WHY VISUAL ART REQUIRES ITS OWN STANDARD UNDER COPYRIGHT FAIR USE

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INTRODUCTION

With the emergence of new digital mediums, the artist's inspiration has shifted. Modern copyright law does not provide adequate protection to the long-recognized artistic movement of appropriation art.

Visual art presents several complexities when compared to other mediums that work against a consistent application of fair use. First, its meaning cannot be defined in a consistent way for every viewer. Further, it cannot be paraphrased or summarized. It is difficult to define how much of a prior work an appropriation artist borrows. The harm to the original artist is difficult to define because the art market values authenticity rather than copies, and the American copyright system does not protect moral rights except in limited circumstances. For these reasons, fair use does not work when applied to the visual arts.

Instead of reaching the ultimate policy goal of promoting the useful arts that was provided for in the Constitution, copyright law leaves artists uncertain when the use of other works is permitted. Visual art requires its own standard under fair use. The inherent differences between visual art and literature can inform a new standard for visual art under the copyright fair use defense.

I. BACKGROUND

A. Appropriation Art

Artists often use the styles and work of others as building blocks in their own works, and appropriation art exemplifies this

practice. As one scholar describes, "'appropriation artists' . . . skew the traditional art goal of originality and seek to express ideas by borrowing and repurposing images from pop culture, advertisements, news media, and other artists."[1] One of the most iconic artists in this style was Andy Warhol. Warhol built off of the celebrity photos of others and even the design of a Campbell's soup can to create his own work.[2] As the Second Circuit described in *Cariou v. Prince*, Warhol's work "comments on consumer culture and explores the relationship between celebrity culture and advertising."[3] This movement has changed the way artists create.[4] As one scholar describes, "[t]hough easy for some to dislike or label as artistically meaningless, these artists are the natural descendants of many others who have used the work of others over the centuries."[5] It "raises questions of originality, authenticity and authorship, and belongs to the long modernist tradition of art that questions the nature or definition of art itself."[6]

Artists today are faced with new mediums that did not exist a century ago.[7] In recent years, the art world has seen the

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[1] Brittani Everson, Comment, *The Narrowest and Most Obvious Limits: Applying Fair Use to Appropriation Art Economically Using a Royalty System*, 63 CATH. U. L. REV. 729, 731 (2014) (footnote omitted) (first citing John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM. J.L. & ARTS 103, 108-09 (1988); then citing Barbara Pollack, *Copy Rights*, ARTNEWS (Mar. 22, 2012, 9:00 AM), https://www.artnews.com/art-news/news/copy-rights-522/ [https://perma.cc/V6WH-YJ5C]; and then citing Anne Jamison, *Collaboration v. Imitation: Authorship and the Law*, 18 LAW & LIT. 199, 202 (2006)). *See also* Richard H. Chused, *The Legal Culture of Appropriation Art: The Future of Copyright in the Remix Age*, 17 TUL. J. TECH. & INTELL. PROP. 163, 167-85 (2014) (discussing the history of the appropriation art movement and its alignment with developments of copyright law in the new technological age).

[2] Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 592 (2016) [hereinafter Adler, *Fair Use and the Future of Art*].

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

[4] Chused, *supra* note 1, at 166 ("Since the 1970s, some artists have become blatant and unapologetic about their use of others' works.").

[5] *Id.* at 170.

[6] *Art Terms*, *Appropriation*, TATE, https://www.tate.org.uk/art/art-terms/a/appropriation [https://perma.cc/3U32-JBMS] (last visited Dec. 15, 2021).

[7] Chused, *supra* note 1, at 173-74 ("From an artist's perspective, it makes no difference whether the reference reused in a 'new' work is an everyday public domain object like a bicycle wheel or an odd, copyrighted photograph of a string of puppies sitting in human laps. Either referenced work can inspire extraordinarily creative responses.") (referencing Marcel Duchamp's *Bicycle Wheel* and Jeff Koons's *String of Puppies*).

development of memes[8] and NFTs.[9] New technology fundamentally changed the way art is created.[10] As one scholar argues, "[a]s technology has unleashed both a torrent of images and the capacity to copy them with a click, copying has become a basic tool for making art, as basic as paintbrushes once were."[11]

Sources of artistic inspiration often originate online.[12] Artists attempt to reflect the state of the world in their work. The "new environment—the one that artists today are seeking to mold and remold—consists of an ever-greater measure of media and other human creations in which intellectual property rights generally subsist."[13] In this way, "[a] contemporary artist . . . [seeking] to portray aspects of everyday life must . . . almost inescapably bump up against some[one] else's copyrighted material."[14] This is because

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[8] David Tan & Angus Wilson, *Copyright Fair Use and the Digital Carnivalesque: Towards a New Lexicon of Transformative Internet Memes*, 31 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 864, 924 (2021). ("Unsurprisingly, memes, with their rich semiotic connotations, are popularly used for the purpose of creating, maintaining and remaking of a digital public persona, and should generally qualify as highly transformative secondary uses that repurpose copyrighted works in a digital medium.").

[9] *See* discussion *infra* note 96.

[10] Christophe Geiger, *Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?*, 8 U.C. IRVINE L. REV. 413, 430 (2018) ("Technology has also increased access to user-generated content, a new source of borrowable material, the influence of which is . . . easily observed in the visual art of proponents of the appropriation art movement such as Jeff Koons."). *See also* Anna Schuler, *Insta-Appropriation: Finding Boundaries for the Second Circuit's Fair Use Doctrine After* Campbell, 85 FORDHAM L. REV. 367, 369 (2016) ("In an age where young artists flock to social media platforms to display their work, society and the law should not sanction this type of blatant appropriation.") (arguing that copyright law does not offer sufficient protection to original creators of digital content).

[11] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 571. *See also* Chused, *supra* note 1, at 174 ("We reached the point in the history of western art where appropriation and remixing of the old became a standard part of our creative, artistic sensibilities. And, of course, no one should be surprised that the digital realm is now in the center of America's imaginative stew.").

[12] Geiger, *supra* note 10, at 430 ("Essentially, the history of popular music, and increasingly popular art as a whole, is a history of artistic development irrevocably connected with the progress of technology and its ability to enable the creation and enrichment of new work by appropriating the old." (citing Aaron Gervais, *Why Pastiche Has Taken Over Music*, NEWMUSICBOX, Feb. 24, 2016, https://nmbx.newmusicusa.org/why-pastiche-has-taken-over-music/ [https://perma.cc/2FNE-PJ7U]).

[13] Stephen E. Weil, *Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood*, 62 OHIO ST. L.J. 835, 837 (2001).

[14] *Id.*

"[t]he digital screen and its endless play of disconnected images is our new daily landscape, as Giverny once was for Monet."[15] As Professor Amy Adler argues, "now that we are bombarded by images, the most important artist may be the one who can sift through other people's art (or trash), the one who functions like a curator, an editor, or even a thief."[16]

B. Copyright Law

Copyright law originated in eighteenth-century England in response to the invention of the printing press.[17] It was provided for in the United States Constitution "*[t]o promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[18] Copyright law struggles to strike the balance between promoting the arts and stifling creativity because the more people can "own" the less flexibility others have to innovate upon their creations.[19] The purpose of the American copyright law system is not primarily to reward the efforts of creators.[20]

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and

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[15] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 571.

[16] *Id.* at 572 (citing Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 277-79 (2009) [hereinafter Adler, *Against Moral Rights*]).

[17] WILLIAM F. PATRY, 1 PATRY ON COPYRIGHT § 1:5 (2013) [hereinafter PATRY ON COPYRIGHT].

[18] U.S. CONST. art. I § 8, cl. 8 (emphasis added).

[19] Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 540 (S.D.N.Y. 2008) ("At stake in this case are the incentive to create original works which copyright protection fosters and the freedom to produce secondary works which monopoly protection of copyright stifles—both interests benefit the public." (citing Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990))). *See also* Everson, *supra* note 1, at 730 ("Copyright law aims to balance the private reward given to copyright holders with the benefit the public accrues from access to intellectual property." (first citing Carlin *supra* note 1, at 104; then citing Jamison, *supra* note 1, at 202; then citing Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); and then citing Leval, *supra* note 19, at 1111)).

[20] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and the useful Arts.'" (quoting U.S. CONST. art. I, § 8, cl. 8)).

inventors in 'Science and useful Arts.'"[21] This system is premised on the theory that copyright protection affords economic incentive for authors to create more works. However, the rewarding of authors is largely incidental to the ultimate goal of promoting more work. In sum, the "grant [of] copyright to individual authors is predicated on the dual premises that the public benefits from the creative activities of authors and that copyright protection is a necessary condition to the full realization of those creative activities."[22]

Importantly, "[c]opyright cannot protect an idea, only the expression of that idea."[23] There is a distinction between the uncopyrightable idea behind an author's expression and the copyrightable expression itself. In other words, "copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[24] For this reason, secondary authors may build upon the ideas of others, as long as they do not infringe on the protected expression.[25] However, drawing the line between idea and expression can be difficult, particularly in visual art. One scholar describes "[a]pplying the idea-expression test to a pictorical work, the 'idea' serves as the equivalent of the iconographic content . . . represented in the picture."[26] The separation from the image itself, which would be the protectable expression, and the idea is essentially impossible to do.

