ART IS BIG BUSINESS:
Fine Art, Fair Use, and Factor Four After Goldsmith

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Abstract

This Article explores fair use jurisprudence in the fine art context. Particularly, this Article proposes that, motivated by an increasingly commercial contemporary art landscape, courts may be reevaluating their approaches to fair use in this sphere. Part I of the Article provides background on fair use law in the fine art context, specifically focusing on the difficulties posed by appropriation art in copyright law. Part II of the Article explores changes to this paradigm following the Second Circuit's recent decision in *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*.[1] I focus on the Second Circuit's reemphasis of the fourth fair use factor, as well as the copyright holder's pecuniary interests in licensing within the fourth factor analysis. Part III offers several motivations that may have informed the *Goldsmith* decision: (1) overly broad interpretations of transformative use from the 1990s to 2010s; (2) a shift away from equitable relief in copyright infringement actions; and (3) growing concern regarding socioeconomic inequality both within and beyond the fine art sphere. Informed by this analysis, Part IV of the Article asserts that, contrary to popular belief, fine art may not be unique when compared to other copyrightable works. As such, distinctly laissez-faire approaches to fair use in this sphere are no longer justifiable. Accordingly, the *Goldsmith* decision and its nod to aesthetic pluralism may instead reconcile the aspirations of the U.S. copyright system with internal shifts in the contemporary art economy.

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1. 11 F.4th 26 (2021), *cert. granted*, 142 S. Ct. 1412 (2022).

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Introduction

In 2019 the global art market was valued at $64 billion USD, and investment in artistic works had reached an all-time high.[2] Once unimaginable, auctions totaling in the hundreds of millions are now commonplace. Though art investment funds have existed for over a century, budding startups have built on this practice, allowing individuals to buy shares of blue-chip artworks in just twenty dollar increments.[3] A recent Citigroup report compared artworks to bonds, finding that between 1985 and 2018, the art market's return has been relatively in line with that of fixed income.[4] In the report, Citi claimed that art is gaining traction as a way for investors to diversify portfolios since its performance is not correlated with any of the other major asset classes.[5]

More anecdotally, that same year, artist Maurezio Cattelan garnered worldwide attention with *Comedian*, Cattelan's first sculpture created for an art fair in over fifteen years. The sculpture was a store-bought banana duct taped to the convention center wall. Mr. Cattelan's banana was offered in a limited edition of three with one artist's proof at a cost of $120,000 apiece.[6] The sale inevitably reignited age-old discussions about what constitutes art, and its camp homage to Warhol's silkscreen series was perhaps apt for the absurdity and decadence of Miami's Art Basel.[7] The sale also inspired continued commentary on the growing status of art as a Veblen good, and perhaps more cynically, as an opportunity for the world's wealthy to diversify portfolios, launder money, or avoid taxation.[8]

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2. Benjamin Sutton, *What You Need To Know From the Art Market 2020 Report*, Artsy.net (Mar. 5, 2020, 5:54 PM) https://www.artsy.net/article/artsy-editorial-art-market-2020-report [https://perma.cc/AK8W-ND8J] (The 2019 figure represented a drop of $3.3 billion in sales from 2018, which was the art market's biggest year in half a decade, with total sales of $67.4 billion).
3. *See generally* Masterworks, https://www.masterworks.io [https://perma.cc/3AEY-YLWW].
4. Pippa Stevens, *Buy a Monet Instead of a Treasury? Art Has Shown Long Term Returns That Rival Bonds*, CNBC (Dec. 7, 2019, 7:38 AM) https://www.cnbc.com/2019/12/07/art-has-shown-long-term-returns-that-rival-bonds.html [https://perma.cc/QTA6-FBVN].
5. *Id.*
6. *See* Elise Taylor, *The $120,000 Banana, Explained*, Vogue (Dec. 10, 2019), https://www.vogue.com/article/the-120000-art-basel-banana-explained-maurizio-cattelan [https://perma.cc/3H67–365S].
7. In 1917, French artist Marcel Duchamp famously—and controversially—presented a manufactured urinal in the museum setting. Duchamp's urinal would be the first of countless "readymade" art works. For this achievement, many describe Duchamp as the father of appropriation art. *See* Hal Foster, Rosalind Krauss, Yve-Alain Bois, Benjamin H.D. Buchloh & David Joselit, Art Since 1990: Modernism, Antimodernism, Postmodernism 140–41 (3rd ed., 2016).
8. A number of scholars and social commentators have likened under-the-table fine art purchases to money-laundering in the past decade. *See, e.g.*, Valentina Di Liscia, *How the Art in* Succession *Paints a Portrait of Power*, Hyperallergic (Dec. 9, 2021), https://hyperallergic.com/698479/how-the-art-in-succession-paints-a-picture-of-power [https://

Yet despite these observations, legal scholars have long espoused two general principles: first, that fine art is somehow special within the copyright context; and second, paradoxically, that fine art is special precisely because it is more than merely commercial.[9] Likewise, though U.S. copyright law is oft described as an economic incentives system, various carve outs have been made to protect the fine artist's *droit morale*. To oversimplify, the Visual Artists Rights Act (VARA) grants fine artists the right of attribution and the right to prevent the mutilation or alteration of their works.[10] Poignantly, VARA explicitly limits its breadth, offering protection only to a specific subset of artists.[11]

Since VARA's enactment in 1990, those in both the legal and artistic communities have challenged its vigor, even calling the law toothless.[12] Nonetheless, VARA speaks to an important normative distinction in copyright doctrine—one

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perma.cc/6EQ4-GJB4]; Helen Molesworth, *In Memory of Static: The Art of Klara Lidén*, Artforum (Mar. 2011), https://www.artforum.com/print/201103/in-memory-of-static-the-art-of-klara-liden-27587 [https://perma.cc/R35G-LE8L]. *See also* Georgina Adam, Dark Side of the Boom: The Excesses of the Art Market in the 21st Century (2017); Graham Bowley, *As Money Launderers Buy Dalís, U.S. Looks at Lifting the Veil on Art Sales*, N.Y. Times (Mar. 24, 2022), https://www.nytimes.com/2021/06/19/arts/design/money-laundering-art-market.html [https://perma.cc/Y65P-ZMK5].

9. *See generally* Amy Adler, *Why Art Does Not Need Copyright*, 86 Geo. Wash. L. Rev. 313, 328 (2018). New York University Law School Professor Amy Adler postulates that visual art works do not require copyright protection. Instead, to Adler, to the extent that art is created for economic reasons, copyright law "is worthless to [artists] as an incentive." *Id.* at 328. As such, "[t]he creativity we see in the visual arts is best captured by the discourse surrounding the desire for authenticity, a norm about which copyright has virtually nothing to say." *Id.* at 324. Yet nonetheless, Adler claims that visual art is "at the heart of copyright law." *Id.*

10. 17 U.S.C. § 106A(a).

11. I use the term "fine art" in place of "visual art." "Visual art" is the only class of art protected by the Visual Artists Rights Act of 1990 (VARA). 17 U.S.C. § 106A. Under VARA, as under the 1976 Copyright Act, "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.

12. Additionally, many critics claim that VARA and other moral rights protections for artists are "antithetical to the traditional economic framework of American intellectual property law." Xiyin Tang, Note, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 Yale L.J. 218, 281 (2012). Nonetheless, other scholars, such as Marina Santilli and Henry Hansman, argue that moral rights actually work to protect artist's economic interests. *Id.* Likewise, Xiyin Tang has argued that VARA benefits the purchasing public, as moral rights—particularly attribution rights—"can reduce search costs, ensure truthful source identification, and increase efficiency in the art market." *Id.*

between fine art, owed additional safeguarding, and ordinary creative works which are perhaps shielded by a thinner veneer of copyright protection. This distinction can also be seen in the context of fair use, where fine artists have typically fared better than other accused infringers.[13] More controversially, courts have given broad deference to appropriation artists asserting fair use.[14] In this vein, legal scholars have even argued that any appropriation by a fine artist is inherently transformative, and thus fair use, simply because the fine artist shifts the way in which the appropriated work is viewed.[15] Alternatively, an appropriation artist may successfully transform copyrighted material by utilizing the material with a transformative intent, thereby altering the significance or meaning of the work in context.[16] In 2021, however, the Second Circuit's decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,[17] appeared to temper its previous decisions, holding against fair use in the most publicized art copyright case in nearly a decade. To summarize, the

13. *See* Jairui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 Stan. Tech. L. Rev. 163, 166 (2019) ("In terms of subject matter, visual arts, including photographs and fine arts, literary works, and audiovisual works, turn out to be far more susceptible to transformative use than music and software . . . .").
14. For the purposes of this article, the term "appropriation art" refers to its conventional meaning; appropriation art borrows images from popular culture, advertising, the mass media, and so on, and incorporates those images into new works of art. *See* Adler, *supra* note 9. Of course, this borrowing becomes more complicated where the underlying work is protected by copyright. The successful appropriation artist is praised for her ability to place images in different conceptual settings and, thereby, change their meaning. Until recently, appropriation artists have successfully argued that this conceptual transformation is sufficient to warrant fair use protection. In *Cairou v. Prince* for example, The Second Circuit notably declared, "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative." 714 F.3d 694 (2d Cir. 2013). Accordingly, an appropriation artist may appropriate the original copyrighted work as a sort of "raw material" to create a new expression that has no critical meaning or relation to the first whatsoever. In an empirical analysis of 16 appropriation art decisions in the past two decades, 50 percent found in favor of the alleged infringer. *See* Liu, *supra* note 13, at 212.
15. Adler has argued in favor of a broad (or perhaps boundless) reading of fair use in the fine art context. Adler asserts that she is not only pro-copying in the art context, but argues that copying has become the central mode of creativity in the contemporary art landscape. *See* Adler, *supra* note 9. As such, Adler proposes that even in *Cariou*, the transformative use test didn't go far enough. To Adler, fair use is inadequately applied to the fine artist, because the doctrine fails to recognize copying as a central building block in artistic creativity, and requires a facetious assessment of "meaning" or "message" in the underlying work. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. Rev. 559 (2016).
16. William & Mary School of Law Professor Laura Heymann proposes an "audience theory" perception of transformative use. To Heymann, because the fine artist invariably alters the context in which a work of art—or even a readymade, *ala* Duchamp –is viewed the secondary use is necessarily transformed. Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 Colum. J.L. & Arts 445 (2008).
17. 11 F.4th 26 (2d. Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

