Drawing Lines: Addressing Cognitive Bias in Art Appropriation Cases

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For centuries, artists ranging from Renaissance painter Raphael to surrealist Salvador Dali have embraced the concept of originality through imitation, drawing heavily from the works of their predecessors to create new and original works of art. Despite the role that appropriation has historically played in artistic culture, art that borrows substantially from other works is more likely to be punished than praised under our current copyright system.

Following the decisions against appropriation artists in Cariou v. Prince *and* Rogers v. Koons*, the future of art appropriation is increasingly unclear. Although the Supreme Court has warned that judges should not employ aesthetic reasoning in assessing works protected by copyright, recent copyright cases suggest that judges are doing exactly that. After showing how the open-ended nature of the copyright and fair use inquiries can make judges particularly vulnerable to various cognitive biases, this Article relies on* Rogers v. Koons *and* Cariou v. Prince *to illustrate how fact finders can be improperly influenced by known cognitive biases such as anchoring, hindsight, and confirmation bias and could be tempted to substitute their own value judgments when assessing an appropriator's work.*

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I. Introduction

Long before Richard Prince utilized Patrick Cariou's intimate photographs of Jamaican Rastafarians for part of an exhibit that would later become the subject of a controversial copyright lawsuit,[1] great artists such as Raphael embraced originality through imitation and created artistic works through a "timeless process of recognizing, emulating, and re-creating [the] genius" of other artists.[2] Today, appropriation artists employ many of the same artistic techniques, drawing inspiration from, and, in many cases, directly copying portions of copyrighted works to create original works of art. The future of these practices, however, is increasingly unclear under current copyright law. In the early copyright case, *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court 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."[3] However, judges frequently do just that and have been

[1] *See* Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011) (holding that an artist's repurposing of plaintiff's photographs into collages and a series of paintings were not a "fair use" of the copyrighted works); *see also* Randy Kennedy, *Apropos Appropriation*, N. Y. TIMES (December 28, 2011), http://www.nytimes.com/2012/01/01/arts/design/richard-prince-lawsuit-focuses-on-limits-of-appropriation.html?ref=richardprince&_r=0 ("The decision [...] set off alarm bells [...] in museums across America that show contemporary art. ... [T]he notoriously slippery standard for [fair use] was defined so narrowly that artists and museums warned it would leave the fair-use door barely open, threatening the robust tradition of appropriation that goes back at least to Picasso and underpins much of the art of the last half-century.").

[2] Richard Schiff, *Originality, in* CRITICAL TERMS FOR ART HISTORY, 149-50 (Robert S. Nelson & Richard Schiff eds., 2d ed. 2003).

[3] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

shown to rely on their own aesthetic and value judgments to reach legal determinations in cases involving art and copyright.[4]

In particular, the open-ended nature of the copyright infringement analysis and the absence of a predictable and cohesive legal framework[5] make copyright vulnerable to this kind of flawed reasoning.[6] This invites judges to apply their own aesthetic judgments and permits inferences derived from ingrained cognitive biases in close cases.[7] This lack of predictability is unsettling because it prevents artists from knowing beforehand what constitutes unlawful copying.[8] Unfortunately, the line between inspiration and unlawful copying is remarkably thin, and the legal outcome for alleged appropriators may differ based on what jurisdiction, judge, or jury ultimately hears the case.

This paper addresses one of the factors that can cause such inconsistent outcomes by focusing on the cognitive biases that can affect judicial reasoning in art appropriation cases. I rely primarily on two key art appropriation cases, *Rogers v. Koons* and *Cariou v. Prince*, to demonstrate how fact finders can be improperly influenced by known cognitive biases such as anchoring, hindsight, and confirmation bias as well as their own value judgments on the merit of an appropriator's work. Part II provides a brief overview of copyright law and recent art appropriation cases. Part III discusses the cognitive biases that can arise in the judicial context. Lastly, Part IV offers potential mechanisms for reducing these biases in the art appropriation context.

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[4] *See* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 805 (2005) ("[B]ecause judges are admonished never to make aesthetic determinations, they are forced to find other ways of deciding cases. Consequently, these disguised aesthetic judgments play havoc with the doctrines of law."); *see also* Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012).

[5] For a discussion of the vague nature of the fair use and copyright infringement analysis see, for example, Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1094-96 (2007); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990) ("Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. . . . Confusion has not been confined to judges. Writers, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes.").

[6] *See* Manta, *supra* note 4.

[7] *See id.* at 1305 ("[E]ven well-meaning individuals may not always act as ironclad logic would dictate and may display pervasive patterns of skewed reasoning… [and] [j]udges and juries are not immune from such biases.").

[8] *Id.*

II. APPROPRIATION ART AND COPYRIGHT

A. *An Overview of Copyright Law*

Copyrights are authorized by Article I, Section 8 of the United States Constitution, "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."[9] To bring an action for copyright infringement, an owner of a copyrighted work must prove both ownership of a copyright and that the defendant unlawfully copied the work without authorization.[10] Once the plaintiff has established actual copying, the plaintiff must prove the allegedly infringing work is "substantially similar" to protectable elements of the infringed work.[11] Courts have taken two approaches to assessing substantial similarity.[12]

Under the first approach—the "dissection" test—courts look only to the copyrightable elements of the two works and "eliminate all unprotectable material in determining substantial similarity."[13] Once it has distinguished the copyrightable elements in each of the works, the court asks whether "the ordinary observer, unless he set out to detect disparities, would be disposed to overlook them and regard their aesthetic appeal as the same."[14] Other courts, including those in the Second Circuit, favor a second approach known as the "ordinary observer test."[15] Under this approach, the court asks "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[16] Unlike the dissection test, this approach looks to the "total concept and feel" of the two works, including non-copyrightable elements.[17]

However, a defendant may be exempt from liability if he or she can prove the infringing work constitutes a "fair use" under Section 107 of the Copyright Act.[18] The doctrine of fair use provides that unauthor-

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[9] U.S. CONST. art. 1, § 8.

[10] Rogers v. Koons, 960 F.2d 301, 306 (2d Cir. 1992) (citing Weissmann v. Freeman, 868 F.2d 1313, 1320 (2d Cir. 1989)).