While the art community opened its arms to appropriation art, the legal world has not yet caught up. The art world celebrates

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[21] Mazer v. Stein, 347 U.S. 201, 219 (1954). *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 155 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts.").

[22] MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 1.03 (2022), LEXIS.

[23] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263 (11th Cir. 2001) (citing Baker v. Selden, 101 U.S. 99 (1880)). *See also* 17 U.S.C. § 102(b).

[24] *Feist*, 499 U.S. at 349-50 (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556-57 (1985)).

[25] *Harper & Row*, 471 U.S. at 548 ("Yet copyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original . . . as long as such use does not unfairly appropriate the author's original contributions.").

[26] Patricia Krieg, Note, *Copyright, Free Speech, and the Visual Arts*, 93 YALE L.J. 1565, 1570 (1984) (footnote omitted). *Id.* 1569 n.24 ("The idea-expression dichotomy does not provide the visual artist with any degree of certainty in application . . .").

copying to create a new work, while the legal world may find these secondary works to be copyright infringement.[27] Instead of recognizing them as their own works, which are entitled to legal protections, the law has carved out an exception to copyright, fair use, that does not consistently apply. In this way, the "time-honored concept of 'originality through imitation' has become a common norm within the artistic community even though it is largely incompatible with the notions of originality and authorship in American copyright law."[28] Furthermore, "[t]he basic notion that work must have some level of originality to claim copyright protection is constantly in tension with the reality that virtually all creative persons work on the shoulders of those who preceded them."[29]

C. Fair Use

Copyright law allows creators, including visual artists, to copy the work of others as long as it is fair use. Fair use is a statutory limitation on the exclusive rights of copyright holders and is an exception to the rule of copyright infringement. The creator of a secondary work that would be infringing may raise this defense. It generally means the borrower used the original work for a productive, creative purpose.[30] The statute "calls for case-by-case analysis."[31] The factors considered are:

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[27] Geiger, *supra* note 10, at 430 ("The fear, then, is that ambiguity in the regulation of appropriation could have an enormous chilling effect on the development of modern art, and in fact[,] history has shown that new art or music forms have largely developed by (deliberately or not) ignoring copyright issues."). *See also* Everson, *supra* note 1, at 733 ("As the use of copyrighted works becomes more common in all genres and technological developments make appropriation of images easier, courts must wrestle with the copyright questions in unconventional mediums.").

[28] Liz McKenzie, *Drawing Lines: Addressing Cognitive Bias in Art Appropriation Cases*, 20 UCLA ENT. L. REV. 83, 88 (2013) (citing Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477 (2007)). *See also* Chused, *supra* note 1, at 166 ("I suggest that as a result of the shifts in both art culture and intellectual property law during the last century, the level of reuse and remixing of protected material, by both artists and nonartists, became so pervasive that traditional copyright enforcement strategies lost much of their utility.").

[29] Chused, *supra* note 1, at 170.

[30] Clark D. Asay et al., *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 915 (2020) (first citing *Harper & Row*, 471 U.S. at 560; and then citing UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000)).

[31] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

> 1. [T]he 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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> 2. [T]he nature of the copyrighted work;
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> 3. [T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> 4. [T]he effect of the use upon the potential market for or value of the copyrighted work.[32]

Fair use is employed where liability for the secondary work would work against the ultimate policy of copyright to promote the useful arts. The doctrine is used to further copyright's purpose "by balancing the simultaneous needs 'to protect copyrighted material and to allow others to build upon it.'"[33] In this way, "[the doctrine] 'permits [and requires] 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.'"[34] The ultimate goal for fair use is to "strike[] a balance between the rights of a copyright holder and the interest of the public in disseminating information."[35] These policy goals drive the application of the factors.[36]

1. Transformative Use

Famously, Judge Pierre Leval (then a Harvard Professor) proposed what is known as the transformative use standard under the first factor of fair use: purpose and character.[37] He argued that "[i]f . . . the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to

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[32] 17 U.S.C. § 107.

[33] Warner Bros. Ent. Inc v. RDR Books, 575 F. Supp. 2d 513, 539-40 (S.D.N.Y. 2008) (quoting *Campbell*, 510 U.S. at 575).

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

[35] County of Suffolk v. First Am. Real Est. Sols., 261 F.3d 179, 193 (2d Cir. 2001).

[36] Everson, *supra* note 1, at 758 ("Fair use is an equitable principle that must be applied in a manner most consistent with the purpose of copyright law.").

[37] Leval, *supra* note 19.

protect for the enrichment of society."[38] Judge Leval provided that "[t]he transformative justification [of the secondary work] must overcome factors favoring the copyright owner."[39]

The Supreme Court later adopted the proposed standard in *Campbell v. Acuff-Rose Music, Inc.*[40] The Court held "[u]nder the first of the four § 107 factors, 'the purpose and character of the use, including whether such use is of a commercial nature . . . ,' the enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is 'transformative,' **altering the original with new expression, meaning, or message**."[41] It has become the dispositive inquiry under the fair use analysis and has led to substantial scholarly discussion.[42] One research study confirmed this trend.[43]

II. THE INCONSISTENT APPLICATION OF FAIR USE TO THE VISUAL ARTS LEADS TO UNCERTAINTY FOR ARTISTS AND STIFLES CREATIVITY.

Thus far, courts have inconsistently applied fair use to the visual arts. This inconsistency stifles the creativity of artists and leads to increased litigation costs. In this section, I walk through some examples of the inconsistent applications. Further, I use two cases involving works of literature to demonstrate that fair use works better when applied to literature. I explain how the uncertainty of the fair use analysis works against the ultimate policy goal of copyright to encourage the arts. Finally, I analyze

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[38] *Id.* at 1111.

[39] *Id.*

[40] 510 U.S. 569 (1994).

[41] *Id.* at 569 (emphasis added).

[42] Jiarui Lui, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 167 (2019) ("As lower courts stretch transformative use to fact patterns increasingly afield from the original contexts in which it emerged, i.e., critical biography and parody, the concept has taken on a life of its own, morphing in dimensions that its architects probably never envisioned."). *See also* Asay et al., *supra* note 30, at 929-30 ("[W]hen a court uses the transformative use concept, the doctrine frequently appears to dictate the court's analysis of the remaining factors and, ultimately, the overall fair use outcome.").

[43] Lui, *supra* note 42, at 166 ("[T]ransformative use has been gradually approaching total dominance in fair use jurisprudence since *Campbell*: While transformative use decisions as a whole account for 51.7% of all fair use decisions under Section 107, the percentage has risen closer to 90% in recent years.").

solutions proposed by other scholars to further illuminate the complications faced when proposing any standard of application of fair use to the visual arts.

A. The applications of fair use and the transformative use standard to visual art have been inconsistent.

The results of courts' applications of transformative use to visual art have been inconsistent. This inconsistency can be compared across three Second Circuit opinions with similar basic facts: a secondary artist uses the photograph(s) of an original artist in new work.

First, in *Blanch v. Koons*, the Second Circuit focused on the secondary artist's stated purpose in creating their work. Jeff Koons, a famous appropriation artist, incorporated a photograph entitled "Silk Sandals" taken by Andrea Blanch in a collage piece entitled "Niagara."[44] The Court held that "[w]hen . . . the copyrighted work is used as 'raw material,'. . . in the furtherance of distinct creative or communicative objectives, the use is transformative."[45] Importantly under the inquiry in this case, "Koons is, **by his own undisputed description**, using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media."[46] In this way, "[h]is stated objective is thus not to repackage Blanch's 'Silk Sandals,' but to employ it 'in the creation of new information, new aesthetics, new insights and understandings.'"[47] The Court discussed the physical differences and differences in meaning and purpose between the two works. They held "the use of a fashion photograph created for publication in a glossy American 'lifestyles' magazine—with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details and, crucially, their entirely different purpose and meaning—as part of a massive painting. . ." was transformative.[48] "Niagara" was entitled to the fair use defense.[49]

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[44] Blanch v. Koons, 467 F.3d 244, 247-48 (2d Cir. 2006).

[45] *Id.* at 253 (citing Castle Rock Ent., Inc. v. Carol Pub. Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998)).

[46] *Id.* (emphasis added).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 259.

