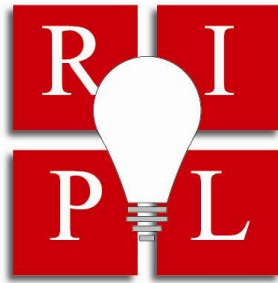


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



A CONTEXT-SENSITIVE INQUIRY: THE INTERPRETATION OF MEANING IN CASES OF VISUAL APPROPRIATION ART

ELIZABETH WINKOWSKI

ABSTRACT

As Andy Warhol's famous depiction of a soup can has demonstrated, the meaning of a work depends on its context. While the Campbell's label signified one thing to shoppers in supermarkets, it raised new questions when presented as a work of art. Warhol's work is just one example of what has come to be known as appropriation art, an artistic practice that borrows and repurposes images from the media, popular culture, and other sources. Unsurprisingly, this art form is in frequent tension with copyright law. This comment suggests that in analyzing the "purpose and character" factor of the fair use inquiry, courts turn to context—both the images and items surrounding the copyrighted work as well as the broader social setting in which the work was placed—as additional evidence of what a work of appropriation art may ultimately mean. It examines two cases in which courts considered context to determine whether a work of appropriation art was sufficiently transformative. In light of the Second Circuit's *Cariou v. Prince* decision, which dispelled the notion that an author must clearly articulate his or her purpose, this comment also examines the difficulties that arise when courts rely too heavily on authorial statements of meaning. It proposes that courts use context as an additional clue to unlocking the difficult question of meaning.

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ELIZABETH WINKOWSKI*

INTRODUCTION

The reader of a fashion magazine flips through ads before stumbling upon “Gilt Trip,” a six-page feature dedicated to metallic-toned cosmetics. For an instant, one image catches her eye—a woman’s feet in gold Gucci sandals adorned with shimmering nail polish. Giving the image only an instant of thought, she dismisses the fashion suggestion. Moments later, finished skimming, she tosses the rumpled magazine atop others in a dental office waiting room.

Years later, the same woman walks through the Solomon R. Guggenheim Museum. She stops to consider Jeff Koons’ *Niagara*, a colorful oil painting in which the legs of four women dangle above trays of pastries. Behind the legs, a large scoop of ice cream hovers above the rushing waters of Niagara Falls.¹ The woman takes a step back and tilts her head to the side—the legs remind her of the sleek airbrushed images of a fashion magazine. Yet, set against an unusual backdrop, they provoke new questions.²

This scenario, based on the facts of *Blanch v. Koons*,³ demonstrates that images derive meaning from context.⁴ This notion is central to appropriation art, a genre that borrows images and objects from mass media and other sources to create new works of art.⁵ For courts engaged in fair use analyses, the question of meaning is

* © Elizabeth Winkowski 2013. J.D. Candidate, May 2013, The John Marshall Law School; B.A. Political Science, Boston College; M.A., Creative Writing, Northwestern University. Thanks to Professor Maureen Collins at John Marshall for inspiring me to write about this particular intersection of art and law.

¹ See *Jeff Koons*, GUGGENHEIM MUSEUM, <http://www.guggenheim.org/new-york/collections/collection-online/artwork/10734> (last visited May 13, 2013) (describing *Niagara* oil painting and Koons’ aesthetic).

² *Id.* The abundant pastries and ice cream in Koons’ painting have been interpreted to reflect the artist’s interest in “mass media, consumerism, and desire.” *Id.*; see also *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006) (quoting Koons’ affidavit to the district court, in which the artist expressed an intention to “comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images”).

³ *Blanch*, 467 F.3d at 247–48.

⁴ E. Kenly Ames, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1481 (1993). Artist Jeff Koons explained this process to the district court in the lawsuit that arose from *Niagara*: “[b]y re-contextualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.” *Blanch*, 467 F.3d at 247.

⁵ See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 260 (2003) (defining and discussing the legal implications of appropriation art). The practice of appropriation art is also referred to as “collage, bricolage, ready-made, found-footage, merz, remix, mashup, sampling, homage, intertext, paratext, [and] postproduction.” CAROLYN GUETIN, *DIGITAL PROHIBITION* 37 (2012).

critical.⁶ To determine whether a secondary work is transformative, courts must address what the secondary work means, and whether that meaning differs from that of the copyrighted work.⁷ Although courts do not always address this question in terms of whether the artist has “recontextualized” the image, this comment suggests that context provides a useful aid in interpreting the meaning of works of appropriation art.

Part I examines the role of transformative use in fair use inquiry and provides an overview of appropriation art. Part II analyzes the existing framework courts use to determine the meaning of works of appropriation art and explores the way in which context has aided this interpretation. It suggests that a purely author-based approach to meaning, in which courts rely on the author’s stated meaning in assessing the first fair-use factor, is problematic. Part III proposes that courts consider how context alters meaning when determining whether works of appropriation art are transformative.

I. BACKGROUND

This Part provides an overview of copyright law and explains why permitting certain transformative use as fair is essential to copyright’s ultimate purpose, promoting creativity to benefit the public.⁸ It then examines the theory and development of appropriation art and concludes with an overview of conflicts between this art form and copyright law.

A. Copyright and the Fair Use Doctrine

Copyright’s ultimate aim is to promote creativity for the benefit of the public.⁹ Copyright fulfills this purpose in two ways. First, it incentivizes creativity by granting exclusive rights to authors for limited periods of time.¹⁰ For visual artists, rights granted by copyright include the right to reproduce the work,¹¹ prepare

⁶ See Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990) (calling this aspect of analysis the “soul” of the fair use inquiry).

⁷ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (analyzing whether the secondary work “adds something new, with a further purpose or different character” than the copyrighted work, thereby altering the copyrighted work “with new expression, meaning, or message”).

⁸ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

⁹ *Id.*; see also Leval, *supra* note 6, at 1107 (explaining that copyright law is designed “to stimulate activity and progress in the arts for the intellectual enrichment of the public”). Copyright law implicates that this intellectual enrichment is vital to society’s well-being. Leval, *supra* note 6, at 1109.

¹⁰ U.S. CONST. art. I, § 8, cl. 8. The Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* The copyright term for current works is the author’s life plus seventy years. 17 U.S.C. § 302 (2012). In the general parlance of copyright, the term “author” applies not only to writers, but also to artists, musicians, and other creators. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (defining author as “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature”).

¹¹ 17 U.S.C. § 106(1).

derivative works,¹² distribute copies of the work,¹³ and display the work publicly.¹⁴ These monopoly rights are granted in exchange for an important public benefit—the “intellectual and practical enrichment” the copyrighted works confer upon society.¹⁵

Only certain types of works receive copyright protection. An eligible work must be an “original work of authorship fixed in any tangible medium of expression.”¹⁶ Originality requires independent creation and a minimal degree of creativity.¹⁷ Copyright protection does not extend to facts and ideas.¹⁸ It applies only to the particular creative expression that the author uses to communicate.¹⁹ This limitation aligns with copyright’s end goal of benefitting the public.²⁰ While protecting an author’s original expression, copyright permits others to build upon underlying facts and ideas to create new works.²¹

The grant of exclusive rights to authors is not the only way copyright law encourages creativity. Under the fair use doctrine, copyright law permits certain uses of existing works as fair, allowing unauthorized use even when protectable expression is copied.²² Without the creative breathing room that fair use affords, rigid application of copyright law would suffocate the creativity that copyright is meant to encourage.²³ The Copyright Act of 1976 recognizes certain uses of a copyrighted work, for purposes such as criticism and commentary, as fair.²⁴ Nevertheless, a valid fair use need not be found among those listed in the Copyright Act.²⁵ Rather, courts evaluate fair use in light of four factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the copyrighted work used, and (4) the effect of the use on the

¹² *Id.* § 106(2). A derivative work is defined as “any . . . other form in which a work may be recast, transformed, or adapted.” *Id.* § 101.

¹³ *Id.* § 106(3).

¹⁴ *Id.* § 106(5).

¹⁵ Leval, *supra* note 6, at 1109.

¹⁶ 17 U.S.C. § 102(a) (2012).

