ON APPROPRIATION: *CARIOU V. PRINCE* AND MEASURING CONTEXTUAL TRANSFORMATION IN FAIR USE

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Oliver Wendell Holmes once wrote: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [an artistic work], outside of the narrowest and most obvious limits."[1] Yet, although courts have freely quoted Justice Holmes when allegedly disavowing their interest in making artistic judgments,[2] few have followed his advice,[3] and fewer, if any, have realized Holmes provided additional guidance only a few sentences further down the page. After warning judges to not judge art lest they miss the new language of genius, Homes wrote of these uncreated works: "if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt."[4] The problem that courts face in adhering to

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1. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903).

2. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Cariou v. Prince, 714 F.3d 694, 711 (2d Cir.), *cert. denied*, 134 S. Ct 618 (2013); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001); Dr. Seuss Enters., L.P. v. Penguin Book USA, Inc., 109 F.3d 1394 (9th Cir. 1996); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

3. Although courts generally proclaim that notions of judicial restraint bar their engagement in artistic criticism in the cases, current fair use jurisprudence effectively makes this non-engagement impossible. In determining the transformative quality of the alleged infringing artwork, courts often engage in artistic criticism in making that judgment. This in itself in understandable—the standard for transformation has become one in which the court examines the use as it would appear to the "reasonable observer," and the court cannot help but engage in artistic criticism to determine whether the use will manifest a distinct aesthetic. *See, e.g.*, *Cariou*, 714 F.3d at 711 ("Lozenges painted over the subject's eyes and mouth . . . the subject appears anonymous, rather than as the strong individual who appears in the original."); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114 (2d Cir. 1998) ("Because the smirking face of Nielsen contrasts so strikingly with the serious expression of the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original."); *Mattel*, 353 F.3d at 802 ("Forsythe conveys a sexualized perspective of Barbie . . . .").

4. *Bleistein*, 188 U.S. at 251–52.

Justice Holmes's wise words is discerning a reliable measure of the public's taste. The current interpretation of the fair use doctrine, a common law creation subsequently codified in the Copyright Act of 1976,[5] attempts to solve this quandary by asking to what extent the new work is "transformative."[6] This question is allegedly subsumed within the inquiry into the first factor of the statutory prescription—"the purpose and character of the use."[7] The problem is that when an artist invocates the fair use defense, there is no singular definition of "transformative."[8] And the specific interpretation used is often of paramount importance, since many applications of the term appear conclusory for the overall finding—i.e., "label[ing] a use 'not transformative' as a shorthand for 'not fair,' and correlatively 'transformative' for 'fair.'"[9] This is not pure conjecture, as recent empirical studies have shown that "the transformative use paradigm, as adopted in *Campbell v. Acuff-Rose* overwhelmingly drives fair use analysis in the courts today."[10]

The recent Second Circuit decision in *Cariou v. Prince* continues this conclusory use of "transformation" in the fair use inquiry and further enlarges the importance of the concept in the overall fair use inquiry. In doing so, the court seized on Campbell's focus on the audience reception as indicative of the transformativeness of a work and stated the focus of the inquiry was on the work itself and not the author's intent.[11] Although at first glance this holding invites praise for recognizing postmodern concepts of authorship, it buries the recognition beneath an insistence on judging the manifestation of new and distinct expression through physical alteration. This reliance on physical alteration leaves a creator unsure of just how much alteration is needed before a court will find her new work has altered the original's expression sufficiently to manifest new and different meaning. In expounding physical change as the genesis for transformation, the court betrays a lack of understanding for the conceptual underpinnings of (post)modern art.

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5. 17 U.S.C. § 107 (2012).

6. *Campbell*, 510 U.S. at 579 ("[T]he goal of copyright, to promote the sciences and the arts, is generally furthered by the creation of transformative works.").

7. *See* 17 U.S.C. § 107(1) (2012).

8. The term "transformative" was first used in the context of fair use by Judge Pierre Laval in *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990).

9. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1][b] (2013).

10. Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 734 (2011); *see also* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PENN. L. REV. 549, 605–06 (2008); *infra* note 32 and accompanying text.

11. Cariou v. Prince, 714 F.3d 694, 711 (2d Cir.), *cert. denied*, 134 S. Ct 618 (2013).

Using audience reception as a signifier for transformation invites difficult questions when presented with works generally categorized as appropriation art. At the start of the twentieth century, a number of artists began to explore the possibilities of using ready-made objects as material for "creation and as a method for articulating social criticism."[12] Within this nascent period, Marcel Duchamp created *Fountain*, an existing urinal he signed "R. Mutt." Duchamp then submitted the sculpture to galleries as a work of art, begging the fundamental question: what is art?[13] Modern artists such as Andy Warhol, Robert Rauschenberg, and Sherri Levine are but a few who have continued to challenge society's understanding of itself, appropriating the materials and objects created by others to comment on the values embodied in those existing works.

Few contemporary appropriation artists are more notorious or celebrated than Richard Prince.[14] Throughout his career, Prince has pushed the boundaries of ownership, using rephotography and appropriation to re-present and therefore alter the meaning of the common.[15] His appropriation and representation often function as an exploration of what the original work imagined.[16] Prince's work has explored modern popular presentations of gender, race, and cultural appropriation.[17] To inquire whether one subscribes

12. E. Kenly Ames, *Beyond* Rogers v. Koons*: A Fair Use Standard for Appropriation,* 93 COLUM. L. REV. 1473, 1477 (1993).

13. Only a photograph exists of the original object, taken by the modern photographer Alfred Stieglitz. (Stieglitz likely disposed of the original work after he had finished.) Stieglitz's photograph was later exhibited in the avant-garde magazine, *The Blind Man*, accompanied by an anonymous manifesto reading in part, "Whether Mr. Mutt with his own hands made the fountain or not has no importance. He CHOSE it. He took an ordinary article of life, placed it so that its useful significance disappeared under the new title and point of view—created a new thought for that object." THE BLIND MAN, no. 2, May 1917, *available at* http://www.toutfait.com/issues/issue_3/Collections/girst/Blindman2/5.html. Ironically, the versions reproduced decades later for placement in some of the world's most important public collections (including the San Francisco Museum of Modern Art, the Centre Georges Pompidou, and the Tate Modern) were carefully crafted handmade facsimiles of the original readymade. Martin Gayford, *Duchamp's Fountain: The practical joke that launched an artistic revolution,* THE TELEGRAPH, Feb. 16, 2009, http://www.telegraph.co.uk/culture/art/3671180/Duchamps-Fountain-The-practical-joke-that-launched-an-artistic-revolution.html.

14. Jeff Koons, both celebrated and reviled for his work, might be one of the few artists that are equally notorious and celebrated. Koons is also of legal fame for being sued multiple times for copyright infringement. *See, e.g.*, Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

15. NANCY SPECTOR, GLENN O'BRIEN, JOHN DOGG & JACK BANKOWSKY, RICHARD PRINCE (2007).

16. *Id.* at 31 (quoting Prince on his rephotography).

17. *See generally id.* (examining multiple instances of Prince exploring gender roles through replacement of advertising copy, as well as appropriation of iconic sex symbols such as the American cowboy).

to a favorable view of Prince's work, or whether one finds it lacking in creativity and substance, misses engaging the critical inquest: Prince's work, and that of many other appropriation artists, has value because a "discursive" community has formed around his work.[18] Whether the critical reception is positive or negative is almost beside the point.

Although not the exclusive method, the existence of discursive communities can demonstrate the societal value, and thus arguably the transformative nature, of a single work of art. The question for a fair use inquiry then becomes how to incorporate this evidence to simplify this inquiry and give greater clarity to authors on both sides of the fair use divide. Presentational context can alter an audience's reception of the work, and if audience reception is to be a determining factor as to whether a secondary work is transformative, a test that can adequately capture this reception is necessary. This test is not the one proposed in *Cariou v. Prince*, where the court held the two works side-by-side to determine the expressive qualities of the physical differences.[19] In certain instances, especially those implicating First Amendment rights and authorial interests of cultural progression, the market can reflect audience reaction and provide a gauge to help a court determine the true transformative nature of a work. If courts look to market indicators to assist them in determining whether a work is transformative, judges will no longer need to assess the artistic value of a work. And instead of allowing a subjective view of a work's "transformation" to drive an ex ante analysis of the potential market harm, courts can limit their inquiry to an ex post determination of any realized market harm using principles from other, more appropriate legal principles.

Part I of this Note examines the common-law basis for the Copyright Act and the fair use doctrine, and then discusses the rising influence and judicial interpretation of the idea of transformation in fair use analysis. Part II then discusses the recent Second Circuit decision in *Cariou v. Prince*,[20] examining the holding with a view towards the court's analysis in determining transformation and the resulting effect on the market. Part III introduces the economic theory of fair use, and then examines how this theory can be colored by social science theory to produce a more appropriate test of transformation. Part IV concludes.

18. *See* Laura Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS. 445, 449 (2008).

19. *See* Cariou v. Prince, 714 F.3d 694, 707 (2d Cir.), *cert. denied*, 134 S. Ct 618 (2013).

20. *Id.* at 711.

I. RISE OF THE TRANSFORMERS

The fair use defense codified at § 107 exists as a "First Amendment accommodation" to moderate the tension between property theories underpinning copyright law and free speech interests.[21] The Copyright Act distinguishes between copyrightable expression and uncopyrightable facts and ideas.[22] But whereas the copyrighted expression is otherwise inviolate, fair use permits its use in service of the public's interest in the progress of science.[23] It "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."[24]

Section 107 provides four factors for a court to consider when a defendant claims fair use.[25] The first of these statutory factors is the "purpose and character of the use."[26] In *Campbell v. Acuff-Rose Music, Inc.*,[27] the Court characterized the "central purpose" of the inquiry into this factor as determining to what extent the secondary use is "transformative."[28] In adopting the term that Judge Pierre Leval had proposed in his 1990 article, *Toward a Fair Use Standard*,[29] the Court made a slight but significant alteration to the meaning of the word, and shifted the focus from the author's purpose in creating the work to the audience's reception of the work.[30] In focusing the inquiry in this manner, the Court instituted a framework that placed judicial consideration of the expressive differences at the forefront of any fair use claim.