In *Cariou v. Prince*, the Second Circuit focused on a reasonable observer standard. In this case, Richard Prince created a series entitled *Canal Zone* in which he used photographs taken by Patrick Cariou.[50] The Second Circuit held "[w]hat is critical [for the transformative use test] 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**."[51] The Court again focused on the physical differences: "looking at the artworks and the photographs side-by-side, . . . Prince's images, except for those [discussed] separately [in the opinion], have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."[52] The Court held that those works discussed separately did "not sufficiently differ from the photographs. . . that they incorporate . . . [to] confidently . . . make a determination about their transformative nature as a matter of law."[53] While the Court determined the majority of Prince's works to be transformative and fair use, these other works were sent back to the district court to apply the stated standard.[54]

Finally, in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, the Second Circuit seems to provide yet another spin on the transformative use standard. In this case, Andy Warhol used a photo taken by Lynn Goldsmith to create what is known as the "Prince Series."[55] Once Goldsmith discovered the series some 40 years later, she informed the foundation of the "perceived infringement of her copyright."[56] The foundation then sued Goldsmith for "a declaratory judgment of non-infringement or, in the alternative, fair use." Then, "Goldsmith countersued for copyright infringement."[57]

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[50] Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013).

[51] *Id.* at 707 (emphasis added). *See also* Adler, *Fair Use and the Future of Art*, *supra* note 2, at 583 ("Here the Second Circuit also had an answer: The viewer who mattered was 'the reasonable observer.'" (citing *Cariou*, 714 F.3d at 707)).

[52] *Cariou*, 714 F.3d. at 707-08.

[53] *Id.* at 710-11.

[54] *Id.* at 712.

[55] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 34 (2d Cir. 2021), *cert. granted*, 90 U.S.L.W. 3297 (U.S. Mar. 28, 2022) (oral arguments are scheduled for October 12, 2022).

[56] *Id.* at 35.

[57] *Id.*

The Court reiterates that "in [*Cariou*], [the Court] rejected the proposition that a secondary work must comment on the original in order to qualify as fair use."[58] Further, the Second Circuit holds: "[i]n conducting [the transformativeness] inquiry . . . the district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue . . . because judges are typically unsuited to make aesthetic judgments and because such perceptions are inherently subjective."[59] Despite this, the Court goes on to hold "there can be no meaningful dispute that the overarching purpose and function of the two works at issue here is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person."[60]

The Second Circuit held "the secondary work's transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist's style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material."[61] The Court found Warhol's work to not be transformative or fair use, and the determination turned on the fact that, in the Court's view, "[w]hile the cumulative effect of those alterations may change the Goldsmith Photograph in ways that give a different impression of its subject, the Goldsmith Photograph remains the recognizable foundation upon which the Prince Series is built."[62] Interestingly, the Court concludes the fair use analysis by proposing:

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[58] *Id.* at 38.
[59] *Id.* at 41-42.
[60] *Id.* at 42.
[61] *Id.*
[62] *Id.* at 43, 52.

> We merely insist that, just as artists must pay for their paint, canvas, neon tubes, marble, film, or digital cameras, if they choose to incorporate the existing copyrighted expression of other artists in ways that draw their purpose and character from that work (as by using a copyrighted portrait of a person to create another portrait of the same person, recognizably derived from the copyrighted portrait, so that someone seeking a portrait of that person might interchangeably use either one), they must pay for that material as well.[63]

The question then arises, if Warhol had sought Goldsmith's permission to create the "Prince Series," would she have approved? And if she had not, would the result that follows from the Court's conclusion, that the "Prince Series" is copyright infringement, be the one that is intended from the policy of the copyright system? In the following sections, I argue that it is not.

B. The fair use factors lend themselves to an application to literature.

Copyright originated with the protection of literature.[64] For these reasons, the elements of fair use lend themselves to literature as its baseline, and this is particularly well illustrated in two cases: *Suntrust Bank v. Houghton Mifflin Co.* and *Warner Bros. Entertainment Inc. v. RDR Books*.

Alice Randall wrote *The Wind Done Gone* as "a critique of [Margaret Mitchell's *Gone with the Wind*]'s depiction of slavery and the Civil-War era American South."[65] The copyright holder of *Gone with the Wind* sued Randall for infringement.[66] The Court held that *The Wind Done Gone* was a parody of *Gone with the Wind*, and it was sufficiently transformative to be a fair use.[67] The Court emphasized "[w]ithout the limited monopoly [afforded by copyright protection], authors would have little economic incentive to create and publish their work."[68] *The Wind Done Gone* was a parody, because it "is principally and purposefully a critical statement that

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[63] *Id.* at 52.

[64] PATRY ON COPYRIGHT, *supra* note 17, at § 1:5.

[65] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259 (11th Cir. 2001).

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1262.

seeks to rebut and destroy the perspective, judgments, and mythology of [*Gone with the Wind*]."[69] Despite being a parody, a work still "must be evaluated in light of the factors set out in § 107 and the constitutional purposes of copyright law."[70] Under the purpose and use factor, the court found the *Wind Done Gone* to be transformative: "While told from a different perspective, more critically, the story is transformed into a very different tale."[71] Further, *The Wind Done Gone* "reflect[ed] transformative value because it 'can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.'"[72] While finding insufficient evidence to determine the third factor of quantity of materials used, the Court did hold "that SunTrust's evidence falls far short of establishing [*The Wind Done Gone*] or others like it will act as market substitutes for [*Gone with the Wind*]."[73] As one scholar has synthesized, "as the court recognized, the essential inquiry is whether, using parody as its vehicle, a later work comments on or criticizes the original upon which it is based."[74]

In *Warner Bros. Entertainment Inc. v. RDR Books*, the Southern District of New York applied the fair use factors to an encyclopedia based on J.K. Rowling's *Harry Potter* series and its companion books.[75] Under purpose and character of use, the court recognized that the reference guide "add[ed] a productive purpose to the original material by synthesizing it [and referring] readers to where the information can be found in a diversity of sources."[76] However, the Court found that in certain places the encyclopedia's use of the verbatim, "distinctive original language from the *Harry*

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[69] *Id.* at 1270.

[70] *Id.* at 1268.

[71] *Id.* at 1270.

[72] *Id.* at 1271 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

[73] *Suntrust Bank*, 268 F.3d at 1276.

[74] Frank Houston, *The Transformation Test: Artistic Expression, Fair Use, and the Derivative Right*, 6 FIU L. REV. 123, 142 (2010). Further Houston argues that "[t]his, the court seems to say, is the core definition of parody, and it is crucial that 'the definition of the parody – against which the theme, language, purpose, and style of disputed works are to be measured – have some objective content because the definitions of these elements of writing are difficult to state with precision, especially for those trained in law rather than literature." *Id.* (quoting *Eleventh Circuit Allows Publication of Novel Parodying Gone with the Wind*, 115 HARV. L. REV. 2364, 2369 (2002)).

[75] 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

[76] *Id.* at 542.

Potter works [was] in excess of [the] otherwise legitimate purpose of creating a reference guide."[77] In this way, parts of the encyclopedia worked against transformative use, considering particularly the fact that large portions of the encyclopedia were copied from Rowling's work without citations, which defeated its purpose as a reference guide to find the material in the original books.[78] Because the encyclopedia's "purpose [was] only slightly transformative of the companion books' original purpose . . . the amount and substantiality of the portion copied . . . weigh[ed] more heavily against a finding of fair use."[79] Under the fourth factor, market harm, "[b]ecause the [encyclopedia] use[d] the *Harry Potter* series for a transformative purpose (though inconsistently), reading the [encyclopedia] cannot serve as a substitute for reading the original novels; they are enjoyed for different purposes."[80] However, the Court reached a different conclusion for the companion books. Because "[u]nless they sought to enjoy the companion books for their entertainment value alone, consumers who purchased the [encyclopedia] would have scant incentive to purchase either of Rowling's companion books, as the information contained in these short works ha[d] been incorporated into the [encyclopedia] almost wholesale."[81] "Ultimately, because the [encyclopedia] appropriate[d] too much of Rowling's creative work for its purposes as a reference guide, a permanent injunction [was issued] to prevent the possible proliferation of works that do the same and thus deplete the incentive for original authors to create new works."[82]

C. The conflicting results from the transformative use standard lead to uncertainty for artists and work against the policy of fair use.

The uncertainty of the existing fair use standard for visual art works against the policy of copyright law. Fair use was created as an exception to allow the use of copyrighted works in secondary

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[77] *Id.* at 544.
[78] *Id.* at 547.
[79] *Id.* at 548-49.
[80] *Id.* at 550.
[81] *Id.* at 550.
[82] *Id.* at 553 (internal citations omitted).

pieces.[83] In this way, it is meant to encourage works of art, not stifle them. Further, "[s]ome scholars in the United States have advocated that the degree of transformation test should be abandoned 'as it has failed art,' made the legality of copying in art more uncertain, and thus has created a detrimentally chilling effect on contemporary art movements where appropriation has started to play a central role."[84] Additionally, "[t]he uncertainty prevails even in litigated settings makes the costs and risks associated with relying on the fair use doctrine problematic for many users."[85] Finally, "[t]he disparate results of these cases, not to mention the high costs of litigating against a backdrop of uncertainty, help explain why a climate of 'self-censorship' has taken hold in the art world."[86]

As Judge Jacobs points out in his concurrence in *Warhol*, "[r]isk of a copyright suit or uncertainty about an artwork's status can inhibit the creative expression that is a goal of copyright."[87] As one scholar argued, "[a]lthough the case-by-case nature of fair use makes it a flexible doctrine, malleability is the enemy of predictability and is made worse when the rules of the case-by-case

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[83] *See supra* Section II.C.