¹⁷ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991) (noting that only a “modicum” of creativity is necessary and that the “vast majority of works will make the grade”).

¹⁸ 17 U.S.C. § 102(b).

¹⁹ 1-2 MELVILLE B. NIMMER & DAVID NIMMER; NIMMER ON COPYRIGHT § 2.03[D] (2012).

²⁰ *See* 7-6 STEVEN FISHMAN, COPYRIGHT AND THE PUBLIC DOMAIN § 7.02 (2008) (explaining that restricting copyright protection to creative expression helps prevent copyright from stifling the creation of new works).

²¹ *See id.*

²² 17 U.S.C. § 107 (2012).

²³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (2004); *see also* Leval, *supra* note 6, at 1109 (explaining that rigid application of copyright law would stifle creativity because (1) all new work builds on prior work to some extent, and (2) many areas of intellectual activity, including scholarship, are inherently referential).

²⁴ 17 U.S.C. § 107. Listing several exemplary purposes, the Copyright Act provides that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

Id.

²⁵ *Campbell*, 510 U.S. at 578.

potential market of the copyrighted work.²⁶ A court considers all four factors in its analysis.²⁷ When the first factor is very strong, the other factors carry less weight.²⁸ Indeed, the Supreme Court and legal scholars concur that transformative use is the heart and soul of the fair use inquiry.²⁹ A court is likely to find fair use when the purpose and character of a work is transformative and noncommercial.³⁰ However, when a work is highly transformative, its commercial nature carries less weight and may be excluded from the first-factor analysis altogether.³¹

Transformative use occurs when an author employs a copyrighted work as “raw material . . . in the creation of new information, new aesthetics, new insights, and understandings.”³² Although courts do not always agree on what “transformative” means,³³ most recognize transformation when the secondary work serves a different purpose than the copyrighted work.³⁴ While courts may consider both physical transformation of the original work and transformation of the work’s purpose,³⁵ they have found transformative use even where the original work has changed very little.³⁶ The creation of transformative works furthers copyright’s constitutionally

²⁶ 17 U.S.C. § 107. The Copyright Act provides that:

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;
- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

²⁷ *Campbell*, 510 U.S. at 578.

²⁸ *Id.* at 579.

²⁹ *Id.* (“[Transformative] works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . .”); see also Leval, *supra* note 6, at 1111 (explaining that “answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative”); see also William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 321 (2012) (“Since the Supreme Court’s *Campbell* decision, it has been clear that ‘transformative’ uses of copyrighted materials are almost certain to be deemed fair.”).

³⁰ 17 U.S.C. § 107(1) (2012).

³¹ See, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004) (commercialism excluded from the first-factor analysis when a for-profit’s website’s use of copyrighted material to criticize cult-like seminars was clearly transformative).

³² Leval, *supra* note 6, at 1111.

³³ Fisher et al., *supra* note 29, at 322 (defining four judicial interpretations of transformation).

³⁴ *Id.*; see, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (holding that search engine’s use of thumbnail images was transformative because the images were used “in a new context to serve a different purpose”).

³⁵ Jeannine M. Marques, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 BERKELEY TECH. L.J. 331, 336 (2007).

³⁶ H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV. J.L. & TECH. 335, 351 n.78 (2011) (summarizing cases).

mandated purpose—to promote the progress of science and the arts,³⁷ which ultimately serves the public.³⁸

B. Appropriation Art: Altering Context to Create Meaning

Appropriation art borrows existing images, frequently from the mass media, to create new works of art.³⁹ These images originate in advertisements,⁴⁰ news items,⁴¹ and depictions of celebrities,⁴² among many other sources.⁴³ The notion that meaning depends on context is central to appropriation art.⁴⁴ Context may be defined as an image's surrounding or setting.⁴⁵ By recontextualizing images from mass media, appropriation artists often criticize the consumer culture from which these images are taken.⁴⁶ Appropriation art does not draw its power from the technical skill of the artist.⁴⁷ Its value lies in the artist's ability to place images into new contexts, thus altering their meaning.⁴⁸

³⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (2004).

³⁸ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

³⁹ LANDES & POSNER, *supra* note 5, at 260.

⁴⁰ See e.g., ELEANOR HEARTNEY, *POSTMODERNISM* 39–40 (2005) (describing the work of Richard Prince, who in the late 1980s reproduced images of Marlboro Cigarettes' "Marlboro Man"). Prince enlarged the advertisements and stripped them of the promotional messages they originally contained. *Id.*

⁴¹ See generally Fisher et al., *supra* note 29, at 246–55 (describing artist Shepherd Fairey's settlement with the Associated Press, which arose from Fairey's unauthorized use of a news photograph by AP photographer Mannie Garcia). The news photograph served the basis for Fairey's iconic "Hope" poster for the 2008 Barak Obama campaign. *Id.* at 244.

⁴² See e.g., HEARTNEY, *supra* note 40, at 33–36 (noting Andy Warhol's appropriation of celebrity images, including the publicity photograph of Marilyn Monroe he used in the *Marilyn Diptych*). Created not long after Monroe's death, Warhol's *Marilyn Diptych* reproduced the celebrity's image twenty-five times in color and twenty-five times in black and white. *Id.*

⁴³ See, e.g., FRANCESCO BONAMI, JEFF KOONS 89 (2008). Koons describes the source of material for his *Lips*, painting, which was part of the same series as *Niagara*:

[The imagery] comes from a wide range of things. From a box of frozen corn where I would cut out the individual pieces of corn and make a spiral . . . and taking an ad of a woman from a fashion magazine and just dropping everything other than her hair; and lips from a fashion magazine; and a photograph that as in a real-estate magazine advertising a parcel of land.

Id.

⁴⁴ Ames, *supra* note 4, at 1481.

⁴⁵ *Id.* at 1481 (quoting John Berger's *Ways of Seeing*, which states that "[t]he meaning of an image is changed according to what one sees immediately beside it or what comes immediately after it").

⁴⁶ *Id.* at 1482.

⁴⁷ WILLIAM PATRY, *PATRY ON FAIR USE* § 3:96 (quoting Sol LeWitt, who states that idea is paramount in works of conceptual art, while the execution is a "perfunctory affair"); see also LANDES & POSNER, *supra* note 5, at 260 (noting that an appropriation artist's technical skills are often "less important than his conceptual ability to place images in different settings and thereby alter their meaning"); see also GUETIN, *supra* note 5, at 38 (proclaiming that "[c]reativity as we have known it in modern times is dead," even though the creative process continues to thrive through borrowing).

⁴⁸ LANDES & POSNER, *supra* note 5, at 260.

By taking images out of their existing contexts and presenting them in a new setting, appropriation artists challenge and subvert the message that society, and individual viewers, have previously attached.⁴⁹ Consider a greeting card depicting three boys herding a pig into a gift box.⁵⁰ A consumer may dismiss this image as overly sentimental. Yet confronted with an enlarged sculptural representation of the same scene, surrounded by other larger-than-life depictions of cartoon characters and figurines, a viewer would likely react quite differently.⁵¹

Artists began exploring the power of appropriation early in the twentieth century, as postmodernism began to take root.⁵² Early forms of appropriation art included Dadaist collages⁵³ and Duchamp's "readymades."⁵⁴ Postmodernism, a reaction against the notions of formality and stability that modernism embodied, was

⁴⁹ Ames, *supra* note 4, at 1481.

⁵⁰ See generally *Campbell v. Koons*, No. 91-CV-6055, 1993 WL 97381, at *3 (S.D.N.Y. Apr. 1, 1993) (granting summary judgment to photographer of similar image). Barbara Campbell's photograph "Boys with Pig" provided Jeff Koons with the basis for his sculpture, *Ushering in Banality*. *Id.* at *1. The work was part of Koons' 1988 "Banality Show" exhibition at a New York City art gallery. *Id.* The Banality Show featured a series of larger-than-life sculptural depictions of cartoon characters and gift-shop kitsch. *Id.* Koons did not prevail against Campbell and lost two other lawsuits based on Banality Show works. See also *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992) (holding that Koons' *String of Puppies* sculpture infringed copyrighted postcard photograph of man and woman holding German Shepherd puppies); *United Features Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 385 (S.D.N.Y. 1993) (granting summary judgment to copyright holder for "Odie" cartoon character, which Koons had reproduced in sculptural form).