[11] BRUCE P. KELLER ET AL., COPYRIGHT LAW: A PRACTITIONER'S GUIDE §11:6.2 (2012).

[12] *Id.* at 11-45.

[13] *Id.* at 11-45, 46.

[14] *Id.* at 11-47 (citing Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 141 (2d Cir. 1992)).

[15] *Id.* at 11-49.

[16] Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).

[17] *See* KELLER ET AL., *supra* note 11, § 11:6:2 at 11-49.

[18] 17 U.S.C. § 107 (2006); *see also* KELLER ET AL., *supra* note 11, § 8:1.

ized copying of original works for certain purposes, such as criticism, education, or comment, do not constitute copyright infringement.[19] The statute instructs courts to balance four factors in determining whether a use is a fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the work used; and (4) the effect of the use on the market value of the original.[20] However, because of the fact-driven nature of this inquiry, it is difficult to determine with any certainty whether a fair use defense will prevail in court.

B. *Appropriation Art and Copyright*

Appropriation art is not a new phenomenon. There is a long tradition of copying and borrowing in the artistic community. As early as the nineteenth century, artists and authors developed the practice of incorporating pieces of existing works into their own works. Many well-regarded classical works, such as James Joyce's *Ulysses*, T.S. Eliot's *The Wasteland*, and Edouard Manet's *Olympia* used portions from existing works.[21]

One of the oldest examples of artistic appropriation goes back to the painter Raphael's *Judgment of Paris* (1515). It is said that one of Raphael's colleagues, Marcantonio Raimondi, made an etching of the image,[22] which was copied decades later by Edouard Manet in *Le Dejeuner Sur l'Herbe*, a work that has itself been the subject of numerous parodies and interpretations, including a series of paintings by Pablo Picasso.[23] Picasso, in particular, drew from many of the earlier artistic masters in a manner that might not be tolerated under today's copyright regime. His 1957 work *Las Meninas*, for example, re-cast the iconic *Las Meninas* painting by Spanish royal court painter Diego Velazquez in 1656.[24] Salvador Dali also painted several works referencing—and

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

[20] 17 U.S.C. § 107 (2006).

[21] E. Kenly Ames, *Beyond* Rogers v. Koons*: A Fair Use Standard For Appropriation*, 93 COLUM. L. REV. 1473, 1478 (1993).

[22] *See Picasso / Manet: Le déjeuner sur l'herbe*, MUSEE D'ORSAY, http://www.musee-orsay.fr/en/events/exhibitions/in-the-musee-dorsay/exhibitions-in-the-musee-dorsay-more/article/picasso-manet-le-dejeuner-sur-lherbe-20437.html?S=&print=1&no_cache=1& (last visited Mar. 8, 2013).

[23] *Id.*

[24] While Velazquez's work would have been in the public domain (and thus not subject to copyright), I use this example to illustrate the significant role that reinterpretation and appropriation has played among artists throughout history. *See* Pablo Picasso, *Las Meninas (group)*, MUSEU PICASSO, http://www.bcn.cat/museupicasso/en/collection/mpb70-433.html (last visited

in some cases copying wholesale—the scene depicted in *Las Meninas.* Dali, who was a noted admirer of Velazquez and had a gridded reproduction of *Las Meninas* in his studio, first reproduced the Velazquez painting in the stereoscopic two-painting set *Las Meninas (The Maids of Honour).*[25] Another Dali work, *The Apotheosis of the Dollar*, repeats a fragment of *Las Meninas* as many as three times.[26] Dali again lifted from *Velazquez* in his 1981 work *The Pearl*,[27] which depicted the Infanta Margarita as portrayed in the original *Las Meninas* with a pearl orb obstructing her face.[28] Unlike Picasso's abstractions, Dali's reproduction of Velazquez's works were crafted in painstaking faithfulness to the originals. Although these works pre-date much of modern copyright law and draw from works that would now be in the public domain, they represent the history of appropriation and tradition of borrowing and re-interpretation that has long been an accepted, routine, and, frankly, vital tradition of the artistic community.

Thus, this time-honored concept of "originality through imitation" has become a common norm within the artistic community even though it is largely incompatible with the notions of originality and authorship in American copyright law.[29] Today, the concept of "appropriation art" has arguably grown even more expansive, finding a foothold particularly in contemporary and postmodern art.[30] Although it may encompass many styles and techniques, appropriation art is generally defined as a movement that:

> [B]orrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art. Often, the artist's technical skills are less important than his con-

Mar. 8, 2013). In total, Picasso completed 58 works in the *Las Meninas* series. *Id.*

[25] *See* Carme Ruiz, *"What's New? Velázquez." Salvador Dali and Velazquez*, FUNDACIO GALI-SALVADOR-DALI (Feb. 6, 2000), http://www.salvador-dali.org/ serveis/ced/articles/en_ article1.html.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *See generally* Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007).

[30] *See, e.g.*, Barbara Pollack, *Copy Rights*, ARTNEWS (Mar. 22, 2012), http://www.artnews.com/2012/03/22/copy-rights/ (noting that virtually any gallery or museum today features artworks that "incorporate or allude to press photographs, fine-art masterpieces, video games, Hollywood movies, anime, found objects, and just about anything that can be pulled off the Internet."); *Pop Art Appropriation*, MUSEUM OF MODERN ART, http://www.moma.org/learn/moma_learning/themes/pop-art/appropriation (last visited Mar. 8, 2013) ("[T]he intentional borrowing, copying, and alteration of preexisting images and objects . . . has been used by artists for millennia, but took on new significance in mid-20th-century America and Britain with the rise of consumerism and the proliferation of popular images through mass media outlets from magazines to television.").