[84] Geiger, *supra* note 10, at 437 (citing Adler, *Fair Use and the Future of Art*, *supra* note 2, at 562-63); McKenzie, *supra* note 28, at 96 ("[The current standard] leaves artists uncertain of whether their work would be considered a fair use in court since existing holdings are incredibly case-specific." (citing Rachel Isabelle Butt, Note, *Appropriation Art and Fair Use*, 25 OHIO ST. J. ON DISP. RESOL. 1055, 1059 (2010))); Liz Brown, *Remixing Transformative Use: A Three-Part Proposal for Reform*, 4 N.Y.U. J. OF INTELL. PROP. & ENT. LAW 139, 141-42 (2014) ("After *Cariou*, one might question who is best suited to evaluate the creativity that the law is designed to foster. In its wake, lawyers, artists, and dealers face growing uncertainty as to what kind of copying is legal."); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) ("While the doctrine's attention to context has many salutary attributes, it is so case-specific that it offers precious little guidance about its scope to artists, educators, journalists, Internet users, and others who require use of author's copyrighted expression in order to communicate effectively."). *See also* Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 322 (2018) [hereinafter Adler, *Why Art Does Not Need Copyright*] ("[The] vast uncertainty [of this area] has led to an ornate and conflicting body of caselaw that chills artistic expression.").

[85] Carroll, *supra* note 84, at 1120.

[86] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 566 (citing Patricia Aufderheide et al., *Copyright, Permissions, and Fair Use Among Visual Artists and the Academic and Museum Visual Arts communities: An Issue Report 8* (2014)).

[87] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 55 (2d Cir. 2021) (Jacobs, J., concurring).

analysis are unclear."[88] While some flexibility likely benefits the protection of visual arts, as it would be impossible to find a one-size-fits all standard, having such limited consistency has detrimental effects. The result is that "[r]ights holders do not know what is permitted among secondary users, and secondary users' artistic expression may be chilled by the unknown parameters of fair use."[89]

D. Solutions by other scholars are varied and offer insight into the problems with the current application of fair use to visual arts.

Many scholars proposed solutions to this problem.[90] Convincingly, Professor Amy Adler argued a return to the fourth fair use factor: market effect. While copyright law's goal of incentivizing artistic works centers around a utilitarian view of the motivation of artists, the reality of the art market may prove that this is the incorrect approach.[91] Adler argues a return to a market-based inquiry would allow the test to fall in line with the current art market.[92] Because consumers of art buy art based on the

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[88] Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J.L. & ARTS 513, 536 (2016).

[89] *Id.* at 536.

[90] Many scholars have written on this topic making different proposals. Not all are addressed here. *See* Carroll, *supra* note 84, at 1090 ("This Article applies this insight by advancing a legislative propose to create a Fair Use Board in the Copyright Office that would have authority to adjudicate fair use petitions and, subject to judicial review, issue fair use rulings.").

[91] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 620. Adler points out that "[e]ven a staunch advocate for copyright acknowledges that copyright is not an economic incentive for artists to create." Adler, *Why Art Does Not Need Copyright*, *supra* note 84, at 339. Adler goes on to discuss writings by Richard Prosner and William Landes. *Id.* at 340 n.120 ("Both Richard Posner and William Landes have previously argued that visual art involves primarily unique works, the production of which would *not* seem to require copyright." (first citing William M. Landes & Richard A. Prosner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 329 (1989); and then citing Richard A. Prosner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 66 (2005))). Adler disagrees with the emphasis on the derivative art market by these scholars. *Id.* ("To the extent money motivates such an artist, as the utilitarian vision of copyright assumes, she would produce new works not for the unlikely and slight, at best, value of any potential copyright income, but instead for the value of earning a huge sum from the sale of the work itself.").

[92] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 620 ("Paradoxically, I suggest that the best way to protect the vital creative and free speech interests in copying may be to stop thinking about art in terms of its expressive value, its meaning or

personal brand of the artist who creates it, art appropriation would never infringe the market of an original piece as no artist could truly recreate the individual brand of another.[93] Adler explains, "[b]ecause an artist who copies another artist's work takes the original artist's visual material but does not take her brand (which would be forgery), the second artist has taken something that is unrelated to the market value of the original work."[94] Further, while the importance of derivative works or licensing is present in markets for music, software, film, or literature, it is not as important in the art world.[95] In fact, "[b]ecause value is no longer to be found in the visual, it has come to reside almost completely in the reputation or 'brand' of the artist, a standard that is policed by the market's emphasis on authenticity."[96]

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message, as the transformative test requires, and to turn instead to thinking about art as a market commodity."). On the other hand, one scholar argues consideration to eliminate the fourth factor entirely. Asay et al., *supra* note 30, at 965 ("[Factor four should be eliminated] because factors one (and several of its subfactors) and three also already address the concerns factor four is meant to protect."). Recently, in the *Google v. Oracle* decision, the Supreme Court seemed to re-emphasize the fourth factor of market harm. *See* Tan & Wilson, *supra* note 8, at 22 ("[T]he Supreme Court in *Google LLC v. Oracle America, Inc.* . . . emphasized the importance of taking into account the likelihood of the copyright owner entering a potential market." (citing Google LLC v. Oracle America, Inc., 141 S.Ct. 1183, 1203 (2021))).

[93] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 619.

[94] *Id.* at 622.

[95] *See supra* note 91.

[96] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 622. While outside of the scope of this analysis, relevant to this conversation is the recent trend of art sales through Non-Fungible Tokens ("NFTs"). NFTs "are digital files that are stored using a technology called blockchain, which is essentially a digital leger." Kara Swisher, *Another Big Step Toward Digitizing Our Lives*, THE NEW YORK TIMES (Mar. 19, 2021), https://www.nytimes.com/2021/03/19/opinion/NFTs-beeple-crypto.html [https://perma.cc/8AJN-PF6C]. However, these are different from "cryptocurrencies, including the well-known Bitcoin, [as] NFTs are not interchangeable with one another, because of their unique digital assets as well as important digital authentication that marks ownership." *Id.* They "have shown their utility most prominently recently in the art world, where people are paying enormous sums for the rights to 'own' things, like a one-of-a-kind GIF of the famous Nyan Cat or a whimsical and often puerile collection of digital art images made by a popular graphic designer named Mike Winkelmann, who goes by Beeple." *Id.* However, notably, a NFT "does not prevent you from copying the artwork to your own hard drive, but it does provide a certificate of ownership that cannot be reproduced." Teresa Adams, *Authentication in Art – The Question of NFTs*, THE MARKETER MAGAZINE, https://themarketer.cc/authentication-in-art-the-question-of-nfts/ [https://perma.cc/6PFV-4H6J] (last visited Nov. 12, 2021). Further, "[i]t is not the digital art that is the asset – it is the unique identifier that has been sold along with it." *Id.* As "[a]n artist may create two separate NFTs of the same piece of art and both pieces

In arguing that art needs no copyright protection at all, Adler asserts, "instead of incentivizing artists, copyright law now figures as a constant threat to them."[97] Further, "the vast uncertainty of this area has led to an ornate and conflicting body of jurisprudence that chills artistic expression."[98] Adler argues that "[t]o the extent unregulated copying might otherwise pose a risk to artists, the art-market norm of authenticity already nullifies that risk."[99] Finally, Adler argues that "[t]he creativity . . . in the visual arts is best captured by the discourse surrounding the desire for authenticity, a concept about which copyright has virtually nothing to say."[100]

Several scholars argue expert testimony as a potential solution. One proposal would require that "parties to copyright infringement cases involving appropriation art retain experts to testify as to whether the allegedly infringing work is meritorious appropriation or not."[101] Another author argues that "[a]llowing parties to introduce evidence from art experts on . . . contemporary customs and [historical] traditions [and context] . . . may promote broader understanding of the artistic process and the prevalence of borrowing, copying, and reinterpretation in art, as a whole."[102]

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could vary in value (whichever one was created first will be sold for a higher price, for example)." Debarshi Chaudhury, *NFTs Are Fueling Authenticity for Digital Assets And Have The Potential To Create New Use Cases*, FORBES (Jun. 29, 2021), https://www.forbes.com/sites/forbestechcouncil/2021/06/29/nfts-are-fueling-authenticity-for-digital-assets-and-have-the-potential-to-create-new-use-cases/?sh=273ec4b1ffca [https://perma.cc/SXM9-6ATN]. Despite this, the market for NFTs is booming, as "2021's first quarter saw NFT sales reach $2 billion." *Id.* The exploding market for NFTs reflects the importance of authenticity to art consumers. Potentially most notably this year, "Christie's Auction House made history . . . selling a JPEG file by artist Beeple for $69.3 million." Teresa Adams, *Authentication in Art – The Question of NFTs*, THE MARKETER MAGAZINE, https://themarketer.cc/authentication-in-art-the-question-of-nfts/ [https://perma.cc/6PFV-4H6J] (last visited Nov. 12, 2021). Despite the record-breaking sale, the piece, "'Everydays: The First 5,000 Days' is a piece of art that can be downloaded and reproduced in seconds by anyone on the internet." *Id.* It has yet to be seen where the NFT trend will lead the art market for consumers. However, it demonstrates that art consumers value authenticity, and artists have a market in their first sales rather than sales of copies.

