"Bad Artists Copy. Good Artists Steal.":*
The Ugly Conflict Between Copyright Law and Appropriationism

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I. INTRODUCTION

In 1988, Calgary, Canada, hosted the Winter Olympics. Anyone who watched the opening ceremonies on television saw athletes parading through snow. Or so it seemed. What we really saw was athletes walking through powder white sand. Sand was used to replace snow because "[w]ith snow, once you start trampling on it, you (mess) it up visually."[1] As one Olympic Committee representative said, "[i]t looked like snow, but without any of the problems of snow."[2] The snow in Calgary—as the representation of a representation—suggests as good a point as any for a discussion of a proposed amendment to the copyright law that would settle the dispute between appropriation in the visual arts and the Copyright Act of 1976.[3]

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* This statement is generally attributed to Pablo Picasso. D.G. Murray, *Picasso* (Visited Nov. 25, 1996) <http://www.traveller.com/~jsmurray/picasso.html>. *But see* Tony Augarde, THE OXFORD DICTIONARY OF MODERN QUOTATIONS 218 (quoting Lionel Trilling "Immature artists imitate. Mature artists steal."), 220 (quoting T.S. Elliot "Immature poets imitate; mature poets steal.").

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[1] Bob Remington, *Organizers Swap Sand for Snow in Olympic Illusion*, ST. PETERSBURG TIMES, Feb. 5, 1988, at Nat'l, at 1A (quoting Terry Steward, media manager for Calgary's Olympic organizing committee) (alteration in original).

[2] *Id.*

[3] On copyright and the non-visual arts, *see* John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103 (1988); Jean-Victor A. Prevost, *Copyright Problems in Mastermixes*, 9 COMM. & THE LAW 3 (1987);

Appropriation in the visual arts emerged in New York in the late 1970s. Generally understood as working through a theoretical next-step within the postmodern[4] discourse, appropriation artists reproduce full and partial images from mass culture, repositioning these images within their own work.

This Article will address the inherent conflict between copyright law and appropriation art in the creation of objects.[5] Part I establishes a basic overview of the foundation of copyright law and its underlying principles. In Part II, this Article discusses appropriation art. Part III of this Article traces the application of traditional principles of copyright law, discussed in Part I as they have been applied to art works that incorporate the images of others. Finally, in Part IV, I propose a revision to the Copyright Act of 1976[6] which will protect both appropriation artists and authors of the original works,[7] while advancing the goals of copyright law.

Sir Isaac Newton is credited with concluding "if I have seen further it is by standing on [the shoulders] of Giants."[8] The question by this analysis is whether appropriation artists are standing on the shoulders of Giants before they are entitled to under current copyright law.

Maria Demopoulos, *Thieves Like Us: Directors Under the Influence, Plagiarism in Music Video Direction,* FILM COMMENT, May 1996, at 33.

[4] For the most part, a discussion of postmodernism is outside the scope of the Article. What matters here is the idea of postmodernism as a practice (critical or not) that aligns notions of authorship and identity with the logics of post war consumer capitalism. For background, *see* Jameson, *Postmodernism: The Cultural Logic of Late Capitalism*, New Left Review 146 (July-Aug. 1984); Mike Davis, *Urban Renaissance and the Spirit of Postmodernism*, New Left Review 151 (May-June 1985).

[5] This Article uses the terms "work" and "object" interchangeably. Both refer to an artist's creation.

[6] The Copyright Act of 1976, 17 U.S.C. §§ 101-504. (1996) [hereinafter "the Copyright Act" or the "1976 Act"].

[7] "Author" is not specifically defined in the Copyright Act. The term is generally accepted as meaning the entity who created the work. The Supreme Court has defined author as "he to whom anything owes its origin. . . ." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). "Author" can also refer to an entity or group of individuals. *See* 17 U.S.C. § 201 (1996) (providing for ownership of a work). In this Article the term will denote individual authors, rather than joint authors or individuals working as employees.

[8] *White v. Samsung, Elecs. Am., Inc.*, 989 F.2d 1512, 1515 n. 15 (9th Cir. 1993) (Kozinski, J., dissenting) (citations omitted).

II. COPYRIGHT LAW—AN OVERVIEW

The United States Constitution provides copyrights "[t]o promote the progress of science . . . by securing for limited times to authors . . . the exclusive right to their respective writings . . . ."[9] The Federalist Papers are brief in their assessment of the copyright clause in the Constitution. The purpose of the first copyright law was to provide general uniformity to the law.[10] To promote the progress of the arts and to advance uniformity, the copyright law allows society to reward authors with the exclusive rights of exploitation of the work in exchange for the creation of the work. Absent an affirmative defense, such as fair use,[11] anyone whose unauthorized use of a work violates one of the exclusive rights of an author is an infringer of the copyright.[12]

Copyright law was conceived to entice people to create works that would move society forward. Culture grows by accretion when everyone builds on the work of those who came before.[13] Thus, copyright law is meant to balance the rights of the creator with society's right to the uninhibited use of the work. Courts must balance "the conflicts and contradictions that pervade the law of copyright, and . . . where elements of the copyright law conflict, [courts] . . . must determine, as a policy judgment, which of its commands prevails over the other."[14]

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[9] U.S. CONST. art. I, § 8, cl. 8. The constitutional enabling clause has generally been interpreted to refer to "writings" of "authors" that promote "science." At the time the clause was written, "science" was used to denote knowledge and learning. Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 14 (1995). *See also*, I PAUL GOLDSTEIN, COPYRIGHT § 1.13.2 (2d ed. 1996).

[10] THE FEDERALIST NO. 43, at 273 (C. Rossiter ed. 1961).

[11] Affirmative defenses include the fair use doctrine, discussed *infra*, in Part I.C., the idea/expression dichotomy and arguments that the object is a useful article under 17 U.S.C. § 101 and is not entitled to copyright protection.

[12] 17 U.S.C. § 501(a) (1996).

[13] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting), *cert. denied*, 508 U.S. 951 (1993).

[14] CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 68 (2d Cir. 1994), *cert. denied*, 116 S. Ct. 72 (1995).

Federal copyright law[15] exists to provide a work's creator with economic incentives to create and to share the work with the public.[16] It should be noted, however, that authors are not required to place their works in the stream of commerce to gain copyright protection under the 1976 Act. This is in contrast to the requirements under the 1909 Act,[17] which anticipated that a work would be "published" and be part of the marketplace at the time that federal statutory protection attached. Additionally copyright protection under the 1909 Act was not automatic as it is now. Instead, federal statutory protection was only available to an author who published with notice. Thus, authors under the 1909 Act could decide not to exchange federal copyright protection for entry into commerce. Today, under the 1976 Act, a work is protected regardless of whether the author intends or desires the work to enter the marketplace.[18]

Even without the guarantee of federal copyright protection, many works were created simply because the author chose to create a work. For example, one commentator has noted that radio and television

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[15] Today, copyright law is primarily governed by the 1976 Copyright Act and subsequent amendments. 17 U.S.C. § 101 (1996). Works either created or first published before January 1, 1978, could be covered by both the 1909 Act and the 1976 Act. However, for purposes of the analysis in this Article, it is assumed that the 1976 Act covers all works.

[16] *See* Feist Publications, Inc. v. Rural Tel. Serv., Co., 499 U.S. 340, 350 (1991); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[c]opyright supplies the economic incentive to create and disseminate ideas").

To some extent the creator of a work is afforded a temporary monopoly in the exploitation of the work. The creator of a work, or her licensees, are the only ones legally permitted to exploit the works. Copyright law is thought to provide an incentive to authors to create works that would not otherwise be made. Lori Petruzzelli, Comment, *Copyright Problems in Post-Modern Art*, 5 DEPAUL-LCA J. ART & ENT. L. 115, 124 (1994). *See also* Kreiss, *supra* note 9, at 14.

However, this theory does not account for works that would be created even if there was no immediate reward for the author, or works that are created, yet never distributed to the public. For example, my diary from junior high school is entitled to copyright protection under the 1976 Act. I did not write the diary because of the incentives available under the Copyright Act; instead, I wrote the diary because of a desire to document my thoughts and the events in my life. Moreover, I do not plan to ever distribute the diary to the public. In this situation, I would have created the diary with or without copyright protection.

[17] Copyright Act, ch. 320, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. § 101 (1994)).

[18] *See* 17 U.S.C. § 102(a) (1996).

shows were created and passed through their "golden years" without the benefit of copyright protection for live broadcast.[19]

Often, benefit to the public is viewed as the primary goal of copyright law.[20] The law gives a copyright owner exclusive rights,[21] thus allowing the owner to monopolize the work and to control its distribution and release to the public, with certain limitations.[22] In exchange for these rights, society benefits from the creation of more works and the eventual free public access to these works. Once works are in the public domain,[23] others can build on the existing works without fear of infringing the first author.[24]

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[19] Barbara Friedman, Note, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 CARDOZO ARTS & ENT. L. J. 157, 177 (1994). *See also* Marci A. Hamilton, *Four Questions About Art*, 13 CARDOZO ARTS & ENT. L. J. 119, 121-122 (1994) (questioning whether a copyright system built on the idea that artists create because they are awarded accurately reflects the motivation of artists).

Additionally, an artist can decide not to release a work or not to place the work in the marketplace. Copyright law allows the copyright owner to control the first distribution. 17 U.S.C. § 106(3) (1996). Yet, an artist who throws a work in the trash may later see that work for sale. *See Perkins v. Hartford Ins. Co.*, 932 F.2d 1392 (11th Cir. 1991).

[20] *See generally*, Fogerty v. Fantasy, Inc. 510 U.S. 517 (1994); Stewart v. Abend, 495 U.S. 207 (1990); Susan Shoenfeld, Comment, *Immunity Under the Copyright Acts*, 36 AM. L. REV. 163, 175 (1986).

[21] Under the 1976 Act, "the owner . . . has the exclusive rights to do and to authorize any of the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . . [and]
> (5) in the case of . . . pictorial, graphic, or sculptural works, . . . to display the copyrighted work publicly; . . ."

17 U.S.C. § 106 (1996).

[22] The author's exclusive right to control the display of a work is limited. Under the 1976 Act, the owner of a visual work of art can display the work without the permission of the copyright owner. 17 U.S.C. § 109 (1996).

[23] Public domain is not defined in the Copyright Act; however, the term is generally understand to mean works that are no longer entitled to or were never entitled to protection under the Copyright Act. Works enter the public domain through a variety of paths, including expired copyright term (17 U.S.C. § 302, § 303), improper registration (17 U.S.C. § 405), and subject matter ineligible for protection (17 U.S.C. § 102).

[24] One commentator has suggested that the "public" is composed of two groups: 1) the regular public that benefits by reading, viewing, or hearing a work that is created, and 2)

Federal copyright law attempts to strike a balance between a creator's exclusive rights to their work and the costs and benefits borne by society because of these exclusive rights.[25] Under copyright law, an author receives a temporary monopoly, created and also limited by the author's exclusive rights and other provisions of the Copyright Act. Thus, society must bear the costs associated with observing the limits placed on free use of the work which are established by the Copyright Act. After the exclusive rights expire, society is able to benefit from the work without compensating the author or the author's heirs. Some "balances" are included within the 1976 Act.[26] Two of the most extensive limits on a copyright owner's exclusive rights are the fair use doctrine[27] and the merger doctrine.[28]

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other authors who will see the work and compete with the original author. Kreiss, *supra* note 9, at 11. In both situations, the general public benefits and the goals of the Copyright Act are furthered because works are created. *Id.* at 13.