⁵¹ See Adam Gopnik, *The Art World*, THE NEW YORKER, Feb. 20, 1989, at 107, available at <http://archives.newyorker.com/?i=1989-02-20#folio=106>. According to Gopnik's review, Koons was producing some of the most shocking art in the United States in the late 1980s. *Id.* But Gopnik found the artist's power to shock mysterious because everything about the Banality Show exhibition had such a familiar feeling to it. *Id.* Surrounded by other larger-than-life representations of everyday images, the cartoonish characters and kitschy, cuddly animals Koons depicted took on a "nightmarish" quality. *Id.* Ames explains this phenomenon:

[W]hen an artist appropriates an existing image from mass culture, takes it out of context and places it in a gallery, where a viewer approaches it with the careful attention many viewers are accustomed to bringing to a gallery setting, the viewer will often examine that image much more closely than she would if she found it on the pages of a magazine. In the process, she may (or may not) discover that the values embodied in that image are values that she does not share when she considers the issue carefully. No matter what conclusion she draws, the process of looking at the image, of really "seeing" it, has forced her to consider the operation of a process that she performs uncritically countless times every day.

Ames, *supra* note 4, at 1481–82.

⁵² *Id.* at 1479.

⁵³ *Id.*

⁵⁴ FRANCIS M. NAUMANN, MARCEL DUCHAMP: THE ART OF MAKING ART IN THE AGE OF MECHANICAL REPRODUCTION 72–73 (1999) (describing "Fountain," a white porcelain urinal Marcel Duchamp submitted to an exhibition under the name "R. Mutt" in 1917). The urinal, which Duchamp purchased at a Manhattan plumbing supply store, is one of the artist's most well known "readymades." *Id.* Similar movements were occurring in music and the arts. See, e.g., T.S. ELIOT, *Philip Massinger*, in THE SACRED WOOD 125 (Methuen & Co., 7th ed.) (famously noting in his collection of critical essays that "[i]mmature poets imitate, mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different").

driven by philosophical and technical upheaval.⁵⁵ Advances in science, such as Einstein's theory of relativity, toppled the idea of a stable universe, challenging notions of progress and order.⁵⁶ Philosopher Walter Benjamin observed in 1935 that for the first time, humans had the power to duplicate virtually any work of art.⁵⁷ Given the ease with which anyone could reproduce an image, art was no longer seen as the solitary, romantic pursuit of a single individual.⁵⁸ In his seminal essay, "The Death of the Author," French literary theorist Roland Barthes later expanded on this notion.⁵⁹ He argued that the reader—not the author—"invented" the text by bringing his or her own experiences to it.⁶⁰

Postmodernism has been called a shift from "production to reproduction."⁶¹ As commercial, celebrity, and advertising images proliferated throughout the twentieth century, many artists began to focus their work not on reality, but on representations of reality found in the mass media.⁶² By the latter half of the century, images supplanted nature as the "primary point of reference" for many artists.⁶³ Appropriation became common practice,⁶⁴ made famous by artists such as Andy

⁵⁵ HEARTNEY *supra* note 40, at 6–8.

⁵⁶ *Id.* at 7; *see also* PAUL GREENHALGH, *THE MODERN IDEAL: THE RISE AND COLLAPSE OF IDEALISM IN THE VISUAL ARTS* 104 (2005).

The single most potent ideological force at the core of modern thought has been that of progress. Modernity is the response to modernization; postmodernism is a critique of the idealist response to modernization. Without contradicting these points, one could easily define idealist modernity as being an affirmation of the idea of progress, and postmodernism as being a critique of progress and the recognition of its end.

Id.

⁵⁷ *See* Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *ILLUMINATIONS* 221 (Hannah Arendt ed., 1968) (observing that by the turn of the century technology allowed for the reproduction of all transmitted works of art, causing "the most profound change in their impact upon the public").

⁵⁸ Kembrew McLeod & Rudolf E. Kuenzli, *I Collage, Therefore I Am: An Introduction to Cutting Across Media*, in *CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGES, AND COPYRIGHT LAW* 8–9 (Kembrew McLeod & Rudolf E. Kuenzli eds., 2011).

⁵⁹ GREENHALGH, *supra* note 56, at 238–39.

⁶⁰ *Id.* at 239. Barthes was also instrumental in the development of semiotics, the study of signs. *See* Ames, *supra* note 4, at 1478 n.15. Just as Barthes rejected the author-based interpretation of meaning, semiotics denied the idea that signs—words, images, sounds, and objects—carry fixed external meanings. GREENHALGH, *supra* note 56, at 239.

[T]he postmodernists cast us adrift in an ocean of signs, to negotiate our way through the world by reading it. The world became a text and our perception of reality fatally compromised, as we read our way through myriad fleeting interpretations of the things around us . . . The concept of singular, solid, permanent meanings in things, of known and undeniable principles, of reason as a tool for uncovering final truths, evaporated into the night.

Id.

⁶¹ HEARTNEY, *supra* note 40 at, 6.

⁶² Ames, *supra* note 4, at 1480 (describing shift from modernism to postmodernism as a shift from making "art about Art" to art about culture).

⁶³ Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, 60 *OCTOBER* 82, 109 (Spring 1992).

⁶⁴ Ames, *supra* note 4, at 1478–80.

Warhol.⁶⁵ Later artists, including Sherrie Levine and Richard Prince, took appropriation art further through rephotography.⁶⁶ Adopting perhaps the most radical critique of authorship, Levine “rephotographed” famous Depression-era photographs taken by Walker Evans and displayed them with no modification.⁶⁷ A development of postmodernism, appropriation arose as a reaction to the increasing prevalence of media.⁶⁸ Even if the postmodern era has now drawn to a close, the practice of appropriation continues.⁶⁹

C. Appropriation Art in Conflict with Copyright Law

Appropriation art is in frequent tension with copyright law because many artists employ copyrighted images, in whole or in part, without the authorization of the copyright owner.⁷⁰ In the past twenty years, many notable appropriation artists have been the subject of litigation. Jeff Koons has been a defendant in four copyright lawsuits, three of which were based on his 1988 “Banality Show” exhibition.⁷¹ In all three cases, the court held that the works were not a fair use, largely because the court did not perceive the works as parodies.⁷² Yet thirteen years later, Koons prevailed against a claim of copyright infringement under the banner of satire when he used an image of a woman’s legs in his *Niagara* oil painting.⁷³ Thierry Guetta, the subject of a 2011 documentary many critics thought to be the hoax of another artist,⁷⁴

⁶⁵ HEARTNEY, *supra* note 40, at 33–34 (recognizing Warhol as one of the first artists to understand photography’s significance to postmodernism).

⁶⁶ *Id.* at 36–40.

⁶⁷ *Id.* at 36–38.

⁶⁸ *See id.* at 7.

⁶⁹ Barbara Pollack, *Copy Rights*, ARTNEWS (Mar. 22, 2012), <http://www.artnews.com/2012/03/22/copy-rights/> (noting that many artists who continue practice today eschew the term “appropriation,” which carries with it connotations of criticism, and prefer instead the concept of “sampling,” drawn from music production). Many artists tend to use images even more freely than their predecessors, often without the intention to critically comment on the works they use. *Id.*; *see also* GUETTIN, *supra* note 5, at 123 (describing how a new movements in contemporary art have moved beyond appropriation). The movement known as “objectless, relational aesthetics” treats artwork as a starting point for conversation and collaboration, rather than a finished product ready for consumption. *Id.*

⁷⁰ LANDES & POSNER, *supra* note 5, at 260.

⁷¹ *See supra* note 50 and accompanying text. Koons has also been a plaintiff in a copyright infringement lawsuit. Kate Taylor, *In Twist, Jeff Koons Claims Rights to ‘Balloon Dogs,’* N.Y. TIMES, Jan. 20, 2011, at C1 (describing Koons’ claim that bookends in the shape of balloon dogs infringed his own copyright in his ten-foot tall “Balloon Dog” sculpture). Koons later dropped the suit. *Id.*

⁷² *See Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (noting that “even given that ‘String of Puppies’ is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph ‘Puppies’ itself”).