The Court's adoption of "transformation" instituted a sea change, moving fair use jurisprudence into a regime where the consideration of "transformation" was paramount in the overall determination of fair use. After *Campbell*, circuit court opinions started to address whether an alleged

21. Golan v. Holder, 132 S. Ct. 873, 890 (2012); *see* NIMMER & NIMMER, *supra* note 9, § 13.05 (suggesting that the Court has recognized the principles of fair use as a constitutional necessity); *see generally* U.S. CONST. art. I, § 8, cl. 8 (securing exclusive property rights to exploit the fruits of one's intellectual labors).

22. *See* 17 U.S.C. § 102(b) (2012). The Supreme Court has noted this idea/expression dichotomy also moderates the tension between copyright protection and the First Amendment. *Golan*, 132 S. Ct. at 890.

23. As noted above in note 6, *supra*, "science" refers to the creative arts.

24. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

25. 17 U.S.C. § 107 (2012).

26. *Id.*

27. 510 U.S. 569 (1994).

28. *Id.* at 579.

29. Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

30. Heymann, *supra* note 18, at 452.

infringing work was transformative approximately five hundred percent more often than pre-*Campbell*.[31] The effect was profound in the overall outcomes in fair use litigation. A recent empirical study has concluded that although a favorable finding of transformation under the first factor is not necessary for a finding of fair use,[32] it is generally sufficient to do so.[33]

The question of transformation driving the overall fair use inquiry has continued to the current day. However, with the Supreme Court having declined to grant certiorari to another fair use case addressing transformative uses,[34] the evolution of the legal application of the concept is seen in the United States Court of Appeals. Post-*Campbell* (and pre-*Cariou*), *Blanch v. Koons*[35] illuminated the change *Campbell* wrought in fair use jurisprudence involving appropriation art. The Second Circuit examined the physical

31. Prior to the Supreme Court's decision in *Campbell*, Circuit Courts of Appeals referenced "transformative use" (or the doctrine under the guise of "productive use") in seven of forty-five cases, or 15.6 percent. Post-*Campbell* circuit courts referenced the doctrine in thirty-five of forty-three cases, or 81.4 percent. The ratio was similar when examining district court decisions temporally divided by *Campbell*—nine of ninety-two cases (9.8 percent) prior and seventy of 119 (58.9 percent) after *Campbell*. Beebe, *supra* note 10, at 604–05.

32. *Campbell*, 510 U.S. at 579 (citing Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984)). Barton Beebe's conclusion in his study of fair use opinions was similar. He found that because "25 (or 36.8%) of the 68 post-*Campbell* opinions that found fair use made no reference to transformativeness and 4 explicitly found that the defendant's use was not transformative." Beebe, *supra* note 10, at 605. However it is important to note that Beebe's data included a number of fair use cases that were outside the scope of uses where transformation is important. Limiting Beebe's data to cases in which he determined the court had characterized the Defendant's use as either parodic/satirical or for criticism/comment alters the results. Out of thirty total cases, only six (twenty percent) made no reference to transformation. (All six were district court opinions, and three of the six came down within the first eighteen months of *Campbell*.) Of the twenty-four opinions to discuss transformation, one case was unclear as to whether the use was transformative. The remaining twenty-three broke down as follows: fifteen of the seventeen that found the defendant's use was transformative found in favor of fair use, and six of the six that found the defendant's use was not transformative did not find fair use. (Beebe's data-driven approach can also be criticized in certain manners for how he categorized the cases. For example, he declined to categorize *Blanch v. Koons* as involving either comment or criticism. *See id.* at 623–24 (explaining Beebe's collection and coding process of the opinions). Data set and coding form are available at www.bartonbeebe.com.

33. Beebe, *supra* note 10, at 605. For modified data for cases involving criticism or comment, see *supra* note 32.

34. In the context of fair use, transformative uses can be roughly divided into three main groups: parodies (*see, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)); other transformative critiques (*see, e.g.*, Suntrust v. Houghton Mifflin Co., 252 F.3d 1165 (11th Cir. 2001)); and transformative adaptations (*see, e.g.*, Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)). Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2548–55 (2009).

35. 467 F.3d 244 (2006).

manifestation of the changes Koons made to the original copyrighted work and determined the outcome of the first factor—"the purpose and character of the use"—and resultantly, the overall fair use test, based on whether these physical differences embodied a sufficient transformation.[36] Although this current construction of the test may appear to sanction widespread appropriation of copyrighted material, the focus on the physical ignores the fundamental reality that, although physical alteration may be sufficient for transformation, it is not necessary.

A. SECTION 107: STATUTORY FAIR USE

Fair use "permits and requires courts to avoid rigid application of the copyright statute, when on occasions, it would stifle the very creativity which that law is designed to foster."[37] Under the Copyright Act of 1976, the owner of a copyright possesses the exclusive right to reproduce the copyrighted work in copies and to prepare derivative works.[38] Section 107 of the Copyright Act of 1976 provides a fair use exemption[39] for works that infringe on those exclusive rights specified in § 106.[40]

> 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;

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36. Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006) (noting that Koons's adaptation differed from the original in "its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details"); Cariou v. Prince, 714 F.3d 694, 706 (2d Cir.), *cert. denied*, 134 S. Ct. 618 (2013) ("Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs.").

37. *Campbell*, 510 U.S. at 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

38. *See* 17 U.S.C. § 106(2) (2012). In the context of determining the "transformativeness" of a work in furtherance of the fair use inquiry, the statutory definition of what constitutes a "derivative work" can cause confusion. Section 101 defines a derivative work as one "based upon one or more preexisting works . . . in which [the original] work may be recast, transformed, or adapted." 17 U.S.C. § 101. Roughly differentiating between the two, "transformation" in the context of a derivative work encompasses works that are a shift in kind and not necessarily meaning, while "transformation" in the context of fair use indicates an alteration of something more fundamental in the essence of the original work. For more detailed exploration of the term as applied in the two inquires, see generally R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008); Mary Wong, *"Transformative" User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use*, 11 VAND. J. ENT. & TECH. L. 1075 (2009).

39. *See* 17 U.S.C. § 107.

40. *See* 17 U.S.C. § 106.

> (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;
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[41]

At its most basic, fair use allows for the copying of part or the whole of a copyrighted work without the permission of the copyright owner.[42] In conjunction with the idea/expression dichotomy, fair use is crucial to protect First Amendment interests by "allow[ing] the public to use not only facts and ideas[43] contained in a copyrighted work, but also expression itself in certain circumstances."[44]

In recognizing the fair use defense in § 107 of the 1976 Copyright Act, Congress noted that the four enumerated factors were simply a codification of the common law.[45] It was Justice Story's 1837 *Folsom v. Marsh*[46] opinion that provides much of the original principles that Congress codified into statue.[47] Arguably the most important contribution of Justice Story's opinion was the maxim that each case presents unique factors and must be addressed on balance of the purpose of the doctrine.[48] But although the specific language in the statute allows for a non-exclusive inquiry of the four factors[49] and suggests that courts retain the ability to adjust the inquiry as they see fit,

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41. 17 U.S.C. § 107.

42. *Id.*

43. Facts and ideas are protected under §102(b). 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . principle, or discovery . . .").

44. Elder v. Ashcroft, 537 U.S. 186, 219 (2003).

45. NIMMER & NIMMER, *supra* note 9, at 1; *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985).

46. Folsom v. Marsh, 9 F. Cas. 342 (1841).

47. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3 (2d ed. 1995).

48. *Folsom*, 9 F. Cas. at 344 ("In many cases, indeed, what constitutes an infringement of a patented invention, is sufficiently clear and obvious, and stands upon broad and general agreements and differences; but, in other cases, the lines approach very near to each other, and, sometimes, become almost evanescent, or melt into each other.").

49. The text of the statute informs that a determination of fair use "shall include" indication that the four statutory factors are non-exhaustive, and courts may adopt other forms of analysis so long as the inquest is taken in light of the overall goal of copyright. *See* 17 U.S.C. § 107 (2012); *see also* NIMMER & NIMMER, *supra* note 9, § 13.05[A][5][b][(noting that the factors are "illustrative and not limitative," and that a number of "fifth factors" have popped up at times); Leval, *supra* note 29, at 1105 ("[A]lthough leaving open the possibilities that other factors may bear on the [fair] use] question, the statute identifies none.").

modern courts have generally engaged in formalistic examinations of the fair use defense.[50]

The preamble to the statute lists six favored uses: criticism, comment, news reporting, teaching, scholarship, and research.[51] Of these, interests in criticism and commentary both implicate First Amendment principles of free speech and expression, as well as authorial interests in promoting the ongoing creation of new works and ideas.[52] Fair use protects these interests in two ways: first, by providing an essential safeguard for resolving conflict between copyright owners' exploitative rights and the free speech and expression interests of the public,[53] and second, by providing authors with the freedom to make productive use of another's work.[54]

B. JUDGE LEVAL AND "TRANSFORMATION"

In his seminal article, *Towards a Fair Use Standard*, Judge Leval argued that the primary inquiry into whether the challenged use should qualify for the fair use exemption should be to what extent the use is transformative.[55] This inquiry, Judge Leval believed, should drive the analysis of the first statutory factor. He further argued that, in contrast to courts' previous consideration of the fourth factor (the market harm) as paramount in a fair use case, the first factor was the "soul of fair use."[56] Judge Leval recognized two crucial facts with regard to creativity: first, no creative activity is wholly original, and second, much of the creative product is explicitly referential.[57] Fair use protects this "secondary creativity" by protecting the creation of transformative works that draw upon existing works for inspiration or raw

50. Beebe, *supra* note 10, at 561–64 (concluding from statistical analysis of fair use opinions from 1978 through 2005 that courts shifted from a more flexible inquiry towards a rhetorically formal treatment that roughly coincided with the Supreme Court's 1985 opinion in *Harper & Row*, 471 U.S. 539).