Second Circuit reversed the decision made by the Southern District of New York that legendary pop artist Andy Warhol's use of a photograph of the musician Prince by photographer Lynn Goldsmith was fair use.[18] In doing so, the panel implicitly retracted its decision in *Cariou v. Prince*, which the Court once described as the "high-water mark" of its recognition of transformative use in the fine art context.[19]

In deciding *Goldsmith*, the Second Circuit reemphasized the importance of the fair use test's fourth factor: the effect of the use on the market for the underlying work. Yet, the Second Circuit simultaneously posited that courts must vigorously engage with the effect a secondary use has upon the work's derivative markets—both actual and potential.[20] Further, the Second Circuit opined that not only should judges refrain from "assum[ing] the role of art critic," but declared that it was "entirely irrelevant" that each of the "Prince Series" pieces were "immediately recognizable" as Warhol's.[21] Unfazed by Warhol's artistic pedigree, the Court compared Warhol's Prince Series to the silver screen, noting that even a "creative genius of [Martin] Scorsese's caliber" would need to license a book before adapting it into a film.[22] Accordingly, the Second Circuit perhaps sought to condemn several of its prior holdings where the secondary user's notoriety appeared to be an essential component of the fourth factor analysis.[23] In doing so, *Goldsmith* articulated a new fair use ethos—fine art is no longer special. Yet, rather than inspiring panic, art enthusiasts and legal scholars alike should see this ethos as a much-needed return to the spirit of fair use and of intellectual property law more generally; creativity ought to be born "on the shoulders of giants," not by giants standing on the rest of us.[24]

I. Fine Art and the Fair Use Doctrine

The United States Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight[s] to their respective [w]ritings and [d]iscoveries."[25] Unlike copyright systems from the continental tradition, United States copyright law exists primarily to provide creators with the

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18. *Id.*
19. *Id.* at 38 (quoting TCA Television Corp. v. McCollum, 839 F.3d 168, 181 (2d. Cir. 2016)).
20. *Id.* at 48.
21. *Id.* at 41, 43.
22. *Id.* at 43 ("[T]he fact that Martin Scorsese's recent film *The Irishman* is recognizably 'a Scorsese' 'do[es] not absolve [him] of the obligation to license the original book' on which it is based.").
23. *See, e.g.*, Cariou v. Prince,714 F.3d 694 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006).
24. Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. Econ. Persps. 29 (1991).
25. U.S. Const., art. I, § 8, cl. 8.

economic incentives to create and share work with the public.[26] In essence, the copyright law provides a creator with a monopoly over her work, and alongside it, the exclusive right to control its distribution and release. As early as 1834, the Supreme Court concluded that copyright was fundamentally utilitarian.[27] For centuries, the Supreme Court has stressed that the rights conveyed by copyright are statutory, as opposed to a natural right belonging to the creator.[28] Thus, U.S. copyright law attempts to strike a balance between the creator's monopoly and the costs borne by the public due to these exclusive rights.[29] As part of this balance, the 1976 Copyright Act formally codified the common law doctrine of fair use, which permits individuals other than the copyright holder to use copyrighted works under limited circumstances. The fair use provision of the 1976 Copyright Act states, in pertinent part:

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

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

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for and value of the copyrighted work.[30]

The four statutory factors are non-exhaustive, however, and courts frequently engage in case-by-case analysis to determine in the aggregate whether the second use of an underlying work is fair "in light of copyright's purpose."[31]

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26. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").
27. Wheaton v. Peters, 33 U.S. 591 (1834).
28. *See*, *e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 111 S. Ct. 1282 (1991) (discussing the statutory and Constitutional foundations of Copyright). *See also*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1108 (1990) (stating that the text of the Constitution implies that exclusive intellectual property rights "exists only by virtue of statutory enactments"). This right is limited to protection of expressions and does not extend to protection of "idea, procedure, process, system, method of operation, concept, principle, or discovery." 17 U.S.C. § 102 (2012).
29. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (noting that the Copyright Act recognized society's interest "in the free flow of ideas" and acknowledged that interest would inherently be impeded by the ability of creators to "control and exploit[]" their creations). *See also* Leval, *supra* note 28, at 1109 (arguing that the ultimate goal of copyright law is to "stimulate creativity" for the greater benefit of the people).
30. 17 U.S.C. § 107.
31. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994).

Because the four statutory factors are non-exhaustive, and because no single factor is conclusive, fair use is said to constitute a mixed inquiry of law and fact.[32] Further, Section 107—the Copyright Act's fair use provision—does not attempt to provide a rule that may be applied to determine whether any particular use of a copyrighted work is "fair" in light of the circumstances.[33] In his well-known treatise on copyright, David Nimmer proposes that this is because Section 107 gives no guidance as to the relative weight of each of the listed factors, and because the four factors are at times augmented by extra-statutory considerations.[34] Here too, courts engage in a utilitarian calculus, attempting to reconcile the benefits of the artist's monopoly and the rights and enjoyment of the public. As such, the affirmative defense of fair use "permits 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."[35]

Because the fair use doctrine is evidently ad-hoc by design, it has long been described as "hopelessly unpredictable and indeterminate," and the most troublesome aspect of copyright.[36] Yet, despite the fact that the relationship between art and law is equally labyrinthic, fair use once appeared to be somewhat predictable where a fine artist was the alleged infringer. In *Rogers v. Koons* the Second Circuit held that famed appropriation artist Jeff Koons' *Puppies* sculpture had infringed the plaintiff's copyrighted photograph.[37] In rejecting Koons' fair use defense, the court stated, "the essence of Rogers' photograph was copied nearly *in toto*, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work. In short, it is not really the parody flag that appellants are sailing under, but rather the flag of piracy."[38] But by 2006, the Second Circuit appeared to eviscerate the holding in *Rogers*, leaving many to speculate that Koons' loss was due solely to his uncouth behavior leading up to proceedings.[39]

In *Blanch v. Koons*, Koons successfully asserted fair use of a photograph taken by Andrea Blanch of the lower part of an unidentified woman's crossed legs.[40] The photograph, which highlighted the metallic nail polish on the

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32. 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.05.
33. *Id.* at § 13.05(A).
34. *Id.*
35. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1196 (2021) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).
36. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 Lewis & Clark L. Rev 715, 716 (2011).
37. 960 F.2d 301 (2d Cir. 1992).
38. *Id.* at 311. Koons' *Puppies* sculpture ultimately debuted at a 1988 exhibition entitled the *"Banality Show*. *Id.* at 304.
39. *See id.* at 309 ("Koons' conduct, especially his action in tearing the copyright mark off of a Rogers notecard prior to sending it to the Italian artisans . . . suggests bad faith in defendant's use of plaintiff's work, and militates against a finding of fair use.").
40. 467 F.3d 244 (2d Cir. 2006).

model's toes, was part of a six-page *Allure* editorial on metallic makeup trends.[41] Koons ultimately incorporated the photograph into a painting featuring three additional pairs of women's legs.[42] In holding that Koons' composite work constituted fair use, the Second Circuit found that Koons' work was sufficiently transformative—which I will discuss in greater detail in Part III—because the transformative use test "almost perfectly describe[d] Koons's adaptation of *Silk Sandals*: the use of a fashion photograph created for publication in a glossy American "lifestyles" magazine—with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details and, crucially, their entirely different purpose and meaning—as part of a massive painting commissioned for exhibition in a German art-gallery space."[43] Later, in *Cariou v. Prince*, the Second Circuit declared, "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative."[44] Accordingly, the court held that as a secondary user, an artist could utilize copyrighted work as a sort of raw material to create new expression, even in instances where the resultant expression has no critical bearing whatsoever.[45]

Further, in *Blanch*, the Second Circuit found that because Koons' use was sufficiently transformative, it could not feasibly supplant the market for Blanch's photograph as required by the fourth fair use factor.[46] For context, the fourth factor assesses whether the new use is likely to have a significant impact on the potential market for or value of the underlying copyrighted work.[47] When a secondary use is transformative, this factor often weighs in favor of fair use because market substitution is less likely to occur.[48] As such, fair use is favored in cases where the "secondary use is not a substitute for the original and does not deprive the copyright holder of a derivative use."[49] In *Cariou*, the Second Circuit held that 25 (of 30) of Prince's works could not possibly usurp the market for Cariou's photographs, because Prince had not only effectively transformed the artistic approach and aesthetic, but also had a distinct clientele.[50] Moreover, in *Blanch*, the Second Circuit held that because Blanch

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41. *Id.* at 247–48.
42. *Id.* at 248.
43. *Id.* at 253.
44. 714 F.3d 694, 706 (2d Cir. 2013).
45. *Id.* at 707–08.
46. *Blanch*, 467 F.3d at 258.
47. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).
48. *See id.* at 591.
49. *See* SOFA Ent., Inc. v. Dodger Prods., Inc., 709 F.3d 1273, 1280 (9th Cir. 2013).
50. *Cariou*, 714 F.3d at 708–09. The Second Circuit noted that while Prince refrained from describing the transformative intent behind his secondary use during his deposition, his failure to do so was not dispositive. *Id.* at 707. The Court elaborated: "What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could

had "not published or licensed" the *Silk Sandals* photograph subsequent to its appearance in *Allure, nor had actively licensed photographs for use in visual artworks,* Koons' use of her photograph "could not cause any harm to her career or upset any plans she had for *Silk Sandals* or any other photograph."[51] As such, the court found that fourth fair use factor "greatly favor[ed]" Koons.[52]

As a result, a finding of fair use long appeared to turn on whether the secondary user sufficiently transformed the copyrighted work aesthetically, or on purpose. In the appropriation art context, this notion of transformation inevitably constituted some minimal degree of aesthetic transformation, and more assertively, a sort of dimensional or contextual transformation. As I will contend in Part IV, arguments regarding dimensional or contextual transformation rely heavily on the same erroneous distinction embedded in VARA—one between fine art and everything else in copyright.

