bielstein, 33. (Emphasis in original.)
256 Krulwich.
whom they source material. Visual artists need to develop the kinds of shared
understandings modeled by the hip-hop community, among others, and reward ethical
behavior and aware appropriation. Critics and scholars need to find ways to question
unethical behavior and “sterile” appropriation without questioning the validity of the
art itself. Above all, artists need to take responsibility for their uses, recognize their
obligations to their source materials and the people from whom they source, and stop
hiding behind fuzzy, defensive language about the recirculation of images. The final
chapter offers an example of this kind of responsibility and obligation.
Conclusion: “The Most Extraordinary Gift”

In July 2016, Kanye West released the music video for his song Famous. (Fig. 34) Early attention focused on the video’s controversial depiction of well-known musicians, politicians, and reality television personalities. There are many ethical (and potentially, legal) problems with Famous, but West’s approach to appropriation was exemplary and is a contemporary parable of aware appropriation and respectful fair use.¹

Kanye West, a world-famous hip-hop artist, producer, fashion designer, and television personality, is, in the eyes of some, also a performance artist.² He is one of the best-selling musicians of all time, having sold more than thirty-two million albums and one hundred million digital downloads.³ He has released eight studio albums and won 21 Grammy awards.⁴ West has plenty of experience without unauthorized reuses: he has

¹ This dissertation does not address the legal or ethical issues around privacy and celebrity likeness raised by Famous.
been both called out others for appropriating his sound and style, and been called out himself.⁵

In creating Famous, West was inspired by artist Vincent Desiderio’s oil painting Sleep (2008). (Fig. 35) Sleep is a massive painting, eight feet by twenty-four feet, that depicts twelve naked, slumbering figures in exacting detail. Vincent Desiderio is an American realist painter, who is also a critic at the Pennsylvania Academy of the Fine Arts and the New York Academy of Art. He is rigorously trained, highly knowledgeable about art history, and his work is technically excellent.⁶ Desiderio’s paintings critique the excesses of consumer culture, but also handle uniquely personal issues, such as the physical experiences of his disabled son.⁷ Desiderio has explained that Sleep was inspired by his experience of cancer treatment, a prolonged period of staring up at the ceiling, but Sleep is a form of reuse, as well: the painter was also influenced by Jan Van Eyck’s The Last Judgment (c. 1430), Michelangelo’s Last Judgment (1536-1541), Jackson Pollock’s Mural (1945), Willem de Kooning’s Excavation (1950), and images of the holds of slave ships.⁸

⁶ Stephen May, “Vincent Desiderio Painting with his Head and his Heart,” American Arts Quarterly 24, Number 4 (Fall 2007), http://www.nccsc.net/essays/vincent-desiderio
⁷ Ibid.
⁸ Ibid.
The day before Famous’ premiere, Desiderio received a phone call from West’s assistant. Desiderio was asked to attend an event at the Los Angeles Forum, and provided with a plane ticket. On arriving in Los Angeles, he met privately with West and members of his team. According to Desiderio, when West showed him the video on a laptop:

I began to recognize that the naked bodies floating past the camera lens were in positions identical to the figures in my painting, “Sleep.” Could Kanye have seen my painting? There were so many similarities. Yes, it was my painting. It had been sampled, or “spliced,” into a new format and taken to a brilliant and daring extreme!

The animatronic sculpture featured in the video was created by DONDA, a loosely defined “creative collective” named for West’s late mother. It took four months to make, and required obsessive observation of photographs of each subject, 3-D scanning, animation modeling and consultation with stylists, and each figure features painstaking detail, including applied human hair, hand-painted freckles, and gentle

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10 Ibid.
breathing enabled by 9-volt batteries.\textsuperscript{12} But instead of seeing a copyright violation, Desiderio saw the efforts of West and his team as a “gift”:

As I looked around the room at the smiling faces, it became apparent that, unbeknownst to me, a remarkable collaboration had occurred, one that brought together artistic expressions that, at least on the surface of it all, couldn’t seem further apart. I felt as if I had been presented with the most extraordinary gift: Kanye and his crew had spent the past months producing a video of tremendous power and beauty, and at its core was a painting. My painting.\textsuperscript{13}

After viewing the video, the two men had a frank, admiring conversation about each other’s work. West went to the Forum and unveiled the video to thousands of adoring fans (and many less-adoring critics) and continued on with his global superstardom. Desiderio went home to upstate New York and continued with his painting and teaching careers. If the parties can be believed, no contract was signed. There was no monetary exchange. Desiderio received no specific promotion from West.

