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THAT OLD THING, COPYRIGHT. . . : RECONCILING THE POSTMODERN
PARADOX IN THE NEW DIGITAL AGE

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I. INTRODUCTION

For as long as art has existed, it has been in flux. That is, art has always gone through a process of denial—of its very essence, its right to be *art*—and then redemption, usually in the form of critical acclaim and then institutional acceptance. Duchamp's toilet, John Cage's music of silence and sounds, Jackson Pollock's drip paintings—each found itself subject to the age-old question of “Is it art?”—and yet each eventually emerged triumphant, game-changing in defining or reifying our very notions of what art is and what it should do. This is the natural trajectory of art as it passes through museums, critics' circles, and eventually, the university. The law has never had much to say in this discourse, did not factor into it, and perhaps did not *care* for it—until now.

To be clear, the law is indeed almost always engaged in every aspect of our daily lives. It dictates, defines, reflects, and shapes the norms of society. But law *cannot*, and *should not*, dictate the norms of art; if for no other reason, the Copyright Clause¹ gives Congress the right to bestow, for a limited time, an exclusive right to authors for one reason and one reason only: to *promote* the “Progress of Science,”² rather than restrict it. For the past 200 years, art and politics—art and law—coexisted, content in the Copyright Clause's implicit Enlightenment-based notions of upward progression and forward propulsion. Yet now, for the first palpable period in U.S. history, we have entered what many regard as a postmodern crisis.³

Scholars have written a great deal about this disjunct between postmodernity and copyright laws.⁴ Many others have written about ideas for reform: burden-shifting, compulsory licensing, or drastically shortened term

¹ U.S. CONST. art. I, § 8, cl. 8.

² This Article will not discuss patents, i.e., the “useful Arts.” Perhaps somewhat counter-intuitively, “the Framers viewed copyrights to be for the purpose of promoting ‘science,’ i.e., learning, and patents to be for the purpose of promoting ‘useful arts’” EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE* 151 (2002).

³ See, e.g., Adam G. Todd, *Painting a Moving Train: Adding “Postmodern” to the Taxonomy of Law*, 40 U. TOL. L. REV. 105, 114 (2008).

⁴ See Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455; Todd, *supra* note 3, at 105; Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267 (2005).

limits.⁵ These are all compelling thoughts on contemporary problems within postmodern theory and legal theory, as well as very viable ideas for change. But I am not content to present the problems as they are with the preface, “Here is how things are. Now let us fix it.” Rather, we would do well to examine the internal logic of things—that is, take an intellectually curious look at *why* things are and *why* we should fix them. Specifically, this Article hopes to answer the questions: *Why* did we get here (that is, to the so-called “postmodern crisis”)? *How* did we get here? *How* has the law responded? *Why* should it respond differently? In answering these questions, this Article raises many new questions along the way. Such is the beauty of attempting to put reason into an era that questions Enlightenment-based reason, and historicize a movement that calls itself resolutely ahistorical.

Part II of this Article examines the anti-progression paradox of Postmodernism by attempting to situate it within a larger, progress-based timeline, one that nonetheless adheres to the Copyright Clause’s emphasis on progress by tearing apart Postmodernism’s internal, forward-moving logic. Part III argues that postmodern art embodies and takes on art’s essential function, which is to both *reflect* and *propel forth* the current societal state of being—to express, in effect, what it is like to be alive and human at this particular moment in time. Part IV relies on several fair use case studies as a sampling of how the common law, through judges only well-versed in the old model attempting to grapple with a new phenomenon, has responded to the new art form. And lastly, Part V explains why Postmodernism’s emphasis on deconstruction and demystification can be good, and productive, and why the law’s resistance to such emphasis could potentially be pernicious.

This Article is an attempt at storytelling. It gives reasons for a legally-resisted movement’s being and arguments for its acknowledgment and acceptance. Without acceptance, the law will never begin to change, and without legal change, art will not have the full freedom to move forward, to transform

⁵ See LAWRENCE LESSIG, *FREE CULTURE: HOW THE BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 213–56 (2004); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1311 (1996); Thomas Wolf, *Toward a “New School” Licensing Regime for Digital Sampling: Disclosure, Coding, and Click-Through*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY, 38–54 (2009), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1043&context=ylsspps_papers.

the way we see the world, and to challenge what we consider to *be* art at all. But first things first.

II. WHY POSTMODERNISM? WHY NOW?

A. *The End of Progress: Progressing Beyond Modernity*

To understand how society arrived at the condition of postmodernity, it helps to first examine the project of modernity, especially because so much of it drives current copyright doctrine's concepts about progress, authorship, and originality. Modernity's project

is one with that of the Enlightenment: to develop the spheres of science, morality, and art 'according to their inner logic.' This program is still at work, say, in postwar or late modernism, with its stress on the purity of each art and the autonomy of culture as a whole.⁶

If current copyright doctrine has refused to acknowledge postmodernism's paradigm shift through which society's concepts of the master narrative or romantic author have changed, then it might be helpful to step back for a moment and understand the historical conditions through which modernism, or the modern, began in its most nascent form. For Jürgen Habermas, the French Enlightenment first brought about the idea of the "modern" as

inspired by modern science, in the infinite progress of knowledge and in the infinite advance towards social and moral betterment. . . . The romantic modernist sought to oppose the antique ideals of the classicists; he looked for a new historical epoch and found it in the idealized Middle Ages.⁷

The break between the classicists and the modernists of the Enlightenment is instructive, for it highlights—as Habermas acknowledges—that before the

⁶ Hal Foster, *Postmodernism: A Preface*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* ix–x (Hal Foster ed., 7th ed. 1991) (1983).

⁷ Jürgen Habermas, *Modernity—An Incomplete Project*, in *THE ANTI-AESTHETIC*, *supra* note 6, at 4.

eighteenth century the artistic ideal was not an infinite propelling forth so much as a looking back in an attempt to recover the greatness of the ancients.⁸

That Congress passed the first Copyright Act in 1790, three years after the incorporation of the Copyright Clause and at the height of the Age of Enlightenment, suggests that the Founding Fathers had a very specific notion of "Progress."⁹ This notion rested on the same "project of modernity formulated in the 18th century by the philosophers of the Enlightenment," which consisted, as Habermas writes, "to develop objective science, universal morality and law, and autonomous art according to their inner logic."¹⁰ Indeed, Justice Samuel Miller, in the 1884 copyright case *Burrow-Giles Lithographic Co. v. Sarony*, articulated as much when he asserted:

Nor is it to be supposed that the framers of the Constitution did not understand the nature of copyright and the objects to which it was commonly applied, for copyright, as the exclusive right of a man to the production of his own genius or intellect, existed in England at that time¹¹

The focus on man as capable, by virtue of his genius and intellect, to harness those innate gifts in the production of works inevitably links the human mind with nature and, in turn, with God. For example, William Wordsworth, one of the most notable Romantic poets of the nineteenth century, addressed the idea of divine imagination in his *Prelude*, a rapturous ode to the powers of his mind by which "Nature" had "lodged The Soul, the Imagination of the whole."¹² This imagination, a gift "exalted by an underpresence," or, "the sense of God . . . vast in its own being" must naturally come "from the Deity."¹³ Many of

⁸ "[A]ntiquity was considered a model to be recovered through some kind of imitation." *Id.*

⁹ As Edward Walterscheid notes, "[t]he term 'intellectual property' is a relatively recent one which first came to be used in the second half of the nineteenth century. . . . Despite occasional argument to the contrary, ancient law failed completely to recognize the concept of intellectual property." WALTERSCHEID, *supra* note 2, at 38.

¹⁰ Habermas, *supra* note 7, at 9.

¹¹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

¹² WILLIAM WORDSWORTH, *THE MAJOR WORKS* 580 II.64–65 (Oxford Univ. Press, 1984).

¹³ *Id.* at 580 II.71–73; 581 I.104.

Wordsworth's nineteenth century literary contemporaries shared this belief, among them William Blake and John Keats.¹⁴ Importantly, authorial genius is linked with nature through God. As the art critic Stanley Kunitz notes:

Ever since the Enlightenment, the arts have been the vehicle for conveying much of the mystery and disorder, the transcendental yearnings, that the Church had been able to contain before it became rationalized. Consequently the modern arts have found their analogue in religious ritual and action, in the communion that predicates the sharing of a deeply felt experience.¹⁵

However, there was a theoretical shift in the twentieth century. Whereas "[e]nlightenment thinkers of the cast of mind of Condorcet still had the extravagant expectation that the arts and sciences would promote not only the control of natural forces but also understanding of the world and of the self . . . [,] [t]he 20th century has shattered this optimism."¹⁶ In 1935, Walter Benjamin, in his infamous article *The Work of Art in the Age of Its Technological Reproducibility*, predicted that technological advances (mostly film and photography, the new inventions at the time) would drastically change the way society receives and perceives art, through the driving back of a work's aura in favor of a simulacrum without originals.¹⁷ The crisis of art in the postmodern age, then, is that *because* of this loss of a work's aura, "[t]he fiction of the creating subject gives way to the frank confiscation, quotation, excerptation, accumulation and repetition of already existing images. Notions of originality, authenticity and presence . . . are undermined."¹⁸ The author-genius, working from divine inspiration, was also

¹⁴ See Mark Greenburg, *Blake's Vortex*, 14 COLBY LIBR. Q. 198, 202 (1978).

