What do Judges Know about Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law

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Abstract:

Judges are struggling to agree on what is worth protecting under the doctrine of the fair use of a copyrighted work in the art'domain, trying to establish the boundaries from which the work would be considered a new and transformed one. From one point of view, when the (subsequent)) artist finishes his work, the meaning of the original (copyrighted) object has been extracted and an entirely new meaning set in its place. If judges insist on the presence of ostensible visual transformation, then many iconic contemporary artworks (e.g. Andy Warhol's) would be at risk of being destroyed. It appears (as the Supreme Court warned) that would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.

Rezumat:

Judecătorii se străduiesc să convină asupra a ceea ce merită protecție din perspectiva doctrinei utilizării corecte a operelor de artă, căutând să determine limitele de la care se poate considera că opera este una nouă, tranformată. Dintr-un anumit punct de vedere, când artistul (subsecvent) își încheie opera, mesajul lucrării inițiale (protejate de dreptul de autor) este eliminat și un complet nou mesaj este așezat în loc. În cazul în care judecătorii insistă în prezența unei ostensibile transformări a operei inițiale, atunci, multe dintre renumitele opere de artă contemporane (cum ar fi cea a lui Andy Warhol) ar fi supuse riscului distrugerii. Apare astfel, (așa cum a avertizat și Curtea Supremă) că ar fi o activitate periculoasă pentru persoanele pregătite doar pentru domeniul dreptului să constituie ei înșiși judecătorii finali cu privire la meritul unei opere, în afara îngustelor și evidentelor limite.

Keywords: *copyright law, defining art, original works, appropriation art, fair use factor, appropriation style, transformative use, copyright infringement claim.*

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I. Introduction

Contemporary art tends to get into trouble. Its postmodern proclivities challenge established norms, religious and popular iconography and majoritarian notions of universality, propriety and decency. Its irreverent portrayals destablise modern myths, cultural heroes and institutionalised symbols. From the US state district courts all the way to the Supreme Court, judges are struggling to agree on what is worth protecting,but there seems to be an eerie unanimity that Andy Warhol's multiple silkscreen renditions that appropriate the image of Marilyn Monroe is the paradigmatic example of transformation in contemporary art that would qualify as fair use in copyright law[203].

Appropriation art, as a genre of contemporary art, is often an ideological critique that takes or hijacks "dominant words and images to create insubordinate, counter messages"[204]. Appropriation art has been defined as "[t]he practice or technique of reworking the images or styles contained in earlier works of art, esp. (in later use) in order to provoke critical re-evaluation of well- known pieces by presenting them in new contexts, or to challenge notions of individual creativity or authenticity in art"[205].

It is identified closely with the practice of 're-coding' or 'a shift in meaning' which occurs purely due to the fact that an original word, image or object has been appropriated[206]. Jeff Koons has exhibited kitschy sculptures of the Pink Panther, Michael Jackson and balloon sculptures from the Museum of Modern Art in New York to the Palace of Versailles, and yet his representations of banality and collages from magazines have resulted in high-profile lawsuits by photographers who claimed that their copyright have been infringed by his works.[207] Similarly, Richard Prince, hailed as "the coolest artist alive"[208], is renowned for "re-photographing" an advertisement for Marlboro Lights to create the iconic artwork *Untitled (Cowboy)* which holds the world auction record for the most expensive photograph at US$3.4 million[209].

[203] Eg *Comedy III Productions, Inc. v. Gary Saderup, Inc.,* 25 Cal. 4th 387, 408-9 (2001); *ETW Corp v Jireh Publishing Inc*, 332 F 3d 915, 936 (6th Cir. 2003). However, it should be noted that Warhol has been sued for copyright infringement on a number of occasions, but the disputes have all been settled out of court. See Emily Meyers, 'Art on Ice: The Chilling Effect of Copyright on Artistic Expression' (2007) 30 *Columbia Journal of Law & the Arts* 219, 225-7.

[204] David Evans, 'Introduction: Seven Types of Appropriation' in David Evans (ed), *Appropriation* (2009) 12,13. See also E. Kenly Ames, 'Beyond *Rogers v. Koons*: A Fair Use Standard for Appropriation' (1993) 93 *Columbia Law Review* 1473.

[205] Meyers, above n 1, 220.

[206] Isabelle Graw, 'Fascination, Subversion and Dispossession in Appropriation Art' in Evans (ed), above n 2, 214, 214 (internal citations omitted).

[207] *Rogers v Koons,* 960 F 2d 301 (2nd Cir. 1992) ('*Koons I*'); *Blanch v Koons*, 467 F 3d 244 (2nd Cir.2006) ('*Koons II*').

[208] Richard Dorment, 'Richard Prince: The Coolest Artist Alive', *The Telegraph* (15 July 2008) <http://www.telegraph.co.uk/culture/art/3556477/Richard-Prince-the-coolest-artist-alive.html>.

[209] Brian Appel, 'Stealing From the Marlboro Man - Richard Prince's $3.4M Cowboy Re-Takes Top Photography Spot at the Fall Contemporary Auctions in New York' <http://www.brianappelart.com/art_writing_richard_prince_ stealing_from_the_marlboro_man.htm>.

However, even these works have attracted allegations of possible copyright infringement by the original photographers like Jim Krantz, who saw Prince's re-photographed works at the Solomon R Guggenheim Museum in New York. See Randy Kennedy, 'If the Copy is an Artwork, Then What's the Original?' *The New York Times*(6 December 2007) <http://www.nytimes.com/2007/12/06/arts/design/06prin.html?_r=1&ref=arts&oref=slogin>.

Prince has been described as an artist "who emerged within the first wave of postmodernist use of photography in the late 1970s … photograph[ing] billboard advertisements, cropping out the branding and texts and showing only the grainy colour-saturated visual fantasies of developed capitalism"[210]. His signature "lifting of popular imagery and storytelling" is considered to be "witty, deft and subversive"[211].