[25] Stewart v. Abend, 495 U.S. 207, 228 (1990).

[26] Most statutory limits to the Copyright Act are contained in 17 U.S.C. §§ 107-120 (1996). In addition to the fair use doctrine discussed *infra* in Part I.C., the Copyright Act includes other permitted uses by society. Libraries are permitted many uses of the work, that would otherwise be a violation of the owner's exclusive rights. § 108. The broadest group of exceptions to a copyright owner's exclusive rights are included in § 110. For example, classroom teachers are permitted to perform and display a work to further education. § 110(1). Religious groups are allowed to perform nondramatic literary or musical works of a religious nature at a place of worship. § 110(3). Finally, under the "homestyle exemption," businesses are permitted to play music for customers on a musical system similar to the type commonly used in homes. § 110(5). Although this exemption may be expanded if pending legislation is passed. *See* S. Res. 1619, 104th Cong., 2d Sess. (1996).

Even specific types of protected subject matter are treated differently. Both musical recordings and architectural works are treated different than the majority of objects protected under copyright law. The exclusive rights granted to the author of an architectural work do not prevent the "making, distributing or public display of pictures, paintings, photographs, or other pictorial representations of the work . . . ." § 120. Perhaps the most extensive limits on an author's exclusive rights, however, are reserved for musical works. Once a work is recorded, anyone else can record the work simply by paying a compulsory license fee to the copyright owner of the underlying work. § 115.

[27] 17 U.S.C. § 107 (1996). *See also* Part I.C. *infra.*

[28] The merger doctrine is a basic tenet of copyright law and forbids the protection of ideas. 17 U.S.C. § 102(b). Copyright law only protects an expression and not the underlying idea, so if there is only one way to express an idea, the idea and expression are said to have "merged." Copyright law prevents an author from enforcing a copyright if this merger has taken place. To grant a monopoly to an author in these situations would prevent knowledge

Created by 17 U.S.C. § 107, the doctrine of fair use attempts to balance these conflicting interest by permitting the copying of another work under certain circumstances. However, the application of fair use standards to appropriation art does not always achieve the proper balance between the original copyright owner and society's rights.[29] The failure of this balancing effort creates the conflict between traditional copyright principles and appropriation art.

Behind the conflict between the goals of copyright law and appropriation art is the question of how society views intellectual property rights within more general property rights doctrines.[30] Copyright law attempts to balance two theories of property law: naturalism and positivism. Under a naturalist theory of copyright law, copyright law is a property right that the author is entitled to because the author created the work. This theory imposes costs on the public.[31] In contrast, a positivist theory gives protection to the author based on a statute—the enactment of a legislative body.[32]

In 1834, the Supreme Court examined the underlying purpose of copyright law in *Wheaton v. Peters*.[33] The Court concluded that copyright law is statutory; it is not a common law or natural right belonging to the author.[34] Thus, under the Supreme Court's ruling in *Wheaton v. Peters*, the rights of the author are less important than the rights of the public. Congress ultimately rejected naturalism as the

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from moving forward. *See* Baker v. Selden, 101 U.S. 99 (1879); Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967).

The merger doctrine is difficult for the courts to apply. Application of the doctrine is particularly troublesome when the subject matter is factual. Generally, facts are not protected. *See* Feist Publications, Inc. v. Rural Tel. Serv., 499 U.S. 340 (1991). However, a court has allowed a factual work copyright protection when the party has used expertise to organize the facts in a specific way. CCC Info. Servs., Inc. v. Maclean Hunter Mrk. Reports, Inc., 44 F.3d 61 (2d Cir. 1994) *cert. denied*, 116 S. Ct. 72 (1995).

[29] *See generally*, E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1498 (1993) ("current copyright law, and especially the fair use doctrine, are ill-equipped to handle . . . appropriation").

[30] *See* Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y. 93, 95 (1994).

[31] Shoenfeld, *supra* note 20, at 175.

[32] *See generally*, R. Anthony Reese, Note, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707 (1995).

[33] 33 U.S. 591 (1834).

[34] *Id.* at 661.

foundation for United States' copyright law in the 1909 Act.[35] However, the conflict between the two theories is still evident in parts of the statute.[36]

A. *Protected Works*

Not all works are entitled to copyright protection.[37] Copyright law protects "original works of authorship fixed in any tangible medium of expression . . . ."[38] This simple phrase contains many hidden requirements for protection.[39] For example, the term that causes the most concern for artists is "original." Both postmodern and appropriation art force society to question what is "original."[40] Left undefined by Congress in the 1976 Act, courts have concluded that "original" is anything more than a "merely trivial variation"[41] therefore making it more than copying.

Additionally, only eight specific categories of works are protected under the 1976 Act.[42] Most works discussed in this Article would

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[35] I PAUL GOLDSTEIN, COPYRIGHT, § 1.13.2.3 (2d ed. 1996).

[36] The fair use doctrine is an example of the continuing conflict between the two theories underlying copyright law—attempting to balance the rights of society to use a copyrighted work against the exclusive rights of the author.

[37] For example, copyright protection is not available to many works including "[w]ords and short phrases such as names, titles, and slogans; familiar symbols or designs . . . ." 37 C.F.R. § 202.1(a) (1996). Also, protection is not available for an "idea, procedure, process, [or] system . . . embodied in [a copyrighted work]." 17 U.S.C. § 102(b) (1996).

[38] 17 U.S.C. § 102(a) (1996).

[39] A work is considered "fixed in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1996). For example, images for a computer game are fixed even though the images are changing and are displayed on a cathode ray tube. *See generally, M. Kramer Mfg. Co., v. Andrews*, 783 F.2d 421, 440-42 (4th Cir. 1986); *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982).

[40] *See* Ames, *supra* note 29; Petruzzelli, *supra* note 16 (appropriation art fails to produce original works).

[41] *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

[42] The protected categories of subject matter are:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;

qualify for protection as a "pictorial, graphic or sculptural" work.[43] This category is further defined in 17 U.S.C. 102(a).[44]

B. *Duration*

Under the 1976 Act, works created by an individual author generally enjoy copyright protection for the life of the author plus 50 years.[45] Once copyright protection expires, the work enters the public domain[46] and society as a whole is able to use the work

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(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

17 U.S.C. § 102(a) (1996). Many of these categories are further defined in 17 U.S.C. § 101.

[43] 17 U.S.C. § 102(a)(5) (1996). Section 101 further defines "pictorial, graphic, and sculptural" works to "include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans . . . ." 17 U.S.C. § 101 (1996).

[44] This assumes that the work would qualify for copyright protection. One commentator has suggested that appropriation and postmodern art would not qualify for copyright protection, because the work is not "original." Ames, *supra* note 29, at 1498. That is, the second work fails to satisfy the rather low threshold of "more than merely trivial in variation." See *Feist Publications, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340 (1991).

[45] 17 U.S.C. § 302(a) (1996). Determining the duration of an author's copyright can be complicated. The 1976 Act contains different duration provisions for works created before and after the effective date of the 1976 Act. Thus, when determining copyright duration it is important to determine the date of publication or creation.

[46] A work in the public domain can never regain copyright protection. However, works that were thought to be in the public domain have benefitted from copyright protection because the owner of the work owned additional copyrights in other aspects of the finished work.

For example, in 1974, the holiday classic "It's a Wonderful Life" was thought to enter the public domain, when the copyright owner failed to file the required copyright renewal application. Television stations across the country were free to show the film without engaging in infringement. However, Republic Pictures, owner of the original negative, determined that while the film was in the public domain, the copyright law still protected the underlying story and the music that accompanied the film. Thus, Republic Pictures claimed ownership in the music and the underlying story. Today anyone who shows the film without the permission of the copyright owner is infringing the owner's exclusive right. As a result, "It's a Wonderful Life" has enjoyed a second chance at copyright protection. Chris Koseluk, *Not a 'Wonderful' Year; Now We'll Discover What Life is Like Without George Bailey*,

without the author's permission and without paying a compulsory fee.[47] Therefore, society benefits because the work has entered the public domain.[48] However, it is arguable that society benefits from the creation of a work at two distinct times. First, when the work is created and the author distributes the work.[49] Second, as noted, the public benefits when the work enters the public domain and is available for others to freely use.[50]

C. *Limits on the Copyright Owner's Exclusive Rights*

Exclusive rights to exploit a work are originally given to the author.[51] However, the law is also concerned that the protection of

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CHICAGO TRIBUNE, Dec. 13, 1993, at 22. *See also*, Eric P. Early, *It's a Wonderful Life-Motion Picture Studios can Regain Control of their Wayward Classics*, 1 UCLA ENT. L. REV. 139 (1994).

[47] With music, society can use an artist's work without permission when the second user pays a compulsory license fee to the author. *See* 17 U.S.C. § 115.

[48] *See generally*, Keith Akoi, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 COLUM.-VLA J.L. & ARTS 1 (1993).

[49] Kreiss, *supra* note 9, at 11.

[50] *See supra*, note 24. The idea that the public benefits when a work enters the public domain, of course, assumes that the owner makes the work available to the public. Many works of art are presently in the public domain. Yet, because they are owned by private individuals, they are not available for viewing. In addition, there is the question of how much does society then benefit from the work being in the public domain?

[51] Under Copyright Law, the creator of a work is assumed to be the owner of the copyright. 17 U.S.C. § 201 (1996). Thus, this Article will assume that the creator of the first work is still the copyright owner for purposes of Copyright Law. As a result, situations of work for hire, where an entity other than the creator owns the copyright, are not discussed here. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (application of the work for hire doctrine to a sculptor); Hamilton, *supra*, note 30 at 107 (discussion of work for hire doctrine and the appropriation artist).

Additionally, this Article will not consider the possibility that an artist's moral rights under 17 U.S.C. § 106A may be violated by a second artist's appropriation. *See generally, infra* notes 159-162 and accompanying text for additional information on an artist's moral rights.

Finally, this Article assumes that the copyright owner has not granted the second user permission to appropriate the image. Valid permission is a legitimate defense to an infringement action.

an author's rights does not inhibit the exchange of ideas[52] since a primary purpose of Copyright law is to promote knowledge.[53]

To permit society to use works under limited circumstances without the author's permission, the 1976 Act created several statutory limits on the exclusive rights of an author.[54] As a result, not all unauthorized uses are violations of the law. Statutory exceptions can be grouped under the type of subject matter entitled to copyright protection,[55] or the type of infringer.[56] The most significant statutory limit to any copyright owner's claim of infringement is the affirmative defense created by the fair use doctrine.[57]

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[52] This statement is not meant to discuss the conflict that is at times inherent between copyright law and the First Amendment which is beyond the scope of this Article. For a discussion of the First Amendment and copyright law, *see generally*, Patricia Kreig, Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565 (1984).