II. Goldsmith and Its Implications

Against this backdrop, the *Goldsmith* holding is striking. The facts in *Goldsmith* are fairly uncomplicated, and not dissimilar from the likes of *Blanch* or *Cariou*. In 1981, photographer Lynn Goldsmith took a series of photographs featuring legendary musician Prince.[53] Though the photographs were initially taken on assignment for *Newsweek*, the photos were not published by *Newsweek*, but were later featured in a *Vanity Fair* article.[54] In order to use the photographs "for use as an artist reference" in connection with an article to be published, *Vanity Fair* obtained a license from Goldsmith.[55] As part of the project, *Vanity Fair* also recruited famed pop-artist Andy Warhol to adapt an image in connection with the article.[56] The article, entitled "Purple Fame," was ultimately published in 1984, and Goldsmith was credited for source photography.[57] The license permitted *Vanity Fair* to publish an illustration based on the Goldsmith photograph in its November 1984 issue, once as a full page and once as a quarter page.[58] The license further required that the illustration be accompanied by an attribution to Goldsmith.[59] Goldsmith was unaware of the license

be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so. Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may "reasonably be perceived" in order to assess their transformative nature." *Id.*

51. *Blanch*, 467 F.3d at 258.
52. *Id.*
53. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 33 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).
54. *Id.* at 34.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

at the time and played no role in selecting the Goldsmith photograph for submission to *Vanity Fair*.[60] *Vanity Fair* did not advise Goldsmith that Warhol was the artist for whom her work would serve as a reference, and she did not see the "Purple Fame" article when it was initially published.[61]

Sometime later, unbeknownst to Goldsmith, Warhol created fifteen additional works based on Goldsmith's original photograph, known collectively with the *Vanity Fair* image as the "Prince Series."[62] The Prince Series comprised of fourteen silkscreen prints (twelve on canvas, two on paper) and two pencil illustrations.[63] At some point after Warhol's death in 1987, the Andy Warhol Foundation (AWF) acquired title to and copyright in the Prince Series.[64] Between 1993 and 2004, AWF sold or otherwise transferred custody of twelve of the original Prince Series works to third parties and, in 1998, transferred custody of the other four works to The Andy Warhol Museum.[65] AWF retained copyright in the "Prince Series" works and licensed the images for editorial, commercial, and museum use.[66] Shortly after Prince's death in 2016, Condé Nast, *Vanity Fair's* parent company, contacted AWF.[67] Its initial intent was to determine whether AWF still had the rights to the 1984 image, which Condé Nast hoped to use in connection with a planned issue commemorating Prince's life.[68] After learning that AWF had additional images from the Prince Series, Condé Nast ultimately obtained a broader commercial license for a different Prince Series image for the cover of the planned tribute issue.[69] Condé Nast published the tribute magazine in May 2016 with a Prince Series image on the cover.[70] Goldsmith was not given any credit or attribution for the image, which was instead attributed solely to AWF.[71]

In July 2016, Goldsmith contacted AWF to advise it of the perceived infringement of her copyright.[72] That November, Goldsmith registered the Goldsmith photograph with the U.S. Copyright Office as an unpublished work.[73] On July 1, 2019, the district court granted summary judgment in favor of AWF, who asserted that the Prince Series works were fair use.[74] Upon

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 35.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 36.

evaluating the four fair-use factors set forth in 17 U.S.C. § 107, the district court concluded that: (1) the Prince Series was "transformative" because, while the Goldsmith photograph portrayed Prince as "not a comfortable person" and a "vulnerable human being," the Prince Series portrayed Prince as an "iconic, larger-than-life figure";[75] (2) although the Goldsmith photograph was both creative and unpublished, which would traditionally weigh in Goldsmith's favor, this was "of limited importance because the Prince Series works [were] transformative works;"[76] (3) in creating the Prince Series, Warhol "removed nearly all [of] the [Goldsmith] [P]hotograph's protectible elements;"[77] and, (4) the Prince Series works "[were] not market substitutes that have harmed—or have the potential to harm" the market of the Goldsmith photograph.[78] Of course, by 2021, the Second Circuit reversed, and so our discussion begins.

Goldsmith's photograph of Prince (Left) and several of Warhol's "Prince Series" works (Right)[79]

While much of the conversation following the *Goldsmith* decision has focused primarily on the *Goldsmith* court's reconceptualization of the first fair use factor—the purpose and character of the use—I am instead interested in the way in which the Goldsmith court reframed the interaction between the first factor and the fourth.[80] While the Second Circuit appeared to weaken the

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75. *Id.* (quoting Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019)).
76. *Id.* (quoting *Goldsmith*, 382 F. Supp. 3d at 327).
77. *Id.* (quoting *Goldsmith*, 382 F. Supp. 3d at 330).
78. *Id.* (quoting *Goldsmith*, 382 F. Supp. 3d at 331).
79. *Id.* at 34–35.
80. *See* Petition for a Writ of Certiorari at 3, *Goldsmith*, 11 F.4th 99 (No. 21–869) (alleging "[t]he Second Circuit's imposition of a novel [transformative use] framework displacing [the Supreme] Court's precedent plainly warrants review.").

once seemingly causal relationship between the first and fourth fair use factors, it nonetheless reaffirmed that the "first and fourth factors are closely linked,"[81] as "the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original."[82] As such, the Second Circuit ultimately found that both the first and fourth factor tipped in favor of Goldsmith, yet it did so without concluding that Warhol's adaptation of Goldsmith's photographs "usurp[ed] the market" for them.[83]

More interestingly, and unlike in *Cariou* and those that came before it, the Second Circuit acknowledged that a wide range of economic interests are cognizable under the fourth factor. Recognizing the limitations of the supplantation standard, the Second Circuit held that even where a secondary use does not usurp the market for the original, the fourth factor may still tip in favor of the copyright holder.[84] For example, the Second Circuit acknowledged that because photographers make a considerable portion of their income in licensing, a secondary work that impedes the copyright holder's interests in active licensing markets may fail to be fair use.[85] Because AWF had licensed the "Prince Series" images, they necessarily encroached upon Goldsmith's own licensing interests.[86] But the Second Circuit went further, offering that the fourth factor also requires assessing the copyright holder's potential interest in licensing, even in markets the copyright holder has not yet entered.[87] Additionally, applying its reasoning in *Salinger v. Colting*,[88] the Second Circuit found that even when a copyright holder outwardly disclaims interest in entering a particular licensing market, the fourth factor may still tip in her favor.[89]

III. Understanding Goldsmith: Factor Four, Economics, and Ebay

While in *Goldsmith*, the Second Circuit clearly pushes back against its earlier fair use decisions, it would be incomplete to posit that this shift was informed by fair use jurisprudence alone. I instead offer that the *Goldsmith*

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81. *Goldsmith*, 11 F.4th at 48.
82. *Id.* (quoting Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015)).
83. *Id.* It should be noted, however, that the Second Circuit expressed skepticism at AWF's supplantation arguments as well. Arguing that Warhol's "Prince Series" could not possibly usurp the market for Lynn Goldsmith's photographs, AWF portrayed the market for Warhol's "Prince Series" as—quite bluntly—those who collect Warhols. *Id.* at 48. The Court quickly dismissed this argument as circular, and even suggested that it affords notorious artists a "celebrity-plagiarist privilege" that I discuss in greater detail in Part III. *Id.* at 43.
84. *See id.* at 49.
85. *See id.* at 50.
86. *Id.* at 49–50.
87. *Id.* at 50.
88. 607 F.3d 68 (2d Cir. 2010).
89. *Goldsmith*, 11 F.4th at 48–49.

decision also evinces larger trends, both the whittling of injunctive relief in copyright infringement actions following *eBay v. MercExchange*[90] and a changed cultural conception of both the artist and the art economy.

A. *Squaring Away "Transformative Use" and "Market Effect"*

First, in deciding *Goldsmith*, the Second Circuit was acutely aware of its decision in *Cariou* just eight years prior. But *Goldsmith* appears more concerned with two things; what *Cariou* got wrong about transformative use and, more importantly, to what extent a transformed use effects the market for the original work under the fourth factor.[91]

As I discussed in Part I, the unpredictability of fair use has long irritated even the most zealous copyright scholars. One of many attempting to make sense of the mess, Judge Pierre Leval authored *Toward a Fair Use Standard* in 1990. In the article, Leval introduced a number of fair use principles, most influentially, the idea that the first fair use factor—the purpose and character of the secondary use—turns primarily on "whether, and to what extent, the challenged use is transformative."[92] To Leval, the transformative use must not only be productive, but must also employ the underlying work in a different manner or for different purpose than the original.[93] As such, a quotation of copyrighted material that merely repackages the original is unlikely to pass the fair use test. Since Judge Leval first described transformative use in 1990, the concept swiftly overtook the fair use analysis; the doctrine of transformativeness has been invoked in over 90 percent of fair use decisions in the past decade,[94] and of the decisions that found a transformative use, 94 percent also held in favor of the alleged infringer.[95]

The transformative use test became not only a heuristic tool for courts, it morphed into the fulcrum of all fair use cases. For example, courts have held that a finding of transformative use overrides findings of the infringer's bad faith or commercial purpose under the first factor, and renders irrelevant the issue of whether the original work is unpublished or creative under the second.[96] So long as a secondary use is sufficiently transformative, courts have accepted copying *in toto*, diluting the amount and substantiality inquiry