⁷³ *Blanch*, 467 F.3d at 247; *see discussion infra* Part III.

⁷⁴ *See generally* Melena Ryzik, *Riddle? Yes. Enigma? Sure. Documentary?* N.Y. TIMES, Apr. 14, 2010 at C1. The film began as Guetta’s attempt to create a documentary about the famous street artist Banksy, but resulted in a documentary about Guetta, made by Banksy. *Id.* This prompted some critics to question whether the entire film was Banksy’s hoax. *Id.*

lost a lawsuit at the district court level for works based on a copyrighted photograph of the rap group Run-DMC.⁷⁵

Other cases have settled out of court.⁷⁶ Andy Warhol had many disputes with photographers that resulted in settlements.⁷⁷ Following the 2008 presidential election, artist Shepherd Fairey settled a lawsuit with the Associated Press for his use of a news photograph, which served as the basis for Fairey's iconic "Hope" poster.⁷⁸

Most recently, the Second Circuit held that Richard Prince's "Canal Zone" series, which appropriated Patrick Cariou's photographs of Rastafarians, was transformative because Prince's works manifested "an entirely different aesthetic" than Cariou's.⁷⁹ While the decision is a clear victory for appropriation art, copyright litigation will likely continue as long as artists continue to build on existing, copyrighted works.

II. ANALYSIS

In assessing whether a particular use is fair, a court must confront the difficult question of meaning.⁸⁰ As described in Part I, a transformative work alters the original work with a "new expression, meaning, or message."⁸¹ This Part analyzes how context changes the meaning of an image or object. It then analyzes two decisions involving appropriation art in which appellate courts have examined how an artist changed the meaning of copyrighted material through the manipulation of context.⁸² It also considers the Second Circuit's analysis of meaning in the *Cariou* decision.⁸³ While an author's explanation of meaning can be helpful in a court's analysis,⁸⁴ this Part suggests that in determining whether a work is transformative, complete reliance on the author's stated meaning is problematic.⁸⁵ When an author is unable to articulate his or her meaning, or chooses not to, context provides additional clues.

⁷⁵ *Friedman v. Guetta*, CV 10-00014, 2011 WL 3510890, at *1 (C.D. Cal. May 27, 2011).

⁷⁶ *See, e.g., Buskirk, supra* note 63, at 100 (describing settlement between artist Robert Rauschenberg and photographer Morton Beebe). Rauschenberg had used Beebe's photograph of a diver in his 1957 print *Pull. Id.* Although Beebe had sued Rauschenberg for \$10,000, the case settled for a much smaller amount. *Id.* In addition, Rauschenberg promised to attribute the original image to Beebe in all subsequent reproductions of the print. *Id.*

⁷⁷ Patricia Search, *Electronic Art and the Law: Intellectual Property Rights in Cyberspace*, 32 LEONARDO, no. 3, 191, 193 (1999); *see also* Buskirk, *supra* note 63, at 100–01 (describing Warhol's settlement with Patricia Caulfield, whose photograph served as the basis for Warhol's 1964 series, "Flowers").

⁷⁸ *See* Fisher et al., *supra* note 29, at 268–69.

⁷⁹ *Cariou v. Prince*, 11-1197-CV, 2013 WL 1760521, at *6 (2d Cir. Apr. 25, 2013).

⁸⁰ *See* discussion *supra* Part I.A.

⁸¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁸² *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003); *Blanch v. Koons*, 467 F.3d 244, 247 (2d Cir. 2006).

⁸³ *Cariou*, 2013 WL 1760521.

⁸⁴ *See* discussion *infra* Part II.B.

⁸⁵ *See* discussion *infra* Part II.C.

A. How Changing Context Creates New Meaning

Appropriation artists create new meaning by placing images into new contexts.⁸⁶ For example, artist Fred Wilson bases his entire artistic practice upon rearranging and recontextualizing existing objects.⁸⁷ In one installation, Wilson rearranged items in a museum collection in unexpected ways.⁸⁸ In a grouping of objects labeled “Metalwork 1793–1880,” Wilson displayed ornate silver pitchers and goblets alongside iron slave shackles.⁸⁹ Wilson derived the message of the installation—critical comment on the way in which museums had ignored African American history⁹⁰—from context alone.⁹¹

Existing images and objects have particular meanings in society.⁹² By manipulating context, artists force viewers to reevaluate the meaning that they unconsciously assign to such images or objects when they first encounter them.⁹³ Viewers approach works of art with many expectations about what art is or ought to be.⁹⁴ When a work of art challenges or upsets those expectations, “visual dissonance” occurs.⁹⁵ Human beings have a natural tendency to try to resolve this dissonance.⁹⁶ In this way, modern artwork often provokes viewers to search for resolution and meaning.⁹⁷ Andy Warhol’s *Thirty Are Better than One*, a series of thirty mini-reproductions of the Mona Lisa, provokes viewers in this way.⁹⁸ Viewers are forced to resolve dissonance between the expectation that the Mona Lisa is a singular masterpiece and Warhol’s incessant repetition of the image.⁹⁹ Placing an everyday item into a formal gallery setting can create similar dissonance, conditioning certain

⁸⁶ LANDES & POSNER, *supra* note 5, at 260 (positing that the real skill of an appropriation artist lies in his or her “ability to place images in different settings and thereby alter their meaning”); *see also* GUETIN, *supra* note 5, at 122 (noting that Duchamp believed that his readymades should only be protected for twenty-five years at most because if their copyright outlived the artist, the work’s original context would have changed so much that the work itself would be rendered meaningless).

⁸⁷ *Fred Wilson*, PBS, <http://www.pbs.org/art21/artists/fred-wilson> (last visited May 14, 2013). Wilson has little desire to work with his hands as an artist. *Id.* “I get everything that satisfies my soul from bringing together objects that are in the world, manipulating them, working with spatial arrangements, and having things presented in the way I want to see them.” *Id.*

⁸⁸ MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 163–65 (2005) (discussing Wilson’s 1992 “Mining the Museum” installation at the Maryland Historical Society).

⁸⁹ *Id.* at 163. Another arrangement placed a Klu Klux Klan robe within a baby carriage, beside a photograph of white children posed with African-American nannies. *Id.* at 163–64.

⁹⁰ Jean Stein, *Mining the Museum*, 44 GRAND STREET, 151, 170 (1993).

⁹¹ *See* BUSKIRK, *supra* note 88, at 163–65.

⁹² Ames, *supra* note 4, at 1481.

⁹³ *Id.*

⁹⁴ ROBERT L. SOLSO, *COGNITION AND THE VISUAL ARTS* 122 (1994); *see also* JOHN BERGER, *WAYS OF SEEING* 11 (1972). Assumptions concerning “beauty, truth, genius, civilization, form, status, [and] taste” come into play when an image is formally presented as artwork. *Id.*

⁹⁵ SOLSO, *supra* note 94, at 122.

⁹⁶ *Id.*

⁹⁷ *Id.* at 124. Duchamp, for instance, thought that art should provide a “cerebral pistol shot.” *Id.*

⁹⁸ *Id.* at 126–27.