¹⁵ Stanley Kunitz, *A Symposium on Pop Art*, in POP ART, A CRITICAL HISTORY 65, 75 (Steven Madoff ed., 1997).

¹⁶ Habermas, *supra* note 7, at 9.

¹⁷ Walter Benjamin describes the Dadaists as predecessors to film, with their "word-salad" poems and bricolage paintings. "What they achieved by such means was a ruthless annihilation of the aura in every object they produced, which they branded as a reproduction through the very means of its production." WALTER BENJAMIN, *The Work of Art in the Age of Its Technological Reproducibility: Second Version*, in THE WORK OF ART IN THE AGE OF ITS TECHNOLOGICAL REPRODUCIBILITY, AND OTHER WRITINGS ON MEDIA 19, 39 (Michael W. Jennings et al. eds., 2008).

¹⁸ Douglas Crimp, *On the Museum's Ruins*, in THE ANTI-AESTHETIC, *supra* note 6, at 53 (internal citation omitted).

recognized as a construct of the Enlightenment, rather than taken as truth.¹⁹ And whereas modern art sought to achieve religious ritual or communion and transcendence, postmodern art—starting with Pop—“rejects the impulse towards communion; most of its signs and slogans and stratagems come straight out of the citadel of bourgeois society, the communications stronghold where the images and desires of mass man are produced, usually in plastic.”²⁰ We can now begin to see the crisis this poses for all artistic production in general. In the new postmodern society, Habermas posits an interesting question, implicit in both legal doctrine and the artistic community today: “should we try to hold on to the *intentions* of the Enlightenment, feeble as they may be, or should we declare the entire project of modernity a lost cause?”²¹

B. *Reconciling the Progress Paradox*

Of course, to declare that in certain academic or artistic circles the meanings of the words “Progress” and “Author” as they appear the Constitution have changed does not mean we should abandon the entire project completely and launch some free-for-all where authors do not exist and works receive no protection.²² Rather, I would like to situate the ahistorical (what Frederic Jameson would call “schizophrenic”²³) approach of postmodernism within a pragmatic and workable framework and inevitably incorporate the postmodern

¹⁹ See Lionel Bently, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973, 985 (1994); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”*, 17 EIGHTEENTH-CENTURY STUD. 425, 428–30 (1983–1984).

²⁰ Kunitz, *supra* note 15, at 75.

²¹ Habermas, *supra* note 7, at 3, 9–10.

²² Foucault, for example, acknowledges that even in “call[ing] for a form of culture in which fiction would not be limited by the figure of the author,” it “would be pure romanticism . . . to imagine a culture in which the fictive would operate in an absolutely free state, in which fiction would be put at the disposal of everyone and would develop without passing through something like a necessary or constraining figure.” MICHEL FOUCAULT, *What is an Author?*, in THE FOUCAULT READER 101, 119 (Paul Rabinow ed., 1984). The fact that he replaces the authorial figure with a “necessary” figure is instructive and helpful when thinking about how postmodernism’s prerogatives do not necessarily call for the end of creator-types.

²³ FREDRIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM 26–31 (Stanley Fish & Frederic Jameson eds., Duke Univ. Press 1992).

into a larger linear historical timeline. This approach is not out of sync with general postmodernist theory. Postmodernist theory is based, in part, on the death of a totalizing worldview in favor of a series of ideological codes.²⁴ Such a theory, of course, recognizes the inherent fallacy in attempting to systematize “something that is resolutely unsystematic,” or historicize “something that is resolutely ahistorical.”²⁵ Advocating a certain sense of “Progress” in art by moving toward the anti-progress turns of pastiche or appropriation allows the arts to evolve, perhaps not in the sense that there is some perfect Platonic ideal that we must move ever-upwards to achieve, but in the sense that we allow art to respond to and shape the changing social, political, and theoretical conditions of its time.

The contemporary poet Anne Carson wrote a line that I think is very telling: “In every story I tell comes a point where I can see no further.”²⁶ In life, as in art, there often comes just that point. After a century of modernism’s ever-upward race toward progress, the exhaustion of its once oppositional values inevitably means a reactionary practice must emerge if we are to make something “new,” even if it means appropriating the old. The critic Hal Foster best justifies this logic when he speaks of postmodernism’s goal as *exceeding* that of the modern, *progressing* beyond the era of Progress, and *transgressing* the ideology of the transgressive.²⁷ Postmodernism must acknowledge that there *is* a tradition it is reacting against, exceeding, and progressing beyond, even if it questions the truth of such modernist objectives as progress. This is due in no small part to the long-held belief that art must in some way oppose the status quo, perhaps as a mirror reflecting, magnifying, and critiquing society’s gaping inadequacies.²⁸ What follows naturally is that once the reactionary tactics of

²⁴ See *id.* at 1.

²⁵ *Id.* at 418.

²⁶ ANNE CARSON, PLAINWATER 30 (1995).

²⁷ Foster, *supra* note 6, at ix.

²⁸ Foucault dates art’s oppositional agenda to the end of the eighteenth and the beginning of the nineteenth centuries, precisely (and perhaps paradoxically) when authors’ rights came into being. “It is as if the author, beginning with the moment at which he was placed in the system of property that characterizes our society, compensated for the status that he thus acquired by rediscovering the old bipolar field of discourse, systematically practicing transgression and thereby restoring danger to a writing which was now guaranteed the benefits of ownership.” FOUCAULT, *supra* note 22, at 108–09.

modernism integrate into the mainstream, something new must arise as its progeny and opposition.

Enter Postmodernism. Read in this way, copyright doctrine's refusal to acknowledge the *new* reactionary mode of artistic production actually means that it is defying "Progress" in the arts as a constitutional imperative.²⁹ "Stripped of its association with modernist teleologies, progress consists, simply, in that which causes knowledge systems to come under challenge and sometimes to shift."³⁰ It is this shift that the law fails to account for, but which is absolutely fundamental if art is to accurately reflect the changing social norms of our time.

III. FROM NATURE TO CULTURE: HOW REMIXES REFLECT THE US OF NOW

One of the most fundamental and drastic shifts in the move from modernism to postmodernism is the shift from nature to culture. As it turns out, that difference accounts for much of what the fine arts—and the other arts, consciously or unconsciously—attempt to reflect today.

But from nature to culture: what does this mean? The art critic Leo Steinberg first (and best) characterized this move toward postmodern painting in his monumental 1972 essay, *Reflections on the State of Criticism*.³¹ "A picture that harks back to the natural world evokes sense data which are experienced in the normal erect posture. Therefore the Renaissance picture plane affirms verticality as its essential condition."³² Even the abstract expressionists—from Newman to Pollock—still lived with the picture in its essentially "uprighted state, as with a world confronting his human posture,"³³ and in that sense they were all nature painters.

As to the meaning of "nature," criticism varies. Roland Barthes, for example, distinguishes between the "Nature" of old and the "new Nature" (what Steinberg, of course, would call culture) by referring to the former as "vegetal,

²⁹ For a discussion of contemporary cases that address appropriation art and remix culture, see *infra* Section IV.A.

³⁰ Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1168 (2007).

³¹ Leo Steinberg, *Reflections on the State of Criticism*, in ROBERT RAUSCHENBERG 7, 27 (Branden W. Joseph ed., 2002).

³² *Id.*

³³ *Id.*

scenic, or human (psychological)", and the latter as "the social absolute".³⁴ One begins to understand that Nature as a romantic modernist ideal was firmly rooted in this idea of the human mind as capable of reaching God through its own innate and endless imaginative powers,³⁵ and nature (or culture) in the postmodern world as re-situating the human within its social context, rather than its divine absolute. There is also a certain sense in which Nature in its proper vegetal form—the scenic greenery of the world in its newly-created, real, untouched state—has been lost, driven back by cultural production, so that even attempting to return to nature, and the real, becomes a bit like tracing images in Plato's cave.³⁶ Indeed, we have reached a point in which "we seem condemned to seek the historical past through our own pop images and stereotypes about that past, which itself remains forever out of reach."³⁷

Thus, given the impossibility of returning to nature (one can see so clearly through the abstract expressionist's last grand stand of the romantic author's claim to authentic experience through sublime mysticism or primitive longings³⁸) the only viable option is to immerse the human in culture. What

³⁴ Roland Barthes, *That Old Thing, Art . . .*, in *POP ART, A CRITICAL HISTORY*, *supra* note 15, at 370, 374.