51. *Id.*

52. Samuelson, *supra* note 29, at 2544 (noting that criticism, commentary, and news reporting are often evident in fair-use cases that implicate First Amendment principles).

53. *Id.* at 2546–47. Pamela Samuelson also identifies three main policies—(1) promoting free speech and expression interests of subsequent authors and the public, (2) the ongoing progress of authorship, and (3) learning—that underpin the six purposeful uses set forth in the preamble to 17 U.S.C. § 107. *Id.* at 2546–47.

54. *Id.* at 2540.

55. *See generally* Leval, *supra* note 29.

56. *Compare* Leval, *supra* note 29, at 1116 ("Factor One is the soul of fair use. A finding of justification under this factor seems indispensible to a fair use defense. The strength of the justification under this factor must be weighed against the remaining factors . . . ."), *with* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 567 (1985) ("[The fourth] factor is undoubtedly the single most important element of fair use.").

57. Leval, *supra* note 29, at 1109.

materials.[58] In articulating his construction, Judge Leval remained true to the statutory formulation of "the purpose of the use" and whether the use "fulfill[s] the objective of copyright law to stimulate creativity for public illumination."[59] In doing so, Judge Leval drew upon property theories of creation and found authorial intent to be important.[60]

In appropriating Justice Story's words asking whether the second work "supersedes" the original work, Judge Leval removed this question from the inquiry of the monetary harm to the original artist or author and altered it into supporting an inquest into the "purpose" of the use.[61] Judge Leval went further in rendering the question of market harm subservient to the requirement of transformation:

> The fact that the secondary use does not harm the market for the original gives *no assurance* that the secondary use is justified. Thus, notwithstanding the importance of the market factor . . . it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.[62]

This formulation contradicts the common law precedent that formed the basis for the 1976 statutory language. The focus on sufficient transformation of the derivative work has led to a regime in which judges are left to their own devices in assessing whether the challenged use is productive and "employ[s] the quoted matter in a different manner or for a different purpose from the original."[63] But what is manner and what is purpose? Judge Level illuminated little beyond that which is derivative from the facts of the two cases[64] that prompted his commentary on the doctrine.[65]

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58. *Id.* at 1109–1110.

59. *See id.* at 1111.

60. Arguably the formulation of the first factor is contradictory, as "purpose" implies authorial intent and "character" implies audience understanding. It is not clear why Congress chose to word the statute this way; needless to say, the Supreme Court and current case law have effectively dispensed with looking to the purpose of the use and instead focus the fair use analysis exclusively on the character, with the attendant problems noted in Section I.C.1.

61. *Compare* Leval, *supra* note 29, at 1111 (using the quotation as asking whether the use of the copyrighted material employs it in a different manner or for a different purpose than the original) *with* Folsom v. Marsh, 9 F. Cas. 342, 348 (1841) (writing that the court must look to "the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work").

62. Leval, *supra* note 29, at 1124.

63. *Id.* at 1111.

64. Salinger v. Random House, Inc., 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.); New Era Publ'ns Int'l v. Henry Holt & Co., 695 F. Supp. 1493 (S.D.N.Y. 1998), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989).

65. It is also unclear whether Leval viewed these two inquires as conjunctive or disjunctive. In attempting to encompass both formulations, Leval appears to be uncertain

C. BEFORE *CAMPBELL*: *ROGERS V. KOONS*

The first major case to grapple with statutory fair use in the context of appropriation art was *Rogers v. Koons*.[66] Jeff Koons, a notable contemporary artist, used a postcard image of a smiling couple holding a litter of puppies as source material for a sculptural representation of the photograph.[67] Koons's artwork made a few minor alterations to the colors in Rogers's original photograph, but otherwise requested his artisans to reproduce the reality of Rogers's photograph.[68] The court's opinion was influenced by its inability to discern any successfully parodic element in Koons's *String of Puppies*,[69] an element the court required for a favorable finding under the first factor of the fair use inquiry.[70] Describing the photograph Koons used as the basis for his sculpture as the "expression of a typical American scene—a smiling husband and wife holding a litter of charming puppies," the court found it "difficult to discern any parody of the photograph 'Puppy' itself."[71] From an alternative perspective though, where the court saw charm in Rogers' idyllic photograph, Koons saw the embodiment of a society in thrall to the "mass production of commodities and media images."[72] Thus, in selecting that specific photograph as his subject, Koons was arguably commenting not only on society at large, but also critiquing and parodying Rogers's unknowing photographic expression of that idea.

The market possibly recognized the distinct purposes behind the two pieces, valuing *String of Puppies* in excess of $100,000,[73] while Rogers sold the

exactly how to characterize the genesis of the creativity—whether the protection is to protect creativity already expressed or to protect creativity still to come. If the former, then the focus should be on the purpose of the use since that is the clearest expression of intended creativity; if the latter, then the focus should be on the character of the use, since that protects the ability of the audience to experience creativity and "stand on the shoulders of giants." Arguably, this is a bit of a circular progression. He does seem to hint at the latter being dominant: "the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." Leval, *supra* note 29, at 1110.

66. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

67. *Id.* at 305.

68. *Id.*

69. *Id.* at 310.

70. *Id.* ("It is the rule in this Circuit that . . . the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.").

71. *Id.* at 303, 310.

72. *Id.* at 309.

73. *Id.* at 305 ("Three of the four copies made were sold to collectors for a total of $367,000; the fourth or artist's copy was kept by Koons.").

original photograph to the commissioning couple for $200.[74] Although, admittedly, it is unknowable to what extent the physical alteration from photograph to sculpture contributed to the price discrepancy, the contribution of certain other factors to the differing valuation of the two works can be explored. Although, as with the changing medium, the contextual factors cannot be priced with specificity, as forces driving the valuation of Koons's sculpture they are incontrovertible. First, the market would have viewed Koons's sculpture through the lens of his previous work. In other words, Koons's history of biting commentary on popular culture was integrated into *String of Puppies*. Second, the presentation of the sculpture in a show entitled *Banality Show* at Sonnabend Gallery, a high-end New York art gallery, added a contextual imprimatur of validity and importance to the artwork. Regardless of a person's individual affection for *String of Puppies*, the audience as a whole inarguably distinguished between Koons's sculpture and Rogers's photograph. Although the court found that Koons copied Rogers's expression and not simply the idea,[75] it misunderstood a crucial point: Koons was not copying Rogers's expression or his idea, he was directly commenting on Rogers's expression of Americana. Although the court missed this distinction, the audience did not, as partly evidenced by the price discrepancy between the two works.

D. *CAMPBELL*

Although the Supreme Court's decision in *Campbell* clarified certain aspects of the § 107 inquiry, most notably explaining that a commercial use does not make a use dispositively unfair,[76] in other aspects it simply created more confusion, such as distinguishing parody from satire and crucially requiring a secondary use to comment successfully on the physical formulation of the original work.[77] In holding that parody was entitled to a

74. *Id.* at 304. Rogers also licensed the photograph for reproduction on note cards and postcards—it was through this licensed printing that Koons encountered the work he subsequently used as material for his sculpture. *Id.*

75. *Id.* at 308 ("[H]ere, Koons used the identical expression of the idea that Rogers created.").

76. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (internal citation omitted) ("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 § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country.").

77. *See id.* at 580. Additionally, the focus in the opinion on issues specific to parody limited the reach of the opinion to other areas. Inherent in parody and satire is commentary, but moving beyond those specific categories, the Court touched little on what constitutes a productive use and did not address some of the other factors Leval relies upon in his

fair use exemption, the Court shined little additional light on the specific requirements for a work to qualify as commentary. The Court held that 2 Live Crew's parody of Roy Orbison's "Pretty Women" was entitled to fair use protection, and the song's commercial nature did not preclude it from protection as a parody.[78] In approving parody as a legitimate form of criticism protected under § 106, the Court conferred institutional legitimacy upon Judge Leval's term of art, "transformative." However, in doing so, the court subtly recast the question from an intent-based inquiry into an audience-based one.[79] Although the Court retained the focus on the purpose of the use, it found the answer to be discernible through the audience's reaction.[80] This was a logical shift, for if the constitutional purpose of copyright is furthered by the public's greater access to and interaction with transformative works,[81] and the existence of separate discursive communities can indicate the presence of transformation, then the answer to the question underpinning fair use, whether a work is "transformative," is inseparable from the public audience's reception of the new work.

Addressing potential market harm, the Court allowed the commerciality of the derivative work to inform a presumption of substantial market harm only in cases involving mere duplication of the original in its entirety.[82] Conversely, to the extent the secondary use is transformative, "market substitution is less certain."[83] However, the Court demurred from clarifying a general conception of market harm in a matter other than critical works, simply choosing to restate much of the accepted doctrine.[84] The market for derivative works consists only of those markets that the original creator would likely develop, including licensing markets. As an artist is unlikely either to lampoon her own work or license another to do so, the Court was able to short-circuit this inquiry into a theoretical analysis of the derivative

formulation of transformation. *See* H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV. J.L. & TECH. 335, 350 (2011).

78. *Campbell*, 510 U.S. at 593.

79. Heymann, *supra* note 19, at 449.

80. *Campbell*, 510 U.S. at 583 (noting that 2 Live Crew's song "reasonably could be perceived" as commenting on the naïveté and white-bread sentimentality of Orbison's original).

81. *Id.* at 579.

82. *Id.* at 591.