⁹⁹ *Id.*

responses from an otherwise mundane object.¹⁰⁰ Artist Marcel Duchamp created such dissonance in 1917, when he entered a now-famous urinal into an art exhibition.¹⁰¹ Given this demonstrable power, context deserves consideration under the purpose and character factor of the fair use analysis.¹⁰²

B. Context and the Judicial Interpretation of Meaning

Use of a copyrighted work for a new purpose, even with little or no alteration of the original, may constitute transformative use.¹⁰³ This has been a dominant trend in fair use analysis for the past two decades.¹⁰⁴ For instance, in *Bill Graham v. Dorling Kindersley Ltd.*, the court held that use of concert posters in a biographical book about the Grateful Dead was transformative because the purpose of the use—telling the story of the band’s history—was different from the original purpose of the posters, promoting concerts.¹⁰⁵ The images used in the book were identical to those on the concert posters.¹⁰⁶ However, because they were creatively rearranged, recontextualized, and used for a new purpose, the court held that the book was transformative.¹⁰⁷ In light of this trend, courts appear to recognize that context changes meaning.¹⁰⁸

In addressing the question of meaning, the Ninth and Second Circuits have both used context to guide their interpretation of meaning. In *Mattel, Inc. v. Walking Mountain Productions*, the Ninth Circuit held that artist’s Tom Forsythe’s photographs of Barbie dolls placed into “apparently dangerous” conflicts with household items constituted transformative use.¹⁰⁹ Forsythe’s series, “Food Chain Barbie,” depicted Barbie dolls in a fondue pot, malt mixer, and other seemingly precarious household settings.¹¹⁰ Although the court found the work a parody, noting that such works enjoy an “obvious” claim to transformative use,¹¹¹ the court also

¹⁰⁰ See Neil Mulholland, *Definitions of Art and the Art World*, in EXPLORING VISUAL CULTURE: DEFINITIONS, CONCEPTS, CONTEXTS 18 (Matthew Rampley ed., 2005).

¹⁰¹ See NAUMANN, *supra* note 54 and accompanying text.

¹⁰² See discussion *infra* Part III.

¹⁰³ See generally R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 484–85 (2008).

¹⁰⁴ PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 80–81 (2011).

¹⁰⁵ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006).

¹⁰⁶ *Id.* at 607.

¹⁰⁷ AUFDERHEIDE & JASZI, *supra* note 104, at 81.

¹⁰⁸ Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 556 n.97 (2004); see, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (holding that search engine’s use of photographer’s images, in reduced sizes, constituted fair use because purpose was to help users locate information); see e.g., *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (holding that newspaper’s use of a photographs of a scantily clad beauty contestant, in conjunction with editorial commentary, gave the images a new meaning or message).

¹⁰⁹ *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

¹¹⁰ *Id.* at 796. Another of Forsythe’s photographs depicted dolls wrapped in tortillas, covered in salsa and placed in a hot oven. *Id.*

¹¹¹ *Id.* at 800.

discussed how Forsythe changed the meaning of the dolls by altering their context.¹¹² Forsythe's background and props, among other creative elements, created a context in which the dolls communicated a new message.¹¹³ While Mattel presented Barbie as the "ideal American woman," Forsythe's photographs depicted a plastic figurine, eerily smiling in spite of the surrounding peril.¹¹⁴ Without referencing any statements from Forsythe himself, the court relied on context to conclude that the photographs commented on "gender roles and the position of women in society."¹¹⁵ The court noted that in parody cases, "context is everything."¹¹⁶

In *Blanch v. Koons*, the Second Circuit considered how context changed the meaning of a fashion photograph depicting a pair of legs.¹¹⁷ As described in the Introduction,¹¹⁸ artist Jeff Koons had incorporated this image into his oil painting, *Niagara*.¹¹⁹ In concluding that Koons had changed the meaning of the image, the Second Circuit both considered context and gave great weight to Koons' carefully articulated explanation.¹²⁰ As Koons stated to the district court, images, as they exist in society, trigger certain responses.¹²¹ "By re-contextualizing these fragments as I do," Koons stated, "I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media."¹²²

In analyzing whether the work was transformative, the court focused on the purpose of the photograph, as created by Blanch and as used by Koons.¹²³ While the photographer's purpose was to create a sexually charged fashion photograph,¹²⁴ Koons sought to comment broadly on the "social and aesthetic consequences of mass media."¹²⁵ To make that comment in *Niagara*, Koons recontextualized a photograph from the mass media.¹²⁶ Looking at the image in its new context—the background against which it was set, its medium, and its placement in an art gallery—the court concluded Koons' use was transformative.¹²⁷

¹¹² *Id.* at 802 (rejecting Mattel's arguments that the court "ignore context—both the social context of Forsythe's work and the actual context in which Mattel's copyrighted works are placed in Forsythe's photographs").

¹¹³ *Id.*

¹¹⁴ *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 802 (9th Cir. 2003).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

¹¹⁸ *See supra* Intro.

¹¹⁹ *Blanch*, 467 F.3d at 247.

¹²⁰ *Id.*

¹²¹ *Id.* (quoting affidavit to the district court, in which Koons stated his intention was to "comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images").

¹²² *Id.* at 247 (quoting Koons' affidavit to the district court).

¹²³ *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) ("Sharply different objectives . . . confirm[ed] the transformative nature of the use").

¹²⁴ *Id.* Andrea Blanch, a noted fashion photographer, earned her reputation as "the woman who knows how to capture a woman." *Biography*, ANDREA BLANCH, <http://www.andreablanch.com/root.swf?t=1294931209000> (click "Biography" link at left) (last visited May 14, 2013).

¹²⁵ *Blanch*, 467 F.3d at 253.

¹²⁶ *Id.* Koons told the district court, "I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time again new insight into how these affect our lives." *Id.* at 252.

¹²⁷ *Id.* at 253.

Koons clearly articulated why it was necessary to use a copyrighted image to achieve his purpose,¹²⁸ stating that he had to use an existing photograph to “comment upon the culture and attitudes” of the medium from which the photograph came.¹²⁹ His ability to justify his use of the photograph eased the court’s decision.¹³⁰ Koons stated that the photograph was necessary to provide the painting an authenticity and reference point for viewers.¹³¹ In light of these statements, the court held that Koons was not merely using an existing image to avoid “working up something fresh.”¹³² Broad social commentary, satirizing the very medium from which the image was drawn, justified Koons’ use.¹³³

In *Cariou v. Prince*, the Second Circuit went further, holding that all but five works in Richard Prince’s “Canal Zone” series were sufficiently transformative even in the absence of social comment.¹³⁴ “Canal Zone” featured 30 works based on Patrick Cariou’s photographs of Rastafarians in Jamaica.¹³⁵ Through collage, enlargement, and other distortions, Prince manipulated the photographs to varying degrees.¹³⁶ While the *Koons* court took note of the artist’s broad social commentary, the court in *Cariou* focused exclusively on the works.¹³⁷ First, the Second Circuit rejected the notion that a work of appropriation art must comment on or refer to the original work in some way.¹³⁸ Second, the court dismissed the suggestion that Prince needed to articulate with clarity the new meaning or message underlying his works.¹³⁹ “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,” the court noted.¹⁴⁰ “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.*”¹⁴¹ What was most critical to the court’s inquiry was how Prince’s works might reasonably be perceived.¹⁴² The court determined that Prince’s manipulation of composition, color, and scale rendered the majority of Prince’s works transformative.¹⁴³

The impact of the *Cariou* decision in future appropriation art decisions remains to be seen, and district courts have not yet manifested the same willingness to adopt

¹²⁸ *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006).

¹²⁹ *Id.*

¹³⁰ *Id.* (stating that while Koons’ satirical meaning was clear, the explanation was helpful because it allowed the court to refrain from relying on its “own poorly honed artistic sensibilities”). Although Koons’ explanation made the court’s decision easier, the court noted that such explanations are not required for a finding of fair use. *Id.* at 255 n.5.

¹³¹ *Id.* at 255.

¹³² *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994)).

¹³³ *Id.*

¹³⁴ *Cariou v. Prince*, 11-1197-CV, 2013 WL 1760521, at *6 (2d Cir. Apr. 25, 2013).

¹³⁵ *Id.* at *2.

¹³⁶ *Id.*

¹³⁷ *Id.* at *6 (“The focus of our infringement analysis is primarily on the works themselves, and we see twenty-five of them as transformative as a matter of law.”)

¹³⁸ *Id.* at *5.

¹³⁹ *Cariou v. Prince*, 11-1197-CV, 2013 WL 1760521, at *6 (2d Cir. Apr. 25, 2013).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (emphasis added).