> ceptual ability to place images in different settings and, thereby, change their meaning.[31]

Many art movements from Pop Art to Postmodernism continue to draw strongly from pop culture, advertising, and existing works of art.[32] However, these principles are often at odds with copyright law. An extremely narrow fair use analysis can often disfavor appropriation artists, even when the work is socially valuable.[33] As one scholar put it, copyright law "stubbornly cling[s] to romantic ideals of authorship and originality as the exclusive grounds for protection" such that works incorporating existing copyrighted materials are less likely to receive protection from judges and triers of fact.[34] Indeed, as art scholar Geraldine Norman noted, "[i]f these copyright laws had been applied from 1905 to 1975, we would not have modern art as we know it."[35] Justice Oliver Wendall Holmes Jr. expressed a similar sentiment in the landmark *Bleinstein v. Donaldson* copyright case, decreeing, "It may be more than doubted [. . .] whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time."[36]

The recent suit against appropriation artist Shepard Fairey by the Associated Press over the iconic *Hope* poster, depicting a cropped photo of presidential candidate Barack Obama in a wash of stylized red, white, and blue shading, demonstrates the shortcomings of our copyright law in protecting artistic works that incorporate appropriated material.[37] Fairey derived the image from a stock photo from the Associated Press, which later demanded licensing and royalty fees for his use

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[31] William Landes, *Copyright, Borrowed Images And Appropriation Art: An Economic Approach* 1, (University of Chicago Law Sch. John M. Olin Law & Economics Working Paper No. 113, 2001), *available at* http://www.law.uchicago.edu/files/files/113.WML_.Copyright.pdf.

[32] *Id.*; *see also* Pollack, *supra* note 30 (noting the pervasiveness of appropriation in modern, pop, and postmodern art forms).

[33] *See, e.g.*, H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV. J.L. & TECH. 335, 336 (2011); Arewa, *supra* note 29, at 495 ("Fair use [...] incorporates significant consideration of commercial context without commensurate consideration of cultural contexts of creation.").

[34] Holland, *supra* note 33, at 336. For an engaging discussion of the difficulty in determining what constitutes originality and authorship in the copyright context, see Arewa, *supra* note 29, at 493-95.

[35] William Landes, *Copyright, Borrowed Images, And Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 17 (2001) (quoting Geraldine Norman, *The Power of Borrowed Images*, ART & ANTIQUES, Mar. 1996, at 125).

[36] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).

[37] Holland, *supra* note 33, at 336.

of the work.[38] The case soon escalated to litigation, with the news agency claiming Fairey's unauthorized use of the photo was copyright infringement.[39]

Fairey argued that his work was a fair use.[40] However, the traditional fair use analysis—which examines the appropriating artist's process of creation for indications of "authorial purpose, process, and activity"—did not favor Fairey, who ultimately settled.[41] Despite the far-reaching social and political meaning the *Hope* poster came to symbolize,[42] Fairey would have been unlikely to prevail at trial since the work's' cultural significance is largely irrelevant to the fair use analysis.[43]

Fair use again arose as a central issue in another recent appropriation art case, *Cariou v. Prince*.[44] The plaintiff, a professional photographer, filed a lawsuit against well-known contemporary appropriation artist Richard Prince after he used photographs from the plaintiff's copyrighted collection of photos of Jamaican Rastafarians entitled *Yes, Rasta*.[45] Prince's *Canal Zone* exhibits used at least 41 photos from *Yes, Rasta*, which were torn and attached to a wooden board for backing.[46] Prince used some photos in their entirety, while others he only partially displayed and subsequently painted over, collaged, cropped, and/or tinted.[47] Cariou allegedly learned of Prince's exhibit when discussions to re-exhibit his photographs in *Yes, Rasta* fell through because the gallery owner did not want to seem like she was capitalizing on Prince's

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[38] *Id.*

[39] Complaint at 1, Fairey v. Associated Press, No. 09-01123 (S.D.N.Y. Feb. 9, 2009).

[40] *Id.*

[41] *See* Holland, *supra* note 33, at 336; s*ee also* Shelly Rosenfeld, *A Photo Finish? Copyright and Shepard Fairey's Use of A News Photo Image of the President*, 36 VT. L. REV. 355, 367-71 (2011) (analyzing how the fair use factors would apply to Fairey's Hope poster and ultimately concluding that Fairey's Hope poster would probably not have satisfied the fair use factors).

[42] Holland, *supra* note 33, at 336-37 ("The Hope poster was not only popular with Obama supporters, it was also a lightning rod for his detractors. . . . Fairey intended the image to convey a message of idealistic leadership potential, and for most supporters this was precisely the meaning derived. But for other, differently situated audiences, the meaning of the work was quite different. These various interpretive communities engaged the Hope poster as a symbol of socialism, communism, religious idolatry, anti-Americanism, and elitism.").

[43] *Id.* at 337; *see also* Rosenfeld, *supra* note 41, at 367-71; Elizabeth Dauer & Allison Rosen, *Copyright Law and the Visual Arts: Fairey v. AP*, 2010 U. DENV. SPORTS & ENT. L.J. 93, 97-103 (2010) (discussing Fairey's likelihood of success at trial).

[44] Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

[45] *Id.* at 343.

[46] *Id.*

[47] *Id.*

success.[48]

After determining that Cariou's photos were worthy of copyright protection,[49] the court rejected Prince's fair use defense on summary judgment.[50] Prince argued that his use of the photos as "raw ingredients" in the new works was transformative, but the court rejected the argument.[51] It also looked closely at Prince's artistic intent and seemed to find Prince's assertion that he "doesn't 'really have a message'. . . to communicate when making art" to be troubling.[52] Ultimately, the court found Prince's paintings to be minimally transformative and ruled that the amount Prince took from the original was "substantially greater than necessary, given the slight transformative value of his secondary use."[53] The ruling represents a blow to appropriation artists[54] and has been criticized for "flawed reasoning" that focused too heavily on Prince's artistic intent when creating the secondary works.[55] As will be discussed in Part III of this paper, I argue that the decision might have been influenced at least in part by the court's own value judgment on Prince's secondary works and his supposed lack of artistic message.

Another leading art appropriation case is *Rogers v. Koons,* decided in 1992 in the Second Circuit.[56] The plaintiff in *Rogers*, also a professional photographer, filed a copyright infringement suit alleging that controversial artist-sculptor Jeff Koons wrongfully appropriated one of his photographs in a large, colored sculpture.[57] Koons, whose works were commanding prices of more than $100,000 a piece at the time of the lawsuit, based his sculpture on the plaintiff's black and white photograph depicting a couple holding eight German Shepard puppies on a

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[48] *Id.* at 344.

[49] *Id.* at 346.

[50] *Id.* at 353.

[51] *Id.* at 348.

[52] *Id.* at 349.