³⁵ Wordsworth, in his *Prelude*, for example, wrote:

The perfect image of a mighty Mind,
Of one that feeds upon infinity,
That is exalted by an underpresence,
The sense of God, or whatso'er is dim
Or vast in its own being; above all
One function of such mind had Nature there
Exhibited by putting forth . . .

WORDSWORTH, *supra* note 12, at 580 11.69–75.

³⁶ Frederic Jameson, *Postmodernism and Consumer Society*, in *THE ANTI-AESTHETIC*, *supra* note 6, at 111, 118.

³⁷ *Id.*

³⁸ The abstract painter Barnett Newman, for example, was obsessed with the notion of approaching the Sublime (in the Burckian sense) through painting. See 2 HAL FOSTER ET AL., *ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM* 366 (Hal Foster et al. eds., 2004). "The Sublime, for Newman, is something that gives one the feeling of being where one is, of *hic et nunc*—of the here and now—courageously confronting the human fate,

Steinberg dubs the “flatbed picture plane” depends upon “a radically new orientation, in which the painted surface is no longer the analogue of a visual experience of nature but of operational processes.”³⁹ It is helpful to visualize this new orientation, from verticality to horizontality, as the moment through which a vertical painting on the museum wall—finished, stoic, hermetic—flips to represent the surfaces that we live with, work on, and even sleep on, “such as tabletops, studio floors, charts, bulletin boards” as well as “the flat bedding in which we do our begetting, conceiving, and dreaming.”⁴⁰

Such surfaces do more than change the orientation through which we view a piece—they also represent a fundamental shift in the way we engage with the world. Thus, Steinberg’s flatbed picture planes become interactive sites of play, reinterpretation, and information reception. The postmodern painter Robert Rauschenberg, for example, championed this move from the romantic author to the cultural collector with his “combine” paintings.⁴¹ Steinberg says these paintings do not represent “the world of the Renaissance man who looked for his weather clues out of the window; but the world of men who turn knobs to hear a taped message Rauschenberg’s picture plane is for the consciousness immersed in the brain of the city.”⁴² Although Rauschenberg painted forty years ago, the work of postmodern painters—from Lichtenstein to Rauschenberg—actually predated (or predicted) the new information society’s predilection to, as art critic Michael Lobel describes it, *scan* instead of *read*.⁴³ Indeed, in Rauschenberg’s pictorial depositories of information and in Roy Lichtenstein’s blown-up comic strips replete with ben-day dots and shared cultural codes (which he took straight from comic books, landing him with accusations of unoriginality and at least one charge of copyright infringement⁴⁴), emerges “a mode of seeing that has become dominant only in our own age of the computer

standing alone in front of chaos, without the props of ‘memory, association, nostalgia, legend, myth.’” *Id.* (quoting BARNETT NEWMAN, *The Sublime is Now*, in BARNETT NEWMAN: SELECTED WRITINGS AND INTERVIEWS 173 (Barnett Newman ed., 1992)).

³⁹ Steinberg, *supra* note 31, at 28.

⁴⁰ *Id.* at 28, 34.

⁴¹ *Id.* at 28–34.

⁴² *Id.* at 34.

⁴³ See MICHAEL LOBEL, *IMAGE DUPLICATOR: ROY LICHTENSTEIN AND THE EMERGENCE OF POP ART* (New Haven & London: Yale Univ. Press, 2002).

⁴⁴ See FOSTER ET AL., *supra* note 38, at 445.

screen [W]e are trained to sweep through information . . . we scan it (and often it scans us, tracking keystrokes, counting website hits, and so forth)."⁴⁵

As Steinberg describes the studio floors, charts, and workspaces we use to tack on and mediate the infinite bits of informational data from our lives, I cannot help but think of current remix culture as just that process: the process by which we cut, copy, and paste familiar sounds, words, or images onto a blank space for creative play. The free culture champion Lawrence Lessig, too, recalls the nature to culture shift on a different scale: his "nature" is that of analog technology, and he asserts the advent of digital technology essentially remade Read-Only "nature" into Read-Write culture.⁴⁶

Read-Write culture is basically what we would call remix culture: that of taking and reordering preexisting bits of sound, video, text, or images into a new whole.⁴⁷ Take the artist Greg Gillis, who goes by the stage name Girl Talk.⁴⁸ Gillis's remixes are mash-ups of popular songs by such well-known artists as Elton John, Notorious B.I.G., and Destiny's Child.⁴⁹ Gillis cuts snippets from the artists' songs and reorders them on his computer with a program called AudioMulch; the result could be a four-minute long song "sampling" over twenty different artists.⁵⁰ Ten years ago, at a time when MTV still dominated the market as *the* source for new music, Fredric Jameson wrote that "[w]hat MTV does to music . . . is not some inversion of that defunct nineteenth-century form called program music but rather the nailing of sounds (using Lacan's carpet tacks, no doubt) onto visible space and spatial segments[.]"⁵¹ In the new digital

⁴⁵ *Id.* at 449.

⁴⁶ See LAWRENCE LESSIG, REMIX 36–83 (2008).

⁴⁷ WOS4: *Lawrence Lessig on Read/Write Culture*, LWN.NET (Sept. 18, 2006), <http://lwn.net/Articles/199877/>.

⁴⁸ *Girl Talk/Gregg Gillis On New Album, Music Industry*, THE WASHINGTON POST (July 29, 2008, 3:00 PM), <http://www.washingtonpost.com/wp-dyn/content/discussion/2008/07/16/DI2008071601445.html>.

⁴⁹ *The Digital Future of the United States, The Future of the World Wide Web: Hearing Before the Subcommittee on Telecommunications and the Internet of the H. Committee on Energy and Commerce*, 110th Cong. (2007) (statement of Rep. Mike Doyle).

⁵⁰ *Girl Talk/Gregg Gillis On New Album, Music Industry*, THE WASHINGTON POST, *supra* note 48.

⁵¹ JAMESON, *supra* note 23, at 300.

age, however, the user has replaced the mass media player as the nailer of such sounds onto visible space.

Over thirty years ago, Steinberg described this revolution in painting “as a change within painting that changed the relationship between artist and image, image and viewer.”⁵² This revolution has transferred over from the visual arts to other forms of art—in Gillis’s case, music. What is more important, however, is that while Rauschenberg, Lichtenstein, Warhol, and the like merely *suggested* a change in the relationship between artist and image, image and viewer, Gillis, in effect, is blurring those lines and relationships completely until the viewer actually *becomes* the artist. This cycle may be self-perpetuating, as there is nothing stopping another “viewer” of Gillis’s work from re-appropriating it as a different piece. But the common link between the Steinberg of the 1970s and the Gillis of now is the idea that *culture*, by nature of its ubiquity, is shared. “Recognizable objects, . . . as man-made things of universally familiar character,”⁵³ belong to all of us precisely because of their recognizability.

That sense of the ubiquitously familiar, on the other hand, is also precisely what makes the works relevant as the art of now. As Lessig writes:

Their meaning comes not from the content of what they say; it comes from the reference, which is expressible only if it is the original that gets used. Images or sounds collected from real-world examples become ‘paint on a palette.’ And it is this ‘cultural reference,’ as coder and remix artist Victor Stone explained, that ‘has emotional meaning to people.’⁵⁴

Steinberg’s revolutionary flatbed picture plane as the workspace of our collective imaginations would not exist without the ability to collect real-life referents and tack them up on blank spaces. Neither would much of postmodernist painting, predicated on just that re-appropriation of the familiar and the recognizable.⁵⁵ Furthermore, it appears as if Benjamin’s prediction at the advent of photography over seventy years ago, that “[a]t any moment, the reader

⁵² Steinberg, *supra* note 31, at 36.

⁵³ *Id.* at 34.

⁵⁴ LESSIG, *supra* note 46, at 74–75 (quoting remix artist Victor Stone).