¹⁴² *Id.*

¹⁴³ *Id.* This framework also led the court to analyze Prince’s works separately, remanding five works in which “Cariou’s work [was] readily apparent” to the district court. *Id.* at *2.

a “reasonable perception” standard.¹⁴⁴ Nevertheless, *Cariou* marks a dramatic departure from the Second Circuit’s earlier decisions. For instance, thirteen years before *Blanch*, the Second Circuit held that Koons’ sculpture *String of Puppies* was not transformative.¹⁴⁵ The sculpture was one in a series of twenty comprising Jeff Koons’ 1988 “Banality Show” exhibition.¹⁴⁶ Koons, who had by then built his reputation on his exploration of art in the age of mass media,¹⁴⁷ based his Banality Show works on images found in consumer culture.¹⁴⁸ Just as he would do later in *Blanch*, Koons identified himself as part of an artistic school that employed mass media objects and images to comment on the society that created them.¹⁴⁹

Recreating a copyrighted postcard photograph in enlarged, sculptural form,¹⁵⁰ *String of Puppies* depicted a man and woman holding eight German Shepherd puppies on their laps.¹⁵¹ Koons raised a fair use defense, arguing that the sculpture constituted “a satire or parody of society at large.”¹⁵² The court held that this purported meaning of the sculpture—broad commentary on society at large—did not fit within the parody defense because the photograph was not the object of Koons’ commentary.¹⁵³ The court also cautioned against the use of existing images to comment on society at large because such use would effectively remove any “real limitation” on the use of copyrighted works.¹⁵⁴ The court appeared to suggest that *Puppies* might have succeeded as a satire of modern society, but confusingly held such use was still not “fair” because it did not parody Rogers’ photograph in particular.¹⁵⁵ Unlike *Mattel* and *Blanch*, the court did not consider how the new

¹⁴⁴ See, e.g., *Friedman v. Guetta*, No. CV 10-00014, 2011 WL 3510890, at *6 (C.D. Cal. May 27, 2011) (holding that artist Thierry Guetta’s use of copyrighted photograph of Run-DMC as the basis for new artwork was not transformative). The court reasoned that because both Guetta and the photographer were artists, and the image was used in works of visual art, no transformation had occurred. *Id.* Even though the two works ostensibly had different meanings, those meanings were not “so distinct as to render Defendant’s use a transformation of Plaintiff’s copyright.” *Id.*; see also Reese, *supra* note 103, at 495 (noting that courts have not offered express guidance on how to determine when a different purpose is sufficiently transformative).

¹⁴⁵ *Rogers v. Koons*, 960 F.2d 301, 304 (2d Cir. 1992). Bad faith and the commercial nature of *Puppies* also weighed against Koons under the “purpose and character of the use” factor. *Id.* at 309–10. Independent of these considerations, however, the court refused to acknowledge the possibility that Koons’ work meant something different from Rogers’. *Id.* at 310.

¹⁴⁶ *Id.* at 304.

¹⁴⁷ *Jeff Koons: Easyfun-Ethereal*, GUGGENHEIM MUSEUM, <http://pastexhibitions.guggenheim.org/koons/index.html> (last visited May 13, 2013).

¹⁴⁸ *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006).

¹⁴⁹ *Rogers*, 960 F.2d at 310.

¹⁵⁰ *Id.* at 305 (detailing Koons’ instructions to artisans to keep the sculpture, “just like the photo”).

¹⁵¹ *Id.* at 303.

¹⁵² *Id.* at 309.

¹⁵³ *Id.* at 310; see also Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 47–48 (Martha Woodmansee & Peter Jaszi, eds., 1994) (arguing that the court’s approach discourages artists who rework existing images, requiring appropriation artists to instead acknowledge their subordinate status in the “‘hierarchy’ of authors”).

¹⁵⁴ *Rogers*, 960 F.2d at 310. *But see* *Blanch v. Koons*, 467 F.3d 244, 255 (permitting broad social commentary as satire).

¹⁵⁵ See *Rogers*, 960 F.2d at 310 (“[E]ven given that ‘String of Puppies’ is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph ‘Puppies’ itself.”).

context of the image—its placement in an art gallery, surrounded by other, oversized sculptures, for instance—may have altered its meaning.¹⁵⁶

C. Why Author-Based Interpretation of Meaning is Problematic

Although *Mattel* and *Blanch* indicate that courts are sometimes willing to consider how context changes meaning, courts at times rely heavily on the author's stated meaning.¹⁵⁷ Courts often operate under the assumption that the meaning of a work lies with the intentions of the author, who transmits a message to an audience that either does or does not "get it."¹⁵⁸ However, meaning is not necessarily consistent among audiences,¹⁵⁹ especially in an art form that deliberately seeks to challenge and subvert the typical meanings assigned to images in society.

Complete reliance on the author's stated meaning poses several problems.¹⁶⁰ First, an artist may not have declared his or her intentions.¹⁶¹ Second, even where an author has stated his or her intention, an interpreter still must decipher and understand those statements.¹⁶² Third, in some situations, the artist may not wish to express his or her actual intentions.¹⁶³ Other critics note that the idea that an artist can dictate the meaning of his or her work is relatively new,¹⁶⁴ and that in the long

¹⁵⁶ See Adam Gopnik, *The Art World*, THE NEW YORKER, Feb. 20, 1989, at 107, available at <http://archives.newyorker.com/?i=1989-02-20#folio=106>. In a review of the "Banality Show" exhibition, the *New Yorker's* art critic wrote:

Koons' sculptures shock not because of their intellectual message or their physical presence. They are nightmarish. The contours of each piece are as chubby as Disney drawings, but their execution seems glacially slow . . . Far from being a detached comment on the place of art in our culture, they have the zombie-like gleam of something genuinely strange and obsessive.

Id. Based on this account, ordinary images and objects appeared to take on a new meaning than the original due to changed context. *See id.*

¹⁵⁷ Holland, *supra* note 36, at 355; *see also* Jaszi, *supra* note 153 at 29–56 (tracing the origins of "romantic authorship" in the development of copyright law, which relies on the author to determine what a work means). Jaszi contends that the *Rogers* opinion exemplifies notions of romantic authorship, depicting *Rogers* as a pure artist while villainizing Koons as a former commodities trader. *Id.* at 42–43.

¹⁵⁸ Holland, *supra* note 36, at 351.

¹⁵⁹ *Id.* at 361.

¹⁶⁰ Compare *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (accepting Koons' stated purpose: to comment on "social and aesthetic consequences of mass media"), with *Rogers v. Koons*, 960 F.2d 301, 310 (rejecting Koons' stated purpose: criticizing how mass media has contributed to the deterioration of society). Relying solely on Koons' purported meaning, the court reached two different outcomes, even though Koons' purpose was almost identical in both cases. *Id.*

¹⁶¹ Matthew Rampley, *The Rise and Fall of the Author*, in EXPLORING VISUAL CULTURE: DEFINITIONS, CONCEPTS, CONTEXTS 157–58 (Matthew Rampley ed., 2005).

¹⁶² *Id.*

¹⁶³ *Id.* Rampley suggests that some artists have deliberately issued contrary statements "to throw critics and readers off the trail, in order to make interpretation more complex and difficult." *Id.* at 158.

¹⁶⁴ Mulholland, *supra* note 100, at 20.

history of art, very few people “have been able to proclaim something to be art and have their opinion taken seriously.”¹⁶⁵

Throughout the twentieth century, critics have called into question the author-based theory of meaning. Barthes¹⁶⁶ criticized the author-based approach to interpretation in the late 1960s.¹⁶⁷ In Barthes’ view, the author plays little or no role in the creation of the meaning of a work.¹⁶⁸ Drawing on linguistic theories, Barthes believed that the meaning of a text was dependent on its relation to other texts, and that the text itself was a collage of these other sources.¹⁶⁹ Barthes referred to this relationship as intertextuality.¹⁷⁰ At most, the author is an “assembler” of fragments of other text, and “meaning is as variable as the readings made of it.”¹⁷¹ Rather than expressing the personal beliefs of the artists, works of art derived their meaning from their relationship to other works.¹⁷²

In the latter half of the twentieth century, “reader”-based interpretations of meaning became more prominent.¹⁷³ Some scholars have suggested that it may be more useful for courts to examine what the secondary work has ultimately become, rather than simply evaluating the author’s stated purpose for his or her actions.¹⁷⁴ New approaches suggest that the meaning of a work cannot be controlled or transmitted by the author, nor is the meaning consistent across audiences.¹⁷⁵ Each viewer brings to the work his or her particular background knowledge and way of

¹⁶⁵ *Id.*

¹⁶⁶ See discussion *supra* Part I.B.