[53] *Stewart v. Abend*, 495 U.S. 207, 228 (1990).

[54] Sections 107 through 120 of the 1976 Act include express limits on the exclusive rights that an author may exercise. Most of these limitations are narrowly defined to exclude certain uses of certain types of subject matter protected under section 102(a). Only § 107, discussed *infra* in Part I.C., is broadly construed by courts.

[55] For example, both "pictorial, graphic, and sculptural works" and "sound recordings" have statutory exceptions that limit the copyright owners exclusive rights. Pictorial, graphic, and sculptural works are protected under § 102(5) of the 1976 Act. The exclusive rights granted under § 106 are limited by § 113(b), which prevents the copyright owner from claiming exclusive rights in any "useful article" that include the copyrighted work. "Useful article" is further defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101 (1996). Thus, an author of a coffee mug that is shaped like the head of a cartoon coyote cannot prevent others from making a coffee mug; the author can prevent others from making a coffee mug with a "substantially similar" artistic version of a coyote. *See generally Rachel v. Banana Republic, Inc.*, 831 F.2d 1503 (9th Cir. 1987). Similarly, copyright owners of the sound recording are granted exclusive rights under § 106(1),(3); these same rights are limited by § 115 which allows for a compulsory license.

[56] Disparate types of potential infringers are treated differently. As an example, not-for-profit organizations are treated differently than for-profit corporations, and libraries are treated differently than individuals. 17 U.S.C. § 110 (1996). Further, innocent infringers are protected from actual and statutory damages. § 405(b). In contrast, willful infringers are subjected to additional fines (§ 504(c)(2)) and possible prison terms (§ 506(a)).

[57] The fair use doctrine includes a four part statutory test which requires a court [i]n 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;

Fair use is an equitable doctrine that permits several specific uses of a work that are not infringing uses.[58] A sub-species of the fair use doctrine is parody.[59] Although both parody and the fair use defense are applicable to visual artists,[60] the courts generally find a second visual artist's use of a copyrighted work to be infringing rather than fair.[61]

The fair use doctrine's four part test allows courts to avoid a rigid application of the law, which could "stifle the very creativity" that the copyright statute was designed to promote.[62] Under the fair use

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(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.

17 U.S.C. § 107 (1996).

A detailed analysis of fair use exceeds the scope of the Article. However, *see generally*, Ames, *supra* note 29; Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195 (1993); Martha Buskirk, *Appropriation Under the Gun*, Art in America 37 (1992).

[58] The preamble to 17 U.S.C. § 107 states that the use of a work for "purposes such as criticism, comment, news reporting, teaching (including, multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Instead, these uses are generally permitted under the fair use doctrine. However, the courts must look at all four factors, even if a use is within the listed uses in the preamble, before determining that a specific instance of copying is a fair use.

[59] *See generally*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Parody allows a heightened tolerance of amounts that can be borrowed. (*Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992)), although the appropriation of images is more "likely to be considered a fair use if it can be classified as a criticism or a comment t, rather than mere parody." Robert A. French, Note, *Copyright:* Rogers v. Koons*: Artistic Appropriation and the Fair Use Defense*, 46 OKLA. L. REV. 175, 188 (1993).

[60] *See Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

[61] A number of defendants have unsuccessfully tried to rely on the affirmative defense of fair use in justifying their actions. *See generally, Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (discussed *infra* in Part III); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914); and *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990).

[62] *Iowa State Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980). *See also, Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (which refocused the fair use doctrine on the central purpose of copyright). Pierre N. Leval, *The Herbert Tenzer Memorial Conference: Copyright in the Twenty-First Century: Campbell v.*

doctrine, a second author can use the first work without either payment to the copyright owner or the permission of the copyright owner.[63] In effect, the fair use doctrine serves as a form of compulsory license and permits uses that have not otherwise been licensed.[64] Fair use sometimes allows uses that would otherwise be prevented due to high transaction costs or the inability to locate the author.[65]

The four-part test[66] also allows flexibility through a case-by-case application by the courts.[67] This same flexibility, however, requires courts to make judgements about the original subject matter entitled to protection. For example, the fair use test requires the court to

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Acuff-Rose: Justice Souter's Rescue of Fair Use, 13 CARDOZO ARTS & ENT L.J. 19, 22 (1994).

[63] Professor Hamilton has suggested that there are points on a continuum between the second user receiving permission for the free use of the work and the second user paying the owner of the first work. She has suggested several models applying various schemes from traditional property law to art appropriation. One theory characterizes fair use as an adverse possession that requires neither permission nor renumeration to the first author. Hamilton, *supra* note 30, at 96.

[64] *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (The Court refused to find fair use and to "judicially impos[e] a 'compulsory license.'").

[65] *See* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1447 (1992). *See also*, Georgia K. Harper, *The University Community Pursuit of the Promise of the New Media*, 13 CARDOZO ARTS & ENT. L.J. 447, 452 n.10 (1995) (The basic assumption underlying the decision in *American Geophysical Union v. Texaco, Inc.*, 37 F.3d 881, 898 (2d Cir. 1994), was "that the reach of fair use was commensurate with high transaction costs associated with asking for permission . . . .").

[66] *See supra* note 57.

[67] 17 U.S.C. § 107. *See* Stewart v. Abend, 495 U.S. 207, 236 (1990) (The doctrine requires the courts "to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.") (internal citations omitted); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) (While the statute gives no indication as to the weight of any one of the four factors, the fourth factor—the effect on the market—is by far the most important.).

See also H.R. Rep. No. 94-1476, at 65 (1976), *reprinted* in 1976 U.S.C.C.A.N. 5659 ("Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."). *But see Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (Fair use has been described as "the most troublesome [issue] in the whole of copyright.").

determine whether a work is fictional or factual.[68] Therefore, while a case by case analysis allows for a careful review of each situation, it does not allow for certainty among potential litigants. Moreover, in the confusing world of "high art,"[69] a case by case approach might cause an uneven application of the doctrine.

Traditional application of the fair use doctrine to visual works of art involves a comparison of the relation of the second work to the first work to determine if infringement has occurred.[70] Fair use requires the court to compare the nature of the first work and the amount taken in relation to the whole.[71] However, with artists who appropriate images, the fair use test is inadequate.[72] Historically, appropriation artists, by definition, use the images of their predecessors.[73] Thus, a lay comparison of the first work to the second work will find the formal similarity. It is just this similarity, which from the point of view of a copyright attorney appears to be an infringement under the law, that is just appropriationist art to the art world.[74]

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[68] *See supra* note 57, where in factor 2 of the fair use test the court considers the nature of the work.

[69] For want of a better term, "high-art" is used to denote works which are usually one-of-a-kind. While the term is problematic, it is useful here to denote works in the art industry rather than works in the mass culture. *See also*, Commonwealth of Penn. v. Bricker, 666 A.2d 257, 261 (Pa. 1995) (holding decorative art found in a museum is high art).

[70] *See generally*, Campbell v. Acuff-Rose, Music, Inc., 510 U.S. 569 (1994); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (discussed *infra* in Part III); Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706, 715 (S.D.N.Y. 1987) (holding the movie poster for "Moscow on the Hudson" infringed the artist's fanciful depiction of New York City because the defendant was not entitled to rely on the affirmative defense of parody, a sub-species of fair use).

[71] *See generally*, note 59.

[72] None of the pre-existing limits on copyright law are easily applied to appropriation art because their goal is to *take* the first work of art. *See generally*, Julie Van Camp, *Creating Works of Art from Works of Art: The Problem of Derivative Works*, 24 J. ARTS MGMT., L. & SOC'Y 209 (1994); Ames, *supra* note 29, at 1482; Kreig, *supra* note 52, at 1573.

[73] *See infra* Part II. All artists learn from their predecessors. Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L. J. 1533, 1556 (1993).

[74] Hal Foster, *Signs & Symptoms*, RECODINGS 16 (1985). Many artists borrow from others. For example, artist Tomasz Rut borrows from the style of Action painting from the 1950s and 1960s. Linda Marx, *Modern Commissions for Classical Paintings, American Artists*, May 1996, at 60.

Commentators have advanced several theories that would allow artists to continue to appropriate the images of others without fear of prosecution. Theories include contracting with the first artist,[75] expanding the First Amendment's political speech defense,[76] and applying the fair use defense.[77] As defendants, Approriationist artists often raise a fair use defense, but the courts tend to reject the doctrine's application.[78] Furthermore, after *Rogers v. Koons*,[79] (discussed in Part III) an appropriation artist's successful application of the fair use defense is uncertain.

III. THE APPROPRIATION ART MOVEMENT

Defining "[p]ostmodernism is like trying to nail gelatin to a wall."[80] Whether we date the emergence of postmodernism to the early 1960s reactions against modernism in the academy, or whether we date it to new forms of capital and representation that arose after World War II, it is enough here for us to understand the notion of postmodernism as a practice that reproduced the logics of the post-war society. Although appropriation and commodity dominated the art

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[75] Carlin, *supra* note 3, at 138; Elizabeth H. Wang, *(Re)Productive Rights: Copyright and the Postmodern Artist*, 14 COLUM.-VLA J.L. & ARTS 261, 277-80 (1990) (citations omitted).

[76] *See generally*, Gordon *supra*, note 73, at 1535 (asking whether copyright law inhibits the First Amendment); Kreig, *supra* note 52; Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM & MARY L. REV. 665 (1992); Wang, *supra* note 77, at 277-280 (citations omitted).

[77] *See generally*, Carlin, *supra* note 5; Sonya del Peral, Comment, *Using Copyrighted Visual Works in Collage: A Fair Use Analysis*, 54 ALB. L. REV. 141 (1989); Marlin H. Smith, Note, *The Limits of Copyright: Property, Parody, and the Public Domain*, 42 DUKE L. J. 1233, 1247-52 (1993) (arguing Koons' use of Rogers' photograph should have been a parody and a fair use).

[78] *See* French, *supra* note 61, at 195-99 for a discussion of the analysis of John Carlin, Sigmund Timburg and Martha Buskirk criticizing the application of the fair use defense to the visual arts.

[79] 960 F.2d 301 (2d Cir. 1992), discussed in Part III, *infra*.

[80] Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 BROOK L. REV. 373, 384 n. 62. *See generally*, Wang, *supra* note 77; TRICIA COLLINS & RICHARD MILAZZO, HYPERFRAMES: A POST-APPROPRIATION DISCOURSE (1989).

world in the eighties, the movement declined by the end of the decade.[81]

From a legal viewpoint, appropriation is the unauthorized use of part or all of an already existing image that is entitled to copyright protection in a second work of art.[82] In contrast, the art world views appropriation as a "complex operation of assimilating the look of an artwork in order to question the very nature of representation."[83] It is appropriation's deoriginated reproduction of the image as against notions of direct quotation that suggests problems for copyright.