⁵⁵ For case studies involving modern-day examples of appropriation art, see *infra* Section IV.

is ready to become a writer,"⁵⁶ has finally come true. We are at that moment in which we as readers can, and do, participate in writing our culture. But courts and, indeed, much of legal scholarship, do not like engaging this argument.⁵⁷ A recent Note, for example, refers to music sampling derogatorily as "enabl[ing] the sampler to use a musical performance without hiring . . . the musician who originally played it [T]his practice poses the greatest danger to the musical profession because the musician is being replaced with himself."⁵⁸

Despite the irony of the phrase "being replaced with himself," this argument misses the point. The argument supposes that the "musician who originally played it" is the ideal object, that the mission of the sampler is not to appropriate and collect, but to reproduce an experience, which, as postmodern theory already suggests, is intrinsically irreproducible. The preferential treatment the law gives to the original musician suggests in some way that there remains a grain of uniqueness to the "original" author's aura, even as the very nature of the digital age transforms how we engage with a work and, subsequently, its author. And if "technological reproducibility emancipates the work of art from its parasitic subservience to ritual" (here ritual is tied to the aura) such that "the work reproduced becomes the reproduction of a work designed for reproducibility," then to even ask for the original musician who played it makes no sense.⁵⁹ The sampler, in constructing his work, wants not to recreate the performance of the original *musician*, but the work itself, which is, of course, just one of many copies. "To ask for the 'authentic' . . . makes no sense."⁶⁰

Nor does the advice posed by the courts—to either get a license or refrain from sampling⁶¹—prove practical. As has routinely been shown over and over again, the would-be sampler lacks considerable bargaining power

⁵⁶ BENJAMIN, *supra* note 17, at 34.

⁵⁷ See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 74 U.S.P.Q.2d (BNA) 1865 (6th Cir. 2005); Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 2 (1997).

⁵⁸ Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1667–68 (1999).

⁵⁹ See BENJAMIN, *supra* note 17, at 24.

⁶⁰ *Id.* at 25.

⁶¹ See, e.g., *Bridgeport Music*, 410 F.3d at 801, 74 U.S.P.Q.2d (BNA) at 1870.

compared to the owner of the copyrighted work.⁶² Furthermore, current copyright law frequently issues strict property rules as a remedy rather than liability rules—which means successful plaintiffs may obtain injunctions rather than mere damages.⁶³ There is an abundance of legal scholarship addressing how burden-shifting or changing the remedy can solve the harsh measures courts dole out to so-called infringers.⁶⁴ But the harm in the courts' tendency to continuously uphold the copyright holder's rights over the defendant user's extends beyond harsh remedies: it also encourages a litigation-happy trend on the part of copyright owners.⁶⁵ This oppressive practice inevitably stops some remix artists from creating (or at the very least, using copyrighted material) in the first place.⁶⁶ Thus, before proposing a structural change in the way law is made, interpreted, or enforced judges, legal scholars, and lawmakers must first shift how they think about artistic creation and the meaning of progress—both ontologically and historically—especially as it stands in the new millennium.

IV. FAIR USE: PROBLEMATIC PAST, PROMISING FUTURE

A. *Outmoded Legal Responses: A Fair Use Case Study*

This mode of seeing the world—as pastiche or collage inextricably mediated by mass media and shared cultural imagery—has found new forms of representation in art today and has, at least in one case, found acceptance in the law under the fair use doctrine.⁶⁷ Courts often tout the fair use doctrine as somehow mitigating the tension between beneficial public use and proprietary

⁶² See Kenneth A. Achenbach, *Grey Area: How Recent Developments in Digital Music Production Have Necessitated the Reexamination of Compulsory Licensing for Sample-Based Works*, 6 N.C. J.L. & TECH. 187, 199 (2004).

⁶³ See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 22 U.S.P.Q.2d (BNA) 1556, 1558 (S.D.N.Y. 1991).

⁶⁴ See NEIL NETANEL, COPYRIGHT'S PARADOX 192 (2008).

⁶⁵ Indeed, the court in *Bridgeport* acknowledges as much. 410 F.3d at 798–99, 22 U.S.P.Q.2d (BNA) at 1869 (“Advances in technology coupled with the advent of the popularity of hip hop or rap music . . . have spawned a plethora of copyright disputes and litigation.”).

⁶⁶ See LESSIG, *supra* note 5, at 98–99; Josh Norek, Comment, “You Can’t Sing Without the Bling”: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System, 11 UCLA ENT. L. REV. 83, 84 (2004).

⁶⁷ See *Blanch v. Koons*, 467 F.3d 244, 80 U.S.P.Q.2d (BNA) 1545 (2d Cir. 2006).

private right—between the belief, stolidly held, that material must be “new” and “original” to be copyrightable and the reluctant acknowledgment that “in truth, in literature, in science and in art, there are, and can be, few, if any, things, which . . . are strictly new and original throughout.”⁶⁸ However, aside from the already abundant problems with current fair use doctrine (its unpredictability, expensive litigation fees, and high damage awards in the event of failure),⁶⁹ the very criteria used to determine “fair use” in the first place is facing scrutiny under current postmodern production, and might prove unproductive when examining and discussing postmodern art. A case study of the recent 2006 Second Circuit decision in *Blanch v. Koons* proves useful in highlighting the tension between the fair use doctrine and the new art of our time.

In *Blanch v. Koons*, fashion photographer Andrea Blanch brought a suit against visual artist Jeff Koons, widely known for his use of “images taken from popular media and consumer advertising” in a style the court rightly deems as “‘neo-Pop art’ or (perhaps unfortunately in a legal context) ‘appropriation art.’”⁷⁰ The image in question, “Niagara,” was part of Koons’ *Banalities* series in the late 1980s, which spawned, as one may well have predicted from the title, three separate copyright infringement suits.⁷¹ As the unpredictable nature of fair use would have it, only “Niagara” passed muster under the doctrine.⁷²

The copyrighted work at issue in *Blanch* was a photograph of a pair of woman’s legs and feet, taken by Blanch.⁷³ Koons saw the photograph in an issue of *Allure* and subsequently scanned and incorporated the work into “Niagara” among other images like doughnuts, pastries, and ice cream, all superimposed

⁶⁸ *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

⁶⁹ See, e.g., Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S. 513, 515 (1999).

⁷⁰ *Blanch*, 467 F.3d at 246, 80 U.S.P.Q.2d (BNA) at 1546.

⁷¹ *Id.* (“In separate cases based on three different sculptures from ‘Banality,’ this Court and two district courts concluded that Koons’s use of the copyrighted images infringed on the rights of the copyright holders and did not constitute fair use under the copyright law.”).

⁷² *Id.* at 259, 80 U.S.P.Q.2d (BNA) at 1555 (affirming the district court ruling that the “Niagara” sculpture did not infringe on the plaintiff’s copyrighted photograph).

⁷³ *Id.* at 247–48, 80 U.S.P.Q.2d (BNA) at 1547.

against a pastoral landscape.⁷⁴ In its decision, the court quoted Koons' explanation that "[b]y re-contextualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media."⁷⁵ That Koons chose to use words as "re-contextualize" and "break out" was quite clever, and perhaps specifically tailored to speak to the "transformative use" criteria of fair use—one of four factors in the fair use test. To be transformative, a secondary use must necessarily add "new information, new aesthetics, [and] new insights" to the original.⁷⁶

While Koons prevailed in *Blanch* because the court deemed "Niagara" to be sufficiently transformative due to changes in the colors, background, medium, size, and details of the original photo,⁷⁷ he was not so lucky in another Second Circuit case, *Rogers v. Koons*, which also involved a *Banality* piece.⁷⁸ In *Rogers*, the court seemed determined to distinguish *Blanch*, emphasizing that in *Rogers* Koons had "slavishly recreated a copyrighted work in a different medium without any objective indicia of transforming it or commenting on the copyrighted work."⁷⁹ Koons' defense failed in *Rogers* largely because the work in question was not a parody of the original work itself, but rather, a satire or a "pastiche". "In short," the court noted, "it is not really the parody flag that appellants are sailing under, but rather the flag of piracy."⁸⁰

The fair use focus on the distinction between satire and parody, and between "transforming" and "copying" a work, are precisely the distinctions postmodern art problematizes. Parody, which targets the original work as the object of its ridicule, is allowed under the fair use defense at least in part because it makes "the audience . . . aware that underlying the parody there is an original

⁷⁴ *Id.*

⁷⁵ *Id.* at 247, 80 U.S.P.Q.2d (BNA) at 1547.

⁷⁶ *Castle Rock Entm't v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141, 47 U.S.P.Q.2d (BNA) 1321, 1328 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

⁷⁷ *Blanch*, 467 F.3d at 253, 80 U.S.P.Q.2d (BNA) at 1551.

⁷⁸ 960 F.2d 301, 22 U.S.P.Q.2d (BNA) 1492 (2d Cir. 1992).