83. *Id.*

84. *See id.* at 590–94.

market for rap music.[85] This then allowed the Court to sidestep the issue of conceptualizing the parameters of derivative frameworks.[86]

E. TRANSFORMATION AND APPROPRIATION ART AFTER *CAMPBELL*: *BLANCH V. KOONS*

Post-*Campbell*, the Second Circuit revisited the fair use doctrine in another case involving Jeff Koons, this time finding in favor of the defendant.[87] In 2000, Koons created seven works for a commissioned show at the Deutsche Guggenheim Berlin. To produce these works, Koons scanned appropriated advertisements and other images into a computer, superimposed them over pastoral landscape backgrounds, and printed them to be used as templates for his assistants to paint onto large canvases. One of these resulting works, *Niagara*, contained images from a photograph the plaintiff had taken for a fashion magazine advertisement. In presenting his defense, Koons told the court that he used the image as "fodder for his commentary on the social and aesthetic consequences of mass media."[88]

In finding that Koons's work qualified for the fair use exemption, the court appeared to have hedged on whether the author's intent was relevant to the question of transformation: "Koons's appropriation of Blanch's photograph in 'Niagara' was intended to be—and appears to be—'transformative' . . . ."[89] However, a close parsing of the opinion indicates that the court might have found Koons's work transformative notwithstanding his statements of purpose. In proposing that "[t]he sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals' confirm[ed] the transformative nature of the use," the court exposes that its inclusion of Koons's purpose in creating his work is merely an ex post justification for an already transformative use.[90] And although the court deferred to Koons's explanation of his purpose, it appeared prepared to rely on its own conclusion if Koons had neglected to supply a justification, stating that "[a]lthough it seems clear enough to us that Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography, we need not depend on our

85. *See id.* at 592–93.

86. As neither party submitted evidence addressing the effect on the potential market for a non-parodic rap version of Orbison's tune, the Court indicated this question would be filled on remand. However, before the lower court re-examined the case, the two parties settled. *Id.* at 594.

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

88. *Id.* at 253.

89. *See id.* at 256.

90. *Id.* at 252.

own poorly honed artistic sensibilities."[91] At the same time it was disavowing its own artistic sensibilities, however, the court was clearly employing a notion of transformation that involved consideration of the physical manifestations of Koons's claimed intent.[92]

II. *CARIOU V. PRINCE* AND THE SUPREMACY OF THE PHYSICAL

In 2013, the Court of Appeals for the Second Circuit found that the artist Richard Prince was not liable for copyright infringement on twenty-five pieces of his *Canal Zone* series of works.[93] In finding that Prince's work was permitted under fair use, the court identified the relevant inquiry under § 107 as neither the author's intent to comment on the original nor the author's intent to transform the work with new expression. Rather, the court held that the question is whether the new work has been sufficiently physically transformed so as to impart new meaning or expression to the viewer.

A. THE FACTS OF THE MATTER

In 2000, Patrick Cariou published *Yes Rasta*, a book containing a series of photographs Cariou had taken during a six-year stint living among Rastafarians in Jamaica.[94] The series was comprised of a number of classical landscapes and portraits attempting to portray the dignity of Rastafarians and their natural environment. Cariou's publisher printed seven thousand copies of *Yes Rasta*.[95] Sales figures of the book were minimal.[96] As for the photographs themselves, excepting a handful of private sales to personal acquaintances, Cariou did not exhibit or sell them.[97]

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91. *See id.* at 255.

92. *Id.* at 235 (describing the use of Blanch's *Silk Sandals* image by noting the "changes in its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the object's details").

93. The Appendix to this Note contains two pairs of images. One pair is comprised of a Cariou photograph and the subsequent Prince work, *Graduation*, that the Second Circuit Court of Appeals was unable to determine made fair use of Cariou's photograph and therefore remanded to the district court. The second pair is again a Cariou photograph and the subsequent Prince work, here Prince's *Back to the Garden*. The reader is invited to make up her own mind on the extent to which each of Prince's works alters Cariou's classical portraiture photographs with "new expression, meaning, or message," as required by the transformative test put forth in *Campbell*. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

94. Cariou v. Prince, 714 F.3d 694, 699 (2d Cir.), *cert. denied*, 134 S. Ct. 618 (2013).

95. *Id.*

96. *Id.* at 698–99.

97. *Id.* at 699.

Seven years later, Richard Prince exhibited works at a hotel in St. Barth's, including *Canal Zone* (2007), a collage work comprised of thirty-five images torn out of *Yes Rasta*. Prince arranged the altered images of landscapes and Rastafarians in a large grid and tacked them to a single piece of plywood.[98] Prince subsequently created thirty additional pieces in the *Canal Zone* series, with all but one incorporating images Prince appropriated from *Yes Rasta*.[99] In late 2008, Prince showed twenty-two works from *Canal Zone* at Gagosian Gallery in New York.[100]

Cariou allegedly first learned about Prince's show from Cristiane Celle, a New York gallery owner.[101] On December 30, 2008, Cariou filed suit against, Prince, Gagosian Gallery, and Lawrence Gagosian, claiming copyright infringement.[102] Prince and his co-defendants asserted a fair use defense, arguing that Prince's use of the photographs was transformative.[103] Each party subsequently filed a motion for summary judgment.[104]

B. THE DISTRICT COURT FINDS NO FAIR USE

In its ruling, the Southern District of New York found Prince's use of the photographs was "not fair use under the Copyright Act."[105] After finding that Cariou's photographs were sufficiently creative to be worthy of copyright protection, the court conducted a standard four-factor fair use inquiry.[106] The court started its analysis of the first factor—the purpose and

98. *Id.* Prince altered some of the images by drawing lozenge and primitive facemasks on some of the Rastafarians' faces, and drawing over other features with magic marker, crayons, pencil, and white acrylic paint. He obscured the faces of others with various other techniques. Affidavit of Richard Prince, Defendant, in Suppor of Motion for Summary Judgment ¶ 48, Cariou v. Prince, 714 F.3d 694 (May 14, 2010) (No. 11-1197-cv) [hereinafter Prince Aff.].

99. *Cariou*, 714 F.3d at 699. In sum, to create the Canal Zone series, Prince appropriated forty-one images from Cariou's *Yes Rasta*, images from two adult books published by Taschen, images from contemporary music magazines, images from anatomy books Prince had purchased, and a single image from a publication on Bob Marley. Prince Aff., *supra* note 98, ¶ 24. For a detailed description of Prince's process in creating each individual work, see *id.* ¶¶ 32–61.

100. *Cariou*, 714 F.3d at 703.

101. *Id.* at 704.

102. *Id.*

103. *Id.*

104. *Id.*

105. Cariou v. Prince, 784 F. Supp. 2d 337, 342 (S.D.N.Y. 2011), *rev'd*, 714 F.3d. 694 (2d Cir.), *cert denied*, 134 S. Ct. 618 (2013).

106. The district court went beyond the standard breakdown of the four factors in considering the propriety of Prince's conduct as a relevant sub-factor in determining the "purpose of the use" under the first factor. The court found Prince's bad faith evident under the factual circumstances that were presented and considered this to further weigh against

character of the use—by explaining that the central question was to what extent Prince had infused Cariou's original photographs with new expression, meaning, or message.[107] In other words, the court asked to what extent Prince's works were transformative.[108]

First, the court rejected Prince's argument that using copyrighted materials as "raw ingredients" should be considered per se fair use, declaring the lack of any precedent allowing for fair use absent "the new work in some way, comment[ing] on, relat[ing] to the historical context of, or critically refer[ing] back to the original work[]."[109] Instead, Prince's works would only be transformative to the extent that they commented on Cariou's photographs.[110] Without commentary, Prince's works would be infringing derivative works.[111]

In determining whether Prince's works met this standard, the court focused much of its inquiry on his intent in creating *Canal Zone*, believing Prince's statement that he did not "really have a message" inherent in his art to indicate that "his purpose in using Cariou's Rastafarian portraits was the same as Cariou's original purpose in taking them: a desire to communicate to the viewer core truths about Rastafarians and their culture."[112] In viewing the twenty-eight photographs as a unified whole, the court found the transformative content of Prince's works to be "minimal at best" and weighed heavily against a finding of fair use.[113]

The court then examined the commerciality prong of the first factor of § 107, which asks whether the use of the copyrighted material is "of a commercial nature or for nonprofit educational uses."[114] The court noted that the importance of the commerciality of the alleged infringing use is inversely proportional to the extent of the use's transformativeness.[115] And given its perception of Prince's works as of low transformative value, the court found this prong of the first statutory factor to weigh against a finding of fair use.[116] In sum, although the court wrote that it "recognize[d] the

Prince under the first factor. *Id.* at 351. On appeal, this conduct was not considered relevant under the proper legal standard. *Cariou*, 714 F.3d at 694.

107. *Cariou*, 784 F. Supp. 2d at 347.
108. *Id.*
109. *Id.* at 348.
110. *Id.* at 349.
111. *Id.*
112. *Id.*
113. *Id.* at 350.
114. 17 U.SC. § 107 (2012).
115. *Cariou*, 784 F. Supp. 2d at 350.
116. *Id.*

inherent public interest and cultural value of public exhibition of art," it found this interest paled in comparison to the substantial commerciality of Prince's "use and exploitation" of Cariou's photographs.[117]

The court then worked through an analysis of the second and third factors—the nature of the copyrighted work and the portion of the first work used in the second work[118]—finding both to weigh against Prince's asserted defense of fair use.[119] Under the second factor, Cariou's photographs were "highly original and creative artistic works" and considered to be at the heart of that which copyright was intended to protect.[120] The analysis of the third factor was, similar to the commerciality prong of the first factor, considered in relation to the transformative value of Prince's works.[121] And given its determination that the works were of low transformative value, the court concluded there was little justification for Prince to have appropriated the "central figures" of Cariou's photographs.[122]

Then, turning to the fourth factor—"the effect of the use on the potential market for or value of the copyrighted work"[123]—the court again found the facts weighed against a finding of fair use.[124] First, the court dismissed as irrelevant Prince's argument that Cariou had not marketed his works more aggressively, reasoning that Cariou was entitled to have the potential market available should he later decided to exploit the commercial monopoly granted by his copyright.[125] The court then focused on two specific points in its analysis of the market harm caused by Prince's works. First, relying on testimony of New York gallerist Celeste Celle that she had planned on showing Cariou's Rastafarian photographs until she learned Prince had shown *Canal Zone* at Gagosian Gallery, the court found it "clear that the market for Cariou's [p]hotos were usurped by Defendant[]."[126] This constituted harm to the actual market for Cariou's original works. Second,

117. *Id.* at 351. The court discussed in some detail the specific commercial environment of Prince's *Canal Zone* show at Gagosian Gallery, including the monetary valuation of the included works, and noted that there was no evidence establishing that Prince's works were available for public view in advance of them being offered for sale. *Id.* at 350–51.