One of the more recognized appropriation artists is Sherrie Levine.[84] Her work used the images from photographers Edward Weston, Alexander Rodchenko, and Walker Evans and the painter

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[81] James Hall, *Old Habits Die Hard*, THE GUARDIAN, Sept. 26, 1995, at T6. *See also*, Hamilton, *supra* note 32, at 118 n. 95 (noting the movement will be over before legislation can be enacted). The question of appropriation art is still applicable to copyright law because of the statute of limitations, (17 U.S.C. § 507), and the questions that the movement raised about how society views property rights.

[82] *See generally*, Hal Foster, *Readings in Cultural Resistance*, RECODINGS 166-79 (1985). This Article will use this definition of the term, although the term "appropriation" has a variety of meanings. In the 1920s and 1930s artists took images out of their original contexts in mass or official culture and placed these images in montages that altered their meanings. Recently, the term has been used to refer to the theft of aboriginal cultural heritage and the inappropriate use of aboriginal symbols. http://www-nmr.bannffcentr...Job/html/appropriate.html (visited June 17, 1996).

See also, Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from Campbell v. Acuff-Rose Music, Inc.*, 60 BROOK. L. REV. 1653, 1656-1658 (1995); Carlin, *supra* note 5, at 129 n. 106; Hamilton, *supra* note 32, at 94-95.

[83] Richard Huntington, *Pictures of Pictures Paintings Follow Works of Buffalo Photographers*, THE BUFFALO NEWS, Mar. 11, 1994, at 31.

[84] *See generally*, Howard Singerman, *Seeing Sherrie Levine*, OCTOBER, Winter 1994, at 79. As noted by one commentator, "Levine's work interrupts the discourse of mastery through the refusal to reinvent an image." DOUGLAS CRIMP, ON THE MUSEUM'S RUINS 6 (1993). *See also*, Wang, *supra* note 75, at 265-66.

Other artists who were critical in this movement included Philip Taaffe, Cindy Sherman, Richard Prince, David Salle, Laurie Simmons, Louise Lawler, and Peter Stephans. *See generally*, Charles Hagan, *Photography Review*, N. Y. TIMES, Jan. 13, 1995, at C 30; Andrew Graham-Dixon, *Art/Radical Chic and the Schlock of the New*, THE INDEPENDENT, Feb. 16, 1993, at 12; Charles Hagan, *Review Photography: The Camera as a Weapon to Assault Modern Ills*, N.Y. TIMES, June 11, 1993, at C 26; Squiers & Wallis, *Is Richard Prince a Feminist?*, ART IN AMERICA, Nov. 1993, at 114.

Man Ray.[85] In her 1981 series "After Walker Evans,"[86] Levine rephotographed a series of Walker Evans' photographs.[87] The appropriated images were not changed in any way; Levine neither added to nor deleted from the first artist's original photographs.[88]

While postmodernist and appropriationist work is generally accepted in the art world as legitimate, it is argued that "much of post-modern art consists of what in copyright terminology is called derivative works."[89] The creation of a derivative work is an exclusive right reserved under copyright law to the copyright owner.[90] Hence, a conflict arises when the second work is created.

IV. THE APPROPRIATION OF "PUPPIES" BY JEFF KOONS

The conflict between copyright law and appropriation art culminated when Jeff Koons used a photographer's image to create a sculpture for his 1988 Banality Show. Although other instances of appropriation had lead to disputes between artists,[91] the conflict

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[85] For example, Man Ray's 1938 painting *La Fortune* was recognized as the source for Levine's 1991 installation at the San Francisco Museum of Modern Art of six custom-made pocketless billiard tables. Levine's work turned Man Ray's painted image into a real object. Kenneth Baker, *Taking a Cue from Man Ray*, SAN FRANCISCO CHRONICLE, Jan. 24, 1991, at E1.; Robert Costa, *Bidlo's Monstrous Eggs*, ARTS MAGAZINE, April 1988, at 76. (discussing Bidlo's mystico-appropriationist Picasso series).

[86] Martha Buskirk, *Appropriation Under the Gun*, ART IN AMERICA, June 1992, at 37.

[87] *Accord* Carlin, *supra* note 3, at 137. Levine showed six rephotographed pictures of Weston's from a famous series of his young, nude nephew. DOUGLAS CRIMP, ON THE MUSEUM'S RUINS 118 (1993).

[88] *See* Howard Singerman, *Seeing Sherrie Levine*, OCTOBER, Winter 1994, at 79.

[89] Petruzzelli, *supra* note 16, at 126. A "derivative work" is defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed or adapted." 17 U.S.C. § 101 (1996).

[90] 17 U.S.C. § 106(2) (1996).

[91] *See* Beverly M. Wolff & Charles T. Danziger, *Recent Developments in Art Law: Copyright Infringement, Fair Use, Moral Rights, and Other Legal Issues in Two Cases*, at 166. Most cases of appropriation have been settled out of court; Sherrie Levine agreed to stop using Edward Weston's photographs in her own prints after his estate objected. Wang, *supra* note 75, at 262 n. 11 (1990).

between Jeff Koons and the photographer was the first to go to trial.[92]

Jeff Koons is a controversial artist. Some regard him as a "modern Michelangelo" and others find his art "truly offensive."[93] Closer to the critical theory of commodity than Levine, Koons' use of mediated images "comment[s] critically both on the incorporated object and the political and economic system that created it."[94]

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[92] In total, Koons' 1988 Banality Show of twenty works resulted in three lawsuits: *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Campbell v. Koons and Sonnabend Gallery, Inc.*, 1993 WL 97381, *3 (S.D.N.Y. Apr. 1, 1993) (holding that Koons' sculpture "Ushering in Banality" unlawfully copied plaintiff's photograph, showing two boys trying to push a pig into a gift box); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 384 (S.D.N.Y. 1993) (holding that Koons' sculpture "Wild Boy and Puppy" was an infringement of plaintiff's cartoon character "Odie").

Rogers' lawsuit against Koons had a great impact on the art world and was a popular topic for interviews.

> AHG: Clearly the much publicized material success of the Banality Show had one unintended side-effect. But for the coverage I doubt whether you would be embroiled in so many copyright lawsuits. You are now fighting four and you have just lost your appeal in one of them, the suit brought by a California photographer whose sugary picture was the germ for your sculpture, String of Puppies. What are your next moves?
>
> JK: At this time, I will fight every case. Economically people will say I'm crazy to continue to fight, but these are my beliefs, so I will defend them. The way I look at it is that all visual information should be available to an artist. The whole history of Modernism is based on this. Look at the collages of Picasso. When visual imagery gets copyrighted, it is taking away a vocabulary not only from the artist but from the total public.

Interview between Jeff Koons and Anthony Haden-Guest, JEFF KOONS, 35 (1992).

[93] Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992). One writer has referred to him as the "master of schlock." Adrian Dannat, *The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, at 20.

[94] Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992). *See also,* DOUGLAS CRIMP, ON THE MUSEUM'S RUINS 286 (1993)(explaining postmodernism as "repudiat[ing] the politicized, materialist practices of the 1960s and 1970s, [and] 'rediscover[ing]' national or historical lineages . . . .").

A. *Rogers v. Koons*

1. The Facts of *Rogers v. Koons*

The facts of *Rogers v. Koons*,[95] are similar to the facts behind any appropriation. Art Rogers is a photographer in northern California.[96] In 1980, he was commissioned to photograph a couple's eight German Shepard puppies. Rogers determined that a photo of the puppies alone would not convey the proper result. Instead, Rogers decided to include the husband and wife holding the puppies. Rogers employed substantial creative effort in the composition and production of the "Puppies" photo.[97] Later, Rogers licensed the photo to a company that produces and sells art notecards.[98]

Meanwhile, Koons began collecting objects in preparation for his 1988 Banality Show at the Sonnebend Gallery.[99] He bought a notecard of "Puppies" from a "very commercial, tourist-like card shop."[100] According to testimony, Koons believed that the image was "typical, commonplace and familiar."[101] He regarded "the picture as part of the mass-culture—'resting in the collective sub-consciousness of people regardless of whether the card had actually ever been seen by such people.'"[102] Koons tore off the copyright notice on the notecard and sent the card to an artisan's studio in Italy

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[95] Rogers v. Koons, 960 F.2d 301, 303-05 (2d Cir. 1992). *See* Ames, *supra* note 29, for a color plate of Koons' sculpture and Rogers' photograph.

[96] *Id.* at 303. Rogers was not well known before he filed suit against Koons. Further, his photo-"Puppies"-was also not well known. Adrian Dannat, *The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, at 20.

[97] Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992).

[98] *Id.* at 304. In addition to the notecards, a private collector purchased a signed print of "Puppies" and Rogers intended to use "Puppies" in a series of hand-tinted prints of his works. Rogers v. Koons, 751 F. Supp. 474, 475 (S.D.N.Y. 1990). *See also*, Beverly M. Wolff & Charles T. Danziger, *Recent Developments in Art Law: Copyright Infringement, Fair Use, Moral Rights, and Other Legal Issues in Two Cases*, 160-61.

[99] Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992).

[100] *Id.* at 305.

[101] *Id.*

[102] *Id.*

with instructions "to copy it."[103] The artisans were to create a 3-dimensional sculptural piece.[104] Koons' "'production notes' stressed that he wanted 'Puppies' copied faithfully in the sculpture."[105]

The question before the court was whether there was unauthorized copying of Rogers' photo by Koons.[106] The Second Circuit concluded that there was direct evidence of copying.[107] Koons gave a copy of the notecard to the artisans in Italy. His instructions were that the creation must be designed as "per photo."[108] Even if evidence of direct copying was not available, the court determined that Koons' work was so substantially similar to the original that reasonable jurors could not differ on this issue.[109] Substantial similarity does not require literally identical copying of every detail. Instead, substantial similarity was determined by the court using an

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[103] *Id.* It is interesting to note that Rogers registered the work after Koons' used the photo to create his own work. Under the 1976 Act, registration is a prerequisite for a U.S. citizen filing a suit for infringement. 17 U.S.C. § 411(a) (1996). However, the lack of registration does not effect Rogers' rights under the Copyright Act. Under the 1976 Act, copyright protection attaches to "original works of authorship fixed in any tangible medium of expression . . . ." 17 U.S.C. § 102(a) (1996). Thus, despite a failure to register to a work, an author is entitled to the exclusive rights under section 106; moreover, except under limited situation permitted by statute (*see supra* Part I.C.), others are legally prohibited from using the author's work. For example, without the permission of the author, a movie studio would be unable to produce a movie based on a book, even though the book may not be registered.

[104] The studio completed three sculptures and an artist's proof. Three of the works sold for a total of $367,000; Koons kept the artist's proof. Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992).

[105] Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992). Koons told the artisans that the "work must be just like photo—features of photo must be captured . . . Keep man in angle of photo—mild lean to side & mildly forward—same for woman . . . keep woman's big smile . . . keep [the sculpture] very, very realistic." *Id.*

[106] *Id.* at 307. A copyright infringement action requires three elements: 1) proof of ownership of the copyright, 2) access to the work, and 3) substantial similarity. *Id.* at 306. Thus, before the court could determine whether Koons took too much of Rogers' photo, the court had to address the threshold issue of whether Rogers owned the copyright in "Puppies." The court concluded that he did. Rogers met the necessary elements of originality in a photograph by posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression along with other variants. *Id.* at 307.