[53] *Id.* at 352.

[54] *See* Randy Kennedy, *supra* note 1; Rachel Corbett, *A Win For Richard Prince In Copyright Case*, ARTNET, http://www.artnet.com/magazineus/news/corbett/prince-wins-right-to-appeal-in-cariou-v-prince.asp (last visited Mar. 8, 2013) ("[M]any observers fear that [the] decision sets a dangerous precedent for the future of appropriation art, and could cause a creative 'chilling effect' more generally.").

[55] *See generally* Adrienne Barbour, Note, *Yes, Rasta 2.0: Cariou v. Prince and the Fair Use Test of Transformative Use in Appropriation Art Cases*, 14 TUL. J. TECH. & INTELL. PROP. 365, 382-83 (2011).

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

[57] *Id.* at 303-04.

bench.[58] Koons admitted that the source for his *String of Puppies* sculpture was the plaintiff's photograph, explaining that it was "intended in part as a criticism of a commercial, mass-produced image from popular culture."[59] The sculpture was featured as part of Koons's "Banality Show" exhibit at the Sonnabend Gallery, which was also named as a defendant.[60]

Although Koons's sculpture made several departures from the photograph—including painting the sculpture in vivid color, adding daisies to the hair of the couple holding the puppies, distorting the couple's facial expressions "for a vacuous effect," and giving the puppies large bulbous noses—both the trial court and Court of Appeals found that Koons's sculpture constituted unlawful copying of the plaintiffs' photograph.[61]

The court noted that it was not the idea of the couple holding a string of puppies that was protected, 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."[62] The Second Circuit found that Koons's sculpture had not simply copied Rogers's idea but also its expression by incorporating the same poses, expressions, and general composition as the photograph.[63] Despite some considerable differences between the sculpture and the photograph—and its intended satiric purpose—the Second Circuit held that no reasonable jury could have differed on the finding of substantial similarity.[64]

Koons also argued the sculpture was a fair use because he intended his work to parody society at-large and "the 'banality' of those aspects of our culture typified by the photograph."[65] Koons stated that although his sculpture resembled Rogers's "charming" photograph in a superficial manner, he purposefully exaggerated the features of the

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[58] *Id.* at 304-05.

[59] *See* Petition for Writ of Certiorari, Koons v. Rogers, 506 U.S. 934 (1992) (No. 92-297), 1992 WL 12073534 at *3.

[60] *Id.*

[61] *Id.* at *4.

[62] *Rogers*, 960 F.2d at 308. The idea/expression dichotomy is a central tenet of U.S. copyright law and provides that only the expression of an idea—rather than the idea itself—is protected by copyright. *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[63] *Id.*

[64] *See id.*

[65] Petition for Writ of Certiorari, *supra* note 59, at *8.

couple so that the sculpture would be "highly disturbing."[66] However, the Second Circuit rejected Koons's fair use parody argument, holding that the copied work must be the object of the parody since "otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large."[67] Therefore, because Koons intended to comment on society at large rather than specifically on Rogers's photograph, the court did not consider it a sufficient parody under the first prong of the fair use test. On the second factor—the nature of the copyrighted work—the judge stated that since the Rogers photograph was "creative and imaginative" it weighed against a finding of fair use.[68] Likewise, the court held on the third factor that Koons's "nearly *in toto*" copying of the plaintiff's photograph took more than was necessary from the original to establish the parody and thus weighed against fair use.[69] On the final factor—the effect on the market for the original work—the Second Circuit found that sales of photographs of Koons's sculpture "would prejudice Rogers' potential market for the sale of the 'Puppies' notecards" despite the different audiences for the two works.[70]

This decision has been criticized by legal scholars for its faulty reasoning, particularly in applying the parody defense to Koons,[71] and for its heavy-handed and dismissive treatment of Koons, whom the court did not appear to take seriously as an artist.[72] The court has also been

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[66] *Id.* at *4. ("The notecard presents a scene that the court below described as 'charming,' while Koons' sculpture is highly disturbing. [Koons'] goal was to take 'the sculpture out of the realm of reality into the realm of unreality but without eliminating a sense of believability.' He felt that he had 'stripped away entirely the personality of the notecard picture and substituted [his] own values and [his] own message.'").

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

[68] *Id.* The mere use of the words "creative and imaginative" in this context, compared to the court's treatment of Koons, seems to suggest the court's belief that the plaintiff, a professional photographer, is a *real* artist (unlike Koons).

[69] *Id.* at 311.

[70] *Id.* at 312.

[71] *See, e.g.*, Farley, *supra* note 4, at 850-54; Ames, *supra* note 21, at 1504-05 ("The court did not consider the possible necessity of copying the entire image in order to fulfill the secondary work's critical purpose, the necessity of appropriating a creative work from American mass culture in order to comment on the values inherent in that culture, or the difficulty involved in appropriating only part of an image.").

[72] *See, e.g.*, Farley, *supra* note 4, at 833 ("A description of [Koons's] background and methods, contrasted with the plaintiff's, was given prominence in the opinion. The court noted . . . that he was a former Wall Street commodities broker; had no skill in drawing, painting, or sculpture; and had Italian artisans manufacture his sculpture for him. The court was appalled by the money he was making from sales of his art. And the court was not impressed by his interpretation of the meaning of his art, which it insolently described as 'commenting upon the

condemned for placing an undue emphasis on Koons's alleged bad faith in copying the work without a license, rather than simply focusing on the issue of whether or not the use was fair.[73] If Koons's use was indeed a fair use, any bad faith—in this case copying without a license—would be irrelevant.[74] Others have found the court's analysis of the similarity between the works to be perplexing, particularly due to the trial judge's statement that, "size and color aside," the Koons work was an exact copy.[75] As Louise Harmon put it, "These seem odd attributes to shrug off-'size and color'-when considering the task at hand: the comparison of two works of visual art."[76] Size, color, and nuanced (or blatant) differences between works are at the heart of determining whether a use is fair, and the court's disregard for these elements is extremely troubling.

Likewise, while the court noted that it is not the "idea" of people and puppies on a bench that is protected, the court seemed to disregard the dissimilar elements of the works and focus solely on the similar ideas portrayed in the works rather than each artists' independant expression.[77] Many legal and art scholars have argued that the expression of the works are actually quite different, and believe that the court's analysis ignores the fundamental distinction between unprotectable ideas and protectable expression under copyright law.[78]

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commonplace.'").