Despite Prince's renowned reputation as one of the most significant contemporary artists alive, ranking alongside Jeff Koons and Damien Hirst, his recent efforts of repainting over photographs of Rastafarians to evoke a post-apocalyptic screenplay that features a reggae band landed him in court where he suffered a surprising defeat in a copyright infringement claim[212].

II *Cariou v Prince*

In *Cariou v Prince*, the plaintiff Patrick Cariou is a professional photographer who spent time with Rastafarians in Jamaica over the course of six years, "gaining their trust and taking their portraits"[213]. Cariou subsequently published a book of photographs in 2000 titled *Yes, Rasta* that contained both portraits of Rastafarian individuals in Jamaica and landscape photos taken by Cariou in Jamaica. In the tradition of his appropriation style, Richard Prince recontextualised Cariou's photographs in his Canal Zone series, and "ultimately completed 29 paintings in his contemplated Canal Zone series, 28 of which included images taken from *Yes, Rasta*"[214]. In an exhibition at the Gagosian Gallery in New York in 2008, the gallery showed 22 of the 29 Canal Zone paintings at one of its Manhattan locations and also published and sold an exhibition catalogue from that show, similarly entitled *Canal Zone,* which contained reproductions of many of the Canal Zone Paintings and photographs of *Yes, Rasta* series.

The transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism.

In his testimony, Cariou revealed that he was negotiating with gallery owner Christiane Celle, who planned to show and sell prints of the *Yes, Rasta* photographs at her Manhattan gallery, prior to Prince's Canal Zone show's opening. Cariou also testified that he intended in the future to issue artists' editions of the *Yes, Rasta* photographs, which would be offered for sale to collectors. Celle originally planned to exhibit between 30 and 40 of the Cariou's photographs at her gallery, with multiple prints of each to be sold at prices ranging from US$3,000 to US$20,000. However, when Celle became aware of the Canal Zone exhibition at the Gagosian Gallery, she cancelled the show "because she did not want to seem to be capitalizing on Prince's success and notoriety"[215].

Batts J of the district court of the Southern District of New York held that Cariou's photographs were clearly worthy

[210] Charlotte Cotton, *The Photograph as Contemporary Art* (Thames & Hudson, London, 2004) 209.

[211] Ibid.

[212] *Cariou v Prince*, 784 F Supp 2d 337 (S.D.N.Y. 2011), 2011 WL 1044915 (S.D.N.Y.) ('*Prince*').

[213] *Prince*, 2011 WL 1044915 (S.D.N.Y.) at *1.

[214] Ibid at *2.

[215] Ibid.

of copyright protection. Perhaps Prince's lawyers should not have asserted that "Cariou's Photos are mere compilations of facts concerning Rastafarians and the Jamaican landscape, arranged with minimum creativity in a manner typical of their genre, and that the Photos are therefore not protectable as a matter of law, despite Plaintiff's extensive testimony about the creative choices he made in taking, processing, developing, and selecting them"[216]. It could have been conceded that copyright subsists in Cariou's photographs; but that Cariou's photographs of the Rastafarians were more factual than artistic, and that Prince's artistic recontextualisation of these photographs had siginificantly transformed the character and purpose of Cariou's works under the fair use doctrine.

In any event, the grant of summary judgment on the issues of copyright infringement, fair use and liability demonstrates more of Batts J's unequivocal disdain for Richard Prince's commercial success and his appropriation art style rather than an adroit judicial reasoning and a principled approach to fair use. Furthermore, Batts J's order for delivery up and destruction of all the unsold artworks[217] is tantamount to artistic genocide.

(i) Transformation in Fair Use

Fair use factors are often codified, but it is difficult to find common ground across jurisdictions in terms of their application to visual artworks. Amongst the common law jurisdictions, the United States provides one of the broadest fair use coverage where the four fair use factors codified in the Copyright Act of 1976 are to be applied to any circumstances in which fair use is argued. Section 107 states that:[218]

« the fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

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

(2) the nature of the copyrighted work;

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

(4) the effect of the use upon the potential market for or value of the copyrighted work.»

The US Supreme Court's decision in *Campbell v Acuff-Rose Music Inc*[219] is important in its emphasis on how a highly transformative use of an original work may qualify the secondary infringing work for fair use protection even if the latter was commercial in nature. In respect of the first factor of fair use, this approach requires courts to examine the 'purpose and character of the use', but neither 'purpose' nor 'character' is defined in the statute. Courts therefore may consider a kaleidoscope of relevant factors like what kind of transformation is present in the secondary work created by an appropriation artist, what is the subject(s) of its critique, the track record of the artist, the contribution of the artist's work on research and study and its significance to the progress of the arts[220]. The

[216] Ibid at *4.
[217] Ibid at *14.
[218] Copyright Act 1976, 17 USC §107.
[219] 510 US 569 (1994) ('*Campbell*').
[220] *Copyright Clause*, United States Constitution, Art I, s 8, cl 8 ('To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.').

Campbell court did not state that in order for a use to be transformative, it must always comment on the original. Souter J, writing for a unanimous court, explained that "[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[221] In a footnote, the court clarified that:

« *when there is little or no risk of market substitution*, whether *because of the large extent of transformation of the earlier work*, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, *taking parodic aim at an original is a less critical factor in the analysis*, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required»[222].