[107] *Id.* at 307. It is interesting to note that in comparing the two works, the Second Circuit relied on photographs of both works, rather than the actual works. Martha Buskirk, *Appropriation Under the Gun*, ART IN AMERICA, June 1992, at 37, 39.

[108] *Koons*, 960 F.2d at 307.

[109] *Id.* at 307-08.

ordinary observer test: "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[110]

2. Koons' Defenses

In response to Rogers' claim of unlawful copying, Koons had two arguments in his defense. First, Koons argued that he had not infringed Rogers' photo because he only took aspects that were not entitled to copyright protection.[111] The court rejected this argument and concluded that "Koons used the identical expression of the idea that Rogers created; the composition, the poses, and the expressions were all incorporated into the sculpture . . . ."[112]

Second, Koons argued that his use of Rogers' photo was a fair use, and therefore, not an unpermitted infringement.[113] Fair use, an affirmative defense, asks the court to weigh at least four factors to determine whether the use is permitted or an infringement.[114] The four statutory factors are: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the whole, and (4) the effect of the use on the potential market.[115] No one factor is dispositive, although courts often give more weight to the effect on the market.[116]

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[110] *Id.* at 307 (quoting Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)). While substantial similarity often requires a court to engage in complex analysis and consider a variety of tests, the Second Circuit relied on the ordinary observer test.

[111] *Id.* at 308. *See generally, supra* Part I.A.

[112] Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992).

[113] *Id.*

[114] The fair use doctrine states that "the factors to be considered *shall* include . . . ." 17 U.S.C. § 107 (emphasis added). This phrase has been interpreted to mean the four factors listed in § 107, plus other factors left to the court's discretion. For example, a court has considered the defendant's efforts to enter into a new business that would usurp the plaintiff's copyrights and frustrate the goals of copyright law. *See* Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1534 (S.D.N.Y. 1991). *See also, supra* Part I.C.

[115] 17 U.S.C. § 107 (1996).

[116] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985). *See also*, 3 NIMMER ON COPYRIGHT § 13.05[A] (1996).

a. *Purpose and character of the use*

The Second Circuit considered whether the original was copied to benefit the public or primarily for the commercial interest of the infringer.[117] Under the court's analysis, "[k]nowing exploitation of a copyrighted work for personal gain militates against a finding of fair use."[118] Thus, Koons' conduct influenced the court. Here, he had torn the copyright notice off of the notecard. The court concluded that this suggested bad faith and went against a finding of fair use.[119]

The Second Circuit also considered whether Koons stood to profit from the "exploitation of the copyrighted material without paying the customary price."[120] While this consideration alone does not determine whether a second use is fair, it is a significant factor.

Koons also argued that the purpose of his work was to parody society. The Second Circuit rejected this argument, since Koons admitted that he was creating a parody of society rather than a parody of Rogers' photo. The court concluded that "String of Puppies" was not a parody. To be a parody it would have to be at least in part a

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[117] Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992). The importance of each factor is a subject of debate for the courts. In *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court held that copies made for commercial or profit-making purposes are presumptively unfair. However, the Court later clarified this holding. While commercial use often favors the first author, a profit-making purpose, by itself, will not cause a court to find the use unfair. *See*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

The Court has also stated that the crux of profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985). *See also*, Princeton Univ. Press v. Michigan Document Servs., 99 F.3d 1381 (6th Cir. 1996).

Many artists would argue that they are not concerned with profit; they must create whether or not they make money. Van Gogh, for example, sold one painting during his life. Margaret Putnam, *Detailed Van Gogh Biography Errs with Caution*, THE SAN DIEGO UNION-TRIBUNE, July 27, 1990, at C3.

[118] *Rogers*, 960 F.2d at 309.

[119] *Rogers*, 960 F.2d at 309. The court also determined that Koons' substantial profit ($367,000 for the sale of 3 sculptures) went against a finding of fair use.

[120] *Id.* (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

parody of "Puppies."[121] In contrast, Koons had stated that he was commenting on society at large.[122] Thus, the court determined that "String of Puppies" was only a satirical critique of our materialistic society.[123]

The court of appeals expressed concern that the boundaries of fair use would be diminished if people could use the works of others to comment on society without in some way crediting the owner of the first copyright. Under the court's analysis, the audience should be aware that underlying the parody there is an original and separate expression attributable to a different artist.[124]

b. *Nature of the copyrighted work*

Generally, the courts are more likely to find a fair use where the original work is factual rather than fictional.[125] In *Koons*, the court concluded that "[a]s an original expression, [Puppies] has more in common with fiction that with works based on facts."[126] Therefore, because Rogers' work was "creative and imaginative," and because Rogers hoped to "gain a financial return for his efforts," the court concluded that Koons' use of the photo went against a finding of fair use.[127]

The Second Circuit's conclusion that the nature of Rogers' photograph went against Koons' claim of fair use could be troublesome for future artists who attempt to use the doctrine as a defense. The court's analysis appears to prohibit all uses of the fair

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[121] The court defined parody as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in doing so creates a new art work that makes ridiculous the style and expression of the original." *Rogers*, 960 F.2d at 309-10. Parody allows the creator of the second work under the fair use doctrine to more extensive use of the copied work than is ordinarily allowed under the substantial similarity test. *Id.* at 310.

[122] *Id.* at 310.

[123] *Id.*

[124] *Id.* Some artists also share this theory. A second artist who uses a first artist's work should (1) acknowledge the first work, (2) identify the second work as being additive to the first, and (3) pay a "fair share of the proceeds" to the first artist. J.S.G. Boggs, *Who Owns This?*, 68 CHI.-KENT L. REV. 889, 892 (1993).

[125] *See generally*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

[126] *Rogers*, 960 F.2d at 310.

[127] *Id.*

use doctrine in the area of appropriation art and could diminish the doctrine's intended purpose—to balance the rights of the appropriationist artist against the benefits and costs to society.[128]

c. *Amount and substantiality of work used*

In evaluating this factor, the Supreme Court has compared the amount copied from the original to the entire original and has concluded that it is not fair to copy more of the original than is necessary.[129] More important than the quantity taken is a qualitative analysis of the copying. Thus, a court's analysis of this factor is linked to the first factor. Again, the court considered Koons' parody defense. Parodists are afforded "significant leeway with respect to the extent . . . of their copying."[130] Under fair use, this factor asks a court to consider what degree of the *essence* of the original is copied in relation to the entire original. The court concluded that Koons had copied too much from the essence of the original photograph, even if his work had been a parody.[131] Because Jeff Koons work was not a parody, the court stated that he was flying under the "flag of piracy," not the permissible "parody flag."[132] The court felt that Koons went beyond copying the subject matter. His instructions to the Italian artisans told them to incorporate the expression of the Rogers' work.[133] This amount of borrowing is not permitted under the fair use doctrine.

d. *Effect of the use on the market value of the original*

The final factor under section 107 requires a "balance . . . between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the

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[128] *Id.* at 309. *See also,* Meeker, *supra* note 57, at 203-212.

[129] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

[130] *Rogers*, 960 F.2d at 311.

[131] *Id.*

[132] *Id.*

[133] *Id.*

use is held to be fair."[134] This factor examines whether the market for the first artist's work is impacted in a manner which would discourage the artist from creating objects in the future. The Second Circuit noted that "where the use is intended for commercial gain some meaningful likelihood of future harm is presumed."[135] Under the court's analysis, the key question was whether or not Koons planned to profit. Here, the court concluded that Koons' work was primarily commercial.[136]

In evaluating the effect on the market, courts consider not only the harm to the market for originals, but also harm to the market for derivative works.[137] In this case, the Second Circuit found it plausible that someone would license the rights from Rogers to create a sculpture.[138] Additionally, the court was concerned that notecards of Koons' image, "String of Puppies," would impact on the market for Rogers' notecards.[139]

C. *After* Koons

In response to the court's analysis, the question arises whether we should and do treat art differently from non-art.[140] One commentator has suggested that after *Campbell v. Acuff-Rose, Music, Inc.*,[141] appropriation art is implicitly excluded from fair use protection.[142] Yet, some appropriation art should be protected, since it is a viable art form that ultimately benefits society by adding new works to the culture.

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[134] *Id.*

[135] *Id. See also*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[136] *Rogers*, 960 F.2d at 312 ("Koons produced 'String of Puppies' . . . as high-priced art.").

[137] *Id.* When analyzing the effect of future markets, courts tend to view the possibilities of a future market rather broadly. *See generally*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (finding that Roy Orbison could have licensed a non-parody rap version of "Oh Pretty Woman.").

[138] *Rogers*, 960 F.2d at 312.

[139] *Id.*

[140] Hamilton, *supra* note 19, at 120-21.

[141] 510 U.S. 569 (1994) (holding that a parody's commercial character was only one factor to consider in a fair use inquiry).

[142] Badin, *supra* note 82, at 1684.

V. A PROPOSED SOLUTION TO THE CONFLICT BETWEEN APPROPRIATION ART AND COPYRIGHT LAW

A. *An Amendment to the 1976 Act*

The problem with trying to apply existing copyright law to appropriation art is that under appropriation, the formal reproduction of the image is exactly the goal.[143] A number of commentators have suggested different approaches for courts to use in reviewing cases of appropriation.[144] In cases of appropriation in the visual arts, I suggest a scheme that is similar, but more direct: change through legislation.[145]

Legislating solutions is not always the best approach for solving a problem. Ideally, any statute should accommodate present and future problems. It is arguable that an amendment prevents the normal evolution of a statute's application to a changing world. However, the current copyright statute is unable to accommodate appropriation art precisely because the statute has failed to evolve. Thus, I argue that in dealing with appropriation art, an amendment to the 1976 Act is the most practical solution because it would create guidelines that both the courts and artists could follow.

Historically, copyright law has changed with the development of technology and evolving standards in society to protect authors and ensure that authors have an incentive to create.[146] Additionally,

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[143] *See* Badin, *supra* note 82, at 1673; Ames, *supra* note 29, at 1482; Kreig, *supra* note 52, at 1573; Wang, *supra* note 75, at 281 (the driving force behind the appropriation movement is its illicit nature).

[144] *See* Carlin, *supra* note 3, at 118 (analyzing the literature that suggests that the basic defenses to appropriation include de minimis use, fair use and freedom of speech).

[145] Other commentators have suggested and rejected legislation, and instead focus on application of the fair use defense. *See generally*, Hamilton, *supra* note 30, at 97 n. 13 (Legislation is often a "lengthy and painstaking process." Legislation is not the solution for adjusting copyright problems in the appropriation art movement.); Carlin, *supra* note 3, at 108.