⁷⁹ *Blanch*, 467 F.3d at 262, 80 U.S.P.Q.2d (BNA) at 1557 (Katzmann, J., concurring).

⁸⁰ *Rogers*, 960 F.2d at 311, 22 U.S.P.Q.2d (BNA) at 1500.

and separate expression, attributable to a different artist.”⁸¹ On the other hand, because “satire can stand on its own two feet” rather than necessarily relying on the original, courts have been reluctant to allow it the same fair use defense they grant parody.⁸² In particular, courts have leveled a number of criticisms at satire, such as the idea that authors only use “the copyrighted work . . . [as] a vehicle to poke fun at another target,”⁸³ or that they do so “to avoid the drudgery in working up something fresh.”⁸⁴

However, both postmodern art and current critical theory problematize the notion that there is “an original and separate expression, attributable to a different artist” at all.⁸⁵ Rather, the move from making parodies to making pastiche or satire is precisely one of the fundamental differences between modernism and postmodernism.⁸⁶ Specifically, to parody a work the secondary user must implicitly acknowledge something *unique* in the original that makes it worthy of imitation—Jameson urges us to think of “Wallace Stevens’s peculiar way of using abstractions” or “of the musical styles of Mahler or Prokofiev. All of these styles, however different from each other, are comparable in this: each is quite unmistakable.”⁸⁷ Satire or pastiche, however, is what happens when we stop believing in the uniqueness or unmistakability of a style or piece. “Pastiche is blank parody, parody that has lost its sense of humor.”⁸⁸ This is due in no small part to the death of the subject or the author, at least in the sense that “a unique personality and individuality . . . can be expected to generate its own unique vision of the world.”⁸⁹

⁸¹ *Id.* at 310, 22 U.S.P.Q.2d (BNA) at 1499.

⁸² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81, 29 U.S.P.Q.2d (BNA) 1961, 1966 (1994).

⁸³ *Dr. Seuss Enters., L.P. v. Penguins Books USA, Inc.*, 109 F.3d 1394, 1400, 42 U.S.P.Q.2d (BNA) 1184, 1189 (9th Cir. 1997).

⁸⁴ *Campbell*, 501 U.S. at 580, 29 U.S.P.Q.2d (BNA) at 1966.

⁸⁵ *See, e.g.*, Jameson, *supra* note 36, at 114 (discussing the disappearance of the identifiable “great modern styles” as each group and profession develops “a curious private language of its own”).

⁸⁶ *See id.* at 113–14.

⁸⁷ *Id.* at 113.

⁸⁸ *Id.* at 114.

⁸⁹ *Id.*

Pastiche is the poetic and artistic realization of what Walter Benjamin championed in mechanical reproduction and the simulacrum of copies.⁹⁰ Barthes, for example, claims that the modern-day writer is no author at all, at least in the traditional sense, but is more aptly deemed a collector, collage-maker, or “scriptor” of our cultural past:

The writer can only imitate a gesture that is always anterior, never original. His only power is to mix writings, to counter the ones with the others, in such a way as never to rest on any one of them. Did he wish to *express himself*, he ought at least to know that the inner ‘thing’ he thinks to ‘translate’ is itself only a ready-formed dictionary, its words only explainable through other words, and so on indefinitely Succeeding the Author, the scriptor no longer bears within him passions, humours, feelings, impressions, but rather this immense dictionary from which he draws a writing that can know no halt: life never does more than imitate the book, and the book itself is only a tissue of signs an imitation that is lost, infinitely deferred.⁹¹

Koons, working in the postmodern fashion, is precisely that collector of dead languages: he had, after all, obtained most of his materials for the *Banality* series by looking through magazines, advertisements, and postcards⁹²—those sources of kitsch that the postmodern artist capitalizes and comments on. His justification for appropriating from said sources is that these pictures—the congenial man and woman with their string of puppies in the plaintiff’s photograph in *Rogers*, the sensuous woman’s leg with silk sandals in *Blanch*, and the happy farm family with pigs in *Campbell*—all speak to our “collective subconsciousness . . . regardless of whether . . . [they have] actually ever been seen by . . . people.”⁹³ Indeed, as the title of his series suggests, such images are now so much a part of our consumer society as to be banal. Parody, which implicitly must acknowledge the uniqueness of both the appropriated work and of the

⁹⁰ See BENJAMIN, *supra* note 17.

⁹¹ ROLAND BARTHES, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142, 146–47 (Stephen Heath trans., 1977).

⁹² See *Blanch v. Koons*, 467 F.3d 244, 247, 80 U.S.P.Q.2d (BNA) 1545, 1547 (2d Cir. 2006); *Rogers v. Koons*, 960 F.2d 301, 305, 22 U.S.P.Q.2d (BNA) 1492, 1495 (2d Cir. 1992); *Campbell v. Koons*, No. 91 Civ. 6055, 1993 U.S. Dist. LEXIS 3957 at *2 (S.D.N.Y. Mar. 30, 1993).

⁹³ *Rogers*, 960 F.2d at 305, 22 U.S.P.Q.2d (BNA) at 1495.

appropriating author, would not suffice.⁹⁴ As a matter of fact, pastiche is the ultimate realization of the postmodern move from nature to culture, God to Pop,⁹⁵ man-as-creator to man-as-machine.⁹⁶

It is antithetical to the project of the postmodern creator to attempt to transform the work (as if via some divine inspiration) into something new or original. Rather, the concept of man as scripter, collector, or machine requires him to recreate the original (which, of course, is arguably not “original” at all) exactly as he sees it. Indeed, Andy Warhol worked to imbue his art with an “assembly-line effect,” completely devoid of any traces of the author.⁹⁷

The court in *Blanch*, unlike the courts in *Rogers* and *Campbell*, was surprisingly receptive to Koons’ argument for satire as symbolic of our greater societal state.⁹⁸ However, the court worked shockingly hard to hammer its

⁹⁴ Neither, too, would the court’s suggestion that Koons merely take the plaintiff photographer’s “idea” itself rather than the expression of that idea. *Id.* at 308, 22 U.S.P.Q.2d (BNA) at 1497. For the point of the humorless pastiche is to “look into the conscience of America’s commercial culture, find the glint of shiny metal no more than an inch thick, and *mirror it brilliantly.*” Steven Henry Madoff, *Wham! Blam! How Pop Stormed the High Art Citadel and What the Critics Said*, in *POP ART, A CRITICAL HISTORY*, *supra* note 15, at xiii, xiv (emphasis added). The end goal is to erase all traces of the author’s hand from the finished product, see FOSTER ET AL., *supra* note 38, at 486–91, something that would not be possible if Koons were to use the “idea” of “Puppies” in creating his own work; this would go against the whole project of copying something as the author sees it.

⁹⁵ Leo Steinberg, in discussing the consumerist focus of Pop Art, said:

I think it has something to do with God and idolatry, God being understood as the object of man’s absolute worship . . . And now Lichtenstein and certain others treat mass-produced popular culture as Duccio would treat the Madonna, Turner the Sea, Picasso the Art of Painting . . . the artists are moving in, naively or mockingly, each in his way, an uninvited priesthood for an unacknowledged, long-practiced cult.

Kunitz, *supra* note 15, at 72.

⁹⁶ Andy Warhol, for example, made a remark in contrast to Jackson Pollock (a high modernist painter’s) statement, “I am nature.” Warhol states flatly instead, “I am a machine.” Madoff, *supra* note 94, at xiii.

⁹⁷ See ANDY WARHOL & PAT HACKETT, *POPISM* 22 (1980).

⁹⁸ *Blanch v. Koons*, 467 F.3d 244, 255, 80 U.S.P.Q.2d (BNA) 1545, 1553 (2d Cir. 2006).

justification for the holding into the fair use doctrine.⁹⁹ The disconnects are palpable. For one, while the court acknowledged that the fair use doctrine is traditionally hostile to satire, it concluded nonetheless that Koons established an adequate justification for the satire.¹⁰⁰ “[W]e need not depend on our own poorly honed artistic sensibilities,” the Second Circuit claimed in deferring to a lengthy description of Koons’ project.¹⁰¹ The same court, however, engaged in just that valuation of artistic sensibility when it struck down Koons’ fair use defense in *Rogers*.¹⁰² Similarly, the court’s justification for finding a transformative use in Koons’ “Niagara” is just as spotty: “When, as here, the copyrighted work is used as ‘raw material’ . . . in the furtherance of distinct creative or communicative objectives, the use is transformative.”¹⁰³ However, Koons clearly delineated his creative objectives in *Rogers* as well.¹⁰⁴ As a matter of fact, the extent to which the nature of the two artworks (“Niagara” and “String of Puppies”) varies is slight, if at all.¹⁰⁵ And of course, it would be ridiculous to suggest that *any* work of art, fine art or otherwise, does not aim to communicate some sort of message—to chalk up transformative use to its communicative objectives. It seems like the Second Circuit is attempting to fit a square peg into a round hole.