This suggests that the degree or extent of transformation is the salient feature of the first factor of fair use regardless of whether the secondary use is classified as a parody, satire or something else. Furthermore, as Souter J affirmed, "[t]he central purpose of this investigation is to see … whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative."[223]

In *Prince*, Batts J ignored Prince's deposition that his Canal Zone series was open to myriad interpretations. Her Honour erred in finding that there was a lack of transformation under the first factor of fair use because "Prince testified that he doesn't «really have a message» he attempts to communicate when making art. … In creating the Paintings, Prince did not intend to comment on any aspects of the original works or on the broader culture."[224]However it was clearly shown in the Defendants' Memorandum, that Prince's creation of the Canal Zone series was informed by certain core meanings or messages he intended to convey through them:[225]

- Prince's concept of a fantastical post-apocalyptical world, where music was the only redeeming thing to survive, as shown through repetitive use of the guitar, figures as band members, and rhythm as expressed through various painterly and collaging techniques;
- An ongoing exploration of the relationships that exist in the world, which are men and men, men and women, and women and women;
- Equality between the sexes, as shown though their nudity and roles as band members.

Moreover, Batts J completely missed the point in Prince's testimony. Prince testified that "in any artwork I don't think there's any one message"[226], consistent with how contemporary artists often prefer to let the audience debate the multiplicity of meanings that may be attributed to a particular work of art[227].2 Prince did not

[221] Ibid 580-1.

[222] Ibid 581 fn 14 (emphasis added).

[223] Ibid 579 (internal quotations and citations omitted).

[224] *Prince*, 2011 WL 1044915 (S.D.N.Y.) at *7.

[225] Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment, Case 1:08-CV-11327-DAB, filed 14 June 2010, at 12-13 ('Opposition Memo').

[226] Ibid 13.

[227] Eg Meyers, above n 1, 219 ('Many artists now use existing images and objects, both from fine art as well as from advertising and mass media, to challenge the viewer's conceptions of art and iconography.').

say that his Canal Zone series had no message at all.

Unlike the arguments advanced in respect of the banality sculpture and the fashion stilettos collage in *Rogers v Koons* ('*Koons I*')[228] and *Blanch v Koons* ('*Koons II*')[229], the artworks in Canal Zone series are neither parody nor satire. This merits a closer examination of the Supreme Court's interpretation of the first fair use factor in *Campbell* in respect of the requirement that the secondary infringing work comments on the original. In *Campbell*, the Court observed that section 107 "employs the terms «including» and «such as» in the preamble paragraph to indicate the «illustrative and not limitative» function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses"[230]. It is clear that if Congress had intended to impose a requirement that all secondary works must comment, it would have done so by adding a comment requirement as a conjunctive element, or by exclusively providing that only those activities listed in section 107 can qualify as fair use.

Thus unlike the parody cases which Batts J relied on, in particular *Koons I* which is of limited precedential value as it was decided before *Campbell*, there was no requirement in law for Prince to comment on Cariou's images since Prince's intent was to recontextualise them into entirely new expression with new messages. Moreover, in a more recent case, the Second Circuit have found in *Koons II* that Jeff Koons' use of Andrea Blanch's photograph to be transformative even though he was not commenting on the underlying work but using the original image "as fodder for his commentary on the social and aesthetic consequences of mass media"[231].

In *Bourne Co v Twentieth Century Fox Film Corporation*, decided two years before *Prince*, Batts J herself held that '[t]he distinction between parody and satire turns on the object of the "comment" made by the allegedly infringing work"[232], but did not impose a requirement of comment.

The New York district court is bound by the decisions of the Second Circuit. Batts J appeared to have misapplied the transformation doctrine as articulated by the Second Circuit in *Koons II*: If "the secondary use adds value to the original – if [copyrightable expression in the original work] 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 protect for the enrichment of society".[233] The Second Circuit did not require the secondary work to comment on the original work or the original artist. On the other hand, Batts J held that:[234]

«On the facts before the Court, it is apparent that Prince did not intend to comment on Cariou, on Cariou's Photos, or on aspects of popular culture closely associated with Cariou or the Photos when he appropriated the Photos, and Price's own testimony shows that his intent was not transformative within the meaning of Section 107, *though Prince intended his overall work to be creative and new*.»

[228] *Koons I,* 960 F 2d 301 (2nd Cir. 1992).

[229] *Koons II*, 467 F 3d 244 (2nd Cir. 2006).

[230] *Campbell*, 510 US 569, 577-8 (1994).

[231] *Koons II*, 467 F 3d 244, 252-3 (2nd Cir. 2006).

[232] 602 F Supp 2d 499, 504 (S.D.N.Y. 2009) ('*Bourne*').

[233] *Koons II*, 467 F 3d 244, 251-2 (2nd Cir. 2006) (quoting *Castle Rock Entertainment Inc v Carol Publishing Group Inc,* 150 F 3d 132, 142 (2nd Cir. 1998) (quoting Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105, 1111)) (internal quotations omitted).

[234] *Prince*, 2011 WL 1044915 (S.D.N.Y.) at *8 (emphasis added).

This holding is contrary to the principles laid down in *Koons II*, previous decisions of the New York district courts[235], and the Supreme Court's observations in *Campbell* that the critical message of the artist could reasonably be perceived as commenting on the original because of a juxtaposition of different purposes or meanings. The Supreme Court held that the 2 Live Crew version of *Pretty Woman* could "reasonably be perceived as commenting on the original or criticizing it, to some degree" because "2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility"[236]. In the copyright infringement dispute regarding the *Harry Potter Lexicon*, Patterson J surveyed a number of Circuit Court decisions and concluded that:

«Courts have found a transformative purpose both where the defendant combines copyrighted expression with original expression to produce a new creative work, and where the defendant uses a copyrighted work in a different context to serve a different function than the original»[237].

Batts J was clearly more charitable to the defendants in *Bourne* who initially sought a license from the plaintiff to use "When You Wish Upon a Star" for their song in *The Family Guy* television comedy program, but upon the refusal of the plaintiff, proceeded to write "I Need A Jew" that evoked the original song. In granting summary judgment for the defendant, Batts J found that a transformative message could reasonably be perceived:

«The Court finds that by juxtaposing the "saccharin sweet" song "When You Wish Upon a Star" with "I Need a Jew" the Defendants do more than just comment on racism and bigotry generally, as Plaintiff contends. Rather, Defendants' use of "When You Wish Upon a Star" calls to mind a warm and fuzzy view of the world that is ultimately nonsense; wishing upon a star does not, in fact, make one's dreams come true. By pairing Peter's "positive," though racist, stereotypes of Jewish people with that fairy tale world-view, "I Need a Jew" comments both on the original work's fantasy of Stardust and magic, as well as Peter's fantasy of the "superiority" of Jews. The song can be "reasonably perceived" to be commenting that any categorical view of a race of people is childish and simplistic, just like wishing upon a star».