[146] Copyright law was originally intended to protect maps and writings. *See* I PAUL GOLDSTEIN, COPYRIGHT § 1.13.2(a) (2d ed. 1996). Many types of subject matter protected today, such as piano rolls and television, were not within the protection of the original copyright act. Kreiss, *supra* note 9, at 24. Over time, however, the law changed as different types of subject matter were added to the statute. In 1971, sound recordings were added; the

changes in society have resulted in courts treating various types of subject matter protected under the Copyright Act differently.[147]

With appropriation art, legislation is a possible solution to prevent disputes over appropriated works in the future. Legislation could add certainty to the market, thus allowing artists to know whether their work was a potential infringement or a permitted use. Certainty in the market could decrease production costs for each work.[148] In addition, certainty for artists using images of another artist could decrease both the cost of and the need for litigation. Today, litigation seems to only occur if the second artist has deep pockets.[149] Jeff Koons is not the only appropriation artist; he is one of the few to be sued.[150]

1976 Act included choreographic works; in 1980, amendments to copyright law included computer programs as "literary works"; and in 1990, the 1976 Act added architectural works as a separate category of protectible subject matter. I PAUL GOLDSTEIN, COPYRIGHT § 1.13.2(a) (2d ed. 1996). Additional amendments to the 1976 Act have clarified protection for types of subject matter. For example, limited protection for home audio taping was added in 1992 (17 U.S.C. § 1001); visual artists were given limited moral rights in their works (17 U.S.C. § 106A); musicians were given additional rights in their sound recordings (§ 106(6)); and currently, a bill is pending before the Congress that would change the scope of the "homestyle" exemption for the public performances of non-dramatic musical works. S. Res. 1619, 104th Cong., 2d Sess. (1996).

[147] Courts tend to analyze similarity differently depending on the type of subject matter protected. As an example, cartoon characters have received protection (Hill v. Whalen & Martell, Inc., 220 F. 359, 360 (S.D.N.Y. 1914)), while a movie character has been denied protection (Warner Bros. v. Film Ventures Int'l., 403 F. Supp. 522 (C.D. Cal. 1975). *See also*, Warner Bros. v. ABC, 720 F.2d 231, 240 (2d Cir. 1983).

Additionally, this Article assumes that appropriated images are taken from other artists and "pop" culture. Other federal statutes already protect some symbols such as United States currency, the Olympic Symbol, and Smokey the Bear; thus an artist might be prevented from using these symbols. Carlin, *supra* note 3, at 117. This Article assumes that the second artist only has problems with copyright law and not other laws used to protect intellectual property or specific symbols (such as trademark laws, misappropriation, publicity or privacy statutes).

[148] *See generally*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

[149] *See supra* note 92.

[150] Because Koons is so "uncommonly famous for an artist, and has so courted the media . . . people have noticed his infringements." Adrian Dannat, *The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, at 20. *See also*, Carlin, *supra* note 3, at 127-29, 132-33 (discussing other appropriation artists sued or threatened with lawsuits); Boggs, *supra* note 124, at 893 (Andy Warhol was sued when he "cut a small section of a photograph of flowers from a magazine, rotated it, and made it his own . . . ."); Meeker, *supra* note 57 at 222-

Beginning with the enactment of the 1976 Act, copyright law has moved toward legislation to solve problems. For example, the 1976 Act now includes sections on fair use (previously a judge made doctrine) and exclusive rights for sound recordings. I suggest an additional amendment to the 1976 Act to alter the analysis of visual works of art. Under my proposed amendment, in certain situations, (1) second artists could appropriate a first artist's work and pay a compulsory license fee, and (2) the courts would apply threshold guidelines to determine whether the second work is parallel (productive) to the first or is fundamentally a mirror image (reproductive) before deciding how to treat the second work legally.[151]

The proposed amendment would need several limits to clarify its application and to enable courts and artists to distinguish between artists who are creating a protected second work and non-protected infringing artists.[152] As proposed, the amendment should only apply to hand-made, one-of-a-kind visual works of art.[153] Both these limits would ensure that only "high art"[154] was entitled to protection as appropriation art. Also, mass-produced art would not be protected, since it is considered "low-art"[155] and is not one-of-a-kind. A hand-made art requirement would reduce the risk of some counterfeiters

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(Walt Disney filed suit against Dennis Oppenheim for his sculpture with Mickey Mouse and Donald Duck skewered on bronze rods.).

[151] This analysis builds on the Supreme Court's decision in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). There the Court considered whether the second use was a "fair use" based on whether the second work was transformative or adaptive in the parody context. *Id.* at 579.

[152] As suggested, the proposed amendment would not allow all uses of appropriated images. Some artists would still be found to be infringers under traditional application of copyright law. However, a safe harbor would be created for some artists, thereby adding some certainty to parts of the art world market.

[153] This would parallel many state laws that limit application of art *per se* statutes to single and limited multiple works. Art *per se* statutes generally compel information exchange from sellers to buyers. JESSICA L. DARRABY, ART, ARTIFACTS & ARCHITECTURE LAW, § 12.02[4][a] (1995). This is similar to the laws in several states that limit the application of statutes to "fine art." *See id.* at app. 1 (summarizing state art consignment laws).

[154] *See supra* note 69.

[155] In contrast to "high-art," *supra* note 69, low-art is mass-produced and created more for the consumer than the collector.

"hiding" in the safe harbor of a statute designed to protect limited appropriations.

Limiting application of the amendment to one-of-a-kind artworks is already within the spirit of the 1976 Act. The copyright act never defines "fine art" or "art," although a "work of visual art" is defined for the purposes of the Visual Artists Rights Act of 1990 (the "VARA").[156] The current definition limits application of the VARA to up to 200 signed and numbered editions.[157] The limitation on quantity is meant to ensure that the VARA only applies to works of high art.[158] Specifically excluded from protection under the VARA are commercial works and mass created works.[159] Similarly,

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[156] 17 U.S.C. § 106A (1996). A discussion of the Visual Artists Rights Act of 1990 is beyond the scope of this Article. For an analysis of the VARA, see Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477 (1990); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79 (1996).

A "work of visual art" is defined as:

> (1) a painting,drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

17 U.S.C. § 101 (1996).

[157] 17 U.S.C. § 101 (1996). *See supra* note 156 for the text of the definition of "works of visual art."

[158] In enacting the VARA, the Congress stated that "the paramount goal of the legislation [was] to preserve and protect . . . original works of art." H. R. Rep. 514, 101st Cong., 2d Sess. 11 (1990). The Congress never refers to "high art," but the definition of a "work of visual art" makes reference to a single copy. *See supra* note 156 for the text of the statute.

[159] A work of visual art does not include

> (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

application of the amendment to one-of-a-kind works will narrow application of the amendment to "high art" and will serve to minimize the impact on the first artist's market.[160]

Finally, the definition of "works of visual art," as the term is used to protect an artist's moral rights,[161] could be used to narrow appropriation. The definition of "works of visual art" has been criticized, since it excludes video art and limits the definition of art.[162] However, the appropriation art movement primarily took place with photographs, paintings, and sculptures. Thus, it is consistent to apply a similar definition to my proposed amendment.

Applying a similar definition to appropriation art would allow the courts to conclude that second artists could borrow more freely from the first artist. While this theory was not supported by *Rogers v. Koons*,[163] one commentator has suggested that *Sony Corp. of*

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;
(iii) any portion or any part of any item described in clause (i) or (ii). . . .

17 U.S.C. § 101 (1996).

[160] The second artist should not be permitted to replace the first artist's market. For example, Richard Prince appropriated a photo taken of Brooke Shields. The owners of the copyright in the original photo intended to sell 1,000 posters of the photo for $1000 each. Richard Prince decided to sell 1,000 copies of his appropriated image for $999 each. Prince considered his images to be an "original" work of art. Prince's action went beyond the "theft and trespass central to appropriation." Carol Squiers, *Is Richard Prince a Feminist?*, ART IN AMERICA, Nov. 1993, at 118 n.7. When the owners of the copyright in the original photo learned of Prince's plans, they threatened legal action. *Id.* at 118.

[161] *See generally, supra* notes 156-159.

[162] The inability of the VARA to apply to computer generated art has been criticized for several reasons. Most uses of digital technology will not meet the requirements of "a work of visual art" because they will not be a signed, limited edition. In addition, application of the VARA gives the artists limited moral rights. The VARA protects against intentional mutilation or damage that would be "prejudicial to the [artist's] honor or reputation" (17 U.S.C. § 106A(a)(3)(A)) to a "work of recognized stature" (17 U.S.C. § 106A(a)(3)(B)). Most artists, however, are not represented by a gallery and are not well known. Therefore, with digital technology, as with most art, only a few artists have the necessary "honor or reputation" to satisfy the statute. Analogously, few works satisfy the "recognized stature" requirement. Thus, the art of non-recognized artists is not protected. Note, *Visual Artists' Rights in a Digital Age*, 107 HARV. L. REV. 1977 (1994).

[163] 960 F.2d 301 (2d Cir. 1992). *See supra* Part III for a discussion of *Rogers v. Koons*.

America v. Universal Studios, Inc.,[164] should provide support for this theory.[165] While applying the fair use doctrine, the commentator concluded that considering the Court's reasoning, "a single painting or drawing which reproduces a copyrighted image or character would be considered a fair use, but not a large multiple edition . . . ."[166]

High art is generally valuable because of the name recognition and importance of the artist who created the work.[167] While a work may be purchased because the buyer "likes it," often the buyer's desire to own a work is prompted by the artist's stature in the art world.[168] Thus, if the appropriating work takes from another work of high art, buyers will still be interested in purchasing the first work because of the stature of the first artist. Similarly, an artist who appropriates from a mass-produced image classified as "low art" will not impact on the market for the first work, since the difference in cost between a mass-produced work and a one-of-a-kind work will exclude many

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[164] 464 U.S. 417 (1984) (holding that a single copy of a televised show, taped for home viewing, is a fair use).

[165] Carlin, *supra* note 3, at 129.

[166] *Id.* at 129-30.

[167] As one commentator has noted "[o]ne of the central . . . reasons for valuing art works is also a common reason for valuing persons, viz., their uniqueness or individuality. This value is not due to the indispensability of given artworks or people, but to their irreplaceability." Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CALIF. L. REV. 421, 463 (1988) (citations omitted).

Often art is worth more to a buyer if the artist is dead or the work has some notoriety attached to it. Counterfeit works do not exist to increase the number of works available to the public, but to increase the number of works available for sale to the public. One reporter has commented that the way to raise the value of a work is to notify the police that the work of art is really part of an illegal activity. *See* Adrienne Drell, *How to Raise Price of Art? Call the Cops*, CHICAGO SUN-TIMES, sec. News, Sept. 18, 1995, at 6 (discussing Gregory Green's work "Ten thousand doses" seized by Chicago police because it was suspected that the work contained LSD).