The key problem with all this is that the fair use doctrine, including its emphasis on transformativeness and the outdated, if not artificial, distinction between satire and parody, is that it forces courts to engage in a process of artistic vetting, of determining what art *is* and what it *isn’t*. To be sure, courts are consistently engaged in the process of making subjective determinations and

⁹⁹ *Id.* at 251–52, 80 U.S.P.Q.2d (BNA) at 1548.

¹⁰⁰ *Id.* at 255, 80 U.S.P.Q.2d (BNA) at 1553.

¹⁰¹ *Id.*

¹⁰² *Rogers v. Koons*, 960 F.2d 301, 309, 22 U.S.P.Q.2d (BNA) 1492, 1498–99 (2d Cir. 1992).

¹⁰³ *Blanch*, 467 F.3d at 253, 80 U.S.P.Q.2d (BNA) at 1551.

¹⁰⁴ Indeed, the Second Circuit in *Rogers* went to great lengths to detail Koons’ own description of his role as an appropriation artist in a long line of similar artistic movements (Cubism, Dadaism, and one of the first appropriators, Marcel Duchamp) with a shared goal of incorporating images from mass media and commodity culture to comment on them. However, the Court quickly dismissed this description. *Rogers*, 960 F.2d. at 309, 22 U.S.P.Q.2d (BNA) 1498–99.

¹⁰⁵ *Blanch*, 467 F.3d at 255, 80 U.S.P.Q.2d (BNA) at 1553.

value judgments that encroach upon all facets of our daily lives.¹⁰⁶ But once courts begin issuing injunctions that strip artistic work of its right to exist, they are interfering with the very constitutional goal of copyright law: to promote the Progress of the arts.¹⁰⁷ As Justice Oliver Wendell Holmes said over 100 years ago:

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.¹⁰⁸

It seems that contemporary copyright scholars and judges have forgotten Justice Holmes' words, if for no other reason than that postmodern art finally challenges what trained reason would define as "the narrowest and most obvious limits." But my critique of detractors like Jane Ginsburg, who see the current problems in copyright law as a debate between the "postmodernist literary critics" who want to introduce chaos and madness into our mode of artistic protection and those who champion artists' rights,¹⁰⁹ is simply that the two are not actually all that different. Postmodern art is here, and if we do not begin changing our legal notions of what it is and what it does, then creators cannot move forward to pursue the next new artistic idea. If we begin tweaking copyright law—and not ridding ourselves of it all together—we have room to accommodate both views, beginning with a more lenient fair use doctrine.

¹⁰⁶ One cannot forget, after all, Justice Byron White's pithy remark in the now overturned decision *Bowers v. Hardwick*: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁷ U.S. CONST. art. I, § 8, cl. 8.

¹⁰⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

¹⁰⁹ Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1064–65 (2003).

B. *Cleaning up the Four-Factor Mess: A Simple Reform*

No matter how infamously murky or unpredictable the doctrine is,¹¹⁰ because fair use is one of the only available defenses to alleged infringers today, it is also one of the best doctrines with which we can begin thinking about copyright reform without changing the basic set of rights copyright holders wield. That is—by giving the receivers of new media—Steinberg’s data collectors, Lessig’s writer-painters—a better defense, we can begin to solve many of the problems this Article proposes. This paper, for the most part, concentrated on *what the new user does with recycled, appropriated, or “found”* information, and *not* whether copyright rights as a whole are some Enlightenment-centric, modernist sham (that would be, I think, far too radical).

Thus, I propose a simple reform, one that rewrites the four-factor test as a simple one-question test: Does the derivative work transform the work such that it creates a new discursive community? This *transformed* notion of transformative use borrows liberally from Professor Laura Heymann’s ideas in her article, *Everything is Transformative: Fair Use and Reader Response*.¹¹¹ Professor Heymann suggests that the pertinent consideration when looking at the “transformative use” question is *not* what the author has added, but rather, whether the author’s work engages with a different discursive community than the plaintiff’s work, creating a transformed *space* for discussion and interpretation around the new work.¹¹² In focusing the inquiry *away* from the author’s intent and instead on the viewer’s response,¹¹³ we rid ourselves of the modernist emphasis on author-as-creator, making room to concentrate on the new *form* of postmodernist discourse occurring in the recycling/compiling/appropriation process (it is further to be noted that the new doctrine, quite obviously, also sees no distinction between parody and satire).

¹¹⁰ For a great case study of why current inconsistencies regarding fair use are prohibitive on speech that very well might be protected under the doctrine, see NETANEL, *supra* note 64, at 15–17 (on the documentarian Jon Else and his battle with a 4.5-second shot of *The Simpsons* playing in the background of a stagehands scene). See also Leval, *supra* note 76, at 1106–07 (discussing judges’ inconsistencies in applying the fair use doctrine).

¹¹¹ Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008).

¹¹² *Id.* at 455–56.

¹¹³ *Id.* at 453–57.

In focusing on this one-question test, my suggested fair use doctrine renders obsolete the fourth factor of the original doctrine (whether the new work is a replacement for the original¹¹⁴), since in creating a new discursive community, a work *de facto* garners new audiences, new fans, and new markets. Furthermore, factor three (amount and substantiality taken¹¹⁵) becomes irrelevant. Factor two, “the nature of the copyrighted work,”¹¹⁶ is a game of favoritism regarding the *copyrighted* work (whether it is factual in nature—as “the scope of fair use is greater with respect to factual than non-factual works”¹¹⁷). As my proposed fair use doctrine already greatly benefits defendants, this factor need not be preserved to further burden plaintiffs.

This drastically simplified re-write of the fair use doctrine not only stays true to the progress-centric purpose of the Copyright Clause (rather than wrongly emphasizing authors’ rights to monopoly profits¹¹⁸) by accommodating for changes in artistic thought and/or production (for postmodernism—and beyond!), but it also replaces the doubt-laden balancing of the original four-factor test with a simple “Yes” or “No” response. In doing so, this proposal helps provide clear answers regarding permissibility to secondary users seeking to incorporate copyrighted works in their own pieces, and to encourage the kind of positive uses of copyrighted works embodied in the spirit of the original doctrine.

V. WHY CARE?

Some might wonder at this point, why society should want to *encourage* the postmodern move toward appropriation, humorless pastiche, unoriginality, and mechanization (or, the removal of the artist’s hand from the final product). Aside from this Article’s earlier arguments that these changes are inevitable

¹¹⁴ 17 U.S.C. § 107(4) (2006) (“... the effect of the use upon the potential market for or value of the copyrighted work.”).

¹¹⁵ § 107(3) (“the amount and substantiality of the portion used in relation to the copyrighted work as a whole”).

¹¹⁶ § 107(2).

¹¹⁷ *New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 904 F.2d 152, 157, 14 U.S.P.Q.2d (BNA) 2030, 2033 (2d Cir. 1990).

¹¹⁸ “The copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.” Leval, *supra* note 76, at 1107.

given their historical precedent (high modernism) *and* desirable as a way of reflecting and commenting on new technological realities, there is also something irreducibly valuable in allowing the postmodern text to reflect Barthes' idea of the "multidimensional space in which a variety of writings, none of them original, blend and clash."¹¹⁹ In dismantling "the modernist ideas of 'master' works and 'master' artists, which were viewed as ideological 'myths' to expose, to 'demystify' or to 'deconstruct'," postmodern authors—many of them female, and some of them minorities—can re-appropriate these spaces as a means through which to critique the dominant male ideology.¹²⁰

One of the most notable appropriation artists from the late 1970s, Sherrie Levine, did just that. Levine was part of an artistic movement known as the "Pictures" generation.¹²¹ In this context, a "picture" was the "palimpsest of representations, often found or 'appropriated,' rarely original or unique, that complicated, even contradicted, the claims of authorship and authenticity so important to most modern aesthetics."¹²² In using the word "pictures," one should immediately think of Steinberg's postmodern "flat-bed picture plane" or what Foster called the "cultural, textual site of the postmodern picture."¹²³

Perhaps unsurprisingly, unlike many other artistic movements, most "Pictures" artists were female. Levine, Barbara Kruger, Cindy Sherman, and Louise Lawler were just a few of the women working in the medium, all of whom dedicated themselves to the project of taking pre-existing works and stripping them of their masculine origins, most often to train the male gaze back in on itself.¹²⁴ In Levine's case, she copied—wholesale, without a modicum of modification—a photograph of Edward Weston's, titling it *Untitled, After Edward Weston*.¹²⁵ The photograph, of Weston's nude son's torso, recalls all sorts of

¹¹⁹ BARTHES, *supra* note 91, at 146.