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90. 547 U.S. 388 (2006).
91. *See Goldsmith*, 11 F.4th at 38, 48.
92. Leval, *supra* note 28, at 1111(emphasis removed).
93. *Id.*
94. Liu, *supra* note 13, at 163.
95. *Id.* "Although the win rate of a transformative use defense is 50.8% overall, it has experienced a steady increase from 26.4% before 2000 to 63.3% after 2010. Between the two copyright hubs, the Second Circuit generated a 58.5% win rate, substantially higher than the Ninth Circuit (45.8%)." *Id.* at 167.
96. *Id.* at 163. *See also*, Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. Pa. L. Rev. 549, 603–06 (2008) (discussing the impact of transformative use in fair use cases).

under factor three.[97] Finally, and most importantly in the context of *Goldsmith*, courts have largely held that the more transformative the secondary use, the less likely the use will have a deleterious impact on the market for or value of the original.[98] As such, the transformed work has buffered alleged infringers from evidence on pecuniary damage to either the primary work or its derivate markets under the fourth factor. Of the cases where courts found that a use was transformative, a staggering 84.9 percent found that the fourth factor also tipped in favor of fair use.[99]

Nowhere has this trend been more evident than in copyright infringement actions involving fine art. Despite Justice Holmes' famous admonition against judges appraising the aesthetic, judges necessarily evaluate aesthetic qualities as part of the fair use analysis.[100] In cases involving appropriation art, this can include judging not only the aesthetic qualities of each underlying work, but to what extent the secondary user does something more. At the heart of this judgment is the inquiry of what constitutes art worthy of copyright's full thrust in the first place. This task has become increasingly difficult as both cultural appetites and modes of artistic expression change. To further complicate matters, the fourth factor compels judges to assess whether an artist's appropriation of a copyrighted work would adversely impact its market or value.[101] Rather than undertaking complex economic assessments, courts instead lean heavily into the notion of transformativeness in art cases, most disturbingly, reimagining the fourth factor analysis as a mere extension of the transformative use test.[102] In *Cariou*, the Second Circuit codified this belief, stating that transformative use controlled factor four, thereby deeply influencing how courts evaluated evidence on market harm.[103]

Worse still, courts have long conflated an artist's style with his commercial success and notoriety, to the extent that such celebrity can erroneously serve as preclusive evidence against a finding of market harm under the fourth factor. In *Blanch*, for example, the Second Circuit held that appropriation artist Jeff Koons' use of a portion of the fashion photograph *Silk Sandals*

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97. *See, e.g.*, Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, 2020 SING. J. LEGAL STUD. 265.

98. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994) ("But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.").

99. *See* Liu, *supra* note 13, at 168.

100. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). In *Bleistein*, Justice Holmes remarked, "[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." *Id.*

101. 17 U.S.C. § 107.

102. *See* Liu, *supra* note 13, at 198–201.

103. *See* Cariou v. Prince, 714 F.3d 694, 709 (2d Cir. 2013).

was fair use as a matter of law.[104] In that case, the court claimed that in part because of Koons' notoriety as a celebrity appropriation artist, his work could not possibly usurp the market for Blanch's photograph.[105] Likewise, in dismissing the danger of market substitution, the court frequently referred to the fact that the transformed artwork appealed to "an entirely different sort of collector"—alluding that Prince's audience was of a different caliber—although the defendant's audience consumed the original work in exactly the same fashion as the first author had intended.[106] In *Cariou*, for example, the Second Circuit painstakingly enumerated a list of celebrities who patronized defendant Richard Prince. The point of this star-studded list was to suggest that the market for Cariou's photographs couldn't be harmed by Prince's adaptation; Prince's works were simply too expensive.[107]

The transformative use test can muddy the waters of what it means when a celebrity artist uses a particular style. It is unclear whether a work could be considered transformed because it employs the artist's signature flourish, or whether that flourish is merely the mark of the celebrity artist. This conflation of style and celebrity has not been merely the error of courts. In 2018, New York University School of Law Professor Amy Adler examined a number of contemporary case studies to suggest a rather radical idea: art does not need copyright.[108] One such case study involved Richard Prince's 2014 *New Portraits* series. To create the series, Prince scoured Instagram for selfies.[109] When he found a selfie he liked, he commented on the post and took a screenshot.[110] Prince later emailed the screenshots to his team of assistants, who had them inkjet-printed and stretched onto canvas.[111] Other than rendering the images on canvas, Prince's only stylistic additions were his own brief comments, which consisted of brief dialogue overheard from the television as he screenshotted the image.[112] Given Prince's known interest in both youth culture and the

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104. Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).
105. *Id.* at 246.
106. *Cariou*, 714 F.3d at 709 (2d Cir. 2013).
107. *Id.* ("Prince's work appeals to an entirely different sort of collector than Cariou's . . . . *Canal Zone* artworks have sold for two million or more dollars. The invitation list for a dinner that Gagosian hosted in conjunction with the opening of the *Canal Zone* show included a number of the wealthy and famous such as the musicians Jay–Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt.").
108. Adler, *supra* note 9.
109. *Id.* at 315.
110. *Id.*
111. *Id.*
112. *Id.* In the artist's statement in the press release announcing the work on the Gagosian Gallery's website, Prince wrote: "The language I started using to make 'comments' was based on Birdtalk. Non sequitur. Gobbledygook. Jokes. Oxymorons. 'Psychic Jiu-Jitsu.'"

seamy side of masculinity, many of the selected selfies were taken by young, attractive women, including models Kate Moss and Emily Ratajkowski, and members of the alternative pin up group, Suicide Girls.[113] The resulting series of six-by-four-foot works sold for about $40,000 each—cheap for Prince, whose works typically cost over $1 million.[114] Following this case study, Adler drew several conclusions. First, Adler argued that despite varied critical reception, the public response to Prince's *New Portraits* series was one of disdain.[115] Second, just as the Second Circuit held in *Cariou*, Adler concluded that because the value of the *New Portraits* series was derived from Prince's notoriety and not from any aesthetic transformation of the works, Prince's victims suffered no pecuniary harm whatsoever.[116] To Adler, while Prince's "original theft from the Suicide Girls" may have been a "moral violation," in the economic terms that copyright recognizes, Prince's thefts may have instead "enriched" his victims.[117] If one were to cross-apply Adler's reasoning to *Goldsmith*, the fact that the Prince Series pieces were quintessential Warhols would alone be enough to assert fair use—a conclusion the Second Circuit was unwilling to accept.[118]

Richard Prince: New Portraits: June 12–August 1, 2015, Gagosian, http://www.gagosian.com/exhibitions/richard-prince—june-12–2015 [https://perma.cc/4AN8-B43B].

113. *See* Adler, *supra* note 9, at 316; Sandra Song, *Emily Ratajkowski Hits Back at Richard Prince Controversy with NFT Sale*, Paper (Apr. 29, 2021), https://www.papermag.com/emily-ratajkowski-richard-prince-2652817441.html?rebelltitem=3#rebelltitem3 [https://perma.cc/Y4TZ-ARD9].

114. *See* Rain Embuscado, *The Top 10 Artists Who Broke Auction Records This Week*, Artnet News (May 13, 2016), https://news.artnet.com/market/artists-who-set-auction-records-spring-2016–495011 [https://perma.cc/6V59-L3SD] (documenting the $9.7 million paid for Prince's 2005–2006 painting, *Runaway Nurse*). Prince is often listed as one of the top ten most expensive living artists at auction. *See, e.g.*, Rain Embuscado, *The Top 10 Most Expensive Living American Artists of 2016*, Artnet News (July 25, 2016), https://news.artnet.com/market/most-expensive-living-american- artists-2016–543305 [https://perma.cc/XX27-FMAT] [hereinafter Embuscado, *Expensive Artists 2016*]; Jerry Saltz, *Richard Prince's Instagram Paintings Are Genius Trolling*, Vulture (Sept. 23, 2014, 2:15 PM), http://www.vulture.com/2014/09/richard-prince-instagram-pervert-troll-genius.html [https://perma.cc/3K8G-JHST].

115. *See* Adler, *supra* note 9, at 317.

116. *See* Adler, *supra* note 9, at 367.

117. *Id.* at 320. More brazenly, Adler exclaimed, "[Prince's] theft produced the value. In the art market, copying does not harm the market for the original." *Id.* at 351.

118. *See* Andy Warhol Found. for the Visual Arts v. Goldsmith,11 F.4th 26, 42 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

Richard Prince, New Portraits (2014) (Installation View)[119]

While in *Goldsmith*, the Second Circuit alleged that it neither had the willingness nor ability to overturn *Cariou*, it explicitly acknowledged that its once "overly liberal standard of transformativeness," risked crowding out statutory protections for the copyright holder's licensing markets or creation of derivative works.[120] To this end, the Second Circuit likewise cautioned that the fair use inquiry should not be overly simplified with "bright-line rules,"[121] and unambiguously stated that the fair use doctrine seeks to strike a balance between an artist's intellectual property rights and the ability of other "authors, artists, and the rest of us to express ourselves by reference to the works of others."[122] The Second Circuit, in effect, reversed *Cariou* by holding that whether a work is transformative cannot turn merely on the stated or perceived intent of the artist.[123] Nor can the transformative use inquiry turn on the meaning that a critic, or for that matter, a judge, ascribes to the work.[124] Accordingly, the Second Circuit appeared acutely aware of its past holdings, even suggesting

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119. Jess Howard, *Social Media, Appropriation, and the Art World*, Norwich Radical (June 30, 2015), https://thenorwichradical.com/2015/06/30/social-media-appropriation-and-the- art-world [https://perma.cc/FA8N-CLLR].
120. *Goldsmith*, 11 F.4th at 39. *See also id.* (quoting Authors Guild v. Google, Inc., 804 F.3d 202, 216 n.18) ("[T]he word 'transformative,' if interpreted too broadly, can also seem to authorize copying that should fall within the scope of an author's derivative rights.").
121. *Id.* at 37 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994)).
122. *Id.* at 36 (quoting Blanch v. Koons. 467 F.3d 244, 250 (2d Cir. 2006). *See also* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (fair use is "flexible" and "its application may well vary depending on context.").
123. *Goldsmith*, 11 F.4th at 41.
124. *Id.*

that the transformative use analysis infuses far too much aesthetic judgement into fair use.