¹⁶⁷ Roland Barthes, *The Death of the Author*, in IMAGE, MUSIC, TEXT 142–147 (1977); see also GUETIN, *supra* note 5, at 121.

Michel Foucault, in his famous essay “What is an Author?”, says that the author is never the origin or location of meaning. Meaning instead is fluid and changeable, always situational over time. Each work exists in conversation or in quarrel with other works. All works, he says, comprise quotations from other works, and “all discourses are objects of appropriation.” The author/artist herself is a huge repository of pre-ordained knowledge from which she draws, and every book is a rich network of influences, connections, and imitations. These forces undermine any notion of authorial intent and so in her absence, he argues, we should understand the original work to be as problematic as any notion of author.

Id. at 121 (citations omitted).

¹⁶⁸ Rampley, *supra* note 161, at 158.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 159.

¹⁷¹ *Id.* 158–59.

¹⁷² *Id.* at 159.

¹⁷³ Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 386 n.65 (1994) (describing “reader response” theory).

¹⁷⁴ Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?, 11 VAND. J. ENT. & TECH. L. 1075, 1109 (2009); see also Laura Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J. L. & ARTS 445, 448–49 (2008), (arguing that approaching the question of meaning from the reader’s perspective would be more helpful in a court’s determination of “whether the defendant’s use promotes the delivery of new works to the public, the ultimate goal of copyright law”).

¹⁷⁵ Holland, *supra* note 36, at 381.

seeing.¹⁷⁶ These new theories of meaning have brought to light the shortcomings of the traditional author-based approach. It is an ideal moment for courts to turn away from the notion of romantic authorship and bring context into the fair use analysis.

III. PROPOSAL

In light of the difficulty involved in the interpretation of meaning, and the demonstrable power of context, courts should use context as an additional aid in the “purpose and character of the use” factor of the fair use analysis.¹⁷⁷ Courts have long recognized that the judiciary should not determine subjective questions of artistic merit and value.¹⁷⁸ Yet in fair use inquiries, courts must assess the purpose and character of an artist’s use of copyrighted material.¹⁷⁹ Courts frequently rely on an author’s stated meaning in making this determination.¹⁸⁰ However, this approach is problematic because the author may not clearly articulate his or her meaning, or may choose not to explain at all.¹⁸¹ Even where an author does explain, courts are still charged with the task of deciphering the explanation.¹⁸² Some scholars have criticized the outmoded notion of “romantic authorship.”¹⁸³ Others suggest that

¹⁷⁶ GILLIAN ROSE, VISUAL METHODOLOGIES 19 (2001) (pointing out that there are multiple sources of meaning for every image related to: (1) the way the image is made, (2) the wider visual context in which the image is placed, and (3) the audiences who view the image).

¹⁷⁷ 17 U.S.C. § 107(1) (2012).

¹⁷⁸ See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903). In recognizing copyright protection for a circus advertisement, Justice Holmes noted:

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.

Id.; see also Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 807 (2005) (explaining rationale behind this viewpoint, including the notions that “art and law belong in separate cognitive and intellectual spheres,” that “law is objective and art is subjective,” and that law concerns precedent while “art is about the evolution of ideas”).

¹⁷⁹ 17 U.S.C. § 107(1).

¹⁸⁰ See Jaszi, *supra* note 153, at 29–56 (discussing the notion of “romantic authorship” in copyright law); see, e.g. *Blanch v. Koons*, 467 F.3d 244, 255 n.5 (2d Cir. 2006) (explaining how Jeff Koons’ “clear conception of his reasons for using ‘Silk Sandals, and his ability to articulate those reasons,” aided the court’s analysis); cf. *Cariou v. Prince*, 11-1197-CV, 2013 WL 1760521, at *6 (2d Cir. Apr. 25, 2013) (pointing out that that “no such rule” requires courts to tie the meaning of a work to an artist’s own statements).

¹⁸¹ See discussion *supra* Part II.C; see also Rampley, *supra* note 161, at 157–58.

¹⁸² Rampley, *supra* note 161, at 157–58.

¹⁸³ See Jaszi, *supra* note 153, at 38. “[T]he law is not so much systematically hostile to works that do not fit the individualistic model of Romantic ‘authorship’ as it is uncomprehending of them.” *Id.*

meaning of a work lies with the audience rather than the creator of the work.¹⁸⁴ One legal scholar indicates that courts quietly analyze artistic works under aesthetic theories of their own choosing without acknowledging it.¹⁸⁵ In their effort to avoid explicit engagement with the question of what art is, courts often do not adequately explain their reasoning.¹⁸⁶

The proposal offered in this Part suggests that in cases of visual appropriation art, courts should consider context as part of the first-factor analysis in fair use inquiries. Context includes both the objects and images adjacent to the appropriated work, as well as the broader social context in which the secondary work now resides. The proposal further suggests that the author's stated meaning should be considered in conjunction with context, rather than in isolation.

A. Using Context as a Clue to Interpret Meaning

In analyzing the purpose and character of a work of appropriation art,¹⁸⁷ and determining whether the work is transformative, courts should consider the images or objects next to the appropriated work and the wider context in which the work has been placed. Courts should recognize that the meaning of an image may change based on the images or objects immediately beside it.¹⁸⁸ Courts should further acknowledge that placement in a museum or gallery—the presumed spaces for works of art¹⁸⁹—triggers certain responses from viewers, which can affect the meaning of a work.¹⁹⁰

Permissible meaning should not be limited to comment on or direct criticism of the original work. Decisions over the past two decades,¹⁹¹ including *Blanch* and *Bill Graham*,¹⁹² as well as *Cariou*,¹⁹³ demonstrate judicial recognition of transformative purposes beyond parody and those enumerated in the Copyright Act. As described above, the original work in a satire is not “a principal target of scorn,” but “a vehicle to make a larger point.”¹⁹⁴ In contrast, parody imitates the original work to ridicule

¹⁸⁴ Heymann, *supra* note 174, at 448; see Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 502 n.9 (1991) (quoting Roland Barthes, who stated that a literary, visual, or musical text “is created not in the act of writing but in the act of reading”).

¹⁸⁵ Farley, *supra* note 178, at 845–46.

¹⁸⁶ *Id.* at 854. “The result is opinions that reveal little more than incompletely informed, deeply subjective, highly personal, unanalyzed feelings that an object is or is not art.” *Id.* Farley argues that the court dodged aesthetic questions in *Rogers v. Koons*, digressing instead into a narrow discussion of parody and commercial use. *Id.* at 855. Farley suggests that courts openly embrace particular aesthetic theories and analyze works within these frameworks. *Id.* at 857.

¹⁸⁷ 17 U.S.C. § 107(1) (2012).

¹⁸⁸ BERGER, *supra* note 94, at 29.

¹⁸⁹ See BUSKIRK, *supra* note 88, at 186.

¹⁹⁰ Ames, *supra* note 4, at 1481–82.

¹⁹¹ AUFDERHEIDE & JASZI, *supra* note 104, at 80–81.

¹⁹² Jeannine M. Marques, *supra* note 35, at 347.

¹⁹³ *Cariou v. Prince*, 11-1197-CV, 2013 WL 1760521, at *6 (2d Cir. Apr. 25, 2013) (“Cariou argues . . . that we are not to consider how Prince’s works may reasonably be perceived unless Prince claims that they were satire or parody. No such rule exists, and we do not analyze satire or parody differently from any other transformative use.”).

¹⁹⁴ PATRY, *supra* note 47, § 3:84.

it, usually in a humorous way.¹⁹⁵ Patry suggests that a rigid dichotomy between parody and satire was never intended by the *Campbell* decision.¹⁹⁶ Courts should permit satire and broad commentary on society at large, as in *Blanch*,¹⁹⁷ rather than shoehorning works of appropriation art into the category of parody.¹⁹⁸ Appropriation artists do not necessarily choose images because they warrant particular comment or criticism. For example, in *Blanch*, Koons stated that he chose the “Silk Sandals” photograph not because it was so unique—but because it was ubiquitous.¹⁹⁹ Accordingly, Koons created new meaning by placing a ubiquitous image in a new context.