¹²⁰ FOSTER ET AL., *supra* note 38, at 598.

¹²¹ *Id.* at 580.

¹²² *Id.*

¹²³ Steinberg, *supra* note 31, at 28; Foster, *supra* note 6, at xiii.

¹²⁴ FOSTER ET AL., *supra* note 38, at 580–83.

¹²⁵ *Id.* Needless to say, Weston's estate, claiming copyright infringement, confiscated the Levine images and prohibited them from being sold. Currently, the Metropolitan Museum of Art owns both the Weston and the Levine images. Reena Jana, *Is It Art, Or Memorex?*, WIRED NEWS (May 21, 2001), <http://www.wired.com/culture/lifestyle/news/2001/05/43902>.

associations with the classic Greek sculptures of the ancients as seen through the filter of the post-Renaissance world.¹²⁶ In “appropriating” or blatantly pirating Weston’s work, Levine is making a claim that goes deeper than merely “challenging his legal status as the creator, and therefore the holder of the copyright to his own work.”¹²⁷ Rather, Levine’s challenge “extend[s] to Weston’s very claim to originality, in the sense of being the origin of his images.”¹²⁸ “[I]n framing his son’s body in such a way . . . it could be argued that Weston was in fact helping himself to one of the most culturally disseminated visual tropes in Western culture[.]”¹²⁹

Demystifying, or dismantling, the idea of the lone, heroic male creator was just one of the first ways the Pictures artists challenged the authorial power of their male predecessors. Here, form and content, theory and technology, fuse inextricably. For if the idea is to emasculate the work by stealing, copying, and denigrating the holy “image” to something as derisive as a mere “picture,” the technology of Levine’s day enabled the *form* that emasculation takes on, “[p]hotography, she implied, only made it technically easier and more transparent to do the kind of stealing—politely called ‘appropriation’—that has always been endemic to the ‘fine arts’.”¹³⁰

Other Pictures artists in the late 1970s and 1980s engaged in various forms of “appropriation” by taking familiar images, tropes, and text—almost all of them created or dictated by the dominant male ideology—to dismantle them, question them, and expose them for what they are: social constructs rather than absolute truths. Here, one can again think of the shift from Nature to Culture or from God to Pop. If men are “the actors in a world in which women [are] the passive objects,” men being the “makers of meaning, while women—the spoken for—[are] the bearers of meaning,”¹³¹ then the only way to take control again is to hijack those spaces from which men speak and retrain the gaze elsewhere. These spaces include movie stills (in the case of Cindy Sherman’s work),¹³² magazines

¹²⁶ FOSTER ET AL., *supra* note 38, at 580.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 581.

¹³¹ *Id.* at 582.

¹³² *Id.*

and other sites of mass circulation (like Barbara Kruger did),¹³³ and photographs. Indeed, it would be difficult to imagine the success of this project *without* some “stealing” of the original work. This is why I used the word hijack; the violence of the word implies a willful act of criminality, like an artistic sit-in on property deemed inaccessible to the marginalized and the voiceless.

In describing the postmodern condition, Foucault replaced “those unities of humanist historical thought such as tradition, influence, development, evolution, source and origin with concepts like discontinuity, rupture, threshold, limit and transformation.”¹³⁴ Postmodernism, in widening the arena of the possible, has opened up the artistic space reciprocally for the “Others,” as well.

A recent case dealing with this retextualization of existing works by long-subjugated “Others” involves African American writer Alice Randall. In 2001, Randall published a novel titled *The Wind Done Gone*. As the title might suggest, this novel appropriates the characters, plot line, and scenes from Margaret Mitchell’s classic, *Gone With the Wind*, to tell a different story from the viewpoint of Scarlett’s half-sister, a mulatto slave.¹³⁵ Mitchell’s estate, unsurprisingly, sued for copyright infringement, and the district court granted a preliminary injunction.¹³⁶ Though the Eleventh Circuit eventually reversed and remanded the case under the fair use doctrine,¹³⁷ the copyright issues surrounding the case make it an interesting one for legal commentary and scholarship. For example, Neil Netanel argues that stifling Randall’s speech, while predicated on liberal borrowing from Mitchell’s original, is an indefensible wrong under First Amendment principles.¹³⁸ As he argues, “From feminist fan fiction to mashups that meld white-bread music with hip-hop, creative appropriation gives individuals a voice, a means to challenge the ubiquity of

¹³³ *Id.* at 583.

¹³⁴ Crimp, *supra* note 18, at 43, 45.

¹³⁵ SunTrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1376–77, 58 U.S.P.Q.2d (BNA) 1652, 1663–64 (N.D. Ga.), *rev’d*, 268 F.3d 1257, 60 U.S.P.Q.2d (BNA) 1225 (11th Cir. 2001).

¹³⁶ *Id.* at 1363–64, 58 U.S.P.Q.2d (BNA) at 1653–54.

¹³⁷ SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 60 U.S.P.Q.2d (BNA) 1225 (11th Cir. 2001).

¹³⁸ NETANEL, *supra* note 64, at 158–60.

mass media culture and the prevailing mores, ideology, and artistic judgments it represents.”¹³⁹

Creative appropriation does give individuals a voice—specifically individuals who have long been denied one. But the reason why *appropriation* specifically—rather than only the creation of the original work¹⁴⁰—is both a legal right and a powerful artistic tool goes back to how the postmodern paradigm shift dismantled the myth of the master text itself. In so demystifying the author and the text, the creator and the object of its creation, we must resituate the constructs long taken for granted as true if we are to understand them at all.

Edward Said, for example, does just that with Orientalist scholarship in his book *Orientalism*.¹⁴¹ In describing the illusion known as “the Orient,” Said reveals Western meanings of Orientalism and the Orient to be a kind of cultural hegemony created by the West to retain their dominance.¹⁴² “[I]n discussions of the Orient, the Orient is all absence, whereas one feels the Orientalist and what he says as presence; yet we must not forget that Orientalist’s presence is enabled by the Orient’s effective absence.”¹⁴³ Said’s distinction between absence and presence—between the enabling of the latter by the former—can also be applied to examine why postmodern authors appropriate known texts to either expose their falsity or to tell a different story. If the presence of canonical works like *Gone With the Wind*—mostly made by white males, or, in Mitchell’s case, by a white female—are canonical, it is because they depend on privileging one set of dominant social ideals over another. The marginalized position of females and minorities—and their marked absences—are so painfully palpable as to entrench and enable the dominant majority’s presences in the cultural canon.

Thus, to take back power, those textual sites of domination and oppression must first be emptied out of meaning—excavated, in effect—and then filled, this time with the voice of the oppressed. Hence the word “hijack.” Without the violent appropriation of the oppressor’s work, the shock value of both the new work and the message behind the taking would be lost.

¹³⁹ *Id.* at 160.

¹⁴⁰ See, e.g., Christopher S. Yoo, *Copyright and Democracy: A Cautionary Note*, 53 VAND. L. REV. 1933, 1955–56 (2000).

¹⁴¹ See EDWARD W. SAID, *ORIENTALISM* (1st Vintage Books ed. 1979).

¹⁴² *Id.* at 204.

¹⁴³ *Id.* at 208.

VI. CONCLUSION

As Leo Steinberg foreshadowed over thirty years ago, “[t]he deepening inroads of art into non-art continue to alienate the connoisseur as art defects and departs into strange territories, leaving the old standby criteria to rule an eroding plain.”¹⁴⁴ These changes can be confusing, painful, and uncomfortable—indeed, this Article raises more problems with current copyright doctrine and changes in contemporary thought than it solves. But moments of extreme crisis can also lead to extreme growth. Thus, we should not be content to automatically default to, or stay entrenched in, a series of legislation dictated by powerful media players rather than think through the intellectual, cultural, and social significance and harm of those laws.

The point of this Article is not to suggest that the law should completely overhaul itself in accord with whatever new brand of philosophical thought or intellectual school emerges, only to change course the next time there is a fundamental shift in thinking. Rather, the real question that judges, scholars, and lawmakers should be asking themselves when undertaking any inquiry of the Copyright Clause is the true meaning of “Progress” in relation to artistic production and output. If one chooses to view Progress mechanistically, if one evaluates what it means to “make something new” merely in terms of the sheer *number* of works produced over a given amount of time, then a certain motive-based view of artistic production might justify current copyright law as protecting the interests of those authors who need the promise of proprietary control over their works before beginning to create.¹⁴⁵

But that view robotically simplifies “Progress” to quantity, encouraging authors driven by monetary incentives to continue churning out pages of words like sausages out of a meat grinder: *production* is there, even if *progress* is not.¹⁴⁶ Even in the strictest sense of the word, that view of Progress cannot hold water.