I contend, however, that the Second Circuit appears to be going further, instead implying that the distinction between art and everything else is itself too great of an aesthetic inquiry for fair use to take on. First, the *Goldsmith* opinion unambiguously asserted that even aesthetic transformation of a copyrighted work may not be enough to assert fair use, stating that it "does not follow" that any secondary work that adds new aesthetic, expression, or meaning to its source material is "necessarily transformative," as doing so may impede the copyright holder's own interests in creating derivative works or licensing down the line.[125] Likewise, the Second Circuit made no attempts to distinguish Warhol's artistic adaptation of Goldsmith's photograph, viewing the process as analogous to a filmmaker's adaptation of a novel.[126] Most stunningly, the Second Circuit reaffirmed *Rogers*, stating that in the case where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created—which essentially covers all appropriation artworks—the "bare assertion of a '*higher or different artistic use*' is insufficient to render a work transformative."[127]

As a result, in deciding *Goldsmith*, the Second Circuit clearly intended to scale back the influence that transformative use once had upon the fourth fair use factor. The Second Circuit also appeared concerned about what considerations may be taken into account as part of the transformative use test; by narrowing the transformative use inquiry and holding that a use that asserts to artistically elevate the underlying work may nonetheless fail to be fair use, the Second Circuit does little to distinguish artists of Warhol's pedigree from other creators, or even garden variety infringers.[128]

B. *All Roads Lead to Licensing*

When the Second Circuit decided *Goldsmith*, they made fair use harder to claim, limited the sway of transformative use, and reframed the fourth factor

125. *Id.* at 38.

126. *Id.* at 39–40 ("Consider, for example, a film adaptation of a novel . . . [d]espite the extent to which the resulting movie may transform the aesthetic and message of the underlying literary work, film adaptations are identified as a paradigmatic example of derivative works.").

127. *Id.* at 41 (emphasis added) (quoting Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992)). *See also id.* (quoting Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019)) ("The district court held that the Prince Series works are transformative because they 'can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure.' That was error.").

128. *Id.* at 48 ("We cannot, however, endorse the district court's implicit rationale that the market for Warhol's works is the market for 'Warhols,' as doing so would permit this aspect of the fourth factor always to weigh in favor of the alleged infringer so long as he is sufficiently successful to have generated an active market for his own work.").

analysis to seriously assess a copyright holder's economic interests in licensing, rather than focusing on the market for the underlying work, as most courts had done before. While this seems to overhaul the fair use analysis as it was once understood, I believe this was done in part because licensing is now a plausible remedy for copyright infringement, and as such, a copyright holder's interest in licensing her work necessarily deserves more play. In tandem, I posit that because an injunction is no longer a reasonable remedy in most copyright infringement actions, courts may be more willing to reject fair use defenses.

It was long assumed that irreparable harm would be presumed—and an injunction would issue—upon proof of a defendant's copyright infringement.[129] However, courts have become increasingly reluctant to grant injunctions even where infringement is clearly demonstrated. Following the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*,[130] copyright holders must now satisfy the traditional four factor test in order to receive injunctive relief.[131] In *eBay*, MercExchange sued eBay for infringing its patent on an electronic market system that was designed to facilitate the sale of goods between private individuals.[132] Though a jury found the patent both valid and infringing, the district court denied MercExchange's request for a permanent injunction that would have shut down eBay's infringing auction service.[133] The court reasoned that because MercExchange was a nonpracticing entity whose business consisted solely of licensing patents, damages would be an adequate remedy.[134]

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129. Prior to the Supreme Court's decision in *eBay*, courts routinely granted injunctive relief when plaintiffs had either proven copyright infringement or shown a likelihood of success on the merits. Some courts went so far as to say that plaintiffs in such cases were "entitled" to injunctive relief. There were however, some exceptions to this trend; for example, in *Universal City Studios, Inc. v. Sony Corporation of America*, the Ninth Circuit acknowledged that "[t]he relief question [was] exceedingly complex" and suggested that "the difficulty in fashioning relief may well have influenced the district court's evaluation of the liability issue." 659 F.2d 963, 976 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984). At the time, Universal would have been entitled to a permanent injunction for such infringements. Nonetheless, the Ninth Circuit opined that *Sony* might be a case in which damages or a continuing royalty might be a more suitable remedy given the substantial public injury that would result from an injunction.

130. 547 U.S. 388 (2006).

131. "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury [(irreparable harm)]; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 391.

132. *Id.* at 390.

133. *Id.* at 390–91.

134. At the trial level, the district court relied on MercExchange's practice of licensing "its patents to others in the past" and "its willingness to license the patents to [eBay]," as well as "its lack of commercial activity in practicing the patents." MercExchange, L.L.C. v. eBay, Inc., 275 F. Supp. 2d 695, 712–13 (E.D. Va. 2003).

While *eBay* only involved patents, federal courts have since reasoned that its holding applies in copyright and trademark cases as well. In the first few years after *eBay*, courts questioned whether *eBay*'s holding should even apply in copyright actions.[135] By ignoring or inadequately construing *eBay*, courts in these early years continued to presume irreparable harm whenever copyright plaintiffs had shown a likelihood of success on the merits. In *Salinger v. Colting*,[136] for example, a New York district court granted the plaintiff a preliminary injunction to prevent publication of Colting's book, *60 Years Later: Coming Through the Rye*, which colorfully reimagined Salinger's Holden Caulfield as an old man.[137] In doing so, the district court relied on pre-*eBay* Second Circuit precedents that presumed irreparable harm when a plaintiff was likely to succeed on the merits.[138] In response to Colting's argument that such a presumption was overturned by *eBay*, the district court asserted that *eBay* had no relevance in copyright cases.[139] In 2010, however, the Second Circuit reversed, holding that a presumption of irreparable harm in copyright cases had been "abrogated" by the *eBay* decision.[140] In *Salinger*, the Second Circuit specifically endorsed withholding injunctions in close fair use cases, stating that when defendants raised colorable fair use defenses, both the plaintiff and defendant had noteworthy first Amendment interests at stake that should be considered in preliminary injunction proceedings.[141]

In *Salinger*, the Second Circuit opined that "as an empirical matter, [it] may well be the case" that most copyright plaintiffs who can show a likelihood of success on the merits have also been irreparably harmed.[142] Nonetheless, the Second Circuit suggested that even where copyright holders are able to demonstrate irreparable harm, injunctive relief may still be inappropriate in cases where monetary damages are an adequate remedy, or where the public's interest would be disserved by the injunction. This hypothetical was later realized in *Whitmill v. Warner Bros. Entertainment, Inc.*,[143] when a Missouri district court refused to issue an injunction that would have prevented the domestic

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135. A 2012 study that assessed the post-*eBay* case law reported that a large number of copyright infringement cases decided between the Court's May 2006 *eBay* decision and June 1, 2010, ignored *eBay* altogether. The study reported that only 11.3 percent cited *eBay* at all, and those that did generally applied its factors "in a very cursory and mechanical way." Jiarui Liu, *Copyright Injunctions After eBay: An Empirical Study*, 16 Lewis & Clark L. Rev. 215, 218, 228 (2012).
136. 641 F. Supp. 2d 250 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).
137. *Id.*
138. *Id.* at 268.
139. *Id.* at 268 n.6.
140. Salinger v. Colting, 607 F.3d 68, 75 (2d Cir. 2010).
141. *Id.* at 82–83.
142. *See id.*
143. No. 11–0752 (E.D. Mo. May 24, 2011).

release of *The Hangover Part II*.[144] There, a tattoo artist who had registered a copyright in the tribal motif he had drawn on the face of boxer Mike Tyson sued Warner Brothers over the alleged use of the tattoo on actor Ed Helms' character.[145] Despite the plaintiff asserting "a straightforward case of reckless copyright infringement" in its motion for a preliminary injunction, that court concluded that harm to the public interest weighed against injunctive relief, as an injunction just moments before the film's release would have imposed losses on thousands of distributors, theater operators, and other third parties.[146]

Beyond limiting the likelihood of injunctive relief, *eBay* also introduced a new conceptualization of damages. While pre-*eBay* courts occasionally awarded compulsory licenses to at least partially compensate the patentee for the defendant's future infringement, the Supreme Court formally codified this practice in the wake of *eBay*, proposing an ongoing or "running" royalty.[147] In this context, an ongoing royalty is monetary compensation paid to the intellectual property holder by the adjudged infringer for post-judgement infringing uses of the protected material.[148] While many have asserted that an ongoing royalty is simply a euphemism for a compulsory license, others argue that the ongoing royalty is only limited to the infringing defendant, and as such, is not really a license after all. Unlike the mechanical license for a previously released musical work under Section 115 of the Copyright Act, for example, an ongoing royalty must be awarded as a remedy at law.[149] Further, traditional licenses are contractual agreements between private parties, where breach of such an agreement would give rise to a contract-based cause of action. In contrast, a violation of a court ordered running royalty would instead be redressable through the court's power of contempt.