[73] *See, e.g.*, 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, 405 (1993) ("Without determining here whether or not Koons's use was indeed exploitive, the court's determination of bad faith at this juncture of its analysis is questionable. The issue was not Koons's conduct, but whether or not his use was fair.").

[74] *See id.* at 402.

[75] *See* Louise Harmon, *Law, Art & The Killing Jar*, 79 IOWA L. REV. 367, 375-76 (1994) ("Our eyebrows would go up if the task were the comparison of two apple pies and the judge casually cast aside the attributes of taste and consistency.").

[76] *Id.*

[77] According to the Koons court, rather than the idea of a couple holding puppies portrayed the photograph, it is the expression of that idea—the light, the arrangement of the individuals and puppies, and their facial expressions—that is original and protectable, according to the court. *Koons*, 960 F.2d at 308.

[78] *See, e.g.*, Harmon, *supra* note 75, at 381-83 ("Neither does Jeff Koons's sculpture capture the spirit, or the 'total concept and feel,' of Art Rogers's photograph. [Koons's] String of Puppies is not charming or beautiful; it is disturbing. It is also ugly. The colors are garish. The man and the woman have goofball looks, as if they were cartoon characters."); *see also* Ames, *supra* note 21, at 1505 ("Koons did not merely produce a three-dimensional version of the photograph in painted wood; he created a new work, with its own message, by appropriating the original work. The issue here was not the change of medium; it was the change in meaning inherent in the act of appropriation.").

III. COGNITIVE BIAS IN ART APPROPRIATION CASES

Decisions involving art pose a higher risk of influence from internal cognitive biases than perhaps any other type of work protected under copyright law. Viewing and interpreting art is an inherently subjective experience. While individuals might be able to agree on the general artistic caliber of works put forth by well-regarded masters such as Leonardo Da Vinci or Claude Monet, the question of artistic value becomes much more complicated when assessing contemporary art that neither adheres to traditional artistic norms nor has centuries of validating accolades from the art community. Art resists easy classification, and, indeed, tomes have been written in an attempt to answer the deceptively straightforward question of "what is art?"[79]

Theories on what constitutes art vary amongst the different schools of aesthetic theory, and no universal definition of art has been applied in the law.[80] In copyright cases involving art this creates a problem for judges and juries who, in the absence of a clear framework for systematic reasoning, may be more prone to relying on engrained biases.[81] Copyright law is particularly vulnerable to bias because it requires judicial triers of fact to analyze matters "usually left to personal taste" and grants judges broad discretion.[82] Although judges purport not to engage in aesthetic reasoning, aesthetic judgments inevitably weigh on judicial decision-making.[83]

This Article contends that the outcomes in some art appropriation cases may have been strongly influenced by the trier of fact's value judgment on the allegedly infringing work and subject to various cognitive biases that affect legal reasoning.[84] This is incredibly problematic because such "hidden" reasoning produces wildly different results in

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[79] *See* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 252-53 (1998) (discussing definitions of art from a range of aesthetic theories); *see also* Farley, *supra* note 4.

[80] Yen, *supra* note 79, at 256. The intentionalist school of aesthetic theory, for example, essentially holds that "an activity becomes artistic only if those who participate in it perceive it that way." Other theories, such as institutionalism, base definitions of art on an artwork's "appreciation by some person or persons acting on behalf of a certain social institution (the artworld)." *Id.* at 259.

[81] *See* Manta, *supra* note 4, at 1305.

[82] *Id.* at 1330.

[83] *See, e.g.*, Farley, *supra* note 4; Yen, *supra* note 79.

[84] *See* Farley, *supra* note 4, at 833 (noting, for example, that in *Rogers v. Koons* "it is evident that in the mind of the court, Koons is not an artist." Likewise, in the 1983 *Gracen v. Bradford Exchange* case, Farley contends that "the reader is left with the strong opinion that Judge Posner did in fact think that the object he was evaluating was kitsch.").

copyright and art appropriation cases and blurs the distinction between aesthetic and legal reasoning.[85] It also leaves artists uncertain of whether their work would be considered a fair use in court since existing holdings are incredibly case-specific.[86] In a revolutionary study applying cognitive science to judicial decision-making, Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich found judges to be "significantly" affected by the five "cognitive illusions" (anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases)[87] known to cause "systematic errors in judgment."[88] This section discusses how these and other biases may improperly affect outcomes in art appropriation and copyright cases.

A. *Hindsight Bias and Bad Faith*

The ex-post nature of copyright remedies creates abundant potential for "hindsight bias" due to the two-part nature of the copyright inquiry.[89] Before ruling on whether the copying of the copyrighted work was unlawful, judges must first determine whether copying indeed took place.[90] This can lead judges to adopt the problematic and circular notion that "what is worth copying is prima facie worth protecting."[91] In other words, the mere finding that a defendant copied the work can increase the likelihood the judge will find substantial similarity between the two works.[92] A determination that copying has taken place can also result in a bias known as the "reverse halo effect," wherein individuals associate an isolated event of "misconduct" (such as copying a copy-

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[85] *See* Manta, *supra* note 4; *see also* Yen, *supra* note 79, at 259 ("the distinction between aesthetic reasoning and legal reasoning is illusory.").

[86] Rachel Isabelle Butt, Note, *Appropriation Art And Fair Use*, 25 OHIO ST. J. ON DISP. RESOL. 1055, 1059 (2010) ("Artists, as potential fair users who want to incorporate another's work, are deterred from engaging in a desired use because of the uncertainty associated with the fair use doctrine.").

[87] The study tested for: "anchoring (making estimates based on irrelevant starting points); framing (treating economically equivalent gains and losses differently); hindsight bias (perceiving past events to have been more predictable than they actually were); the representativeness heuristic (ignoring important background statistical information in favor of individuating information); and egocentric biases (overestimating one's own abilities)." Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

[88] *Id.* at 778 ("Like the rest of us, [judges'] judgment is affected by cognitive illusions that can produce systematic errors in judgment.").

[89] *See* Manta, *supra* note 4, at 1339.