Second Circuit courts have considered a broader examination of transformation that does not require the presence of comment so long as the purpose in using the original work is "plainly different from the original purpose for which it was created"[238] and have "given weight to an artist's own explanation of their creative rationale when conducting the fair use analysis"[239].Academic commentator Peter Jaszi has argued that some cases, such as *Koons II*, suggest "that as old attitudes have been displaced or supplanted by new ones in the domain of culture, law is (however belatedly) beginning to follow suit"[240]. If one of the key goals of

[235] Eg *Bourne*, 602 F Supp 2d 499, 508 (S.D.N.Y. 2009); *Warner Bros Entertainment Inc & JK Rowling v RDR Books & Does 1-10*, 575 F Supp 2d 513, 541 (S.D.N.Y. 2008) ('*Warner*').

[236] *Campbell*, 510 US 569, 583 (1994).

[237] *Warner*, 575 F Supp 2d 513, 541 (S.D.N.Y. 2008). See also ibid ('Because it serves these reference purposes, rather than the entertainment or aesthetic purposes of the original works, the Lexicon's use is transformative and does not supplant the objects of the *Harry Potter* works.').

[238] *Bill Graham Archives v Dorling Kindersley Ltd*, 448 F 3d 605, 609 (2nd Cir. 2006) ('*Bill Graham Archives*'); *Koons II*, 467 F 3d 244, 252-3 (2nd Cir. 2006).

[239] *Koons II*, 467 F 3d 244, 255 (2nd Cir. 2006).

[240] Peter Jaszi, 'Is There Such a Thing As Postmodern Copyright?' (2009) 12 *Tulane Journal of Technology & Intellectual Property* 105, 105-6. See also Matt Williams, 'Silence and Postmodern Copyright' (2011) 29 *Cardozo Arts & Entertainment Law Journal* 47, 48-9.

copyright law is to foster learning, then fair use doctrine should also be concerned with whether the audience has 'learned' anything[241]. In *Prince*, it ought to be a triable issue of fact whether the Canal Zone series could reasonably be perceived to contain significantly different messages or meanings from Cariou's original photographs – thus creating "new information, new aesthetics, new insights and understandings"[242]– even though there may not have been a direct comment on Cariou's photographs. The value of this postmodern encounter "lies in the observer's opportunity to confront a familiar work in a nuanced context … [and this] unanticipated juxtaposition of familiar and unfamiliar challenges the viewer's preconceptions as it shifts the force of the dominant culture against itself"[243]. The "customization of the natural world" through disruptive interventions of colour and artificiality has long been the style of conceptual art photographers like Roy Villevoye and Nina Katchadourian;[244] Prince's photographs could have been examined by a jury against this backdrop of prevailing artistic conventions.

It appears that Batts J was unduly influenced by the commercial success of Prince's appropriation artworks; in particular, the Gagosian Gallery had a gross sales of US$10.48 million from the Canal Zone series with US$6.288 million (60%) paid to Prince as his share of the profits[245]. Batts J's hostility to Prince, and his appropriation style of art, was evident in her brief recitation of the legal principles to be applied and then perfunctorily concluding that: "This Court recognizes the inherent public interest and cultural value of public exhibition of art and of an overall increase in public access to artwork. However, the facts before the Court show that Defendants' use and exploitation of the Photos was also substantially commercial"[246]. The cursory analysis of the transformative nature of Prince's Canal Zone series "[i]n giving virtually dispositive weight to the commercial nature' is exactly the kind of examination that the Supreme Court frowned upon in *Campbell*[247]. The Supreme Court has instructed that "the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use"[248]. It is arguable that Batts J's finding that Prince's Canal Zone series was "minimally transformative"[249] was erroneous because she required comment on the original, and that Prince in presenting a completely different artistic message and purpose from Cariou's original photographs documenting the lives of the Rastafarians in fact created highly transformative works[250].

Finally, Batts J's finding that Prince was acting in bad faith was also erroneous[251].The Second Circuit held that the mere failure of an artist to seek the

[241] Pierre Leval noted that Justice Souter's opinion in *Campbell* 'rescued' fair use by 'reorient[ing] the doctrine of fair use to serve the central goal of copyright – to promote the growth and dissemination of knowledge.' Pierre N Leval, '*Campbell v Acuff-Rose*: Justice Souter's Rescue of Fair Use' (1994) 13 *Cardozo Arts & Entertainment Law Journal* 19, 26.

[242] *Campbell*, 510 US 569, 579 (1994).

[243] Meyers, above n 1, 220. See also Kembrew McLeod, *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity* (Doubleday, USA, 2005) 132.

[244] Cotton, above n 8, 35-6.

[245] *Prince*, 2011 WL 1044915 (S.D.N.Y.) at *9.

[246] Ibid at *9.

[247] *Campbell*, 510 US 569, 584 (1994).

[248] Ibid 579.

[249] *Prince*, 2011 WL 1044915 (S.D.N.Y.) at *10.

[250] See *Koons II*, 467 F 3d 244, 253 (2nd Cir. 2006) ('When, as here, the copyrighted work is used as"raw material" in the furtherance of distinct creative or communicative objectives, the use is transformative') (internal citations omitted).