118. *See* 17 U.S.C. § 107(2)–(3).

119. *Cariou*, 784 F. Supp. 2d at 351–52.

120. *Id.* at 352. For an interesting discussion of the accuracy of this contention, *see generally* Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J. LAW AND TECH. 339 (2012).

121. *See Cariou*, 784 F. Supp. 2d at 352.

122. *Id.* at 352.

123. 17 U.S.C. § 107(4).

124. *Cariou*, 784 F. Supp. 2d at 353.

125. *Id.* at 353.

126. *Id.* at 353.

the court considered the harm to Cariou's potential licensing market for derivative works. The court believed that allowing Prince to use Cariou's photographs without procuring a license demonstrated that widespread similar practice would destroy the general ability of artists to license their works for others to use.[127] Therefore, in addition to suffering damage to the actual market for his works, Cariou had suffered the loss of potential licensing fees from Prince's unauthorized use of his photographs.[128]

After examining each of the four statutory factors, the court concluded that none favored a finding of fair use. Thus, the court felt "the purposes of copyright are best served by extending protection to Cariou's [p]hotos," and held that the defendants were not entitled to a fair use defense.[129] The court then ordered Prince to "deliver up for impounding, destruction, or other disposition, as [Cariou] determines, all infringing copies of the Photographs, including the Paintings, and unsold copies of the Canal Zone exhibition book."[130]

C. THE COURT OF APPEALS FOR THE SECOND CIRCUIT REVERSES (IN PART)

Prince appealed the district court's decision, and in April 2013, the Court of Appeals for the Second Circuit reversed in part, holding that twenty-five of the thirty works were protected under the fair use doctrine and remanding to the district court for a determination under the proper legal standard as to whether the five remaining works were entitled to the same defense.[131]

In addressing the first statutory factor and the inquiry "at the heart of" the fair use inquiry, the court noted that the district court had conducted its analysis upon a substantively incorrect legal premise.[132] The court clarified that, in contrast to the district court's belief, "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute."[133] Although many of the seminal "fair use works" did appropriate copyrighted work for the direct purpose of commenting on the

127. *Id.* at 353.
128. *Id.* at 353.
129. *Id.* at 354–55.
130. *Id.* at 355.
131. Cariou v. Prince, 714 F.3d 694, 712 (2d Cir. 2013), *cert denied*, 134 S. Ct. 618 (2013).
132. *See id.* at 705–06.
133. *Id.* at 706.

culture those images represented,[134] a work can still be transformative in the absence of such expressed purpose: it simply "must alter the original with 'new expression, meaning, or message.'"[135]

The court conducted its analysis by holding Prince's work side-by-side with Cariou's and observing the physical differences between the two works,[136] finding twenty-five of them to be "transformative as a matter of law."[137] The court explained that Prince's composition and his use of color and mixed media altered the fundamental physicality of Cariou's photographs.[138] Describing Prince's works as "crude," "jarring," "hectic," and "provocative," the court concluded that Prince imbued Cariou's photographs with new expression—"looking at the artworks and the photographs side-by-side, we conclude that Prince's images . . . employ new aesthetics with creative and communicative results distinct from Cariou's."[139] Perhaps understanding that its analysis could be taken to suggest that any physical alteration would be sufficient for fair use, the court pulled back to note that its holding applied only to those changes that presented the images with a "fundamentally different aesthetic,"[140] and that its conclusion should not be interpreted to mean that any cosmetic changes to Cariou's photograph would be sufficient.

The court succinctly addressed the second factor, finding that although it was clear that Cariou's photographs were creative and published, thus weighing against an overall finding of fair use, this factor is of "'limited usefulness where,' as here, 'the creative work of art is being used for a transformative purpose.'"[141]

Examining next the amount and substantiality of Cariou's photographs that Prince used in his works in relation to the whole of Cariou's works, the court expressed confusion as to how the district court concluded that

134. *See id.* (noting that Warhol's Campbell's soup can series and Marilyn Monroe portraits comment on consumer culture and celebrity).

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

136. *See id.* at 708. In addition to focusing on the differences in image, the court also discussed the physical difference in the form in which the images were presented. Cariou's black and white images were printed in book form; Prince presented his works on large canvases, often incorporating color and other additional images to create his collage pieces. *Id.* at 706.

137. *Id.* at 707.

138. *Id.* at 706.

139. *Id.* at 707–08.

140. *See id.* at 708.

141. *Id.* at 710 (quoting Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006)).

Prince's "taking was substantially greater than necessary."[142] Additionally, the court noted, there is no legal prohibition that the secondary artist takes no more than necessary.[143] And, although Prince appropriated essential portions of Cariou's photographs, in twenty-five of the thirty works, Prince "transformed those photographs into something new and different."[144] This fundamental alteration in the materials' meaning is crucial to informing the weight given the third factor, and the court found this factor to cut heavily in Prince's favor for the twenty-five works the court deemed transformed.[145]

Turning to an examination of the effect of the use on the potential market for the copyrighted work, the court dismissed the district court's focus on whether Prince's use had damaged both the actual and potential markets for Cariou's original work.[146] The court noted that it had previously addressed this issue in *Blanch v. Koons*—the question is not whether the potential market is damaged, but whether the secondary work usurped the market of the original work.[147] The court found the audience for Prince's works to be distinct from Cariou's potential audience and that there was "no evidence that Prince's work ever touched—much less usurped—either the primary or derivative market for Cariou's work."[148]

With regard to the remaining five works,[149] the court found Prince's alterations not significant enough to allow the court to make a judgment as to whether the works were transformative: "Although the minimal alterations that Prince made in th[e]se instances moved the work in a different direction from Cariou's classical portraiture and landscape photos, we can not say with certainty at this point whether th[e]se [five] artworks present a 'new expression, meaning, or message.'"[150] The court then remanded those five pieces to the district court for a determination under the correct legal standard as to whether the works were transformative or whether they impermissibly infringed on Cariou's copyright.[151]

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142. *Id.*.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 708.
147. *Id.* (quoting Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006)).
148. *Id.* at 709.
149. The remaining works are titled *Graduation*, *Meditation*, *Canal Zone* (2008), *Canal Zone* (2007), and *Charlie Company*. *Id.*
150. *Id.* at 711 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).
151. *Id.* at 710–11. Upon remand to the district court, the parties reached a settlement and dismissed the action. The settlement provides that Prince shall own the disputed works "free and clear of any claim by [Cariou]. . . ." Stipulation of Voluntary Dismissal with

Writing in partial dissent, Judge Wallace noted the inconsistency in remanding only five of the thirty works to the district court for a further determination as to whether they were fair use.[152] Although he agreed with the majority that the district court had incorrectly required that Prince's works comment on Cariou's photographs to be entitled to a fair use defense, Judge Wallace favored remanding the entire case to the district court.[153] Much of his dissent was tied to his reticence to make an artistic determination of the transformativeness of Prince's works, pointedly noting his "limited art experience."[154] Additionally, and in contrast to the majority, Judge Wallace considered Prince's testimony to be relevant to the transformativeness analysis.[155]

D. "SIDE-BY-SIDE" AND TRANSFORMATION

The holding in *Cariou* continues the shift away from authorial intent informing a finding of fair use. In examining the nature of transformation, the court explicitly clarified the relationship between the fair use inquiry and authorial intent:

> What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so. . . . The focus of our infringement analysis is primarily on the Prince artworks themselves . . . .[156]

After examining the question of transformation, the court examined the other three factors as dependent on the answer to the former question. And even within the analysis of the first factor—addressing "whether [the] use is of a commercial nature"—the court defaulted to the formulation in *Campbell*. Since *Campbell* recognized that commercial uses were not presumptively unfair, the more transformative a work, the less commercialism weighs

Prejudice, Cariou v. Prince, 784 F. Supp. 2d 337, (S.D.N.Y. 2011), *rev'd*, Cariou v. Prince, 714 F.3d. 694 (2d Cir.), *cert denied*, 134 S. Ct. 618 (2013) (No. 1:08-cv-11327), ECF No. 141.

152. *Cariou*, 714 F.3d at 713 (Wallace, J., dissenting) ("I fail to see how the majority in its appellate role can 'confidently' draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination.").

153. *Id.* at 712.

154. *See id.* at 714.

155. *Id.* at 713.

156. *Id.* at 711 (majority opinion) (internal citations omitted).

against a finding of fair use.[157] Therefore, in *Cariou* "[a]lthough there is no question that Prince's artworks are commercial, [the court did] not place much significance on that fact due to the transformative nature of the work."[158] The second factor was dealt with in much the same manner: although Cariou's photographs were creative,[159] "this factor 'may be of limited usefulness where,' as here, 'the creative work of art is being used for a transformative purpose.'"[160] The third factor—the amount and sustainability of the copyrighted work used—follows as well: "[t]he third-factor inquiry must take into account that the extent of permissible copying varies with the purpose and character of the use."[161] In other words, the amount of permissible copying is dependent on what the artist does with the material. If the use is transformative, then copying, both in quality and in substance, is generally more permissible.