[90] *Id.* at 1339-40.

[91] *Id.* (quoting Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1631 (2009)).

[92] *Id.* at 1340-41.

righted work) with "generally bad character."[93] Research suggests that many jurors and judges may conclude that "the type of person who is willing to copy from others is also the type who is willing to do so in a way that is unlawful."[94] Thus, a subconscious determination of a defendant's bad faith can unduly influence the substantial similarity or fair uses analyses, as a trier of fact may often have a desire to punish the copier, regardless of the lawfulness of the copying.

This particular bias appears to have been a factor in the decisions against appropriators in *Cariou v. Prince* and *Rogers v. Koons*. In *Rogers*, the court's disdain for defendant Koons is palpable.[95] The first sentence of the opinion venomously notes Koons's "deliberate" copying of the plaintiff's photograph and vows not to grant the defendant special status due to his prominence in the art world.[96] However, the deliberate nature of Koons's copying is irrelevant if the work is a fair use. Some amount of deliberate copying is necessary and, indeed, permitted for a proper parody.[97] However, the *Rogers* court cannot seem to separate the fair use analysis from the determination that Koons has engaged in intentional copying and intermingles statements regarding Koons's status as an appropriator, copier, and pirate throughout the opinion.[98] In rejecting the argument that Koons's *String of Puppies* sculpture could suffice to comment on the saccharine, "commonplace" idea conveyed in the plaintiff's photograph, the judge explained that "it is not really the parody flag that [Koons is] sailing under, but rather the flag of piracy."[99] This statement itself indicates the strong feelings of distaste Koons incited from the judge.

Similarly, in *Cariou v. Prince*, the court's fair use analysis was

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[93] *Id.*

[94] *Id.* at 1341.

[95] "The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism." Rogers v. Koons, 960 F.2d 301, 303 (2d Cir. 1992).

[96] *See id.*

[97] *See* Ames, *supra* note 21, at 1497 ("Both of these standards permit the appropriation of whatever material is necessary to make an effective parody possible, even if that necessary material is the 'heart' or 'essence' of the appropriated work."); *see also Rogers*, 960 F.2d 301, 310 ("[A] parody entitles its creator under the fair use doctrine to more extensive use of the copied work than is ordinarily allowed under the substantial similarity test.").

[98] The language in the opinion denounces Koons as a copier and appropriator in no uncertain terms throughout the opinion: "[N]o copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated." *Id.* at 308.

[99] *Id.* at 311.

heavily influenced by the determinations that artist Richard Prince had engaged in bad faith copying by failing to seek permission from photographer Patrick Cariou—even when asking for additional copies of his photography book—before using photos.[100] This factor, however, is improper for fair use analysis since "an appropriation under the Copyright Act remains an appropriation regardless of the offending party's best or worst intentions."[101] While bad faith may be relevant for other legal determinations, such as deciding the scope of damages, it should not weigh on the fair use analysis since many defendants asserting a fair use defense will not have obtained permission from the owner of the work.[102] Although fair use is an equitable doctrine, allowing undue emphasis on the appropriator's good or bad faith detracts from the statute's policy goals of permitting creations of "new" works based on existing works and promoting free expression.[103] Permitting judges and juries to focus on bad faith in appropriation cases is improper since triers of fact are often unable to discard this bias even when deciding matters wholly unrelated to intent.[104]

B. *Anchoring*

Another bias that may arise in appropriation cases is the phenomenon known as "anchoring," wherein individuals unduly rely on arbitrarily set points in their decision-making.[105] Anchors—such as a list price for a home or the opening offer in settlement negotiations—lead individuals to "consider seriously the possibility that the real value is similar to the anchor, thereby leading them to envision circumstances under which the anchor would be correct."[106] Thus, in a copyright context, when asked to compare between the original work and the allegedly infringing work, judges and jurors are more likely to focus on

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[100] For a thorough discussion of the court's focus on bad faith in *Cariou v. Prince*, see Jennifer Gilbert-Eggleston, Cariou v. Prince: *Painter Or Prince Of Thieves?*, 2011 DENV. U. SPORTS & ENT. L.J. 117, 125-27 (2011).

[101] *Id.* at 126. Gilbert-Eggleston argues that bad faith should not have a place in fair use analysis: "Although the lack of knowledge might be appropriate in determining how to deal with punishment for the theft, it does not change that the action is a theft. Including an analysis of behavioral justification goes beyond the scope of Copyright law." *Id.*

[102] If the defendant had permission, it would be unlikely that the case would escalate to litigation. Thus, focusing on bad faith does not serve a clear purpose in fair uses analysis.

[103] *See* Holland, *supra* note 33, at 347.

[104] *See* Manta, *supra* note 4, at 1341 (noting that because this bias "operates at the subconscious level" it is difficult for triers of fact to repress the negative reactions elicited by knowledge of intentional copying).

[105] *Id.*

[106] *See* Guthrie et al., *supra* note 87, at 788.

similarities and lean toward a finding of liability.[107] Irina Manta contends that, because of the nature of the substantial similarity tests and manner in which the original and infringing works are presented to judges and juries,[108] works may be "perceived as more strikingly similar as a result of anchoring than they ever would have if they had been encountered by observers outside the courtroom."[109] Anchoring is especially likely to have an effect when the original work is presented first, as is typically the custom in copyright infringement lawsuits.[110] Especially in courts employing the reasonable observer test, which does not disregard any noncopyrightable elements shared by the two works, triers of fact are likely to over-focus on similarities. This can also be problematic for fair use defenses, given the nature of the third factor, which analyzes the "amount and substantiality of work used." The focus on the amount of taking implores judges and juries to disregard non-similar elements and search only for evidence of copying, perhaps making works seem more similar than they actually are.

C. *Confirmation Bias*

Appropriation cases are also susceptible to confirmation bias,[111] which refers to an individual's "seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."[112] Manta argues that a judge's finding of a similar trait between the underlying work and allegedly infringing work may lead to interpreting other traits to be more similar than they would otherwise find "but for these initial conclusions."[113] Confirmation bias is often intertwined with anchoring and the hindsight/reverse halo effect in art appropriation cases because a judge's first point of reference is the copyrighted work juxtaposed with an allegedly infringing work and an allegation of bad faith copying. Thus, a judge seeking to punish a bad faith copier may be inclined to interpret evidence in a light more favor-

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[107] *See* Manta, *supra* note 4, at 1342.