[251] *Prince*, 2011 WL 1044915 (S.D.N.Y.) at *9. Batts J did not even consider *Koons II* in her superficial analysis of the existence of bad faith.

permission of the original copyright owner could not be construed to be acting in bad faith. In *Koons II*, the court emphatically stated: "In any event, the only act of bad faith alleged here is that Koons used Blanch's photograph without first asking her permission. We are aware of no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith".[252] Following from the reasoning that "[i]t was the Supreme Court's intention for the parody doctrine to protect new works that have reason to fear they will be unable to obtain a license from copyright holders who wish to shield their works from criticism"[253], Prince's failure to ask for permission to use Cariou's photographs should not be construed as bad faith. In any event, Cariou is unlikely to license his photographs to Prince for the photographs to be subjected to the kind of irreverent treatment characteristic of Prince's works.

(ii) Market Impact on the Original Work

Besides the issue of transformation, one of the more controversial aspects of *Cariou v Prince* is Batts J's conclusion on market usurpation. In *Campbell*, the Supreme Court held that the fourth fair use factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original."[254]

Indeed where the secondary work serves as a market replacement for the original or its derivatives, it will be likely that cognisable market harm to the original or its derivatives will occur[255]. Furthermore, the Second Circuit has also clarified that:

«The fourth statutory fair use factor requires us to evaluate the economic impact of the allegedly infringing use upon the copyright owner. The focus here is on whether defendants are offering a market substitute for the original. In considering the fourth factor, our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work. … the relevant market effect with which we are concerned is the marketfor plaintiffs' "expression" and thus it is the effect of defendants' use of that expression on plaintiffs' market that matters, not the effect of defendants' work as a whole»[256].

The only evidence Cariou furnished of market usurpation was the cancellation of his planned show. Batts J held that:

«Here, it is undisputed that a gallery owner discontinued plans to show the *Yes, Rasta* Photos, and to offer them for sale to collectors, because she did not want to appear to be capitalizing on Prince's Paintings and did not want to show work which had been "done already" at the nearby Gagosian Gallery. It is therefore clear that the market for Cariou's Photos was usurped by Defendants»[257].

Such a peremptory conclusion is devoid of any meaningful appreciation or analysis of the different markets in which the photographs of Patrick Cariou and the artworks of Richard Prince serve. It was patently clear that Prince had no intention to compete in Cariou's primary or

[252] *Koons II*, 467 F 3d 244, 256 (2nd Cir. 2006).
[253] *Bourne*, 602 F Supp 2d 499, 511 (S.D.N.Y. 2009).
[254] *Campbell*, 510 US 569, 590 (1994) (internal citations omitted).
[255] Ibid at 591-3.
[256] *NXIVM Corp v The Ross Institute*, 364 F 3d 471, 481-2 (2nd Cir. 2006).
[257] *Prince*, 2011 WL 1044915 (S.D.N.Y.) at *11.

derivative markets. Contrary to Batts J's assertion, Prince has not "unfairly damaged both the actual and potential markets for Cariou's original work and the potential market for derivative use licenses for Cariou's original work"[258]. As one of the most influential – and most expensive – contemporary artists of this century, Richard Prince exhibits in prestigious venues like the Museum of Modern Art and the Guggenheim Museum in New York and the Tate Modern in London, and his artworks are highly sought after at auctions by Sotheby's and Christie's. On the other hand, Patrick Cariou's photographs of Rastafarians and the Jamaican landscape command a mere fraction of Prince's works and have never been exhibited at these world-renowned musuems. Finally, Christiane Celle's ironic confession she pulled Cariou's exhibition because she 'did not want to appear to be capitalizing on Prince's Paintings' suggests that the value of Cariou's photographs are likely to be significantly enhanced rather than diminished by their association with Prince's Canal Zone series.

III Defining 'Art'

Courts have always shied away from attempting to define "art". The Supreme Court has consistently affirmed the importance of protecting artistic expression under the First Amendment[259], preferring to sidestep the debate on the value or worth of different kinds of artistic expression: «a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," ... would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll»[260].

In the context of right of publicity infringement, the California Supreme Court emphasised that: «the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism»[261].

The court also stressed that "in determining whether the work is transformative, courts are not to be concerned with the quality of the artistic contribution – vulgar forms of expression fully qualify for First Amendment protection"[262]. The court's reference to the transformative nature of Andy Warhol's celebrity silkscreen depictions was endorsed by the Sixth Circuit, who commented that "[t]hrough distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself"[263]. Although almost a literal depiction of celebrities like Marilyn Monroe, Elizabeth Taylor, Elvis Presley and James Dean, the silkscreens created by Andy Warhol are universally accepted by the US courts as being highly transformative, perhaps influenced to some degree by the

[258] Ibid.

[259] Eg *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 569,(1995) ('*Hurley*'); *National Endowment for the Arts v Finley*, 524 US 569, 602-3 (1998) ('The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations.').

[260] *Hurley*, ibid 569.

[261] *Comedy III Productions Inc v Saderup Inc,* 25 Cal 4th 387, 406 (2001).

[262] Ibid 407.

[263] *ETW Corp v Jireh Publishing Inc*, 332 F 3d 915, 936 (6th Cir. 2003)

interpretations of art critics[264], largely attributed to the social commentary as intended by the artist.

The Second Circuit recognised the genre of appropriation art as a "tradition [which] defines its efforts as follows: when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place. An example is Andy Warhol's reproduction of multiple images of Campbell's soup cans."[265]

In *Koons I*, although the Second Circuit thought that Jeff Koons' earlier work of 'a stainless steel casting of an inflatable rabbit holding a carrot' belonged to this genre[266],it found Koons' sculpture 'String of Puppies' which was displayed at an art gallery to be insufficiently transformative and hence infringing the copyright in the original photograph 'Puppies' on which the sculpture was based. True to the tradition of appropriation art, there must exist a significant degree of exact reproduction of the original object (eg Warhol's reverential treatment of the Campbell's soup cans) in order for the artist to convey his or her comment or criticism of a particular cultural or social phenomenon. It may be just a subtle shift in context, medium, motif or style which delivers that postmodern critique. In *Koons I*, it is arguable that Jeff Koons did just that.