¹⁴⁴ Steinberg, *supra* note 31, at 36.

¹⁴⁵ See *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15, 65 U.S.P.Q.2d (BNA) 1225, 1236 n.15 (2003) (“Congress heard testimony from a number of prominent artists; each expressed the belief that the copyright system’s assurance of fair compensation for themselves and their heirs was an incentive to create”).

¹⁴⁶ See *Mazer v. Stein*, 347 U.S. 201, 219, 100 U.S.P.Q. (BNA) 325, 333 (1954) (“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 inventors in ‘Science and useful Arts.’”).

Artistic production would be a mouse trapped in its wheel, continuously moving but never going anywhere. Surely, defining “Progress” as development and growth implies that there is something more to artistic output than mere numbers.

The second view is that to make something “new” does not mean merely rehashing the same idea in different words, which lies at the heart of current copyright law’s idea/expression dichotomy.¹⁴⁷ Rather, “newness” is making art that is different, even in idea, from what came before. Hence, the Romantic poets’ vision of what made good literature differed markedly from the Modernists’ vision of what makes good literature. However, those shifts in ideas and ideologies have existed in harmony with copyright law until the twenty-first century. The author’s prerogative in the nineteenth century was to come closer to God in the pursuit of the Burckian notion of the sublime,¹⁴⁸ and the early twentieth century prerogative was to reflect the world as machine: cold and senseless in the existential search for God.¹⁴⁹ What does one do when, in the postmodern era, the very idea of the master narrative, of the singular author, has come under attack? Without the romantic author, what can be the meat holding up the bones of the story? Or, to put it more practically, if the romantic author does not exist, then what does copyright law protect?

This is the fundamental fear underlying the copyright battle today. Certainly, the anxiety that freeing information completely under this guise would give in to anarchy or complete relativity is not unfounded. To truly acknowledge that there are no authors or original works would mean the death of copyright law as we know it. I am not advocating such an approach. But, what the law needs at this moment, when our culture, beliefs, and literature have already approached a new paradigm shift, is for Congress or the courts or both to fulfill the constitutional imperative of promoting Progress in the arts by actually allowing the arts to *progress* in line with shifting belief systems and

¹⁴⁷ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 225 U.S.P.Q. (BNA) 1073, 1079 (1985).

¹⁴⁸ See EDMUND BURKE, *A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL* 39–40 (James T. Boulton ed., Univ. of Notre Dame Press 1958) (1757).

¹⁴⁹ For an example of high modernist literature, see KNUT HAMSUM, *HUNGER* (Sverre Lyngstad trans., N.Y.: Penguin Books 1998) (1890), a novel without chapter breaks or a traditional plot, instead focusing on the psychological inner workings of a starving narrator as he wanders the streets of Christiania (modern-day Oslo) searching for food.

artistic practices. To do so does not spell some anarchic end of copyright law. It does not even require restructuring copyright law so much as it does changing the remedies (from property rules to liability rules), expanding the rights of others to appropriate from copyrighted works (by allowing limited sampling or rewriting the fair use doctrine¹⁵⁰), or limiting the rights copyright owners wield (by rethinking, for example, the derivative works doctrine).

Remixes, collage, and brickolage is the art of now precisely because they highlight so many of the focal points resonant in our society today. Collage, whether or not one chooses to believe it, is power. Just as the original works from which the collage “steals” are sites of constructed truths and false illusions used to keep the dominant in power, so collage liberates us from those constructs.

Its [collage’s] heterogeneity, even if it is reduced by every operation of composition, imposes itself on the reading as stimulation to produce a signification which could be neither univocal nor stable. Each cited element breaks the continuity or the linearity of the discourse and leads necessarily to a double reading: that of the fragment perceived in relation to its text of origin; that of the same fragment as incorporated into a new whole. . . . The trick of collage consists also of never entirely suppressing the alterity of these elements reunited in a temporary composition. Thus the art of collage proves to be one of the most effective strategies in the putting into question of all the illusions of representation.¹⁵¹

I would like now for a moment to point to the radical movements of that storied era known as the 1960s—a time in which African Americans were struggling for their voice, in which the Beat Generation roamed free on the streets of Greenwich Village in some attempt to transcend the very deadness of their white skin—in which general civil unrest seemed to mirror that of a larger problem in society: the happy complacency of the American mainstream, their white-picket fences and suburban homes, their shiny new automobiles and

¹⁵⁰ See *supra* Section IV.B.

¹⁵¹ Gregory L. Ulmer, *The Object of Post-Criticism*, in *THE ANTI-AESTHETIC*, *supra* note 6, at 83, 88.

plastic celebrities.¹⁵² There was a general acknowledgment that “something fundamental had changed in culture.”¹⁵³ That was when Pop was born, when Lichtenstein, Warhol, and Rosenquist, with their smirking, winking reproductions of Coke bottles, Campbell’s soup cans, and cartoon strips, set about to reflect and define that change. Now, almost five decades later, we are at the brink of another paradigm shift. Will we let the remix artists of today— young, old, amateurs, professionals, musicians, writers, artists, thinkers—reflect that change? Our legal system has the power, after all, to both dictate and reflect norms. Now, more than ever, the law must take baby steps into the wide breadth of the unknown, beginning first with remix culture.

¹⁵² For a moving polemic of the radicalism and conformity riddling post-World-War-II America, see Norman Mailer, *The White Negro*, in LEGACY OF DISSENT (Nicolaus Mills ed., 1994).

¹⁵³ Madoff, *supra* note 94, at xv.

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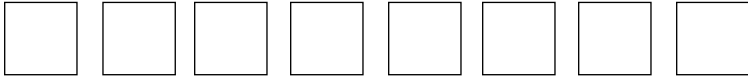
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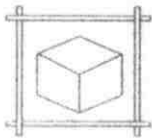
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The screenshot shows the AIPLA Career Center website. At the top, it says "Serving America's Legal and Creative Community". Below this is the AIPLA logo and navigation links: HOME, SITE MAP, LOGIN, LOGOUT, REGISTER, LINKS. A search bar is also present. The main content area is titled "Professional Development" and "Career Center". It includes sections for "Job Seekers" and "Employers / Recruiters". The "Job Seekers" section lists options like "Post an Anonymous Resume", "View Jobs", and "Create Job Alerts". The "Employers / Recruiters" section lists options like "View the Resumes", "Post a Job", and "Create Employer Account". A "Questions/Feedback" section is at the bottom.

Home > Professional Development > Career Center

Professional Development

Career Center

This area was constructed to help connect our members with new employment opportunities. Use the links below to guide you as you begin your job search. Employers and recruiters: You now have access to our specialized niche.

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- Anti-Counterfeit Trade Act
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- Google Copyright Cases
- Secondary Liability

Ethics

- Attorney Professionalism – A Judge’s Perspective
- Duty of Candor and Inequitable Conduct in Patent Practice
- Ethical Obligations Towards IP During Bankruptcy

International

- The Changing Role of Customs
- Comparative Dispute Resolution Practices for Trademarks
- Comparison of IP Rights in the US and Europe
- Export Controls
- Foreign Corrupt Practices Act
- Privilege Concerns With a Global IP Portfolio

Law Practice Management

- The Benefits of Diversity
- Best Practices for Hiring Outside Counsel
- The IP of Grapes!
- Managing Outside Counsel Expense

Licensing

- IP Assets in Bankruptcy
- Licensing As a Means for ITC Jurisdiction
- The New IP Marketplace
- Patent Licensing Strategies in the Trenches
- Recent Patent Licensing Case Law

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- Calculating Damages Claims in Patent Cases
- Defendant’s Motions to Dismiss and Transfer Venue
- Effective Use of the ITC
- Mock Oral Arguments and Witness Examination in IP Cases
- Plaintiff’s Motions for Preliminary Injunction and Compelling Discovery
- Recovering Costs and Fees
- Willful Patent Infringement and Trebling of Damages

Patents

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- Historical Basis for Patent System
- Inequitable Conduct
- ITC Section 337 Actions Based on Patent Infringement
- Patent Examination Process
- Patent Infringement Damages, Including Entire Market Value, Reasonable Royalty, and Willfulness
- Patent Subject Matter Eligibility Across the Globe
- Strategies for Managing Patent Examination Cost, Quality, and Time

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- Injunctions in Trademark Cases
- The IP of Grapes / Appellation
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