[108] *Id.* ("In the case of copyrighted materials, jurors or judges are asked to compare an allegedly infringing piece to the original, which may turn the original into an anchor. At least at the margins, decisionmakers are likely to overfocus on similarities to the original and gravitate toward a finding of liability, which again favors plaintiffs.").

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

[113] *See* Manta, *supra* note 4, at 1342.

able to the plaintiff to achieve a "just" result.

Similarly, upon an initial finding of similarity, a judge may inadvertently interpret other factors, such as substantial similarity or fair use, to support their initial hypothesis. The broad discretion granted to triers of fact assessing copyright infringement and the fair use defense makes them particularly vulnerable to this type of bias since the framework is so ambiguous.[114] David Nimmer finds that judges often first make a determination as to whether a use is or is not a fair use and then simply align the four fair use factors to justify an outcome they have already decided.[115] Instead of driving the analysis of fair use, Nimmer argues that the four factors merely "serve as convenient pegs on which to hang antecedent conclusions."[116] This could have been at play in *Cariou v. Prince*, as demonstrated by the judge's initial strong emphasis on Prince's bad faith and artistic intent in transforming the *Yes, Rasta* photographs and the cursory analysis of the other three fair use factors.

This system of decision-making is particularly troubling for art appropriation cases, where judges and juries may have visceral reactions to bad faith copiers and the type of artwork put forth by appropriation artists. In *Rogers v. Koons*, a notoriously close case, a court could have interpreted fair use to reach the opposite result and found in favor of Koons, but instead analyzed the fair use factors in a light most conducive to punishing the bad faith copier.[117] The court took careful strides to depict the plaintiff as a legitimate "professional artist-photographer."[118] Meanwhile Koons—who at this point was selling works for hundreds of thousands of dollars—is described not in terms of his artistic success at the time, but as a former "mutual funds salesman, [. . .] registered commodities salesman and broker, [and] commodities futures broker," as though Koons's prior finance career has some effect on his ability to create art.[119] It is evident that the court

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[114] Manta warns that "the effects of particular attributes of judges or juries, combined with 1) copyright's emphasis on the decision-maker's direct perception of the allegedly illegal subject matter, and 2) the bias-increasing ambiguity of the subject matter, may create a dangerously unreliable black box whose ill effects are only undone with great difficulty in any given trial." *Id.* at 1346.

[115] David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS., 263, 281 (2003).

[116] *Id.*

[117] *See* Ames, *supra* note 21, at 1504 (Ames notes that "[i]t seems likely that the court's cursory analysis of the interests involved in the Koons case was due primarily to its distaste for Koons's bad faith and rather flagrant commercialism.").

[118] *Id.*

[119] *Id.* (quoting *Rogers*, 960 F.2d 301, 304 (2d Cir. 1992)).

does not consider Koons to be an artist worth protecting. The opinion also reiterates conflicting reactions from art critics regarding Koons's work, and repeatedly notes the high selling prices that his work commands.[120] Numerous scholars have interpreted the decision as reflecting the court's "moral distaste" for Koons, who evinced clear disregard for the court and argued that the plaintiff's wholesome photograph represented "deterioration in the quality of society."[121] Ultimately, Koons appears to have been punished not for unlawful appropriation, but for his contempt for the judicial system and arrogance regarding the value of his art compared to the "banal" subject matter of the *Puppies* photograph.[122]

D. *Value Judgments and Aesthetic Determinations*

Judges and jurors may also be unable to escape their own aesthetic judgments when assessing the value of a work, an appropriator's artistic process, and the validity of fair use defenses. Reactions to works of art are highly individual, and much of the difficulty in assessing copyright cases involving art arises from the subjective nature of the artistic experience. Psychological studies show that a person's appreciation for different types of art can vary based on educational background, age, whether or not they have spent time visiting art galleries or museums, and even individual personality traits such as openness and extraversion.[123] German psychologist Kurt Koffa, for instance, believed a person's "life experiences, interests, goals, strivings, and even factors such as freshness and fatigue" could influence how an individual experiences a certain piece of art.[124] Artistic preferences can also be influenced by numerous demographic variables. One study found that men generally tend to prefer cubist and Renaissance art while woman generally are more attracted to traditional Japanese paintings and impres-

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[120] *See Rogers*, 960 F.2d at 304 ("He is a controversial artist hailed by some as a 'modern Michelangelo,' while others find his art 'truly offensive.' A New York Times critic complained that 'Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd.'").

[121] *See* Ames, *supra* note 21, at 1504 n. 174.

[122] Koons's argument that "a trial judge uneducated in art is not an appropriate decision-maker" did not sit well with the Second Circuit. *Rogers*, 960 F.2d at 307. Neither did the trial court's finding of Koons in contempt of court go unnoticed by the appellate court.

[123] *See* Tomas Chamorro-Premuzic et al., *Who Art Thou? Personality Predictors of Artistic Preferences in a Large UK Sample: The Importance of Openness*, 99 BRIT. J. PSYCHOL. 1 (2008).

[124] BJARNE SODE FUNCH, THE PSYCHOLOGY OF ART APPRECIATION, 77-78 (1997).

sionism.[125] Studies have also shown a correlation between the level of art education a person has received and their appreciation of abstract art.[126] While these admittedly represent generalizations, the effect of these factors on aesthetic judgment should not be ignored, particularly given the demographics of the American judiciary, which, despite an increase in minorities and women, is still comprised primarily of older White males.[127] Although a variety of factors and traits influence how one perceives a work of art, art provokes an emotional response that is shaped by countless life experiences.

Interestingly, many art appreciation theories emphasize the viewer's psychological processes in conjunction with the formal characteristics of the artwork.[128] In other words, "talking about a work of art requires taking into consideration the psychological process of the viewer in conjunction with the characteristics of the work of art."[129] This is important in the judicial context because it implies that inherent in any assessment of art is the individual's own psychological response to a work. While judges are not asked to evaluate the artistic merit of the works at issue in a copyright case, they may be unable to suppress their subconscious reactions to a work of art in some cases. As with other intangible notions like morality, intuitive determinations concerning art and appropriation may involve more gut feeling than judges like to admit. Manta contends that this "I know it when I see it" hunch feeling actually leads to overconfidence in judicial decision-making and makes judges even less likely to question their preexisting attitude.[130]

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[125] *See* Tomás Chamorro-Premuzic et al., *The ARTistic Personality*, 20 THE PSYCHOLOGIST 84-87 (2007).