In an interview with the \textit{New York Times}, Desiderio explained how impressed he was with the hip-hop star:

Kanye saw things in it that I don’t know how he could’ve seen. Kanye is truly an artist. Talking to him was like speaking to any of my peers in the


\textsuperscript{13} Ibid.
art world — actually, more like talking to the brightest art students that have their eyes wide open.\textsuperscript{14}

Desiderio’s response may be attributed to his generous nature, or his appreciation for West’s specific reuse, or his ability to understand and exploit the brief-yet-powerful glare of attention that association with West invariably confers. But West’s respectful approach to Desiderio may have been equally influential. Speaking to \textit{The New York Times}, Desiderio said:

As far as I’m concerned, it has nothing to do with copyright. A work of art goes out there, and there’s a stream that activates and widens the communal imagination. It was an honor that I was being quoted. There was no money involved at all. It wasn’t offered, but I wouldn’t have taken it. That would’ve cheapened the whole thing – this building of an amazing bridge between aesthetic realms that are feeding off of the same information.\textsuperscript{15}

Through this experience, Desiderio formed a positive connection with West, and he also capitalized on the attention that West’s reuse brought to his artwork. When the media came calling, he was well-prepared with answers about West, appropriation, and the role of reuse in image-making. Would Desiderio have felt as warmly about West’s reuse if he had learned of it via a friend, or in the newspaper, or on television? Or if he


\textsuperscript{15} Ibid.
had been caught off guard by the media blitz and unprepared to address questions about *Famous*?

These questions go answered, because this is a superb example of ethical fair use, and of the kind of “aware appropriation” identified by Jaron Lanier. West did not ask for permission and, under the four-factor fair use analysis and recent jurisprudence, I would argue that he did not need to do so. Although *Sleep* is evidently a creative work (which, under the “nature” factor, is less likely to be fair use) and West recreated the composition quite vividly (which, under the “amount” factor, is less likely to be fair use), “Famous” is a highly transformative reinterpretation (which, under the “purpose” factor, is more likely to be considered fair use) and did not harm Desiderio’s sales, unless it is assumed that a licensing market for reuse of paintings in music video does or should exist. It would be difficult to ascertain exactly how much money West made from the “famous” video. Did it boost sales of his album, *The Life of Pablo*? Perhaps, but both the album and video were released exclusively via Tidal, the troubled music service in which West is an investor.\(^{16}\) West may have revenue from tickets to the premiere: tickets

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were twenty-five dollars each, the Los Angeles Forum seats over seventeen thousand, and two showings were held.  

Later that summer, the sculpture was displayed at Blum and Poe in Los Angeles, and the conditions supporting the appropriation shifted. Kanye West, rather than DONDA, was named as the artist. (Fig. 36, Fig. 37) The selling price was speculated to be four million dollars, or it was considered not for sale. Mysteriously, gallerist Timothy Blum told the *New York Times* that the work was for sale at four million “for the right buyer,” but also stated that “the show and project were not done with price or sale in mind” and claimed that he “would act upon it as every other piece of art I handle.”

Blum later corrected this statement to the *Los Angeles Times*, stating, “If it was for sale, I’d be very happy to sell it to the right buyer, and we’d work in concert with Kanye to price it and sell it – but that hasn’t happened yet.”

This obfuscation was wise: once the sculpture entered Blum and Poe, West arguably entered Desiderio’s market. The buyer of a realist oil painting made by a

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17 Alex Young, “Kanye West is asking fans to pay $25 to attend the premiere of his new music video,” *Consequence of Sound*, June 22, 2016, http://consequenceofsound.net/2016/06/kanye-west-is-asking-fans-to-pay-25-to-attend-the-premiere-of-his-new-music-video/
19 Popescu.
20 Ibid.
contemporary academic painter and the buyer of a battery-powered animatronic sculpture made by a hip-hop artist’s employees are likely not the same market.