Although the shift towards a visual comparison of two works will likely result in a more permissive atmosphere for appropriation artists in all mediums to create heterodox works, it falters when a court is asked to address works that gain their transformative nature from new expression that is intrinsically linked to the exact copying of an original work. In the context of this Note, the most appropriate examples might be Prince's untitled cowboy works.[162] Prince's commentary on the hyper-masculine image of the American male would arguably have been lost in the process of substantially altering the images. Prince's images, though, would run afoul of the *Cariou* standard, where the question of transformation is intertwined with sufficient alteration of the physical. It is the height of irony that in formulating a test that at first glance appears to create a standard allowing almost any substantive physical modification to an original work to influence a fair use determination, the court has in fact laid down a reductive and restrictive doctrine that removes from protection those works that are arguably most transformative in their emotional effect on the audience.

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

158. *Cariou*, 714 F.3d at 708.

159. For an interesting exploration of photography and copyright, see Hughes, *supra* note 119.

160. *Cariou,* 714 F.3d at 710 (quoting Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d. Cir. 2006)).

161. *Id.*

162. One could also imagine a counterfactual history in which Duchamp had chosen to not sign *The Fountain* and simply submit the work as it was. The contextual presentation of the work in the gallery might still affect an understanding of the urinal as more than simple utilitarian object, which was arguably Duchamp's exact point. *See supra* note 13 and accompanying text.

E. MISUNDERSTANDING THE EXISTING MARKET

The court's consideration of the relationship of transformativeness to the fourth factor is similar. Although not explicitly driving the consideration of the market harm, the court clarifies that the question of market usurpation versus market suppression turns in large part on the question of a finding of transformation. Citing precedent for the importance of examining whether the target market of the secondary use is the same as the target market for the original, the court remained "mindful that the more transformative the secondary use, the less likelihood that the secondary use substitutes for the original, even though the fair use, being transformative, might well harm, or even destroy, the market for the original."[163]

In addressing the harm to Cariou's market, the court bifurcated what one would consider the market for Cariou's work into two distinct camps—those persons with the financial means to acquire Prince's work, and those without. The court recited a list of celebrities invited to a dinner the Gagosian held in concert with the *Canal Zone* opening.[164] It used this as evidence that "Prince's work appeals to an entirely different sort of collector than Cariou's," and that the markets were distinct.[165] Although the logic in this statement fails,[166] by happenstance, the court's conclusion that Prince's work did not displace Cariou's holds. The crucial query is whether the derivative work acts as partial substitution for the original. Absent an evidentiary finding that this is the case, it then logically follows that the consumer views the two products as distinct and thus serving a different purpose. And although the court obsessed over the low selling price of Cariou's work as indicative of Cariou's work existing in a separate market from Prince's, the true importance of this evidentiary inquiry lies elsewhere. The court touched upon it when it wrote, "nothing in the record suggests that anyone will not now purchase Cariou's work, or *derivative non-transformative works* (whether Cariou's own or licensed by

163. *Cariou,* 714 F.3d at 709 (internal citations omitted).

164. *Id.* For the curious, the guest list included, among others, 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. *Id.*

165. *Id.*

166. Bifurcating or, more accurately, stratifying a market into segments based on the wealth of the those persons purchasing artwork in that market ignores the fact that those purchasing Prince's works also have the means to purchase Cariou's work. Although a cursory appropriation of income distribution models indicates that Cariou's customers are likely unable to possess the means, assuming there exists a desire, to purchase Prince's work, there is no resulting implication that the markets are distinct.

him) as a result of the market space that Prince's work has taken up."[167] The problem with this analysis is exposed not by the twenty-five works found to be transformative, but by the five works remanded to the district court. If we assume those five works are *derivative non-transformative works*, then, by the court's analysis, these five works should substitute in the market for Cariou's works.[168] But in predicating the fourth-factor market analysis on the different values placed on the two artists' respective works, the court committed itself to a market analysis that viewed the respective audiences as distinct simply because of the prices of the artists' works. This cannot hold. If Prince's work is non-transformative and thus acts as a substitute for Cariou's photographs, it, by definition, touches the same primary market for Cariou's work.

III. SYNTHESIZING ECONOMIC AND SOCIAL THEORIES TO MODIFY THE FAIR USE INQUIRY TO BETTER COMPORT WITH COPYRIGHT PRINCIPLES

Reframing the analysis of the fourth-factor market inquiry to inform, rather than follow, the determination of transformation would give a court substantive findings upon which to ground its analysis of the purpose and character of the use. Rather than a court inferring insignificant market harm because a work is transformative, a work should be considered transformative precisely because there is insignificant actual market harm. This follows because insofar as the fourth factor turns on the distinction between complementary and substitutional copying[169]—i.e., transformative and superseding copies—a lack of market impairment can indicate that the audience has determined that the secondary use is complementary.[170] The question that remains is how to determine when there is market harm. Here, theories ported from the social sciences can indicate when the public views a work as complementary—i.e., insignificant market harm—and when it views a work as substitutional—i.e., significant market harm. Although reversing the direction of implication appears to be a subtle shift, it is one that could have profound effects on how fair use is analyzed.

167. *Cariou,* 714 F.3d at 709 (emphasis added).

168. This is simply the contrapositive to the idea that "the more transformative the secondary use, the less likelihood that the secondary use substitutes for the original." *Id.*

169. *See* Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 518 (7th Cir. 2002).

170. *See id.* at 522 ("Factor (4) at least glances at the distinction we noted earlier between substitute and complementary copying, since the later does not impair the potential market or value of the copyrighted work . . . .").

A. THE FOURTH FACTOR'S FALL

Prior to *Campbell*, the Supreme Court had unambiguously stated that the fourth factor—the effect upon the potential market—was "undoubtedly the single most important element of fair use."[171] And although, post-*Campbell*, the fourth factor has remained the single factor most closely correlated with an overall finding of fair use, it has been for a markedly different reason. Rather than informing the outcome of the overall inquiry by informing the analysis of the other three factors, the fourth factor "essentially constitutes a metafactor under which courts integrate their analyses of the other three factors and, in doing so, arrive at the outcome not simply of the fourth factor, but of the overall test."[172]

In arguing that the first factor is the "soul of the fair use,"[173] Pierre Leval also contended that the Supreme Court had overstated the importance of the market factor.[174] He argued that, although in cases where the secondary use substantially interfered with the market for the original work the fourth factor should weigh heavily against a finding of fair use, "the inverse does not follow."[175] Leval's article was persuasive. In *Campbell*, the Court repudiated its earlier language in *Harper & Row*, writing, "All [four statutory factors] are to be explored, and the results weighed together, in light of the purposes of copyright."[176] The effect on fair use jurisprudence was considerable. Prior to *Campbell*, over half (fifty-nine percent) of the fair use opinions explicitly cited *Harper & Row* for the proposition that the fourth factor—the effect of the use on the market—was "undoubtedly the single most important element of fair use."[177] After *Campbell* ruled that all the factors were to be explored holistically,[178] only around one quarter of opinions continued to state the fourth factor was the most important.[179]

171. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

172. Beebe, *supra* note 10, at 617.

173. Leval, *supra* note 29, at 1116.

174. *See id.* at 1124.

175. *Id.* ("The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use was justified.").

176. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

177. Beebe, *supra* note 10, at 616–17 (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985)).

178. *See Campbell*, 510 U.S. at 578.

179. Beebe, *supra* note 10, at 617.

B. UNDERSTANDING THE USES AND LIMITATIONS OF ECONOMIC THEORY IN A FAIR USE ANALYSIS

Underlying the market inquiry of the fourth factor is the basic theory of supply and demand. Copyright effectively grants an individual a monopoly over the market for her work. The right to exclude others from the market through the rights granted in § 106 ensure that additional supply neither impinges the copyright owner's ability to profit from her creation, nor decreases the incentive for an individual to create future works.

Economic theory characterizes copyright law as a cure for market failure that stems from the existence of "public goods" characteristics inherent in artistic expression.[180] The problems associated with these characteristics, most notably the inability to exclude free riders, result in public goods being under-produced if left to the mechanics of an unregulated market.[181] When a transaction that would be beneficial to both parties does not occur, this breakdown is known as market failure. In totality, the legal system often establishes parameters intended to limit occurrences of market failure.

In this economic system, fair use exists as a corrective to inefficiency in copyright transactions.[182] There are three main circumstances where the fair use doctrine comes into play.[183] First, it provides a remedy for situations where high transaction costs exist and normalized market forces are inadequate to effect an agreement between two parties.[184] Fair use is also important for matters where implied consent—for example, the industry practice of book reviews quoting part of the original material—indicates an acceptance of the need for greater consumer information and the confidence that, in not needing to gain the favor of the author to reprint passages, the reviewer remains objective.[185] Finally, fair use exists to allow the creation of "productive uses."[186] This productive use can take many forms—for

180. *See* Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1610 (1982). A public good contains two general defining traits: first, supply is effectively inexhaustible; and second, persons cannot readily be excluded from use of the good. *Id.* at 1610–11.

181. *See id.* at 1611.

182. *See generally id.*; William M. Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1 (2000–2001); Richard Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1997); William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

183. *See* Landes, *supra* note 182, at 10.

184. *Id.*

185. *See id.*

186. *Id.*

example, parody or satire[187]—and rests on the transformation of the original work into a work that is unlikely to substitute in the market for the original work or create substantial harm to what otherwise would be a lucrative licensing market.[188] There can be substantial overlap between the three categories, but any one is justification for fair use existing to create a more efficient and rational market.