He wanted every feature of the photograph by Art Rogers of a typical American scene – a smiling husband and wife holding a litter of eight charming puppies – copied faithfully in the sculpture.[267]The minutiae of Koons' craft itself is a critical commentary of the obsession of the media with, and the general interest of the public in, banality. Four sculptures were made; Koons sold three copies for a total of US$367,000 and kept the fourth for himself. The court accepts Koons' argument that he had drawn upon "the artistic movements of Cubism and Dadaism, with particular influence attributed to Marcel Duchamp, who in 1913 became the first to incorporate manufactured objects (readymades) into a work of art, directly influencing Koons' work and the work of other contemporary American artists".[268] The court also agreed that Koons 'belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it".[269]

The Second Circuit's issue with Koons was that he failed to comment critically on the original photograph that was incorporated into his work. Decided before the Supreme Court's landmark decision on fair use in *Campbell* in 1994, the court in *Koons I* did not make a clear distinction between parody and satire, simply observing that "[p]arody or satire … is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original"[270]. However, consistent with the later

[264] Eg John Coplans, Jonas Mekas and Calvin Tomkins, *Andy Warhol* (1970) 50-2 (as cited in *Comedy III Productions Inc v Saderup Inc,* 25 Cal 4th 387, 406 (2001)).

[265] *Koons I*, 960 F 2d 301, 304 (2nd Cir. 1992).

[266] Ibid.

[267] Ibid 305, 307. See also *Campbell v Koons*, 1993 WL 97381 (S.D.N.Y.) (where Jeff Koons' sculpture 'Ushering in Banality' based on Barbara Campbell's photograph 'Boys with Pig' was held not to be fair use).

[268] Ibid 311.

[269] Ibid.

[270] Ibid 309.

Campbell decision, the Second Circuit was adamant that "[t]he copied work must be, at least in part, an object of the parody … otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large"[271]

The court found that that "even given that «String of Puppies» is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph «Puppies» itself."[272]. In finding against fair use, like in the present case of *Prince*, it was evident that the Second Circuit then found repugnant the fact that Jeff Koons was a highly successful appropriation artist, whose artworks which often bordered on kitsch, commanded very high prices. The court held that "there is simply nothing in the record to support a view that Koons produced «String of Puppies» for anything other than sale as high-priced art."[273] But, post-*Campbell*, and indeed fourteen years after *Koons I* was handed down, Jeff Koons was back before the Second Circuit again – this time, the result was in his favour, despite the absence of parody.

In *Koons II*, the court demonstrated a greater willingness to embrace appropriation art and its postmodernist technique of recontextualising or repurposing objects and images in mainstream media or familiar to the public at large. Koons' use of Andrea Blanch's photograph 'Silk Sandals by Gucci' published in a fashion magazine for his collage 'Niagara' – one of the artworks in the "Easyfun-Ethereal' series exhibited at the Deutsche Guggenheim Berlin – was held to be transformative. To create these paintings, Koons culled images from advertisements or his own photographs, scanned them into a computer, and digitally superimposed the scanned images against backgrounds of pastoral landscapes. He then printed color images of the resulting collages for his assistants to use as templates for applying paint to billboard-sized, 10' x 14' canvasses. Koons did not intend to parody or comment on the original Blanch photograph; but he claimed that he created the painting to "comment on the ways in which some of our most basic appetites – for food, play and sex – are mediated by popular images."[274] He also intended to "compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media"[275] and he used Blanch's photograph because it represented "a particular type of woman frequently presented in advertising' and that this typicality 'further[ed] his purpose of commenting on the commercial images … in our consumer culture."[276]

The Second Circuit held that even though 'Niagara' appears to target the genre of which Silk Sandals is typical, rather than the individual photograph itself "the broad principles of Campbell are not limited to cases involving parody."[277] The court implicitly recognised that *Koons I* may not be good law today. Furthermore, the court reiterated that in the examination of fair use in contemporary art, one should not be overly concerned on whether the secondary work comments on the original:

[271] Ibid 310.

[272] Ibid. Relying on *Koons I*, the New York district court also found against Koons when United Feature Syndicate sued Koons for copyright infringement in his sculptural work 'Wild Boy and Puppy' that featured the Odie cartoon dog character from the *Garfield* series. Leisure J did not even attempt to examine issues of parody, satire or critical commentary, but simply cited *Koons I* as authority that the US$125,000 sculptures were nothing but 'high-priced art'. *United Feature Syndicate Inc v Koons*, 817 F Supp 370, 379 (SD NY. 1993).

[273] *Koons I*, 960 F 2d 301, 312 (2nd Cir. 1992).

[274] *Koons II*, 467 F 3d 244, 247 (2nd Cir. 2006).

[275] Ibid.

[276] Ibid 248 (internal citations omitted).

[277] Ibid 255.

«The question is whether Koons had a genuine creative rationale for borrowing Blanch's image, rather than using it merely "to get attention or to avoid the drudgery in working up something fresh." Although it seems clear enough to us that Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography, we need not depend on our own poorly honed artistic sensibilities.»[278]

After *Koons II*, it is clear that courts should focus instead on examining the appropriation artist's "justification for the very act of borrowing"[279] and the artist's explanation of how "the use of an existing image advanced his artistic purposes"[280]. In *Koons II*, the Second Circuit did not find it necessary to examine whether Koons was commenting on Blanch's photograph, but instead pronounced that "[t]he sharply different objectives that Koons had in using, and Blanch had in creating, "Silk Sandals" confirms the transformative nature of the use."[281] In *Nunez v Caribbean International News Corp*[282], the First Circuit also found that copying a photograph that was intended to be used in a modeling portfolio and using it instead in a news article was a transformative use. By putting a copy of the photograph in the newspaper, the work was transformed into news, creating a new meaning or purpose for the work. The use of Cariou's images in Prince's Canal Zone series is more analogous to the situation in *Nunez* and *Koons II* because Prince has created a new purpose for the images and was not simply superseding Cariou's purpose. There is much similarity between Koons' and Prince's intent in reproducing original photographs in order to successfully convey new meanings through repurposing preexisting works.This is evident from Koons' testimony, which was accepted by the Second Circuit:

«By using a fragment of the Allure photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in Allure Magazine. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary – it is the difference between quoting and paraphrasing – and ensure that the viewer will understand what I am referring to»[283].