97 Adler, *Why Art Does Not Need Copyright*, *supra* note 84, at 374.

98 *Id.*

99 *Id.* at 375.

100 *Id.*

101 Brown, *supra* note 84, at 142.

102 McKenzie, *supra* note 28, at 104.

However, these tests may not provide just or consistent results. It is easy to imagine how an expert may favor the work of a well-known artist rather than a lesser-known artist. In fact, one scholar argues that "[e]xperts can testify on both the artistic functions of each work—meaning both the original and the secondary—as well as each artist's reputation and body of work."[103] They add that "information can often—though not always—say a great deal about an artist, give insight into whether an appropriated work falls within a market that the original artist would be likely to exploit and, in some cases, add context to the work of the secondary artist."[104]

Some scholars argue bias may already exist in the current state of the law. Artist Jeff Koons was found liable for copyright infringement in one case, and many years later, once his career had taken off, in another case, his work was found within the bounds of fair use.[105] "Koons was no longer a sleazy 'pirate[],' as the Second Circuit had called him in *Rogers* . . . now he was a master artist whose work was a gift to us all."[106] Similarly, one scholar acknowledged that the previous *Rogers* "decision has been criticized by legal scholars for its faulty reasoning, particularly in applying the parody defense to Koons, and for its heavy-handed and dismissive treatment of Koons, whom the court did not appear to take seriously as an artist."[107] Further, this scholar also argued that "[t]he decisions in both *Rogers* and *Cariou* evince clear judicial disdain for the appropriators' works."[108] Another scholar makes a similar comment on the *Cariou* case: "[t]he district court's casting

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[103] Caroline L. McEneaney, *Transformative Use and Comment on the Original: Threats to Appropriation in Contemporary Visual Art*, 78 BROOK. L. REV. 1521, 1548 (2013). Note, the focus of artistic stature or reputation also exists in the context of the VARA statute. *See* discussion *infra* note 110.

[104] *See* McEneaney, *supra* note 103, at 1548.

[105] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 581 ("I think Koons won in *Blanch* and lost in *Rogers* because in the intervening years, Koons had become an art star whose work was now seen as benefiting the public at large." (citing Blanch v. Koons, 467 F.3d 244, 254 (2d Cir. 2006)).

[106] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 581 (citation omitted).

[107] McKenzie, *supra* note 28, at 93 (citing Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 833 (2005)).

[108] McKenzie, *supra* note 28, at 103. Further, "[w]hile likely unintentional, the absence of a focus on the appropriators' artistic process and message seems to reflect a judgment by these courts as to which art works they viewed to be artistically legitimate and thus more worthy of copyright protection." *Id.*

of Prince as a thieving appropriator and the Second Circuit's inability to come to a conclusion on five of his works illustrate a lack of understanding of significant contemporary art movements and appropriation's place within such movements."[109] While moral rights do not exist in the copyright system outside the Visual Artist Rights Act of 1990, the tone taken by these opinions reflects a sentiment that these original artists were wronged by the secondary works.[110]

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[109] Holly Gordon, *Appropriation Artists and Testifying Experts: Reconciling Postmodern Artistic Expression and Copyright Law*, 43 AIPLA Q.J. 445, 458 (2015).

[110] Moral rights are extremely limited in the copyright system. "[I]n 1990, having acceded to the Berne Convention for the Protection of Literary and Artistic Works, the United States creates its first federal moral rights law, the Visual Artist Rights Act of 1990 ("VARA"). Patricia Alexander, *Moral Rights in the VARA Era*, 36 ARIZ. ST. L.J. 1471, 1472-73 (2004) (citing Pub. L. No. 101-650, 104 Stat. 5089 (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 302, 411, 412, 501, 506 (2000))). The statute provides some discrete rights to defined artists under the title.

> (a) Rights of attribution and integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—
>
> (1) shall have the right—
>
> (A) to claim authorship of that work, and
>
> (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
>
> (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
>
> (3) subject to the limitations set forth in section 113(d), shall have the right—
>
> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to **his or her honor or reputation**, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

A similar concern of bias in expert testimony arises with the use of the market usurpation test. It is hard for a new artist to have a "personal brand." What if, for example, a widely acclaimed artist visits a high school art gallery and borrows from a young artist's work? It would be easy for that artist to argue that the young student has no personal brand. While if the roles were reversed, and the student began selling art building off the original artist's work, a court might use this test to find that the student had usurped that artist's market.

A recent news story demonstrates this potential fact pattern. Famous artist Jasper Johns incorporated a sketch drawn by 17-year-old Jéan-Marc Togodgue, "who moved to the United States from the Republic of Cameroon in west-central Africa."[111] The artist first saw the sketch, which is of the muscles and tendons of the human knee, when visiting his orthopedic surgeon's office.[112] Togodgue accepted an offer from the artist to visit his art studio with his host-parents to see the finalized work and "was thrilled and posed for a photo with the piece, which perfectly reproduced his original drawing."[113] However, "the father of Togodgue's close friend, took issue with an artist of Johns's renown copying the work of a child without permission," and "he sent Johns a strongly worded letter, accusing him of intellectual property theft."[114] After lawyers became involved, "Johns and Togodgue reached an undisclosed settlement for a licensing agreement . . ."[115] Because

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> (B) to prevent any destruction of **a work of recognized stature**, and any intentional or grossly negligent destruction of that work is a violation of that right. 17 U.S.C. § 106A (emphasis added).

As one scholar has argued, "[b]y its language, all that VARA protects are important originals that are produced by important artists who are self-sustaining enough that they do not have to rely on being employed by the person buying the art, and independent enough that they refuse to sign a waiver of their rights." Patricia Alexander, *Moral Rights in the VARA Era*, 36 ARIZ. ST. L.J. 1471, 1495 (2004).

[111] Sarah Cascone, *The Complicated Story Behind Jasper Johns's Dispute With a Cameroonian Teen Over a Drawing of a Knee (It Has a Happy Ending)*, ARTNET NEWS (Oct. 1, 2021) https://news.artnet.com/art-world/jasper-johns-used-teenagers-knee-drawing-2016175 [https://perma.cc/RU9B-T3MV].

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

"[w]hat constitutes fair use of copyrightable material in fine art is a complex question[,]" it is unclear whether "Johns's appropriation of Togodgue's intellectual property could be considered transformative."[116] This set of facts presents some of the potential complexities of relying entirely on any application that may consider an artist's stature, as expert testimony or the existence of a personal brand may favor Johns's work. If the roles were reversed, and Togodgue incorporated the work of Johns's into a piece, these same tests may work against Togodgue, and his secondary work may not be fair use.

Adler argues the standard should be applied from the viewpoint of "an art world insider – an art expert or consumer."[117] However, Adler points out that "it is less clear that an undiscovered or unpopular artist would garner the same recognition under this standard."[118] Adler's critique of the presented standard echoes the concerns arising from use of expert testimony or personal brand discussed above. Further, "undiscovered and unpopular artists may be the ones we care most to protect; their work may represent the future of art."[119]

Another scholar argues that appropriation art should be *per se* transformative.[120] This would be a revolution from fair use as the exception to the rule of copyright infringement.[121] William F. Patry argues that "[s]aying you are an appropriation artist and can therefore do whatever you like with others' works is singularly unappealing."[122] Further, "[a]s Judge Posner and Professor Landes observed: 'From the perspective of copyright law the very term 'Appropriation Art' is a provocation; 'appropriation' of a copyrighted works connotes stealing.'"[123] For these reasons, how and why visual art is distinct from other mediums must be adequately addressed.

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[116] *Id.*

[117] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 613.

[118] *Id.* at 616.

[119] *Id.* (citing Adler, *Against Moral Rights*, *supra* note 16, at 277-79).

[120] Brown, *supra* note 84, at 173.

[121] *See supra* Section II.C.

[122] William F. Patry, PATRY ON FAIR USE § 3:27 (2022) [hereinafter PATRY ON FAIR USE].

[123] *Id.* (citing WILLIAM LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 261 (2003)).