[168] As an example, an unscrupulous manager was able to con artist Mark Kostabi. "Kostabi, one of the most outrageous personalities ever to succeed in the art world, paints by proxy. He is renowned chiefly for having his work conceived and created by a team of assistants; he has said that a perfect Kostabi exhibition would be one where he merely signed the paintings and showed up at the opening." James Kaplan, *The Art of the Steal; How Mark Kostabi, the Art World's Ultimate Con Man, Got Conned*, NEW YORK MAGAZINE, Jan. 24, 1994, at 28. A market existed for counterfeit Kostabi's, because buyers wanted to purchase his works, due to his stature.

buyers of the first work from the second market. While it is arguable that buyers of the appropriated work will not purchase the first work once they own the second,[169] the artists of the first work would be compensated for this loss of profit through the compulsory license fee.[170]

Under the proposed amendment, artists interested in appropriating another artist's work with the intention to create a hand-made, one-of-a-kind work, would be entitled to a compulsory license from the first artist.[171] Presently the music industry and television broadcasts are the only areas covered by the copyright act that permit compulsory licenses.[172]

Compulsory licenses are not the best solution for every problem.[173] By forcing an artist to license his work, compulsory licenses eliminate aspects of the free market and competition among second users for an exclusive license. Additionally, compulsory licenses prevent artists from deciding who can use their images.[174]

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[169] This assumes that the first work is *not* a one-of-a-kind, but rather a mass-produced work. If the first work is a one-of-a-kind, the buyer of the second work may also be interested in owning the first work, but be unable to own it because of the limited availability of the work.

[170] A compulsory license permits a second user to pay a fee to the first author and use the first author's work without gaining the first author's permission. In effect, a compulsory license negates the first artist's exclusive right to determine distribution. It is arguable that a compulsory license limits the first artist's choice of who can use the work. Thus, the compulsory license is a distribution of rights in favor of society over the rights of the author. With a compulsory license, society has greater rights than the first author, and by paying a fee, another author can exercise these rights.

[171] *See* Hamilton, *supra* note 30, at 115.

[172] In the music industry, the compulsory license allows a second musician to record their own version of the first musician's song. As a result, society is able to select from many versions of the same song. 17 U.S.C. § 115 (1996). Similarly, a statutory license for television broadcasts is limited to secondary broadcasts made for private home viewing. *Id.* § 119(b). In contrast to the proposed compulsory license this Article suggests, the compulsory license in the music industry specifically excludes uses that would result in the creation of a derivative work. *Id.* § 115(a)(2).

[173] As an alternative to a compulsory license, one commentator has proposed a Model Agreement between a second artist and the owner of the first work's image. *See* Carlin, *supra* note 3, at 141.

[174] This is in contrast to the 1976 Act which generally allows a copyright owner to control the distribution and the use of his work. *See* 17 U.S.C. § 106(3) (1996). Yet, a compulsory

Finally, compulsory licenses prevent the first artist from bargaining for the right price.[175] However, when the first artist lacks name recognition and stature in the art world, a compulsory license with pre-established fees may actually help the artist obtain the best price.[176] One of the benefits to a compulsory license system is that several artists can obtain a license from the same artist, and the first artist receives compensation for all uses of his work.[177] Moreover, a licensing scheme would promote the goals of the copyright act because society benefits from having these works added to the culture.[178] For example, in the music industry, because of the compulsory license, a listener can choose from a number of artists performing a single song.

There are additional benefits to permitting a second artist to secure a compulsory license to create a one-of-a-kind work. The second artist could create her work with certainty that she will not later be sued for copyright infringement. This certainty will increase the marketability of the second work, a goal of the copyright act.[179] For

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license exists in both the music and the television industries, and in these areas is a permitted interference with the copyright owner's exclusive rights.

[175] To some degree this perpetuates the image of the artist as lacking the power and skills to bargain. Artists are often in a weak bargaining position with galleries or dealers. *See* Morseburg v. Balyon, 621 F.2d 972, 975 (9th Cir. 1980).

[176] It is interesting to note that the compulsory license in the music industry includes pre-established licensing fees. *See* 37 C.F.R. § 255 (1995). However, the practice in the industry is to negotiate a lesser license fee. What often happens is the first artist trades money (as allowed under the federal regulations) for more certainty in accounting procedures. It is conceivable that a similar model could work in the art world. Thus, a pre-established fee would only serve as a starting point for negotiations.

[177] Like the compulsory license used in the music industry, the statute should also suggest a proper fee. One commentator noted that a contemporary of Sherrie Levine's who appropriated images paid one-fifth of the net profit from the work to the owner of the first copyright. Carlin, *supra* note 3, at 137 n. 128. Another plan suggests that the fee be equivalent to the percentage of the original work used. Thus, as one artist has suggested, a second artist who used 20% of a first artist's work would pay 20% of the going rate for the first artist's work. Boggs, *supra* note 124, at 894.

[178] *See* Hamilton, *supra* note 30, at 117.

[179] *See*, Hamilton, *supra* note 19, at 123 n.116 (compulsory licenses solve transaction cost problems and reduce the monopoly of the author); Midge M. Hyman, Note, *The Socialization of Copyright: The Increased Use of Compulsory Licenses*, 4 CARDOZO ARTS & ENT L. J. 105, 111-12 (1985); Darlene A. Cote, Note, *Chipping Away at the Copyright Owner's Rights: Congress' Continued Reliance on the Compulsory License*, 2 J. INTELL. PROP. L. 219 (1994).

example, institutions or individuals that purchase both the copyright and the work[180] are assured that the work is free of possible copyright infringement claims.[181] Further, the first artist will acquire compensation for the second artist's use of the work and will not have to engage in litigation to enforce his exclusive rights.[182]

Under the proposed amendment, some second artists would qualify for a compulsory license under the proposed amendment. These artists could secure a compulsory license and use the first artist's work without fear of litigation. However, artists that fail to apply for a compulsory license would still be open to lawsuits.

In disputes arising under the proposed amendment, the court would first apply the two threshold requirements stated above.[183] Next the court could consider whether the second work is parallel to the first work (a productive use) or a mirror image of the first work (a reproductive use). A second work would be considered parallel if it contributes something to the first work that is itself entitled to copyright protection. Likewise, a work would be considered to be a mirror image, or infringing use, if the second work was merely a reproduction of the first work. The proposed amendment would ask the court to consider the extent to which the second work alters the meaning, expression, or message of the first work.

One problem is whether the second created work would be considered merely "derivative,"[184] and hence, a violation of the

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[180] Under the 1976 Act ownership of the object is distinct from ownership of the copyright. Transfer of the art work does not necessarily include the transfer of copyright ownership. 17 U.S.C. § 202 (1996). In fact, absent a written agreement specifically transferring the copyright, the author of the work retains the copyright. 17 U.S.C. § 201 (1996).

[181] While a copyright is not always sold when a work is sold, there are a number of sales of works of living artists to museums where the copyright is also transferred. This practice allows the museum to profit by making derivative works (*e.g.* posters and mugs) with the works' image without renegotiating with the artist.

[182] This Article assumes that litigation would be used to enforce the first artist's rights.

[183] For a discussion of the threshold requirements *see supra* notes 151-155 and accompanying text.

[184] A derivative work is defined as: "a work based upon one or more preexisiting works, such as a . . . art reproduction . . . or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101.

copyright owner's exclusive right.[185] Although the second work may be defined as a derivative work under the Copyright Act,[186] because of the role of derivative works in the one-of-a-kind art market, the second image should not necessarily involve an infringing use.

However, a derivative work that infringes on the first work may be created when the second artist makes mass-market reproductions of their own work. It is conceivable that these second tier derivative works will impact on the market for derivative works of the first work. While consumers may not purchase the postcard of the second work as a substitute for the second work,[187] some consumers may mistakenly purchase the postcard of the second work while intending to purchase a postcard of the first work. For this reason, mass-market derivative works of the second work should be limited.

Several schemes for limiting derivative works of the second artist could be adopted. First, the proposed amendment could prohibit the creation of any derivative works of the second work. Easy to enforce, this approach would raise other problems. For example, issues of First Amendment rights, always in the background of a fair use analysis, would be applicable.[188] A fair use analysis often considers First Amendment rights since a fair use analysis asks the court to weigh the rights of the author to maintain a monopoly against the rights of society to use the author's work without permission and without compensating the author. To some extent the opening preamble to the fair use statute considers fair use examples. The preamble states that limited use for "criticism, comment, news

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[185] Exclusive rights include the right to make derivative works. 17 U.S.C. § 106(2) (1996). *See also supra* Part I.

[186] One commentator has argued that all work is derivative, since everything builds on previous works. McLean, *supra* note 80, at 390 n.98. *See also* Dennis S. Karjala, *Copyright and Misappropriation,* 17 DAYTON L. REV. 885, 901-05 (1992).

[187] This assumes that consumers of the second work are interested in the work because the artist has name recognition.

[188] First Amendment rights are part of the analysis of copyright issues and are evidenced in the Supreme Court's balancing of the fair use doctrine and the idea-expression dichotomy. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985); Smith, *supra* note 77, at 1269.

reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement."[189]

Additionally, it would be difficult to promote the second artist's work without creating some sort of derivative work, such as a gallery opening postcard or a photograph accompanying a newspaper review.[190] Yet, these are the types of works that the fair use statute seems designed to protect. By favoring a First Amendment right over the first author's rights, and by permitting the dissemination of a photo of the work, the public is better served in the spirit of the Copyright Act.

A second approach would limit the creation of derivative works to those necessary for publicizing the second artist's work and would only permit derivative works of a "disposable" nature. Here, a derivative work would be considered "disposable" if it were created merely to promote the second work. For example, photographs appearing in a newspaper or magazine article and used as part of a review of the artist's work would be permitted.[191]

Finally, the creation of derivative works intended to be purchased by art aficionados, such as notecards and postcards, could be allowed, but limited. Sales of such items could be limited to locations that exhibit the original second work, rather than allowing sales within a broad distribution area. This would decrease the chance of an innocent buyer who, intending to buy a postcard of the first work, instead leaves the store with a postcard of the second work. Additionally, any gross profits derived from the sale of the second

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[189] 17 U.S.C. § 107. *See also, supra* Part I.C.

[190] One commentator has suggested that limiting the use of derivative works by the second artist could create "a significant chilling effect upon: (1) galleries and museums printing and posting invitations and postcards; (2) art journals and critics illustrating the artist's work; and (3) publishers and museums producing books and catalogues illustrating an artist's works." Carlin, *supra* note 3, at 131 (citations omitted).

[191] Traditionally, society encourages free expression and open discussion. Thus, a review of the second artist's work would fall within activities typically protected and encouraged. Further, a review would parallel the type of work already permitted under a traditional fair use analysis, which encourages the use of a work for commentary or criticism. Thus, while the original second work may not qualify under the fair use doctrine, a review of the work is usually supported by the policy underlying the doctrine. *See* 17 U.S.C. § 107.

work's derivative items could be shared with the first artist to help make up for any loss of market for the first artist.

Such limits are justified since the market for derivative works in the high art world is different than in other areas of entertainment.[192] Usually, high art exists in a one-of-a-kind format. Thus, the only derivative works of high art are reproductions that are not intended to serve as a substitute for ownership of the original.[193]

Similarly, appropriation art is not meant to serve as a substitute for the original. True, reproductions of the second work could, in some situations, substitute for reproductions of the first work. However, in general, the original work of art is not intended to substitute for the first work. Instead, the second work asks society to reconsider how originals are viewed.[194] Appropriation art asks society to consider "What is the significance of owning an original?" Thus, in high art, the appropriated image would not serve as a substitute for the first work. Rather, the second work would be another work that could be

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[192] In other areas of entertainment, derivative works often exist in a market similar to the original. For example, a book (the underlying work) is made into a movie (the derivative work). People who read the book go to see the movie, and conversely, movie patrons purchase the book. In fact, this is the marketing strategy behind many films.