The Second Circuit's focus on "artistic purpose" is consistent with the line of Supreme Court decisions that has affirmed the First Amendment's protection of artistic expression, even art that does not convey a "particularized message"[284]. Robert Kausnic hints at this postmodern turn in copyright law:

«Koons expressed the purpose of allowing the viewer to create the meaning from his or her own 'personal experience with these objects, products, and images and at the same time gain new [and unspecified] insight into how these affect our lives. In a sense, Koons carefully refused to infuse particular meaning to the work, but rather empowered the viewer with establishing his or her own relative meaning»[285].

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[278] Ibid.

[279] *Campbell*, 510 US 569, 581 (1994); *Koons II*, 467 F 3d 244, 255 (2nd Cir. 2006).

[280] *Koons II*, ibid. The court also cautioned that 'Koons's clear conception of his reasons for using "Silk Sandals", and his ability to articulate those reasons, ease our analysis in this case. We do not mean to suggest, however, that either is a *sine qua non* for a finding of fair use – as to satire or more generally.' *Koons II*, ibid fn 5.

[281] Ibid 252.

[282] 235 F 3d 18, 22-3 (1st Cir. 2000).

[283] *Koons II*, 467 F 3d 244, 252 (2nd Cir. 2006).

[284] See above n 57-58 and accompanying text.

[285] Robert Kausnic, 'The Problem of Meaning in Non-Discursive Expression' (2010) 57 *Journal of Copyright Society of USA* 399, 421.

Similarly, Jaszi suggests that *Koons II* "may signal a general loosening of authors' and owners' authority over, by now, not quite so auratic works, allowing greater space for the free play of meaning on the part of audience members and follow-up users who bring new interpretations".[286] This kind of art – typical of the oeuvre of contemporary artists like Warhol, Koons and Prince – has been termed "nonpropositional art" because it conveys "no single representation or message"[287]. Randall Bezanson contends that such art yields "a message or meaning that is the creation not of the artist's propositional intention but the viewer's independent construction"[288]. Referring to Warhol's Campbell's Soup Cans and Prince's Marlboro Man series, Benzanson argues that "their 'message' is their value as an instrument that unleashes the viewer's own, perhaps idiosyncratic, leap of imagination and perception"[289].

The fourth fair use factor is also important; but courts should be careful not to confuse the commercial success of the artist or secondary work with the "the effect of the use upon the potential market for or value of the copyrighted work". In general, the *Campbell* court has stated that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use"[290]. More specifically, on the fourth factor, the Second Circuit in *Bill Graham Archives v Dorling Kindersley Ltd* has noted that "a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images"[291]. A highly successful secondary work by an appropriation artist does not substitute or reduce demand for the original work, and may in fact increase demand for the original work.

In *Koons I*, the commercial success of Koons' 'String of Puppies' can fuel demand for Rogers' original photograph. Similarly, the widespread success of Richard Prince's Canal Zone series that recontextualised the Rastafarians as band members in a post-apocalyptic landscape can also stimulate the interest of art collectors and the public in the original raw untainted photographs by Cariou. But more importantly, in the primary or print markets for art, there are no true substitutes, even for what may appear to some to be a nontransformative work. Referring to Sherrie Levine's rephotographing of Walker Evans' photographs in her series titled *After Walker Evans*, Emily Meyers argues that "[i]n this regard, authorship is tantamount, for it infuses the appropriated or derivative work with vastly different significance. A derivative or appropriating use in this regard will never substitute for the original"[292] Levine's attempt has been lauded by art critics:

«Levine's re-presentation of the Evans works as her own is an astute artistic strategy that questions not only the power relations inscribed in the action of the 'master' photographer Evans but also the subsequent art-historical canonization and market value of the original works. Property relations, patriarchal authority, authorship and originality are all brought under scrutiny.»[293]

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[286] Jaszi, above n 38, 116.

[287] Randall P Bezanson, *Art and Freedom of Speech* (University of Illinois Press, Chicago, 2009) 280.

[288] Ibid.

[289] Ibid 285.

[290] *Campbell*, 510 US 569, 579 (1994).

[291] *Bill Graham Archives*, 448 F 3d 605, 615 (2nd Cir. 2006). See also *Castle Rock Entertainment Inc v Carol Publishing Group,* 150 F 3d 132, 146 (2nd Cir. 1998) ('copyright owners may not preempt exploitation of transformative markets')

[292] Meyers, above n 1, 239.

[293] Polly Staple, *Sherrie Levine 'After Walker Evans' (1981)* <http://www.frieze.com/issue/article/switzerland/>.

Indeed the original image by Evans and the second by Levine may be indistinguishable from one another, "the roles each plays in the history of art continuum are unique"[294]but Evans' image clearly has a different purpose and character from Levine's.[295]

However, the appropriation artist should not have carte blanche to use the original work of another artist without the payment of a license fee. Judges need to be more attuned to the nature of the postmodernist movement in the world of contemporary art and how particular recontextualisation techniques can result in a legitimate change in "purpose and character" as contemplated by 17 USC § 107. If Andy Warhol's less visually transformative silkscreens may be adjudged to be sufficiently transformative under § 107, then surely Prince's paint-overs of the Rastafarians to transform them into electric guitar-playing band members with a multiplicity of interpretations open to the beholder should be similarly categorised.