However, the appearance of a sculpture made by artist Kanye West in Blum and Poe marks a subtle but significant transition in the artwork’s context, reception, transformative qualities, and potential incursion into Desiderio’s market. It also puts a distinct price on the work, and suggests a trigger for a reconsideration of the work’s status as a fair use, and a different issue with Desiderio. In this context, West’s sculpture will be characterized as a commodity and seen according to its value rather than its worth, to use Hyde’s terms. West’s transposition of the sculpture from a music video to an art gallery is the kind of subtle shift that requires further attention, which economists, judges, lawyers, and copyright scholars are likely to notice, but to which artists, gallerists, art critics, and art scholars must become more attuned.

Art critic John Yau asked, “After the death of the author, how does an individual reinstate the mantle of authorship and take responsibility for what he or she makes?” Such questions suggest that it may be time for authors/artists to stop thinking of themselves as dead, and instead think of themselves as in relation to readers/viewers to whom they owe responsibilities for their choices, and in dialogue with those from whom

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22 Desiderio made no public comment about the exhibition of the sculpture.
they source material, to whom they must demonstrate respect and consideration. Courts must encourage this kind of personal responsibility by considering intent and good faith in fair use cases. The fair use doctrine requires consideration of the four factors, but does not limit consideration to only the four factors.\textsuperscript{24} Intent and good faith should not be required inquiries, but they can and should enhance a fair use defense.\textsuperscript{25} Minor copyright reform is needed, but extensive development of community-oriented, customs-based norms related to artistic reuse is even more necessary. Copyright must be understood as a useful constraint, when it is applied with restraint.

Over the last three decades, legal writing on copyright and fair use has repeatedly invoked “postmodernism” in an appeal to poststructuralist thought.\textsuperscript{26} As discussed in Chapter 1, this emphasis has often been its own aim, intended to question and expand the idea of the legal subject.\textsuperscript{27} But postmodernism also has been used as a justification for appropriation in specious legal arguments that represent a constellation of sophisticated, competing art critical theories as monolithic. This interpretation of art critical discourse ignores three decades of further progression in the fields of art history

\textsuperscript{24} Law professor Eva Subotnik explains that attention to intent and good faith has a long, if poorly theorized, history in copyright law. Subotnik, 935-988.
\textsuperscript{25} Ibid., 975-980. See also Greg Lastowska, “Digital Attribution: Copyright and the Right to Credit,” Boston University Law Review 87, no. 1 (February 2007): 41-90.
\textsuperscript{26} In art critical discourse, we call these theories “poststructuralist.” Lawyers and legal scholars sometimes use “postmodern” when writing about art and copyright.
\textsuperscript{27} See Chapter 1 for the historiography of the postmodern legal subject.
and visual studies, and will not help judges better understand appropriation art. For the last forty years, art critical discourse has often responded to the self-reflective tenets of postmodernism with a negation of the self in art. At the theoretical level, this has been proposed as a questioning of authority, a repudiation of master narratives, and a fragmentation of universal truth. Its practical, quotidian impact is a dehumanization of artists. When critics and interpreters of artworks refuse to engage with an artist’s own statements and writings about an artwork, and discuss artworks and images as freely circulating signs, they deny these objects’ connections to the real human beings that created these images.

To raise such questions is not a call for the return of a discourse on genius, or the artist’s hand, or belief in a kind of authenticity that is almost certainly irretrievable, if it ever existed in the first place. Instead, this dissertation has suggested that overemphasis on critical interpretation, especially forms of interpretation that deny the importance of an artist’s writings and statements, have created a discourse on appropriation that makes inquiry into the ethics of appropriation seem both impossible and irrelevant. This diversion away from artists forecloses discussions of the ethics of appropriation, and may prevent development of extralegal customs and opportunities for resolution. While more clarity in copyright is a laudable goal, sharper rules mean less flexibility for the kinds of transgressive outliers likely to be found in court. Extralegal forms of resolution
and cooperation such as the College Art Association’s Code of Ethics are more sensitive and reasonable approaches to the future development of practical approaches to artistic appropriations.