Other scholars are concerned with the legal ideals of property and ensuring the original artist "gets their due" from the benefits of the secondary work. One scholar has proposed a royalty system for the use of original works of art in secondary works.[124] They argue, "[b]y looking only at objective facts, the use of copyrighted work for profit, and the amount of those profits, judges can make decisions that are based on the facts of each case."[125] The author argues that "[i]nstituting a royalty system is a fair use solution that best accomplishes this goal [balancing copyright protection with the creativity of secondary artists] because it is most consistent with the economic principles underlying copyright protection."[126]

The royalty system brings in the question of damages. To have damages, there must be a defined harm that can be difficult to prove particularly in copyright cases. It is arguable that a secondary artist "usurps" the market from an original artist.[127] For this reason, there may be no true monetary injury to account for with art appropriation.

The policy of copyright law has some basis in the economic theory that unless artists can protect and sell their work, they will not be motivated to create.[128] However, how does awarding royalties from the work of another encourage the useful arts? Some might argue that original artists can sleep soundly knowing they will be compensated for the use of their work. However, repaying the original artist punishes and discourages the creation of the second artist.

Courts' use of the objective standard presents its own problems. Applying the objective standard moves judges away from adjudicating law and into subjectively evaluating art. As one scholar described, "[a]s courts adjudicated the vast majority of

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[124] Everson, *supra* note 1, at 758.

[125] *Id.*

[126] *Id.* Some authors have proposed various forms of a system that would compensate the original artists. *See* Chused, *supra* note 1, at 166-67 ("The goal is to define and construct a system – not just for artists, but also for other standard copyright areas—in which we accommodate ourselves to the frequency and cultural power of appropriation without losing the incentives we have traditionally used to encourage the making and distribution of original creative works. This can be done by pooling funds from taxes on electronic and digital equipment to compensate the owners of works that have been remixed and widely distributed online.").

[127] *See* Adler, *Fair Use and the Future of Art*, *supra* note 2, at 622.

[128] *See supra* Section II.B.

transformative use cases at motion-to-dismiss, preliminary injunction, and summary judgment stages, judges of law would often be called on to serve as judges of artistic views without the benefit of extensive evidence on record."[129] Further, "the objective approach, by using the perspectives of average reasonable persons as a benchmark, could penalize pioneer artists with extraordinary visions ahead of their times."[130] Judge Holmes famously warned against the risk of judges becoming art critics:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme[,] some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.[131]

Judge Holmes goes on to highlight the importance of public interest. As he points out, "[i]t may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time."[132] This is the crux of the problem with the current state of the law and visual arts: employing such a narrow exception of fair use to visual arts stifles the creativity of secondary artists. As one scholar has argued, "[w]here courts have once evaluated fair use largely in terms of market harm, requiring judges to think like economists, fair use determinations involving potentially transformative uses now involves judges in the act of critical interpretation."[133]

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[129] Lui, *supra* note 42, at 208. *See also* Everson, *supra* note 1, at 753 ("Consequently, judges, as opposed to juries have become the sole authority of what can be reasonably perceived in each work. What is described as an objective test is then transformed into a subjective test based on the visual experience of a single individual." (citing Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 485 (2010))) (discussing the result of fair use cases decided on motions for summary judgment).

[130] Lui, *supra* note 42, at 208. *See also* Adler, *Fair Use and the Future of Art*, *supra* note 2, at 616.

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

[132] *Id.*

[133] Houston, *supra* note 74, at 136. Further, Houston argues: "Transformative fair use decisions necessarily involve the court in an enterprise of criticism, evaluating the relative artistic merits of the works of secondary authors in an attempt to separate

III. FAIR USE POLICY FAVORS SECONDARY ARTISTS, AND VISUAL ART SHOULD HAVE ITS OWN STANDARD UNDER FAIR USE.

In this section, I argue that ultimately the policy goals of copyright law and fair use favor secondary artists. Further, I explain why visual arts are different from other mediums entitled to copyright protection. These inherent differences support the conclusion that visual art requires its own standard under fair use. I compare the visual arts to literature to compile a list of considerations to be used to formulate a new standard for the visual arts. Finally, I summarize my analysis in a table to present the key considerations.

A. Fair use policy favors secondary artists.

The policy of fair use allows 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."[134] As one scholar has argued, "[j]ust as it might be sound copyright policy to provide contemporary visual artists with greater latitude than other creative practitioners as to what they may incorporate into their own work, it may also be sound policy to limit the ability of such artists to use copyright to impede the free circulation of images of that work within the cultural and commercial marketplaces."[135] Further, "[w]hen the copyright law is used . . . not merely to award damages but actually to suppress a work of art, then its effect is to diminish the stock of reality available to all of those who might one day have come into contact with that work."[136]

To demonstrate how the copyright policy favors secondary artists, it is helpful to analyze a world where the law favored the original artists. In this world, creators of art would have property rights to their works. Secondary artists would not be able use the works without their permission, essentially doing-away with the fair use defense.[137] This may create complex licensing schemes

original works from free riding ones. This role – court as critic – is unusual, but given the doctrine we have, inevitable." *Id.*

[134] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (citing Stewart v. Abend, 495 U.S. 207, 236 (1990)).

[135] Weil, *supra* note 13, at 840.

[136] *Id.* at 838.

[137] *See infra* note 151.

where artists would have to pay for the ability to incorporate the work of others.[138] Firstly, lesser-known artists or artists early in their career may have limited bargaining power for licensing. In this way, the system would naturally favor financially successful artists who could afford these licenses. Addressing the need to narrow the existing derivation right in copyright, one author argues that "[i]f every end product required a license from someone in that chain of production, then economic activity would be choked."[139]

Secondly, there may be a need for a system like the current United States Trademark and Patent Office. This likely would not achieve the policy goal of compensating artists to encourage more creation because artistic expression has continued for centuries without this level of protection. Finally, this would lead to "private censorship" as other scholars have pointed to.[140] Original artists would be the final arbitrators of whether another artist creates a work.

There are benefits to this rule. It would require no subjective evaluation. There would no longer be a sticky question of "fair" or "transformative" use. Further, it would offer protection to original artists.

However, adopting a rule in favor of protecting the art appropriation movement would be in line with the ultimate goals of copyright law. Secondary artists should be able to freely work off original works to create something new. In light of the new sources of inspiration and the policy of copyright law to "[t]o promote the Progress of Science and useful Arts," it follows that this type of art

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[138] *See* Brown, *supra* note 84, at 168 ("Compulsory licensing may be easier to administer and enforce in the music business than it would be in the visual arts." (citing *Campbell*, 510 U.S. at 569)); McEneaney, *supra* note 103, at 1542 ("Where it is difficult or impossible to obtain a license, the goals of copyright are arguably deterred because by prohibiting the use of certain images, the artist's choices are narrowed, stifling artistic progress.").

[139] Houston, *supra* note 74, at 152-53.

[140] Geiger, *supra* note 10, at 431 ("But far more problematic from a theoretical point of view is that submitting the artistic creation process to the approval of rightsholders resembles at the end a sort of private censorship, as private entities or individuals have the potential to decide what can be created or not and to block the dissemination of new works." (citing Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 378 (1996))). *Accord* McEneaney, *supra* note 103, at 1542. *See also* discussion and accompanying notes *supra* Section IV.A.

should be allowed.[141] Allowance of secondary works of visual arts does not discourage the creation of new works by the original artist because the secondary work cannot usurp the market for the original work.[142] Fair use is ultimately a policy question, and the policy favors the allowance of secondary works.

B. Visual art should have its own standard under fair use.

1. Visual art is different from other mediums protected by copyright.

Several scholars have argued that visual art requires its own fair use test because of the inherent differences between visual art and other mediums. One scholar argues "that the realms of the verbal and the visual are so fundamentally different that the rules developed to govern fair use in the one realm—language-based rules developed primarily in the context of the printed word—are not necessarily the most productive rules by which to govern fair use in the other."[143]

Visual arts cannot be reworded or reshaped to convey any inherent meaning from the original work. Unlike those mediums involving language, "works of visual art—because they partake of the simultaneity and infinite complexity of the visual realm—cannot be adequately summarized or paraphrased."[144] Art in verbal mediums can be explained by different viewers and each explanation will likely convey similar inherent concepts. Further, "[t]he age-old problem that surrounds the visual, the way it cannot easily be described as having a 'message' was the artist's undoing."[145] For these reasons, the third factor of substantiality of the portion used is easier to apply to other mediums than to the visual arts.[146]

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[141] U.S. CONST. art. I § 8, cl. 8.

[142] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 619. *See* discussion *supra* Section III.D.

[143] Weil, *supra* note 13, at 835.

[144] *Id.* at 839.

[145] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 586.