When applying *eBay* and its influence to *Goldsmith* and the fair use doctrine, there appear to be two poignant takeaways. First, an injunction is an inappropriate remedy where the public would be harmed. Following *Salinger*, such harm includes impeding the defendant's First Amendment interests, and

144. *Tattoo Artist Fails to Stop Release of "Hangover' Sequel*, 23 Westlaw J. Ent. Indus. 5 (2011).
145. *Id.*
146. Plaintiff's Memorandum in Support of His Motion for Preliminary Injunction at 1, Whitmill v. Warner Bros. Ent. Inc, (E.D. Mo. April 28, 2011) (No. 4:11-cv-00752).
147. After the *eBay* decision, Federal Circuit courts began adopting the ongoing royalty remedy where permanent injunctions appeared inappropriate. *See, e.g.*, Paice LLC v. Toyota Motor Corp., 504 F.3d 1293,1313–14 (Fed. Cir. 2007).
148. *See generally* § 30:90.50. Ongoing royalty for future infringement, 4 Annotated Patent Digest § 30:90.50. *See also* Christopher B. Seaman, *Ongoing Royalties in Patent Cases After* eBay*: An Empirical Assessment and Proposed Framework*, 23 Tex. Intell. Prop. L.J. 203 (2015). 23 Texas Intellectual Property Law Journal 203 (2015).
149. 17 U.S.C.A. § 115 (West); *Section 115 Compulsory License: Hearing Before the Subcomm. On Courts, the Internet and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Marybeth Peters, the Reg. of Copyrights), https://www.copyright.gov/docs/regstat031104.html [https://perma.cc/FWS4–74E5].

one can easily imagine that among all infringers, artists certainly have persuasive First Amendment interests at stake. Following *Whitmill*, this harm also includes financial injury to third parties that may be relying on the sale or distribution of the infringing work. Of course, the sale of an infringing art work implicates an entire constellation of gallerists, curators, investors, and collectors, just as the distribution of an infringing song or film implicates beneficially interested third parties.

Second, *eBay* and its copyright counterparts hold that where an intellectual property holder is actively licensing her works and derives a majority of her income from incensing, as did Lynn Goldsmith, equitable relief is simply inappropriate. Further, by introducing the ongoing royalty solution, *eBay* created a license-as-remedy, and if not, something at least license-like. Doing so may have invertedly lowered the stakes of many fair use cases involving artists, perhaps rendering a finding of infringement easier for courts to swallow. In previous art copyright cases, a finding of infringement may have entailed a lost profits remedy, under circumstances where lost profits are notoriously difficult to calculate. However, the option of an ongoing royalty precludes even more unsavory outcomes. For example, Section 503 of the Copyright Act offers a number of harsh remedies for copyright infringement, including impoundment, prohibiting the display of the infringing work, and even requiring the destruction of all physical objects in which the infringing work is embodied.[150] In *Whitmill*, the court recognized that despite defendant's purported "reckless copyright infringement" it would be nonetheless inequitable to enjoin *The Hangover Part II*'s release.[151] It appears similarly inequitable to order injunctive relief in cases of *Goldsmith's* ilk, where on ongoing royalty may suffice, and where the public would be disserved; Courts should clearly prevent the destruction of works that, while potentially infringing, are still an integral part of the artistic canon.[152]

150. 17 U.S.C. § 503. In *Rogers*, where the Second Circuit found that Jeff Koons' "Puppies" sculpture infringed upon the plaintiff's copyrighted photograph, the court ordered an impounding of the works—even the most fervent copyright advocates may perhaps agree that this was a negative outcome keeping copyright's creativity-maximizing bottom line in mind. *See* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

151. Plaintiff's Memorandum in Support of His Motion for Preliminary Injunction at 1, *Whitmill* (No. 4:11-cv-00752).

152. *See* Petition for a Writ of Certiorari at 37, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 99 (2d Cir. 2021) (No. 21–869) (In its petition for certiorari, counsel for AWF appears concerned that in the event that Warhol's use of Goldsmith's was not fair use, there would be a legitimate risk of the Act's harsh remedies for copyright infringement under Section 503. However, Goldsmith outwardly disclaimed interest in these remedies. Likewise, injunctive relief does not appear to be a feasible remedy under *Goldsmith's* facts for the reasons I have discussed.).

C. *Fine Art, "Sweat of the Brow," and Economic Equity*

As I discussed in Part I, U.S. copyright law is utilitarian in nature, and the rights conveyed by copyright are statutory, as opposed to a natural right belonging to the creator. To this end, Section 102 of the Copyright Act states that copyright protection subsists in the creative work itself; in essence, the copyright protection automatically exists within the copyrightable work, and does not belong to one because of their labors on the work.[153] As such, originality has long been called the sine non qua of copyright. In *Feist*, the Supreme Court reiterated this principle, holding that copyright rewards originality, not simple diligence or "sweat of the brow."[154]

If copyright's sine non qua is originality alone, some would argue that it is difficult to imagine anything more worthy of copyright than a work of fine art.[155] As I discussed earlier, VARA conveys an additional set of rights on those producing works of visual art; those deemed a visual artist have the right to prevent the alteration, mutilation, destruction, or modification of their work.[156] But of course, these rights, far broader than the rights conveyed by Copyright alone, are only available for "a painting, drawing, print, or sculpture, existing in a single copy, or in a limited edition of 200 copies or fewer."[157]

Although the Second Circuit in *Goldsmith* devotes a significant portion of its opinion to Goldsmith's creativity, it devotes far greater attention to Goldsmith's creative labor. For example, while the Second Circuit begins its opinion stressing the holistic nature of the fair use test, it characterizes the fair use inquiry as a sort of equitable balancing—one between an artist's intellectual property rights to "the fruits of her own creative labor, including the right to license and develop . . . derivative works based on that creative labor" and "the ability of [other] authors, artists, and the rest of us to express them—or ourselves by reference to the works of others."[158] Likewise, in stating that it was

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153. *See* 17 U.S.C. § 102.

154. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991) (finding that the 1976 revisions to the Copyright Act "leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection in directories and other fact-based works"); *see generally* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (finding that a photograph is copyrightable when the photographer had made a "useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same entirely from his own original mental conception").

155. In *Copyright and Cultural Capital*, however, Xiyin Tang is quick to point out that our current fetishism for a spark of the "original" has only existed for just over 100 years. "Before then, copying and the '*copy qua copy*' ideal remained the gold standard in the world of Western painting." Xiyin Tang, *Copyright and Cultural Capital*, 66 RUTGERS L. REV. 425, 425 (2014).

156. *See supra* note 11.

157. *Id.*

158. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 36 (2d Cir. 2021). Interestingly, the first portion of the quotation comes directly from the *Goldsmith* panel; the second portion, which does not describe creative *labor* is quoted from *Blanch v.*

"entirely irrelevant" to the fair use analysis that each Prince Series piece was "immediately recognizable as 'a Warhol,'" the Second Circuit warned against a "celebrity-plagiarist privilege," in which an established artist would have greater leeway to "pilfer the creative labors of others."[159] Finally, the Second Circuit's decision to move the fair use inquiry's locus away from the first factor and towards the fourth factor appears to be with Goldsmith's labor in mind. These decisions ultimately reveal that much of *Goldsmith* is really about the parties themselves.

It is up for debate whether the consideration of an artist's stature in the fair use analysis aligns with the nature of art and the principles that drive copyright law. Some scholars have called for the end of copyright in fine art, as art derives value from authenticity, and not copyright's monopoly.[160] Such authenticity inherently cannot be monopolized. As such, if the creation of art is not motivated by copyright, or more specifically, the financial incentives copyright provides, concerns about licensing standards and their purported "chilling effect" on the production of art appear disingenuous at best.[161]

Even if the ultimate aim of visual art is authenticity, described as some hybrid between copyright-defined originality and a common sense understanding of attribution, to what extent does that excuse the appropriation of works that ultimately do rely on the incentives and protections that copyright affords? Say we were to ignore the *Goldsmith* holding and look back at *Cariou*, where the Second Circuit referred to Cariou's *Yes Rasta* photographs as Prince's "raw materials."[162] Do artists not pay for gesso, stretcher bars, canvas, and paint? Are artists absolved from freely exploiting raw materials, so long as they happen to be copyrightable? In *Goldsmith*, the Second Circuit unequivocally answers no; even if visual artworks no longer require copyright protection, artists are still bound by copyright rules. This conclusion makes sense intuitively: though art scholars long bemoaned copyright's previous exclusion of street art, street artists were nonetheless prohibited from downloading pirated music online, and though conceptual artworks are not copyrightable, conceptual artists are still prohibited from using copyrighted material in installations, unless they pass the fair use threshold.[163]

But the Second Circuit's conclusion also makes sense contextually. The art world has undergone a number of reckonings in the past decade, all of which

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Koons. 467 F.3d 244, 250 (2d Cir. 2006).

159. *Goldsmith*, 11 F.4th at 43.

160. *See Adler*, *supra* note 9.

161. *See* Petition for a Writ of Certiorari at 15, 37, *Goldsmith*, 11 F.4th 99 (No. 21–869).

162. Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

163. *See, e.g.*, Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020) (finding that street art is copyrightable); Helen Stoilas, *In Victory for Street Artists, US Supreme Court Declines to Hear 5Pointz Developer's Appeal*, Art Newspaper (Oct. 8, 2020) https://www.theartnewspaper.com/2020/10/08/in-victory-for-street-artists-us-supreme-court-declines-to-hear-5pointz-developers-appeal [http://perma.cc/3THD-6ZJA].

ultimately boiled down to questions of power dynamics—those of class, race, gender, and so on.[164] As such, art institutions have publicly condemned past elitism and have outwardly acknowledged that the art world perpetuates socio-economic inequality.[165] Beyond the art world, political discourse increasingly concerns economic inequality and class relations, and populist candidates on both the left and right have garnered broad-based support in response to perceived failings of the elite.[166] Recent studies have evinced how art has become intertwined with the dynamics of financial accumulation and economic inequality. For example, Dr. Christopher Upton-Hansen, a private equity analyst, has examined how the notion of art as an investment has become mainstream over the past half century and can be traced to the proliferation of new pricing methods, structural elements like high-end freeports, collection management software, or art securities exchanges.[167] To Upton-Hansen, these innovations have ultimately enmeshed the art market with the broader financial system.[168] Recent research suggests that art prices reflect income inequality: a one percent increase in the share of total income of the top 0.1 percent triggers an increase in art prices of about fourteen percent.[169]

Unlike world-renowned artists like Koons, Prince, or Warhol, Lynn Goldsmith primarily relied on licensing for income, and therefore relied on copyright ownership. As such, the Second Circuit's novel emphasis on unrealized licensing markets and other derivative sources of income appears to be an

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164. *See, e.g.*, Margaret Carrigan, *How the Art Industry Is Grappling with Its Systemic Race Inequality*, Art Newspaper (July 10, 2020), https://www.theartnewspaper.com/2020/07/10/how-the-art-industry-is-grappling-with-its-systemic-race-inequality [http://perma.cc/35YY-FZ5H].