In assessing the purpose and character of the use, courts should focus on what the reader might perceive from the image.²⁰⁰ Laura Heymann argues that the transformativeness inquiry should not focus on what an author has done to create the secondary work, but rather on whether a viewer may perceive the secondary work as signifying something different from the original.²⁰¹ In Heymann’s words, there must be “interpretive distance,” between the two works and “distinct discursive communities” surrounding each one.²⁰² While a court may have little information about how a discursive community perceives the work, context can provide clues.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (“More likely is that Justice Souter was making a small, illustrative point, and not one intended to be blown up into a rigid dichotomy.”).

¹⁹⁷ *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006).

¹⁹⁸ *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

¹⁹⁹ *Blanch*, 467 F.3d at 255. Koons emphasized the importance of choosing a photo from the mass media:

The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication. Images almost identical to them can be found in almost any glossy magazine, as well as in other media. To me, the legs depicted in the *Allure* photograph are a fact in the world, something that everyone experiences constantly; they are not anyone’s legs in particular.

Id. Artist Shepard Fairey adopted a similar thought process in creating his “Hope” work, which was based on a news photograph of Barack Obama:

I set out to find a reference photo on the Internet that would fulfill my needs. It did not need to be an extraordinary photo in and of itself; it only needed to be a sufficient point of departure for what would become a stylized and idealized illustration of Obama. After several hours of searching for images on Google, I narrowed my potential reference images for my Obama illustration to six I liked. After experimenting in Photoshop with the images, I chose a favorite—a reference of Obama from a 2006 Darfur conference—and began digital preparation for my illustration.

Fisher et al, *supra* note 29, at 270. The parties settled in January of 2011, neither party surrendering its own view of the law. *Id.* at 269.

²⁰⁰ Heymann, *supra* note 174, at 455; *see also* *Cariou v. Prince*, 11-1197-CV, 2013 WL 1760521, at *6 (2d Cir. Apr. 25, 2013).

²⁰¹ Heymann, *supra* note 174, at 455.

²⁰² *Id.* A discursive community arises around a work as those who experience the work begin to offer their interpretations of it. *Id.* at 456. Heymann suggests that critical reception, the secondary author’s stated meaning, or a reasonable interpretation from the perspective of the courts all provide evidence of different discursive communities arising around a work. *Id.* at 456–57.

Because images have certain meanings within society,²⁰³ courts can look to setting and surrounding images to help gauge what the work might reasonably mean to a particular community. Context provides the additional evidence needed to interpret what works of appropriation art ultimately mean to particular audiences.

Finally, in examining the context of an appropriated work, courts should be willing to analyze works separately. In *Cariou v. Prince*, the district court analyzed all of Richard Prince's works together at once,²⁰⁴ even though some works contained more original painting and creative elements than others, as the Second Circuit later pointed out.²⁰⁵ Similarly, in *Friedman v. Guetta*, the court considered four of an artist's works *in toto*, even though Patry suggests that at least one of the works was transformative.²⁰⁶ In reality, each work of appropriation art may have its own set of context clues capable of creating new meaning.

B. Considering Context in Conjunction with the Author's Stated Meaning

Context provides a useful counterbalance to the author's stated meaning. Without going beyond the author's stated meaning, the fair use inquiry turns into a "rivalry of incentivized authors,"²⁰⁷ even though additional meanings may be possible. Therefore, if courts are to consider an author's stated meaning, they should do so in conjunction with context, adopting a mixed analysis similar to that used in *Blanch*.²⁰⁸ Courts should take into consideration not only the author's own purported meaning, but also the meaning that might be reasonably perceived based on context. In doing so, courts would retreat from subjecting appropriation artist to the narrow and standard of "romantic authorship."²⁰⁹

Balancing context and authorial statements of meaning would provide an effective approach to analyzing the purpose and character of the use factor. While some scholars have suggested focusing on viewer interpretation and audience engagement,²¹⁰ others have indicated that an author's stated purpose should be balanced against some other factor.²¹¹ It is necessary to look to context for additional

²⁰³ Ames, *supra* note 4, at 1481.

²⁰⁴ *Cariou v. Prince*, 784 F. Supp. 2d 337, 350 (S.D.N.Y. 2011).

²⁰⁵ *Cariou v. Prince*, 11-1197-CV, 2013 WL 1760521, at *2 (2d Cir. Apr. 25, 2013).

²⁰⁶ PATRY, *supra* note 47, § 3:96 (referring to the "Old Photo" work, which positioned two members of the rap group Run-DMC within a nineteenth century portrait of an unsmiling man and woman).

²⁰⁷ Holland, *supra* note 36, at 382; *see also* AUFDERHEIDE & JASZI, *supra* note 104, at 20 (noting that contemporary copyright law, "heavily emphasizes individual authors, individual works, and the notion that creativity is an individual act"). Aufderheide and Jaszi call this outlook a "truly unfortunate distortion" in conflict with the realities of modern society. *Id.*

²⁰⁸ *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (relying not only on Koons' purported meaning, but also considering the background in which "Silk Sandals" was set, its size, detail, and "entirely different purpose"). As Heymann describes it, the court still clung to notions of authorial intent, but also "adopted language indicating a focus on interpretation." Heymann, *supra* note 174, at 461.

²⁰⁹ *See* Holland, *supra* note 36, at 359 ("It is a mistake, however, to define the social value at the heart of copyright solely in terms of authorial activity.").

²¹⁰ *Id.* at 382.

²¹¹ *See* ROBERTA KWALL, *THE SOUL OF CREATIVITY*, 84-85 (2011) (proposing a two-prong test for moral rights, balancing an author's intended message against whether heightened originality

guidance as to a work's meaning because in many cases of appropriation art, the author's meaning is unclear.²¹² If the purpose of copyright law is to promote creativity for the public's benefit,²¹³ courts should be willing to acknowledge new meanings, even where the author has not expressly articulated them.²¹⁴

C. Acknowledging New Meaning Does Not End the Fair Use Inquiry

While a context-based approach to the first factor of the fair use inquiry may result in more findings of transformative use, transformativeness does not end the fair use inquiry.²¹⁵ Context may change the meaning of a work, even where the accused infringer's fair use defense is ultimately unsuccessful.²¹⁶ Nimmer notes that courts should address the question of transformative use on its own merits.²¹⁷ As the Court stated in *Campbell*, transformative use is not "absolutely necessary for a finding of fair use," even though such works often tend to promote the progress of science and the arts.²¹⁸ Because fair use is a balancing test, courts should be willing to recognize new meaning, even if other factors weigh against the alleged infringer.

CONCLUSION

In cases of appropriation art concerning fair use, where a court must interpret meaning, context provides information that can aid in a court's analysis. Interpreting the meaning of a work of art is a difficult task. A work of art conveys different meanings to different audiences, and artists may not always clearly articulate their intentions and goals. Given these problems, consideration of context can help enrich the "purpose and character" factor of the fair use inquiry. As the court noted in *Blanch*, fair use analysis should involve "an open ended and context-sensitive inquiry."²¹⁹ This comment takes those words literally, suggesting that courts use context as additional evidence of what a work of appropriation art may ultimately mean.

and substantial creativity are perceptible to an ordinary observer). Kwall suggests that Koons' work in *Blanch* passed both prongs of the test. *Id.*

²¹² Holland, *supra* note 36, at 360–61 (noting that a work could potentially trigger meanings and responses that the author never expected or intended).

²¹³ Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

²¹⁴ Holland, *supra* note 36, at 360–61. Although Prince stated that he didn't "really have a message" and did not go to great lengths to explain his purpose, the court did not find his lack of explanation dispositive. *Cariou v. Prince*, 11-1197-CV, 2013 WL 1760521, at *6 (2d Cir. Apr. 25, 2013).

²¹⁵ 4-13 NIMMER, *supra* note 19, § 13.05[A][1][b] (noting that "not transformative" is often incorrectly used as a shorthand for "not fair").

²¹⁶ *Id.* (criticizing decisions that confuse "transformative" with "fair").

²¹⁷ *Id.*

²¹⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²¹⁹ *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).