The examination of the market harm under the fourth statutory factor focuses on two markets: the immediate market for the work in question and the secondary market.[189] The test for harm in the primary market rests on the alleged infringing work superseding the first work.[190] Harm resulting from the destruction of the market for the original work is different; there is no privilege for the original artist to capitalize on her product being in the market, only the right to access the market free of a substitute work diminishing the size of the market.[191]

The secondary market is more complicated, since it necessarily involves a hypothetical projection of the likelihood of that work being the subject of licensing desires. The secondary market implicates a circular analysis—a work has licensing value if it is used in the secondary work, but the value is dependent on the transformativeness of that secondary work. Additionally, the use in a secondary work is often dependent on the absence of licensing costs associated with the use. And in the absence of a standard licensing practice such as those employed by AP or Getty Images, calculating the lost licensing cost can be nearly impossible. Finally, the identity of the secondary artist can significantly alter the potential value of the secondary work, and thus alter the negotiations between the copyright holder and the potential licensee.[192] Although this may simply engender an economic solution based

187. The *Campbell* Court defined both parody and satire. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). *But see Archer Vice: Southbound and Down* (FX television broadcast Feb. 24, 2014) (arguing that "nobody really knows" what satire is).

188. *See* Landes, *supra* note 182, at 10.

189. *See Campbell*, 510 U.S. at 590–93; Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) ("Th[e fourth factor] inquiry must take account not only of harm to the original but also of harm to the market for derivative works.").

190. *Campbell*, 510 U.S. at 590–93.

191. This differentiates between full substitute works, which, by being identical to the original work, will infringe and partial substitute works, which are more likely to be transformative.

192. For a real-world example of the issues in determining licensing harm, consider the suit brought by French photographer Henri Dauman against Andy Warhol's estate for allegedly infringing a photograph of Jackie Kennedy that first appeared in *Life Magazine* in 1963. Although Warhol had used the image as source material a few months after her husband's assassination in November 1963, Dauman only became aware of the use in the mid-1990s, when one of Warhol's *Jackie* works sold at Sotheby's for $418,000. Although the

on principles of supply and demand, the likely outcome in most cases is the overvaluing of the original work by the copyright owner, thus resulting in market failure.[193]

In many ways, an economic approach to copyright would allow appropriation art to flourish in much the same way that a robust fair use regime based upon social context theories of reception would. However, this is mainly an ex post analysis of the economic rationale for preferences society has already approved. In some cases, the economic analysis fails to account for societal preferences for expression, while in others it fails to account for an irrational market. The former will be explored in the following section; for the latter, *Rogers v. Koons*[194] provides a useful example. Although a pure economic exploration indicates that the outcome should have been avoided by Koons paying a small fee to license the image he used as basis for his sculpture, this contention often does not hold up when confronted with standard real-world barriers. If economic theory is to provide assistance in favorably adjusting the current fair use inquiry, it will only be as a supplement to additional theories.

C. SOCIAL SCIENCE THEORIES OF CONTEXTUAL ENGAGEMENT

If the underlying goal of the fair use exemption is to further the progress of the arts by providing the public with greater access to transformative works, then the audience's reaction can be instrumental in determining whether a work is transformative. If it is granted that the audience is composed of divergent evaluations, it is inarguable that it will contain varied opinions of what a work is expressing. This implies that everything is variably transformative; logically, then, the concept of transformation cannot be a binary. Instead, the relevant question in a fair use inquiry is not whether an alleged infringing work is transformative or not, but to what degree the work is transformative, and whether this is sufficient to favor fair use.[195] Returning to *Campbell* for an example, the relevant question was "whether a parodic

case settled before a judicial ruling, Dauman's complaint asked for a finding of copyright liability and for damages. Dauman v. Andy Warhol Found. for Visual Arts, Inc., No. 96 CIV.9219, 1997 WL 337488, at *1 (S.D.N.Y. June 19, 1997). This elicits two questions. First, is the value of the license determined at the moment of infringement, or at post-sale of the work? If the former, then any loss of licensing revenue to Dauman would likely have been extremely minimal, as, although Warhol's works sell for millions today, in 1964 they were of little value. If the license value is determined upon sale of the work, then we are effectively punishing an artist for creating a secondary work that the public believes to exist independently from the original work.

193. *See* Landes, *supra* note 182, at 11.

194. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

195. *See* Heymann, *supra* note 19, at 449.

character may reasonably be perceived."[196] If the relevant responder to that question is properly considered the public, and not the judge substituting her own beliefs for the public, then social science theories can assist in discerning the public's reaction to the artwork in question.

Divorcing the audience's understanding of the existence and purpose of this examination from an analysis of the transformativeness of a work reduces the inquiry to a facial examination of the physical differences between two works. Although this differentiation between the physical can provide a window into the transformativeness of a work, it is not necessary,[197] nor should the law consider it sufficient.

Adjusting the inquiry from one that attempts to divine purpose though authorial statements to one that focuses on audience interpretation will still allow authorial intent to influence the examination. But rather than burden judges with the task of discerning intent by holding two works side-by-side, the audience can accept either the stated rationale of an artist or infuse a work with a new collective meaning. This ability to infuse a work with a meaning different from the artist's original intent recognizes the power of the audience to determine a work's true transformative nature.[198] Meaning is arguably contextual, and a judge experiences a work in a different context than any other individual. This then implies that the judge's experience of the work is unique, and potentially not representative of the larger audience. Consider, for example, Koons's *Banality* show. Removing his sculpture, *String of Puppies*, from the context of an exhibition entitled *Banality* diminishes the meaning of the work as a critical object.[199] The same is true of Prince's use of Cariou's photographs—audience engagement is predicated on the context of the encounter with the work. It is within this context that the meaning of the work is transmitted from author to audience. The context can amplify, diminish, or simply distort the author's intent. Although the author can place her artwork within a certain context—for example in a gallery[200] or on the sides of buildings[201]—much of the time the work is subject to engagement in

196. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994).

197. *See* SPECTOR ET AL., *supra* note 15.

198. *See* William W. Fisher III, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart & Marita Sturken, *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243 (2012).

199. It is difficult to believe that a person walking into the show would find Koons's piece to have developed a similar meaning to Art Rogers's photograph. Simply the name of the show would likely give some indication that Koons was commenting on the banality of Rogers's puppy photograph.

200. For example, Koons's *Banality* show at Sonnabend Gallery.

201. For example, Banksy's street art.

myriad circumstances.[202] Divorcing the work from the artist alters the discourse that exists surrounding that work, and recasts the audience's interaction with the work in view of what the audience perceives to be the new "truth."[203] But under the test set forth in *Cariou*, a court should give no weight to this fact.[204]

D. MEASURING THE VALUE OF THE ENGAGEMENT

Extrapolating theories of contextual engagement to a fair use inquiry will only assist if the court can discern some method of measurement. To this end, the market can provide a guide. As shown in *Cariou*, the values the market placed on the two artists' respective works differed greatly. But where the court in *Cariou* determined the absence of market usurpation followed from the transformative nature of Prince's artworks, examining the issue from a theory of contextual engagement changes the form. Instead, a court examining the same case under the new proposal to reinvigorate the market-harm inquiry as the dominant factor in a fair use inquiry would determine that the transformative elements of Prince's work could only have followed the creation of a dialogue around the work that was distinct from the one that formed around Cariou's photographs. The different market values for the works provide evidence that Prince's work was not acting as a substitute for Cariou's work. If it had, economic theory would suggest that the prices of the two works would be identical, or close to identical.

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202. One notable example of a work adopting divergent meanings in different contexts is Shepard Fairey's *Hope* poster. Adopting an image from an Associated Press ("AP") photographer, Fairey cropped the image, made color and other adjustments to the image, and eventually ended up with the iconic image that spread across the country in 2008. Its lasting impact on culture will be its influence as a political poster, but within that context it resonates deeply with cultural interaction with the political. The poster draws upon various sources of inspiration—including Soviet agitprop political posters, Warhol's pop-art exploration of celebrity, traditional notions of photographic dignified power, and 1980s populist street art—to create a singular image that harmonized these disparate meanings. The contextual presentation of the poster can highlight one or more of these influences, allowing the viewer to ascribe his own thoughts into the meaning, and transforming the piece accordingly. This can also be examined in the subsequent adoption of the image into a textual reference for numerous other images—positive and negative, sincere and ironic—all of them referencing Fairey's poster and not the underlying AP image. For a comprehensive treatment of the poster and the litigation surrounding it see Fisher et al., *supra* note 198.

203. For an example, consider the case of *The Education of Little Tree*, discussed in Heymann, *supra* note 19, at 459.

204. *See* Cariou v. Prince, 714 F.3d 694, 707 (2d Cir.), *cert. denied*, 134 S. Ct 618 (2013) ("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 address their transformative nature. The focus of our infringement analysis is primarily in the Prince artworks themselves . . . .").

The court's suggestion that the market segments for the two artists were distinct from one another fails to understand that an artwork does not form distinct from the author. Although the author has limited control over how the audience engages with her work, the audience can ascribe an artist's brand onto a creation. This understanding is essential to a conceptualization of the alteration of expression through appropriation.[205] When Richard Prince appropriates an existing work, he imbues that work with his brand, one that has been cultivated through his career and is recognized by the public as distinctive. The market value of his work is partially a simple representation of that recognition. Prince's work is distinct, and therefore transformative, because the market—i.e., the public—has recognized it as so.

This Note does not purport to imply that monetary value is the only true representation of the true worth of a work of art. Quite often, the most influential works are those that are initially rejected by the public. But, as Justice Holmes warned, judges should not be the arbiters of taste.[206] In all but a very small subset of cases, which we can assuredly count on judicial common sense to sniff out, the copyright holder is not harmed by a secondary use that implicates First Amendment concerns or authorial interests. In the vast majority of fair use litigation, it is best to listen to what the public is indicating it values.