IV Concluding Comments: Fair Use and Postmodern Art

It is widely accepted in the art world that "Marcel Duchamp appropriated an industrially produced, quotidian object, in order to redefine the cognitive and epistemological status of the aesthetic object"[296], and almost fifty years later, similar questions and contradictions were explored by pop artists like Andy Warhol who "introduced mechanically produced, 'found' imagery into the high art discourse of painting (by technological procedures of reproduction, such as the dye transfer process and silkscreen printing) … [to repudiate the] originality of expression."[297]

This genre of contemporary art, through [e]ach act of appropriation, therefore, inevitably constructs a simulacrum of a double position, distinguishing high from low culture, exchange value from use value, the individual from the social … it creates the commodity it sets out to abolish[298].

Courts should endeavour to better understand the quintessential role of recoding in contemporary art, its transformative nature and ultimately its critical relevance to the defence of fair use. Since *Campbell*, the "transformativeness reasoning gradually rose to become the most important principle in interpreting fair use among judges … [and] became a central principle by which ordinary people could interpret fair use"[299]. Judicial pronouncements that appropriation art should directly comment on the original works appropriated in order to be adjudged transformative[300] are plainly wrong and exhibit a woeful understanding of contemporary art and a disregard for the line of authorities which established that a change in purpose that did not supplant the need for the original was fair use[301].The parody/satire distinction that

[294] Meyers, above n 1, 239.

[295] Art historians have highlighted 'the political and feminist underpinnings of the exclusively masculine works by seminal male artists Levine chose to appropriate'. Meyers, above n 1, 224. See also *After Walker Evans:2, 1981* <http://www.metmuseum.org/toah/works-of-art/1995.266.2>.

[296] Benjamin H D Buchloh, 'Parody and Appropriation in Francis Picabia, Pop and Sigmar Polke' in *Artforum* (March 1982) reprinted in David Evans (ed), *Appropriation* (Whitechapel Gallery, 2009) 178, 179.

[297] Ibid 180.

[298] Ibid.

[299] Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright*

(University of Chicago Press, Chicago, 2011) 85 (internal quotations omitted).

[300] Eg *Cariou v Prince*, 2011 WL 1044915 (SDNY) at *7.

[301] Eg *Kelly v Arriba Soft Corp*, 280 F 3d 934, 942 (9th Cir. 2002) ('The thumbnails do not stifle artistic creativity because they are not used for illustrative or artistic purposes and therefore do not supplant the need for the originals. In addition, they benefit the public by enhancing information gathering techniques on the internet.'); *Warner*, 575 F Supp 2d 513, 541 (S.D.N.Y. 2008).

was articulated by the Supreme Court almost two decades ago is a clumsy tool for the evaluation of contemporary visual art, and courts ought to focus instead on the "character and purpose of the use" and the contribution of contemporary art to the goals of the Copyright Clause.

In 2006, the Second Circuit in *Koons II* has begun to shift away from this distinction[302], and more courts should follow suit and provides an analytical framework for a legal examination of recoding in appropriation art within the first factor of fair use.

Indeed "[w]hether the creator of a transformative work is an unsuccessful artist on a shoestring budget like Forsythe or a hugely successful public figure with funding from Deustche Bank and the Solomon R. Guggenheim Foundation like Koons, fair use allows artists to further the generation of new meaning through repurposing preexisting works."[303] One does not need to like what Richard Prince does, but it is quintessential to the progress of the arts[304] that one learns to appreciate the diversity of styles and perspectives. Guggenheim art curator Nancy Spector commented that "Prince's appropriations of existing photographs are never merely copies of the already available. Instead, they extract a kind of photographic unconsciousness form the image, bringing to the fore suppressed truths about its meaning and its making."[305] The world of contemporary art is already familiar with the possibilities that postmodernist practice represents for contemporary artists like Prince: "to be able to knowingly shape the subjects that intrigue them, conscious of the heritage of the imagery into which they are entering, and to see the contemporary world through the pictures we already know."[306]

Copyright law has a long way to catch up. If Batts J had her way, and if judges bluntly insisted on the presence of ostensible visual transformation or a direct criticism of the original work, then many iconic contemporary artworks – like Andy Warhol's silkscreens of Jacqueline Onassis based on Fred Ward's photograph, Robert Rauschenberg's collage 'Pull' that incorporated Morton Beebe's photographs and Sherrie Levine's rephotographs – would be at risk of being delivered up and destroyed.

The Supreme Court's warning should be heeded: «[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], 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

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[302] *Blanch v Koons*, 467 F 3d 244, 254-6 (2nd Cir. 2006) ('"Niagara," on the other hand, may be better characterized for these purposes as satire – its message appears to target the genre of which "Silk Sandals" is typical, rather than the individual photograph itself ... [Ultimately] Koons's appropriation of Blanch's photograph in "Niagara" was intended to be – and appears to be – "transformative," because the creation and exhibition of the painting cannot fairly be described as commercial exploitation and the "commerciality" of the use is not dispositive in any event'.). See also *Mattel Inc v Walking Mountain Productions*, 353 F 3d 792, 802 fn 7 (9th Cir. 2003) ('Mattel strongly argues that Forsythe's work is not parody because he could have made his statements about consumerism, gender roles, and sexuality without using Barbie. Acceptance of this argument would severely and unacceptably limit the definition of parody. We do not make judgments about what objects an artist should choose for their art.').

[303] Williams, above n 38, 70.

[304] See *Copyright Clause*, United States Constitution, Art I, s 8, cl 8.

[305] Nancy Spector, *Richard Prince* (Guggenheim Museum Publications, New York, 2007) 26.

[306] Cotton, above n 8, 218.

the public had learned the new language in which their author spoke.»[307]

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[307] *Campbell*, 510 US 569, 582-3 (1994) (quoting *Bleistein v Donaldson Lithographing Co,* 188 US 239, 251 (1903)).