[146] Weil, *supra* note 13, at 840 ("Because visual images cannot be summarized, paraphrased, described, or even quoted from, it follows that uses intended for the purposes of education, criticism, and comment must—if they are to engender the meaningful discourse essential to ongoing well-being of the visual arts—necessarily

Case law demonstrates this. In a case surrounding software, the Supreme Court held that "11,500 lines [of computer code] . . . [were] only 0.4 percent of the entire [code] at issue, which consists of 2.86 million total lines."[147] Further, "[i]n considering 'the amount and substantiality of the portion used' in this case, the 11,500 lines of code [was] viewed as one small part of the considerably greater whole."[148] In a case involving a literary work, "[the secondary artist] had taken only some 300 words out of [the original work], but [the Court] signaled the significance of the quotations in finding them to amount to 'the heart of the book,' the part most likely to be newsworthy and important in licensing serialization."[149] Defining the heart of a piece of visual art that a secondary artist might borrow from is difficult, because visual arts "cannot be adequately summarized or paraphrased."[150]

While music, software, and literature each has its own system of licensing copies, visual art is ill-equipped to fit into any licensing scheme.[151] To create one, there would need to be an entirely new system where artists register their work for licensing, much like trademark, music, or literature.[152] As scholar Stephen Weil argues:

> Fair use is quintessentially a "don't ask" practice. First comes the use; and the discussion of whether or not it was a fair use follows, if and when the original copyright owner objects. A use authorized in advance is only an authorized use, not a fair one.[153]

include some greater 'amount and substantiality' of the copyrighted original than might be the case for some other kind of use or in some other area of creativity.").

147 Google LLC v. Oracle America, Inc., 141 S.Ct. 1183, 1188 (2021).

148 *Id.*

149 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587 (1994) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564-66 (1985)).

150 Weil, *supra* note 13, at 839.

151 Brown, *supra* note 84, at 168 ("In the music industry, a few major organizations help consolidate the licensing process, including the Recording Industry Association of America (RIAA) and Broadcast Music Incorporated (BMI). In the visual arts, however, there is no comparable hegemony."). *See also* McEneaney, *supra* note 103, at 1542 ("Licensing in the visual art world is impractical, sometimes impossible, and serves only the copyright holders and not the objectives of copyright laid out in the constitution.").

152 *See supra* Section IV.A.

153 Weil, *supra* note 13, at 846.

Authors of literature and music profit off the sales of multiple copies of their work. In this sense, "individual songs or books or movies are perfect substitutes for one another."[154] However, "the art market prizes scarcity rather than volume, and originals rather than copies."[155] Further, "market watchers now describe the artist not as author but as 'brand'; the value of art is no longer a function of aesthetics but of the market power of the artist-brand who created it."[156] Because the markets for other mediums protected by copyright are grounded in sales of copies while visual arts are not, the potential costs of secondary works to those original creators are greater than the potential costs to original artists of visual works.[157] There is no risk under the fourth factor of market harm for visual artists as their brand, the driving value in the current art market, cannot be copied.[158]

Further, purpose in other mediums, particularly with things like parody or software, is easier to define. As the Supreme Court pointed out in *Campbell*, parody "must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable."[159] Further, "[f]or the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[160] However, appropriation art does not have to "comment on the original," or even bring the original to mind.[161]

In the software context, the Supreme Court describes "[g]enerically speaking, computer programs differ from books, films, and many other 'literary works' in that such programs almost always serve functional purposes."[162] Visual arts are not seen as

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[154] Adler, *Why Art Does Not Need Copyright*, *supra* note 84, at 331.

[155] *Id.*

[156] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 620.

[157] Adler, *Why Art Does Not Need Copyright*, *supra* note 84, at 375 ("To the extent unregulated copying might otherwise pose a risk to artists, the art-market norm of authenticity already nullifies that risk.").

[158] *Id.* at 349. *See also* discussion and accompanying notes *supra* Section III.D.

[159] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588 (1994).

[160] *Id.* at 580.

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

[162] Google LLC v. Oracle America, Inc., 141 S.Ct. 1183, 1198 (2021).

having a functional purpose and, often, the purpose factor under fair use turns to the transformative inquiry.[163]

2. The differences between art and literature offer insight into the factors to be considered in a new standard.

This section compares literature to visual art to understand why the fair use doctrine works for literature but not visual art.[164] Determining what features are unique to visual arts compared to literature will inform what factors should be considered in an analysis for visual art. At the end of this section, a table summarizes the findings.

Because a secondary artist will seldom usurp the market of the original artist, the incentive for the original artist will not be curbed by the creation of secondary works.[165] Secondary works in visual art does not work against this policy goal of copyright to incentivize creation in the same way that it might in literature. As seen in the *Warner Bros. Entertainment* case, the use of an original work can deter original artists from creating new work. Rowling testified that she would not want to write the encyclopedia she had already begun working on if the defendants were allowed to publish their own.[166] The court was convinced that this would result in irreparable harm to Rowling and the charities that would have received any proceeds from the publication of her encyclopedia.[167] This is supported by the fact that the market for derivative works does not exist for visual art as it does for literature.[168]

Further, because it is often impossible to assign meaning to art, the transformative standard under purpose of use fails when applied to visual arts. The question of whether visual art adds new meaning and expression under the transformative use standard is

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[163] *See* discussion *supra* Section III.A.

[164] Literature was chosen as a medium of comparison as copyright law and fair use was designed with literature in mind. PATRY ON COPYRIGHT, *supra* note 17, at § 1:5.

[165] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 621 ("…an artist who copies another's work, even without any evidence of transformative message, meaning or purpose, even without any changes whatsoever, will not substitute in the art market for the artist she has copied."); Adler, *Why Art Does Not Need Copyright*, *supra* note 84, at 341.

[166] Warner Bros. Ent. Inc v. RDR Books, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008).

[167] *Id.*

[168] *See* Adler, *Why Art Does Not Need Copyright, supra* note 84, at 337.

extremely difficult to answer.[169] As Weil argued, "[i]t is here that the situation of the visual arts diverges most radically from that of the literary ones."[170] Literature and the written word have both latent and explicit meaning, while images typically do not in the art context. While images of the shoes in Koons's "Niagara" call to mind shoes for the viewer, the meaning behind the overall collage piece would be different for each person.[171] Contemporary art rejects the notion of meaning.[172] Further, "[w]hile fair use law begins from the assumption that the viewer will unearth a work's single, stable meaning, contemporary art often begins from the assumption that a viewer does not unearth meaning but helps create it, and that meaning constantly changes as a result."[173]

While authors often have some purpose in their works (e.g., creating a reference guide for the *Harry Potter* series or drawing attention to the misrepresentation of the Civil-War-era American South in *Gone with the Wind*), the purpose of a creator in visual arts is not clearly defined. While the artist can testify to their purpose when creating a piece,[174] visual arts do not lend themselves to one distinct purpose.[175] This makes applying the first factor of fair use difficult in the visual art context, as well as the third factor of nature of the use.

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[169] Brown, *supra* note 84, at 169 ("[I]t is difficult to pinpoint verbally what the 'expression' of any artwork is, and therefore what elements can be protected by copyright, as a rule, in the same way that expression' can be identified and quoted in a written work."). *See also* Asay et al., *supra* note 30, at 957 ("Indeed, the modern transformative use inquiry focuses on the second comer's added expression or meaning in using the copyrighted material, the 'very criteria that contemporary art rejects' in the act of appropriation." (citing Adler, *Fair Use and the Future of Art*, *supra* note 2, at 563)).

[170] Weil, *supra* note 13, at 845. Weil further argues: "With the possible exception of lyric poetry, literary works are primarily *about* something. This is not so for works of visual art. They are about but they also *are*." *Id.*

[171] Importantly, "[p]sychological studies show that a person's appreciation for different types of art can vary based on educational background, age, whether or not they have spent time visiting art galleries or museums, and even individual personality traits such as openness and extraversion." McKenzie, *supra* note 28, at 101 (citing Tomas Chamorro-Premuzic et al., *Who art thou? Personality predictors of artistic preferences in a large UK sample: The importance of openness,* 99 BRIT. J. PSYCHOL. 1 (2008)).

[172] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 616.

[173] *Id.*

[174] *See* Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).

[175] Amy Adler, *Fair Use and the Future of Art*, *supra* note 2, at 586. *See also* discussion *supra* Section IV.B.1.

Literature has defined genres that support its purpose. For example, the reference guide in the *Warner Bros. Entertainment* case has a clear purpose as a source of information about the *Harry Potter* series.[176] Further, *The Wind Done Gone*, as a parody, had the purpose of critiquing *Gone with the Wind*.[177] Distinct from these examples, the genre of art, for example, pop art, impressionism, or realism, informs the viewer on the particular defined style of the artist, rather than the artist's purpose. In this way, visual arts do not have the same defined genres that exist in literature that can in turn inform and support their purpose.

A viewer clearly can categorize da Vinci's *Mona Lisa* as a portrait or Monet's *Water Lilies* as a landscape. However, no two viewers are likely to define either artist's purpose the same way beyond the *Mona Lisa* as a portrait or *Water Lilies* as a landscape. The categorization of a work of art as portrait or landscape says little about their purpose in terms of the first factor of fair use as a categorization of a reference book or historical fiction novel would tell us for a work of literature.