165. *See, e.g.*, Nic Brierre Aziz, Opinion, *When "Art" Dies, the Community Will Thrive*, Hyperallergic (Nov. 21, 2021), https://hyperallergic.com/693358/when-art-dies-the-community-will-thrive [http://perma.cc/8STZ-25QU]; Scott Reyburn, *The Art World's Elephant in the Room*, N.Y. Times (Sept. 21, 2018), https://www.nytimes.com/2018/09/21/arts/design/elephant-graph-income-inequality.html [http://perma.cc/5322–7DXR].

166. *See, e.g.*, Adam Taylor, *The Global Wave of Populism that Turned 2016 Upside Down*, Wash. Post (Dec. 19, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/12/19/the-global-wave-of-populism-that-turned-2016-upside-down [http://perma.cc/QC92–6SC5]; Duncan Espenshade, *Populism in American Elections: Bernie Sanders and Donald Trump*, Foreign Pol'y Rsch. Inst. (June 10, 2020), https://www.fpri.org/article/2020/06/populism-in-american-elections-bernie-sanders-and-donald-trump [http://perma.cc/CDT6-GMRU]; Mitchell A. Orenstein & Bojan Bugarič, *How Populism Emerged from the Shadow of Neoliberalism in Central and Eastern Europe*, London Sch. of Econ. & Pol. Sci. (Oct. 21, 2020), https://blogs.lse.ac.uk/europpblog/2020/10/21/how-populism-emerged-from-the-shadow-of-neoliberalism-in-central-and-eastern-europe [http://perma.cc/J97Q-MP6W].

167. Kristina Kolbe, Chris Upton-Hansen, Mike Savage, Nicola Lacey & Sarah Cant, *The Art World's Response to the Challenge of Inequality* 6–7 (London Sch. of Econ. Int'l Ineqs. Inst., Working Paper No. 40, 2020).

168. *See id.* at 7.

169. *Id.*

attempt to reconcile the fair use doctrine with the policy debates of our time: artists who labor for licensing fees must be adequately compensated, perhaps by way of an ongoing royalty, and artists who can afford to license probably should.[170] Though critics may opine that labor relations and other secondary considerations should have nothing to do with copyright, copyright has adjusted to industry changes before;[171] for example, courts only expanded their conception of contributory liability in the advent of peer-to-peer services.[172] More concretely, however, fair use is chiefly about the public's interest; while this undoubtedly includes the public's interest in unfettered creativity, perhaps it includes some notion of economic equity as well.[173] Professor Jane Ginsburg argues that courts should acknowledge that "the [fair use] statute's designation of 'the value of the copyrighted work' identifies independent kinds of [economic] harm and entails considerations distinct from market substitution."[174] As such, Ginsburg proposes that courts should treat the impact of the use upon the value of the work as an inquiry distinct from the assessment of market harm or market substitution.[175] In doing so, the fair use doctrine can fill in the

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170. Several of the economic considerations peppering *Goldsmith* were also articulated in *Fionarelli v. CBS Broadcasting Inc.* 551 F. Supp. 3d 199 (S.D.N.Y. 2021). There, the court warned that if large media outlets (including CBS, BBC, and Paramount, among others) could "'forgo paying licensing fees' to the work's creator and 'instead opt to use the work at a potentially lower cost'" it would be "hard to imagine that freelance photojournalists would continue to seek out and capture difficult to achieve pictures if they could not expect to collect any licensing fees." *Id.* at 248 (quoting N. Jersey Media Grp. Inc. v. Pirro, 74 F. Supp. 3d 605, 622 (S.D.N.Y. 2015)) (quoting Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 189 (D. Mass. 2007)). The court also noted that such a scenario is "'exactly the kind of situation that copyright is meant to impact—where unrestricted use would likely dry up the source.'" *Id.* (quoting *Fitzgerald*, 491 F. Supp. 2d at 189).

171. *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). In *Bleistein*, Justice Holmes recognized that (then-novel) photography was an artistic medium warranting copyright protection. In that case, Holmes warned, "[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." *Id.* at 251.

172. *See generally* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), *aff'd sub nom.* A&M Recs., Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

173. *See* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1206, 209 (2021) ("Further, we must take into account the public benefits the copying will likely produce. Are those benefits, for example, related to copyright's concern for the creative production of new expression? Are they comparatively important, or unimportant, when compared with dollar amounts likely lost (taking into account as well the nature of the source of the loss")).

174. *See* Jane C. Ginsburg, *Essay – Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"* J. of Copyright Society of USA (forthcoming Spring 2020) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537703.

175. *Id*.

gaps where equity demands that courts take account of additional interests relevant to copyright holders.[176]

IV. Is Fine Art Actually Unique in Copyright?

"Artists today know more. They are aware of the market more than they once were. Thereseems to be something in the air that art is commerce itself."

—Jasper Johns, 2008[177]

In *Campbell*, the Supreme Court newly recognized that a secondary work's status as commercial should be of little import in the fair use inquiry, as most secondary uses—fair or not—involve profit.[178] As such, apparent commerciality has not been to artists' detriment; since *Campbell*, large profit margins have not factored against artists asserting fair use. Despite this acknowledgement, the legal community has been long fixated on quixotic notions about art and the artist, and in doing so, has applied arbitrary distinctions between fine art and everything else.[179] Yet, what once distinguished fine art no longer exists.

First, the notion of artistic authenticity no longer rests in the artist's hand, but rather, in the artist's brand.[180] Today's collectors no longer rely on the artist's physical expression, and due to increasingly delegated production, which began with Warhol's factory, value is instead derived from the artist's signature.[181] While the Second Circuit seemed to be aware of this in *Blanch* and

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176. *Id*.

177. Carol Vogel, *The Gray Areas of Jasper Johns*, N.Y. Times (Feb. 3, 2008), https://www.nytimes.com/2008/02/03/arts/design/03voge.html [https://perma.cc/5XYB-LZAA].

178. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584–85 (1994) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985) (Brennan, J., dissenting)) ("If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of [Section] 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'").

179. *See generally* Debra L. Quentel, "*Bad Artists Copy. Good Artists Steal.": The Ugly Conflict Between Copyright Law and Appropriationism*, 4 UCLA Ent. L. Rev. 39 (1996).

180. In *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, Professor Xiyin Tang argues that because contemporary art has become a pure commodity object, we need moral rights to protect the artist's economic interests. To Tang, the shift of art to commodity can be evinced by the fact that art prices almost exclusively correspond with the artist's signature, rather than any expressive elements. This is in part because works of art are "no longer unique entities by nature of their mechanical reproducibility" and delegated production, and in part because the artists' signature accordingly replaces any need for the artist's physical touch. As an example, Tang notes that Andy Warhol's famous silkscreened Brillo boxes can be distinguished from the consumer product not because of any aesthetic differences, but rather, because of the Warhol "stamp" promising authenticity. *See* Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 Yale L.J. 218, 231–232 (2012).

181. Not only did Warhol intend to turn "art into a consumer product," but he was also prone to purposefully claiming that his assistants created many of his works. Amy M. Adler,

Cariou, it ultimately found that the artist's signature was itself a transformation that should be cognizable under fair use.

Second, as I discussed in Part III, courts have described art as uniquely creative in copyright, even as having the utmost punctilio of creativity. If the sine non qua of copyright is indeed originality, then media forms that seemingly ensure originality would receive even thicker copyright protections than works of fine art. Nonetheless, while non-fungible tokens (NFTs) are by definition unique, discrete, and non-interchangeable, the legal community is yet to accept the medium as artistic in nature.[182] Moreover, copyright has long excluded overtly creative mediums like conceptual art.[183] Collectively, such reticence begs the question whether courts are deciding what art is extemporaneously, based on their own aesthetic preferences.

Third, in characterizing art as only quasi-commercial, scholars inadvertently romanticize the starving artist trope, and normalize the idea that an inability to support one's self is a requisite part of creating good art.[184] However, the romantic notion of the starving artist is not limited to painters and collagists. While fine art is a winner-takes-all market, it is just one of many in the world of copyright—it appears odd to portray art stars as any rarer than rock stars.[185]

Against Moral Rights, 97 CALIF. L. REV. 263, 296 (2009).

182. *See, e.g.*, Clara Cassan, *NFTs and the Legal Challenges Ahead*, ARTLAW (May 18, 2021), https://artlaw.club/en/artlaw/nfts-and-legal-challenges-ahead [https://perma.cc/5SDQ-KP6F]. For instance, no court has held that NFTs are works of art for the purposes of VARA. *See, e.g.*, Alex Swanson, *Will–and Should–VARA Cover NFTs?*, N.Y.U. J. OF INTELL. PROP. & ENT. LAW BLOG (Nov. 30, 2021), https://blog.jipel.law.nyu.edu/2021/11/will-and-should-vara-cover-nfts [https://perma.cc/32W6-LBX8].