[126] Adrien Furnham & John Walker, *Personality and Judgments of Abstract, Pop Art, and Representational Paintings*, 15 EUR. J. PERSONALITY 57-72 (2001).

[127] Although there has been an increase in the proportion of women and ethnic minorities appointed to the federal judiciary, in 2009 70 percent of all federal judges were white males. Likewise, the average age for a federal judge is 60 years old for a district judge and 62 years old for an appellate judge. *See* Russel Wheeler, *The Changing Face of the American Judiciary*, BROOKINGS INST. REPORT 1 (August 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/08_federal_judiciary_wheeler/08_federal_judiciary_wheeler.pdf; *see also* LEE EPSTEIN ET AL., THE BEHAVIORS OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 338-39 (2013).

[128] *See* FUNCH, *supra* note 124, at 77 (discussing the application of Gestalt theory to art).

[129] *Id.* at 76.

[130] See Manta, *supra* note 4, at 1316-17, for a discussion of the Supreme Court's finding in *Scott v. Harris* that no reasonable jury could disagree that a car chase presented "a substantial and immediate risk of serious physical injury to others" after viewing videotape evidence of the car chase. A later study of 1350 individuals who were shown the same video of the car chase found that while a majority of the group agreed with Supreme Court, many individuals—particularly African-Americans, low-income workers and residents of the Northeast—did not

The decisions in both *Rogers* and *Cariou* evince clear judicial disdain for the appropriators' works. Koons, who hired laborers to craft most of his sculpture, is contrasted against the hardworking, genuine professional photographer who dutifully sets the lighting and staging for the "charming" *Puppies* photograph. Likewise, Prince is also cast as a thieving appropriator who makes millions simply by collaging the work of other "true" artists. However, while both opinions recognize the labor and creativity behind the plaintiff's artistic process, there is little analysis of the defendants' creative processes or their intended purposes in creating the work.[131] Neither court made an effort to contextualize the defendants' works or legitimately explore their larger artistic commentaries, instead focusing solely on the merit of the plaintiffs' works. While likely unintentional, the absence of a focus on the appropriators' artistic process and message seems to reflect a judgment by these courts as to which art works they viewed to be artistically legitimate and thus more worthy of copyright protection. This leaves the future of artistic appropriation at the mercy of a largely unpredictable judiciary system.

IV. LOOKING PAST OUR BIASES

Although it may be difficult for judges and juries to overcome these ingrained cognitive biases, there may be ways to modify the litigation process to minimize bias in copyright cases. One manner of reducing subjective bias, Irina Manta suggests, is to allow parties to introduce survey evidence about the intended audience into copyright infringement litigation, as is common in trademark litigation.[132] Manta contends that allowing surveys in the substantial similarity analysis to measure the degree of similarity an audience sees between two works may inspire judges to look outside of their own subjective assessment of the similarity.[133] However, this approach could work against con-

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agree with the outcome after viewing the tape. *Id.*

[131] Arewa argues that American copyright law fails to account for individual creative process and various meanings of originality and creativity in specific artistic fields. ("Cases involving artistic works generally do not reflect detailed analysis of the creative process or context of creation of the works being considered. Rather such cases are more likely to be permeated with generalized and often unsupported assumptions about authorship, ideas, expression, and transmission that often do not sufficiently reflect the reality of how many works are actually created.") Arewa, *supra* note 29, at 494.

[132] *See id.* at 1351.

[133] "If presented with the perceptions of numerous members of the intended audience, jurors and judges are more likely to reach the optimal result than if told that their own perceptions are the relevant ones or that they need to deduce what an abstract average, reasonable observer

troversial or postmodern artists, who may be punished for art that is considered obscene, abrasive, or otherwise outside of general societal norms. It would also do little to minimalize biases against bad faith copiers and internalized aesthetic judgments that already exist in the current system.

But there is another option that would be particularly helpful in art appropriation cases. Allowing parties to introduce evidence from art experts on historical and contemporary customs and traditions in the art world may promote broader understanding of the artistic process and the prevalence of borrowing, copying, and reinterpretation in art, as a whole. By showing the history of cultural borrowing and significance of appropriation in the history of art—even from universally well-regarded artists—defendants in art appropriation cases may be better able to contextualize their sources of inspiration, the work of their predecessors, and how their work builds upon or comments on their predecessors. This approach could perhaps also minimalize the stigma of being perceived as a bad faith copier. Or, as Farley suggests, instead of inviting judges to employ their independent aesthetic judgments about the works at issue, judges could look to aesthetic theory when analyzing art appropriation cases.[134] Farley notes that "[t]here is no excuse for courts to act as if questions of artistic value and classification have not already been theorized."[135] Engaging in discourse about aesthetic theory encourages judges to be more reflective about the basis of their analyses and requires them to "examine their prejudices and predilections."[136] This could reduce the "mismatch of legal and artistic developments," and ensure that legal frameworks are deferential to artistic norms, thereby promoting a broader understanding of the seminal role that appropriation plays in creating artistic works.[137]

V. CONCLUSION

It is important to recognize how ingrained biases and internalized judgments can affect legal decision-making. Particularly in areas of law such as copyright, where a vague legal framework invites subjectivity, judges and jurors must be cognizant of their biases. Instead of ignoring that these well-documented biases exist, we should recognize that the "reasonable man," judge, or juror may not always rely on rea-

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would perceive." *Id.* at 1353.

[134] *See* Farley, *supra* note 4.

[135] *Id.* at 857.

[136] *Id.*

[137] *Id.*

son. Minimizing the havoc these subconscious biases play on our legal system is certainly not easy. However, allowing triers of fact to rely on aesthetic theory and confront their own expectations about art may help alleviate these intrinsic judgments and promote more reasoned analysis in art appropriation and fair use disputes.