Like parody, art appropriation builds off the original work. However, appropriation art does not have to bring the original to mind.[178] At this point, "no universal definition of art has been applied in the law."[179] However, "many works of appropriation art cannot be easily characterized as either parody or satire, creating difficult questions for triers of fact."[180] Words are more definite relative to visual images.[181] When we read a parody or work of criticism, it is clear that the work is commenting on the original, and if it is not, then it is not a successful parody or criticism. The message is often able to be paraphrased and can convey consistent meaning.[182] This is not usually the case for visual arts. They are not clearly parodies or clearly criticisms. This is because the work will naturally have different meanings to each viewer and that subjective understanding of meaning should play no role in the

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[176] Warner Bros. Ent. Inc v. RDR Books, 575 F. Supp. 2d 513, 554 (S.D.N.Y. 2008).

[177] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001).

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

[179] McKenzie, *supra* note 28, at 95 (citing Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 256 (1998)).

[180] Gordon, *supra* note 109, at 477.

[181] *See* Weil, *supra* note 13, at 839. *See also* discussion *supra* Section IV.B.

[182] *Supra* note 146.

legal evaluation of the work itself.[183] To sum, "[a]rt resists easy classification, and, indeed, tomes have been written in an attempt to answer the deceptively straightforward question of 'what is art?'"[184] For this reason, art appropriation may need a definition and classification, similar to parody.[185]

Courts often grapple with the idea-expression dichotomy under copyright law.[186] However, distinguishing the expression from the idea of visual arts is almost impossible to do. For example, taking Warhol's Prince Series, Goldsmith's photograph of Prince cannot be separated from the idea of Prince depicted in that way. In *Goldsmith*, the Second Circuit recognized that "[a]s applied to photographs, [copyright] protection encompasses the photographer's 'posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any variant involved.'"[187] However, "Goldsmith cannot copyright Prince's face."[188] If the idea behind Goldsmith's photograph is a representation of Prince, it is nearly impossible to separate this from the expression itself: the picture. In this way, Warhol would not have been able to use Goldsmith's "idea" without borrowing from her expression. In another way, any photograph Warhol would have used of Prince would have depicted the same person, but Goldsmith would not have been able to seek copyright protection for her photograph had he used someone else's photograph, nor would she have likely wanted to. Second Circuit held in *Goldsmith* that "where, as here, the secondary user has used the photograph itself, rather than, for example, a similar photograph, the photograph's specific depiction of its subject cannot be neatly reduced to discrete qualities such as contrast, shading, and depth of field that can be stripped away, taking the image's entitlement

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[183] Adler, *Fair Use and the Future of Art*, *supra* note 2, at 616. *See also* McKenzie, *supra* note 28, at 101 (citing Thomas Chamorro-Premuzic et al., *supra* note 171).

[184] McKenzie, *supra* note 28, at 95 (citing Yen, *supra* note 179, at 252-53).

[185] Adler has suggested that art would require a clear legal definition under the proposal that art does not require copyright. Adler, *Why Art Does Not Need Copyright*, *supra* note 84, at 370.

[186] *See* discussion *supra* Section II.B.

[187] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 46 (2d Cir. 2021) (quoting Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992)).

[188] *Id.*

to copyright protection along with it."[189] For these reasons, the Court held that Warhol did take from the Goldsmith's protectable expression, not just her idea, as "the Warhol images are instantly recognizable as depictions or images of the Goldsmith Photograph itself."[190] Notably, the court held that Warhol's work was not sufficiently transformative from the photograph in part because both depicted the same person.[191]

On the other hand, the encyclopedia in the *Warner Bros. Entertainment* case took large sections of Rowling's verbatim expression in the *Harry Potter* series' companion books.[192] The court found "the copied text [was] expression original to Rowling, not fact or idea, and therefore is presumptively entitled to copyright protection."[193] In other words, the way she wrote the stories and compiled the materials in the companion books was the expression that can be distinguished from the idea behind the works. Writing a reference guide on her works was permissible; however, taking large portions of the text which was protectable expression was not permissible as that could serve as a substitute for some of the original works.[194]

The third fair use factor, substantiality of the work used, is also difficult to apply to the visual arts, though not as difficult as the other three factors. Artists may incorporate a whole photograph as Prince did in his work *Canal Zone* and add images on top of it, an artist may incorporate a photograph into a broader collage as Koons did in "Niagara," or as Warhol was famous for doing, an artist could simply recast an entire photograph in a screen print of different colors.[195] Each of these works incorporated whole parts of the original image, but transformativeness is the major inquiry in the courts' fair use analysis for the visual arts.[196] Unlike literature, a court may not be able to determine "the heart" of a work of visual arts, or evaluate the amount used as an indicator of fair use.[197] In

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[189] *Id.* at 47.
[190] *Id.*
[191] *Id.* at 42.
[192] Warner Bros. Ent. Inc v. RDR Books, 575 F. Supp. 2d 513, 544 (S.D.N.Y. 2008).
[193] *Id.* at 536.
[194] *Id.* at 550-51.
[195] *See supra* Section II.C.
[196] *See* Liu, *supra* note 42, at 167. *See also supra* Section II.C.1.
[197] *See* discussion *supra* Section IV.B.1; Weil, *supra* note 13, at 839.

literature, the substantiality of the portion used may be emphasized, particularly whether or not the secondary author takes "the heart" of the work, as it was in *Harper & Row*.[198]

Key differences between visual art and literature that make literature an easier medium to apply fair use factors to.	
Literature	**Visual Art**
There is a clear market for copies and derivatives in literature.[1]	The art market favors authenticity, and few artists have any market for derivative works.[1]
Words have latent as well as explicit meaning.[1]	Visual art does not lend itself to explicit meaning.[1] Each viewer contributes to the meaning of the piece.
A reader can typically identify how the secondary author is commenting on the original work, including whether that is with criticism, sarcasm, satire, or parody.	Viewers of visual art cannot clearly, consistently interpret any particular work as criticism, sarcasm, satire, or parody. Each viewer may have their own understanding of a piece different than they would when reading a secondary work.

[198] *See supra* Section IV.B.1; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587-88 (1994) (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564-66 (1985)).

Similar to the commentary of the secondary work on the original, readers can typically glean some of the author's purpose in the literary work, like criticism, sarcasm, satire, or parody. This is because literature's purpose often falls in line with the defined genre the work falls under.	Like meaning, art does not lend itself to a defined purpose. The purpose of art does not flow from any defined genre like literature.[199] Instead, genre tells the viewer more about the style of the artist rather than the purpose of the art.
The idea behind a work of literature can be separated or distinguished from its expression.[200]	The idea and expression of visual art are intrinsically connected, and it is nearly impossible to separate the two.[201]
Words are quantifiable, and courts easily evaluate the proportionality of the use by the secondary work, including whether the proportion is "the heart" of the original work.[202]	It is more difficult to determine the amount taken or whether "the heart" was taken from an original visual work.[203]

These factors reflect the unique features of visual art that make the current fair use standard difficult to apply. A new fair use standard for visual art should consider these factors.

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[199] *See* discussion *supra* Section IV.B.1.

[200] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991) (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556-57 (1985)).

[201] *See* Krieg, *supra* note 26, at 1570.

[202] *See supra* Section IV.B.1; *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587 (1994) (quoting *Harper & Row*, 471 U.S. at 564-66).

[203] *See* Weil, *supra* note 13, at 839. *See also* discussion *supra* Section IV.B.1.

IV. CRITIQUE

A. Some may argue that allowing creative freedom for appropriation artists would disfavor the economic incentive theory behind copyright law.

Some might argue the lack of protection to the original artist would "discourage" their creation. This comes from the idea that without compensation artists would not be incentivized to create.[204] As discussed above, the art market favors authenticity, and the risk of stealing market value is more limited in visual art than it is for other mediums.[205] If an appropriation artist is not stealing the potential demand for original artist's work, then what is the harm to the original artist themselves? It seems that the inclination that this might be wrong may be based on the idea of copyright protections as a moralistic right or as traditional property right – that it is "unfair" to use the ideas of others without paying original creators.[206] However, our current system does not permit moralistic rights except for in limited instances.[207]

B. There are remaining holes in my argument.

My argument does not propose a solution to the subjective standard problem that artists may face in court. There is no bright-line rule that will work for visual arts, and any analysis will likely require some subjective determination. The potential use and overlap with the VARA statute must also be expanded. Further, I have not identified a clear standard that should be applied to visual art, and the factors must be reshaped and expanded upon to become a workable legal standard. However, the considerations listed above are the starting point. These factors allow us to center on the problems we know we have when applying fair use to the visual arts. Addressing these issues first in any proposed legal standard will be the first step towards offering artists certainty on when their use of other's work is fair use under copyright law.

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[204] *See supra* Section II.B.

[205] *See* Adler, *Fair Use and the Future of Art*, *supra* note 2, at 622.

[206] *See supra* Section II.B.

[207] *See supra* note 110.

CONCLUSION

Copyright law is intended to encourage creativity. Artists have always used the works of others to create new work. Copyright policy favors this practice and should protect it. Because of its unique features, visual art should have its own fair use standard. The practical differences between a work of literature and a work of visual arts should be considered in crafting a new fair use standard for the visual arts.