A work of visual art is different than a book. A book may be the source of many derivative works—audio tapes, a play, a movie. Generally, none of these derivative works are considered lesser than the original. With a work of visual art the "original" is experienced by very few. For most of us, our exposure to visual works of art is limited to derivative works: notecards, postcards, reproductions, viewing the work on an Internet cite. These are not considered equal to the original.

Additionally, a buyer interested in a $20,000 one-of-a-kind art work, may not be interested in owning a $50 photograph, or derivative work, of the original. Landes & Posner, *supra* note 148, at 354.

[193] The issue of whether Jeff Koons created a derivative work was never addressed by the Second Circuit. The district court had concluded that Koons' sculpture was a derivative work under the plain meaning of the statute. Rogers v. Koons, 751 F. Supp. 474, 477 (S.D.N.Y. 1990), *aff'd* 960 F.2d 301 (2d Cir. 1992).

One commentator has suggested that Koons may have had a protectible copyright for some elements of "String of Puppies" had the court of appeals concluded that Koons had contributed authorship to the sculpture. Even so, Koons still would have owed compensation to Rogers, since the creation of a derivative work is an exclusive right owned by the underlying copyright owner. *See* Wolff & Danziger, *supra* note 91, at 163.

[194] *See generally, supra* notes 85-89. "By reconceptualizing the image, the artist has . . . transformed and altered it in an attempt to force viewers to see the original work and its significance differently." Badin, *supra* note 82, at 1660.

a benefit to society. Since a Constitutional goal of copyright law is to encourage authors to create works that will ultimately benefit society,[195] it is arguable that appropriation art satisfies this goal. Appropriation art adds works that are not a substitute for the first work to the culture. Because the second work exists in its own right and is not a substitute for the first work, the second work is productive; it has transformed the first work into another independent work.[196] And therefore, the second work could be a permitted use under the proposed amendment.

In contrast to a non-infringing parallel work, a second work may be a mirror image of the first artist's work. A work would be an infringing mirror image if the second artist made no changes to the first work. Under traditional copyright law analysis, a mirror image work would not be a derivative work, since the second work does not "transform" the first work.[197] A mirror image work could substitute for the first work without the consumer's knowledge. The ability of the second work to cause confusion in the market and to substitute for the first work would prevent the application of the proposed amendment. Thus, the second work would infringe the first artist's exclusive right to make copies.[198] Moreover, if the second work merely duplicates the first work and replaces the need for the first work, it would impact on the market for the first work. In these situations, confusion among the public as to source may be possible. Consequently, a mirror image appropriation should not be permitted, and the second artist would be considered an infringer.

In determining whether a work is a mirror image or parallel, the courts should also consider whether the work created by the second artist is a one-of-a-kind, or a multiple. This goes to the requirement that the second work be one-of-a-kind, high art. If the second artist has created one work, and that work transforms the first, the courts should conclude there is not infringement and compel the second artist to obtain a compulsory license as described in the proposed

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[195] *See* Campbell v. Acuff-Rose, Music, Inc., 501 U.S 369 (1994). The goal of copyright law is generally furthered by the creation of transformative works.

[196] *See supra* note 84.

[197] *See* 17 U.S.C. § 101 (1996).

[198] 17 U.S.C. § 106(1) (1996).

amendment. If the second artist has created a work that is capable of being reproduced in a way that raises the question of which is the "original" then traditional rules of fair use analysis rather than the proposed amendment, should be applied.

In applying the amendment, courts should examine the customs in the visual art industry, just as in other areas of the entertainment industry. For example, when an actor was sued for breach of an oral contract, the court considered the customs and usage of oral contracts in the movie industry.[199]

Artists create objects as a result of artistic decisions.[200] In effect, artists create a historical lineage for a work.[201] Artists who are able to justify the artistic decisions that they have made regarding the decision to appropriate images into a single work of art should not be found to have infringed merely because they have appropriated the copyrighted work of another.[202] By creating new works, artists are

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[199] In 1991, Main Line Pictures filed a lawsuit against actor Kim Basinger for breaching a verbal agreement. Main Line Pictures claimed that Basinger had verbally agreed to appear in the film "Boxing Helena." In the film industry a lot of business is completed based on a handshake, rather than a signed contract. The Los Angeles Superior Court concluded that Main Line Pictures could enforce the oral contract against Basinger and awarded damages to the production company. Douglas Kari, *Basinger in a Box: Verbal Contracts in the Film Industry*, ENT. L. REPTR. (July 1993).

[200] Sherrie Levine's work is justified in terms of art history. Her work, "and that of others working in a similar vein, represents an important extension of the ability of artists to develop in radical ways that might not be immediately obvious or within established criteria of value and originality." Carlin, *supra* note 3, at 138.

[201] Some states require certification of authenticity for prints. *See* JESSICA L. DARRABY, ART, ARTIFACTS & ARCHITECTURE LAW, app. 1 (1995). Similarly, a certificate of philosophical lineage could be created for works. The certificate could list the works that have been appropriated and indicate that proper fees had been paid. This would satisfy the copyright laws' interest in giving the first artist credit and avoid potential litigation over copyright infringement.

[202] In *Rogers v. Koons*, the Second Circuit determined that Koons' work was not a parody of Rogers' photo, since Koons did not accord Rogers attribution. The court was concerned that the right parties be given the proper credit. Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992).

However, proper attribution has not always protected an artist from lawsuits. McLean, *supra* note 80, at 397 n. 138 (discussing various lawsuits of several artists who attempted to settle out of court). In contrast, the amendment that this Article proposes would provide both rights of attribution and the payment of royalties to artists when their works were appropriated. This scheme may reduce litigation and add certainty to the market.

moving society and the art world forward. These same works add to society's culture and ultimately benefit the public; thereby satisfying the goals of the Copyright Act.

B. *Application of a parallel v. mirror image standard*

The most difficult aspect of the proposed amendment is the fact that it may ask the courts to actually judge art. This, of course, is against the tenets of copyright law.[203] However, the amendment's threshold requirements would assist the courts in applying the law and diminish the emphasis on "judging art." Absolute copying is easy to see. A more difficult area, and a question that the courts should not be deciding without guidance, is the gray area of transformation. Transformation asks "Is the second work productive?" It is more difficult for the courts to determine what works would qualify as parallel, rather than a mirror image. However, a few guidelines can be established.

Examining the works of the artists discussed earlier, the works of Sherrie Levine would be mirror images, rather than parallel. Her work duplicated Ed Weston's. She was not adding anything visually new to his image; she was instead creating a mirror image of his works.[204] This, of course, was the point of her work; to force society to question "What is an original?"[205] Yet, by selling her prints of his prints, she was increasing the number of his "images" available and impacting on the market for his works.

Jeff Koons' work may be at the other end of the continuum.[206] While Koons' sculpture is substantially similar to Rogers' photo, it is not a mirror image of Art Rogers' photo. However, the question remains, does Koons' work move so far from the original to exist as

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[203] Almost 100 years ago, Justice Holmes warned that "[i]t 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." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[204] *See supra* Part II.

[205] *See supra* notes 85-89.

[206] *But see*, Carlin, *supra* note 3, at 113 (Sherrie Levine and Jeff Koons are "flagrant appropriators").

a parallel work? Do we perceive Koons as changing and transforming Rogers' photo into a different work of art, rather than a derivative work? I believe that the answer to both questions is yes. Koons has appropriated elements of Rogers' photo and has transformed these elements into a different work of art.

"String of Puppies" appropriated major parts of Rogers' photo;[207] however, Koons altered many of the essential elements of Rogers' expression of the idea.[208] Koons instructed the artisans to use identical shading, and arrangement of the idea—the husband and wife with the dogs.[209] Koons changed the medium from photo to sculpture and used bright and non-realistic colors. He placed daisies in the wife's hair, and changed the couple's facial expression. One commentator described "String of Puppies" as "depict[ing] a couple with clown faces painted in garish colors with daisies in their hair. They are embracing eight gigantic blue puppies sporting bulbous noses . . . . Gone is the 'charming' and cuddly warmth of Rogers' photograph and in its place is a garish, perhaps horrifying, perhaps hilarious image."[210]

Jeff Koons made the couple comical and transformed Art Rogers' "expression."[211] While one could still use copyright laws' "ordinary observer test" to determine substantial similarity, the reasonable person should also ask "Has the second work transformed the first?" Obviously, the test is subjective. However, the proposed amendment would provide the courts with the tools to assess changes between the two works in determining whether there is unlawful copying.

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[207] Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992).

[208] *See* Ames, *supra* note 29.

[209] The court stated that "it is not . . . the idea of a couple with 8 small puppies seated on a bench that is protected [by copyright law], but rather Rogers' expression of this idea—as caught in the placement, in the particular light, and in the expressions of the subjects—that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable." Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992).

[210] Lynne Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L. REV. 1, 26-27 (1992).

[211] Although these changes may still be labeled "copying" by a court, they do "transform," adapt, and alter the original. Thus, while still a derivative work, "String of Puppies" is not identical to "Puppies." Therefore, the level of appropriation used by Koons should be permitted.

Although Koons' work may transform Rogers' photograph, ultimately I would argue that Koons' sculpture "String of Puppies" would not qualify for protection under the proposed amendment. First, Koons' artisans created four copies of the sculpture rather than one-of-a-kind. Second, it is questionable whether Koons' sculptures are hand-made. While I do not intend for the proposed statute to require an artist to make his own work,[212] it is unclear from the facts how the artisans created Koons' sculpture. If "String of Puppies" was created by hand it would satisfy the second prong of the proposed amendment's threshold requirements and be protected. However, if the work was fabricated by machine, I would suggest that it not be afforded protection under the proposed statute.

VI. CONCLUSION

The nature of the appropriation art movement has created a conflict with the application of traditional principles of copyright law. Appropriation artists reposition images from mass-culture in their own works. These first works, however, are generally protected under the Copyright Act of 1976. Thus, the use of the image by the second artist is an infringement. Artists have been unsuccessful in their use of the fair use doctrine, and, after *Rogers v. Koons*,[213] it appears that courts will remain unwilling to apply the fair use doctrine to appropriation art.

A solution to this problem is an amendment to current copyright law. The proposed amendment would allow courtsa new framework under which to assess each work independently to determine whether the second artist's use is permitted or an infringement. While no solution is perfect, the proposed amendment contains several threshold steps that courts and artists could apply to reach a determination. Hopefully, the proposed amendment would add certainty to copyright law and improve the ability of courts to address these problems.

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[212] Throughout time, artists have employed apprentices to create their works. A recent and famous example is Andy Warhol's factory. Gordon Burn, *Is Mr. Death In?*, THE INDEPENDENT, Feb. 17, 1996, at 18 ("probably half [of Warhol's] . . . paintings were created completely by assistants."). *See also supra* note 169.

[213] *See supra*, Part III.