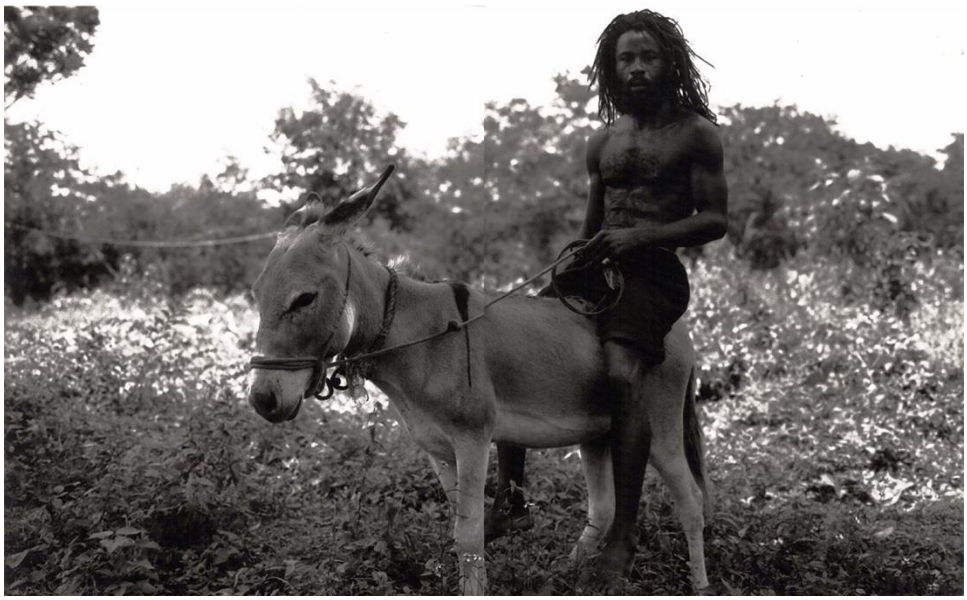
205. Consider the case of Damien Hirst's *The Physical Impossibility of Death in the Mind of Someone Living*. Ostensibly nothing more than a shark submerged in formaldehyde, in 2004 the piece sold for $12 million. To understand the sale price, it is instructive to examine what differentiated Hirst's work from any other shark submerged in formaldehyde. Hirst's shark was not the first: in 1989, two years prior to Hirst creating *Physical Impossibility*, a man named Eddie Saunders displayed a shark on the wall of his electrical shop in London. When, in 2003, Saunders displayed his shark at the Stuckism International Gallery and advertised his shark for sale at a steep discount from the price for Hirst's piece, he received no offers. Saunders displayed his piece under the title, *A Dead Shark Isn't Art*. And the market decided that in his case, he was correct. Hirst's shark was evaluated differently. Even at the genesis of the piece in 1991, Hirst already possessed a reputation as a leading figure in what would be known as the Young British Artists, having curated multiple lauded exhibitions and impressed the influential Charles Saatchi with his installation piece *A Thousand Years*. When Cohen purchased Hirst's shark in 2005, he was buying not only a shark or the expression of Hirst's idea of this single work, but also what Hirst as a brand contributed to the public's valuation of the work. For more information on the creation and subsequent history of Hirst's work, see DON THOMPSON, THE $12 MILLION STUFFED SHARK: THE CURIOUS CASE OF CONTEMPORARY ART (2008).

206. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 351 (1903).

IV. CONCLUSION

Since the first judicial decision that addressed copyright and fair use in the area of appropriation art, courts have struggled with the conceptual underpinnings of the artistic form. In sum, the judiciary has done admirably, often expanding its understanding of the fair use doctrine in order to serve the core goal of copyright—to promote the arts. But in doing so, it has potentially travelled down a rabbit hole. The focus on transformation itself is not the issue; the concept has proven useful as a malleable term of art for judges to explore different conceptions of the purpose and character of the use under the first statutory factor. However, the recent decision in *Cariou v. Prince* indicates that transformation might be exclusively found in physical alteration. The *Cariou* transformation test divorces artwork, especially appropriation artwork, from an individual's contextual and experiential engagement with the artwork. It forces a judge to engage as a critic. Instead of continuing down this path, courts should reorient themselves and allow the public to indicate the transformative nature of a work. Courts can do this by examining social theories of contextual engagement in concert with fundamental market principles to determine actual market harm. This determination can then inform the question of transformation. The effect is to return the power to determine what is in the public interest to the public.

APPENDIX



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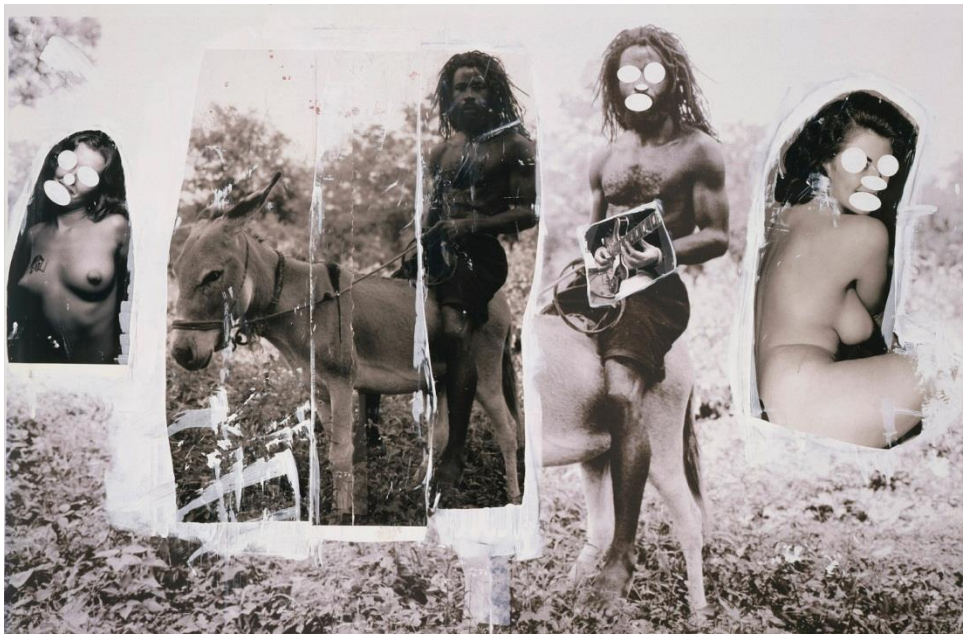
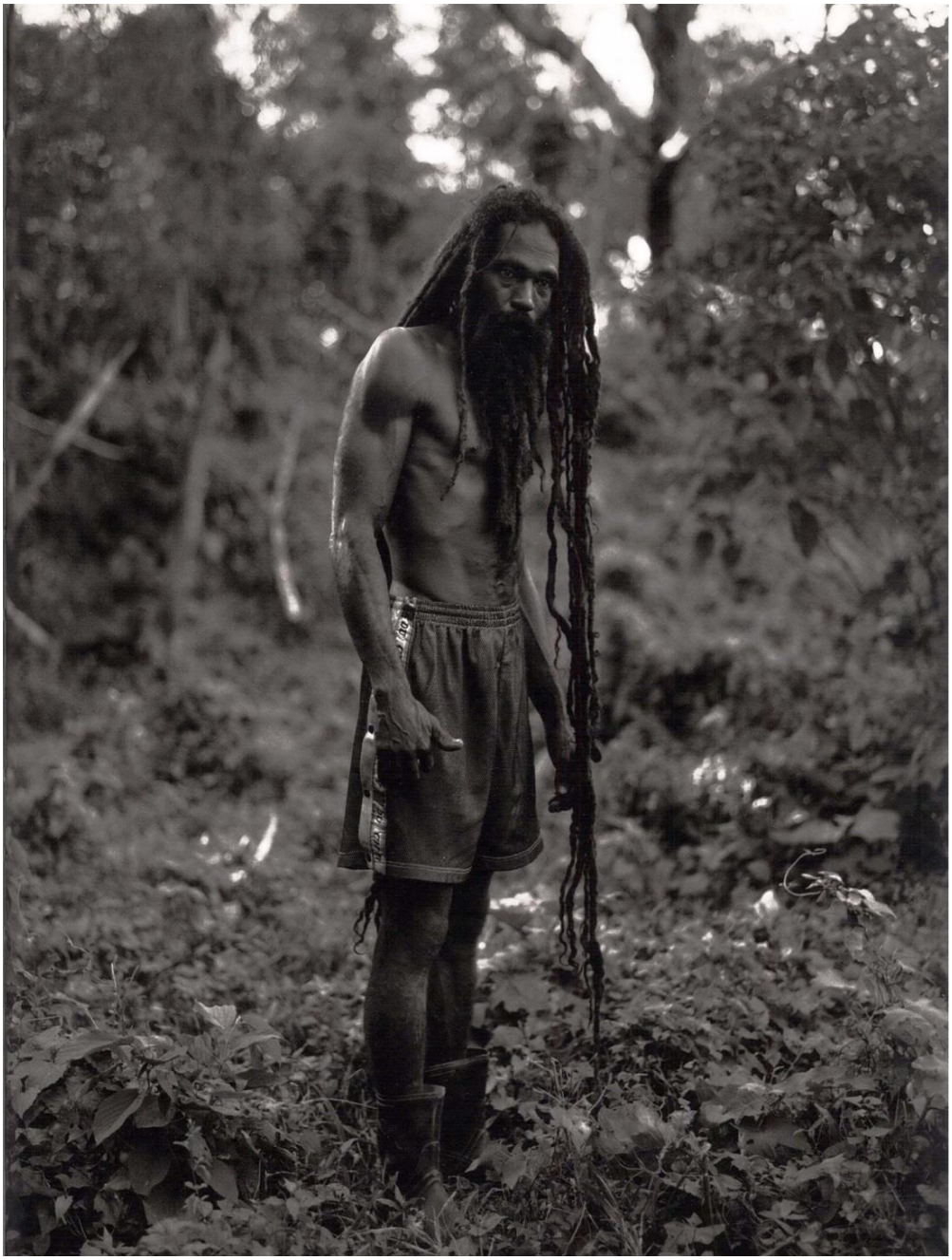


Richard Prince, *Back to the Garden* (2008).



PATRICK CARIOU, YES RASTA 118 (2000).

Richard Prince, *Graduation* (2008).