When appropriation artists do appear in court, critics who subscribe exclusively to poststructuralist/postmodern theories of art interpretation will make poor experts in fair use cases. Copyright law relies on a baseline assumption that is rarely discussed, a secret key to understanding why some works of art trigger legal action and others do not: it is generally assumed that a person pays for the things that he or she likes. A person is expected to exchange payment to view, listen to, watch, or otherwise engage with things he or she enjoys, when those things are made by another person, and especially when he or she proposes to touch, alter, own, or otherwise appropriate some aspect of that thing. The law allows more latitude when an appropriator dislikes the thing in question. The antagonistic drive to parody, criticize, deconstruct, or otherwise tear down the thing seems to afford some clemency. Yet, as described above, much contemporary appropriation art is iconophilic, or negotiates the artist’s attraction and repulsion to the appropriated matter. These artworks do not regard their incorporated materials coolly, and are usually ambiguous rather than antagonistic.

Judges must instead be encouraged to rely on the array of art critical literature that uses more flexible forms of interpretation, including feminist and postcolonial
theory, to assess appropriation art in terms that allow for multivalent and ambivalent interpretations. Efforts to interpret appropriation through lenses described by Helaine Posner as “hot,” such as the psychology of desire, complement rather than detract from prior efforts to theorize the operation as cool, calculated, and wholly intellectual. These warm lenses help viewers understand and explain those tricky forms of appropriation – the constructive, complimentary forms – that are less often litigated. These flexible models are utterly necessary for the critical interpretation of an art form that has always and, absent foundational change to the framework of American property rights, will always transgress legal boundaries.

In an 1813 letter to Isaac McPherson, Thomas Jefferson wrote, “He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.” Proponents of copyright reform often quote Jefferson’s letter to explain why information can and must be free. I am not sure that artworks can ever be free of their creators, or that they even should be. Lewis Hyde’s more intermediate description of creative works as gifts that travel from one generous hand to the next, linking dots and creating ties, seems more apt to me. Both descriptions, of flame shared taper to taper or a gift that is continuously

29 Ibid., 18
recirculation, share the principle of motion. Vincent Desiderio, speaking again of Kanye West, said:

Artists quote other artists. That is what keeps the ball in constant motion. Kanye deserves his due for producing a beautiful and compelling video. You all might be surprised, but Kanye West is a consummate artist.30

In the early modern period, invention, genius, and creativity were treated as gifts from God. In the modern era, artistic excellence has been re-characterized as something originated in a self, which could be packaged and sold like a commodity. It may be possible in the twenty-first century to understand creative works as gifts that have always been in motion and must continue to move. It is time that lawmakers and legal scholars consider the principle of motion as a guide, and write new laws that prioritize sharing, recognize that creativity cannot be incentivized through traditional economic measures, and reward ethical behavior. Finally, art historians might turn their attention to a reconsideration of the ways in which appropriation art is described, and describe the work itself, rather than resorting to the shorthand that borrowed vocabularies make so easy.

Copyright law cannot become more adaptable and remain stable enough to permit sufficient predictability and fair outcomes. Contemporary cannot both be linear

30 Seed.
and rational in its operations and retain its capacity to express in ways that extend beyond the confines of language and logic. But artists, art historians, economists, legislators, lawyers, judges, and legal scholars can adapt. Appropriation art can be treated as a normative practice, as Leo Steinberg observed, and cease to be described as a form of art making that is antagonistic, oppositional, or antithetical to intellectual property rules. As understanding of appropriation changes new knowledge and ways of relating may occur. This dissertation has been an attempt to share some of the best resources from art history, law, and economics in order to provide more adaptive models for looking at, writing about, and regulating appropriation art. Please take this effort as a gift, and pass it on.
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Biography

Katherine de Vos Devine was born on December 30, 1978 in Bethesda, Maryland. She earned a Bachelor of Arts and Master of Arts in Art History from Duke University and a Juris Doctor from the Duke University School of Law. She is the former Executive Director of Black Mountain College Museum + Arts Center in Asheville, North Carolina.