183. In *Kelley v. Chicago Park District*., the Seventh Circuit held that a large outdoor installation of landscape art was not copyrightable on multiple grounds, including fixation, authorship and "subject matter." 635 F.3d 290, 301 n.7, 304, 306 (7th Cir. 2011). Zahr Said argues that *Kelley* stands in tension with current artistic practices, known broadly as conceptual art. To Said, because the court held that a work of art "would not be fixed if it changes unpredictably with forces beyond the author's control," the question arises as to "whether other sorts of forces beyond the author's control might similarly threaten the work's status as fixed." Zahr K. Said, *Copyright's Illogical Exclusion of Conceptual Art*, 39 COLUM. J.L. & ARTS 335, 344 (2016). Under what Said describes as the "inherently changing" test, many conceptual forms of art, such as viewer-participatory art, or works that incorporate "random changes" like the ones discussed in *Kelley*, might be vulnerable to being deemed unfixed, and consequently ineligible for copyright protection. *Id.* at 341.

184. *See, e.g.*, Terrica Carrington, *It's Time We Stop Romanticizing the Myth of the Starving Artist*, COPYRIGHT ALLIANCE (Nov. 30, 2016), https://copyrightalliance.org/stop-romanticizing-starving-artist [https://perma.cc/UMG8-GQYF].

185. Both high-earning musicians and high-earning visual artists are anomalous; nonetheless, high earning artists should not be able to claim immunity to copyright licensing despite the fact that most artists receive little to no income for their works.

Finally, as I stressed in Part III, fine art sales no longer operate in a vacuum and are increasingly part of the global financial system. In past decades, sales for art were once quite different than sales for other copyrightable works, guided not by the free market but instead by an intricate system relying on institutions, galleries, and settled norms of pricing and costs of entry.[186] When art selling was more ritual than random, viewing visual art as more genteel than songs, books, and films may have made sense, but such a system has all but evaporated.[187] Appropriately, even successful artists openly mock the distinction between 'high' and 'low' art. Not only have artists like Jeff Koons, Damien Hirst, and Alex Israel licensed their own works for a congeries of commercial products, ranging from cheap consumer goods to Louis Vuitton bags, but Koons did so with the specific intention of challenging arbitrary artistic hierarchies.[188]

Mirroring Justice Holmes' guidance in *Bleistein*, judges should instead endorse a sort of aesthetic pluralism: either popular artworks are aesthetically valuable as measured by the same standards as traditional high art, or are dissimilar yet should be perceived as equally valid given their respective modes of aesthetic judgment.[189] Ironically, it was Andy Warhol who championed this

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186. Art collector Stefan Simchowitz, for example, is a popular target for critics who claim that his penchant for promoting young, undiscovered artists through bulk acquisitions of their work (to later flip for profit), destabilizes established workings of the art world—age-old value-determining systems composed of a long-standing and tight network of critics, publications, universities, museums and galleries that collectively define the nature of 'good' art. *See* Michael Porter, *The Notorious Stefan Simchowitz on Art Dealing, Social Media, and Faith in Art*, HYPERALLERGIC (July 25, 2018), https://hyperallergic.com/452852/the-notorious-stefan-simchowitz-on-art-dealing-social-media-and-faith-in-art [https://perma.cc/VJE6-MRRH]. As such, the method employed by Simchowitz and those like him, subverts the establishment; Simchowitz sells his curated acquisitions directly to a diverse network of wealthy clients who trust his taste implicitly. Simchowitz remarked "there used to be this universally accepted sort of 'minimum wage' for artwork. It was something like $1,200 for a painting and then it was $3,000, then four, now five. There is this weird baseline, it depends on volume as well. It's like black magic in a sense. It's sometimes right and sometimes wrong. It works and sometimes, it doesn't." *Id.*

187. *See id.*

188. *See* Caroline Goldstein, *Louis Vuitton Taps Jeff Koons to Put The World's Most Obvious Art References on Handbags*, ARTNET (Apr. 11, 2017), [https://perma.cc/H74T-37XX] (Koons described the project as Koons sees them as "a continuation of [his] effort to erase the hierarchy attached to fine art and old masters."); Eugene Kan, *Damien Hirst for Supreme Skate Decks & Box Logo Tee*, HYPEBEAST (Nov. 12, 2009), https://hypebeast.com/2009/11/damien-hirst-supreme [https://perma.cc/E7LN-3QPC]; *Vilebrequin X. Alex Israel*, VILEBREQUIN, https://www.vilebrequin.com/us/en/alex-israel-vilebrequin-collaboration[https://perma.cc/3D6H-4MGA]; Renz Ofiaza, *Here's an Official Look at Alex Israel's Rimowa Luggage*, HIGH SNOBRIETY, https://www.highsnobiety.com/p/rimowa-porsche-collaboration [https://perma.cc/46TJ-GGMH].

189. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). John A. Fisher proposes that there are three general attitudes regarding the distinction between "high"

concept; not only did Warhol assert, perhaps for the first time, that art was for everyone, but also that making art was "just another job."[190] In commenting on the ubiquity of consumer culture, Warhol imagined the very act of making money as art. He directly challenged the notion that both legal academics and courts continue to make—that real artists create for the sake of art alone.[191] Thus, *Goldsmith* aptly inquires: if art is business, and business is art, ought it be compensated?

Conclusion

It is easy to debate whether art should even be protected by copyright. Most would agree, however, that the art world has changed dramatically since the 1976 Copyright Act first codified fair use. Arguably, the art landscape is unrecognizable when compared to the years preceding Judge Leval's *Toward a Fair Use Standard*, and it continues to change each year. But *Goldsmith* demarcates a crossroads in the ongoing question of the role of money in art and artmaking. Because AWF successfully petitioned the Supreme Court for a writ of certiorari, this crossroads appears all the more significant.[192] As AWF notes in its petition, *Goldsmith* has perhaps created a circuit split between the Ninth and Second Circuits, which serve as the two hubs for copyright actions.[193] In ending this Article, however, I would like to revisit the Art Basel anecdote I discussed in the introduction. Shortly after Catellan's banana series first debuted, David Datuna, a Georgian-born American artist, sought to parody

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or "low" artforms: "There appear to be three general attitudes toward the distinction. First, elitism: the view that the high arts are artistically more valuable on the whole because they primarily encourage the values alluded to in the high art cluster. Second, populism: the view that the arts of popular culture are more alive, authentic, meaningful and on the whole more artistically valuable for modern audiences than the arts of high culture. Third, pluralism: the view that artworks in both popular and high forms and genres can have great artistic value. One such pluralist position would say that popular artworks are aesthetically valuable as measured by the same standards as traditional high art; another version of pluralism would emphasize the different aesthetic values embodied by popular and high art forms and genres." John A. Fisher, *High Art Versus Low Art*, *in* The Routledge Companion to Aesthetics 473, 480 (Berys Gaut & Dominic McIver Lopes eds., 2013). *See also* Ted Cohen, *High and Low Thinking About High and Low Art*, 51 J. Aesthetics & Art Criticism 151 (1993).

190. Warhol once purportedly asked "Why do people think artists are special? It's just another job." Andy Warhol, The Philosophy of Andy Warhol: From A to B and Back Again (1975).

191. *See* Varian Viciss, *On Warhol: Business Is the Best Art*, Medium (Oct. 28, 2015), https://medium.com/art-meanderings-for-living/on-warhol-business-is-the-best-art-f4b2ddfa53d9 [https://perma.cc/WG32-JMBZ].

192. *See* Adam Liptak, *Supreme Court to Hear Copyright Fight Over Andy Warhol's Images of Prince*, N.Y. Times (Mar. 28, 2022), https://www.nytimes.com/2022/03/28/us/politics/supreme-court-andy-warhol-prince.html [https://perma.cc/W9CQ-WTUA].

193. *See* Petition for a Writ of Certiorari at 15, 37, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 99 (2d Cir. 2021) (No. 21–869).

the piece by eating it.[194] Datuna, who has exhibited works at the Smithsonian's National Portrait Gallery and had a long history of performance and site-specific political work, envisaged his conduct as an performance art piece.[195] Datuna's performance reminds us that whether the Supreme Court ultimately upholds the Second Circuit's decision in *Goldsmith*, the decision finally articulates a growing number of questions in regards to art and copyright. What is art anyways? Is there a creative hierarchy when it comes to art and fair use? If so, should there be? Does the creation of art itself absolve otherwise unacceptable conduct? Finally, as popular art-memer @jerrygogosian—AKA artist and consultant Hilde Lynn Helphenstein—once queried, is the financialization of art not the art of our times?[196] Only time will tell, but courts now appear to be listening.

194. Mara Siegler & Laura Italiano, *The $120K Banana Eaten by NY Performance Artist*, N.Y. Post (Dec. 7, 2019, 5:52 PM), [https://perma.cc/GY99–9MXT]. Datuna, notably, had a long history of performance and site-specific political work, such as laying out blocks of ice to spell Trump in New York's Union Square, which would later melt—the action was a tongue-in-cheek criticism of Trump's withdrawal from the Paris Climate Agreement. This action was inspired by the withdrawal from the Paris agreement. *See* Shannon Barbour, *'Trump' Gets an Icy Reception in Union Square*, Bedford + Bowery (June 8, 2017), https://bedfordandbowery.com/2017/06/trump-gets-an-icy-reception-in-union-square [https://perma.cc/X6QE-YPCM].

195. Hakim Bishara, *"It Tasted Like $120,000," Says Artist Who Ate Maurizio Cattelan's Infamous Banana Artwork*, Hyperallergic (Dec. 9, 2019), https://hyperallergic.com/532217/it-tasted-like-120000-says-artist-who-ate-maurizio-cattelans-infamous-banana-artwork [https://perma.cc/Z98M-USBR]; Raf Carillo, *On "Comedian," NFTs, and Value*, Medium (Oct. 22, 2021), https://tradingtv.medium.com/on-comedian-nfts-and-value-75f2b694d62d [https://perma.cc/46CN-4X7Y].

196. *See* Jerry Gogosian (@jerrygogosian), Instagram, https://www.instagram.com/jerrygogosian/?hl=en.