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Appropriation Art and U.S. Intellectual Property Law Since 1976

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by

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DEDICATION

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ABSTRACT OF THE DISSERTATION

Appropriation Art and U.S. Intellectual Property Law Since 1976

by

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This dissertation examines the notion of "appropriation" in contemporary art since the mid-1970s in relation to simultaneous developments in United States intellectual property law. The five chapters analyze specifics art works and legal cases involving the Pictures Generation and late postmodern appropriation art generally, tactical media practices and "post-appropriation" art in the present. U.S. copyright law, trademark law, and artists' moral rights comprise the legal frameworks through which appropriation is understood as both artistic expression and critical gesture.

Additionally, critical theory, poststructuralism, new media theory and other scholarship are employed to analyze ideologies of authorship, the status of art in society, and artists' ethical responsibilities.

The dissertation begins with simple questions: what is the status of appropriation in contemporary art today? Why has appropriation art seemed to enjoy a status above the law in ways that other cultural expression (e.g., music, documentary film) does not? While describing instances in which appropriation artists have been taken to court over alleged infringements, the chapters ultimately argue that appropriation art as a subversive practice has helped to usher in a new, "postmodern" intellectual property law, in which increased tolerance for creative copying has come at the expense of neutralizing appropriation art's critical power. As the dissertation progresses, the author attempts new ways of defining what form a critical, twenty-first century appropriation art might take.

Introduction

One of the most significant issues to face the production of visual culture in the United States over the last half century has been that of intellectual property (IP). Generally stated, IP comprises creations of the mind protected by certain legal entitlements. U.S. Court of Appeals Judge Richard Posner and legal scholar William Landes further define intellectual property as

> ideas, inventions, discoveries, symbols, images, expressive works (verbal, visual, musical, theatrical), or in short any potentially valuable human product (broadly, "information") that has an existence separable from a unique physical embodiment, whether or not the product has actually been "propertized," that is, brought under a legal regime of property rights.[1]

Although the term was first coined among legal scholars and other specialists in the 1860s during a time of rapid industrialization and rising debates over the protection of

new inventions, IP only entered wider use with the development of post-industrial or "information" economies at the end of the twentieth century, which are characterized by the dominance of value production derived through intangible goods or services.[2] Apple's iTunes is but one simple, contemporary example of IP in action: consumers purchase media content through the service, but are not securing physical copies of music albums or movies so much as buying access to digital versions that may be played back on a range of devices. Even as their media libraries expand, consumers own no actual property, but rather a collection of licenses that Apple, and the content industries, ultimately control.

Much has been written over the last twenty-five years about the ways in which intellectual property regimes shape the production of culture. Prominent legal scholars such as Lawrence Lessig, James Boyle and Peter Jaszi have provided rigorous critical analysis of the American IP system and the ways in which it has strengthened what some consider to be an already overreaching set of laws.[3] Writing more from the perspective of cultural practices, academics Rosemary Coombe and Jane Gaines, among others, have laid out how creative workers of all stripes both uphold and subvert IP regulations in their everyday lives.[4] Theorizing intellectual property in the context of class relations and technology's liberating potential, media scholar McKenzie Wark has proposed that the persona of the "hacker" can help release information from its exclusive status as property, towards new social relations and shared value production.[5]

This brief list represents only a small amount of the work done over the past several years at the intersection of intellectual and cultural production. Yet, in terms of academic analysis within the history, theory and criticism of late twentieth century visual art, much less has been written about intellectual property. This is especially curious insofar as so much of the history of modern art up until the present involves the creative re-use of (often mass-produced, copyrighted, trademarked) materials and the questioning of the notion of artistic originality. From the early avant-garde's experiments with the readymade and collage, to Pop Art's incorporation of mass media, to postmodernist critique of the "sign" to today's "remix" tendencies, what I am referring to here may generally be regarded as "appropriation" art. Etymologically speaking, "to appropriate" itself suggests the transgression of property relations and rights: "To make (a thing) the private property of any one, to make it over to him as his own; to set apart"; to "Take (something) for one's own use, typically without the owner's permission."[6] To appropriate materials in the name of art, then, is to break the law, or at least to undermine norms associated with the ownership of cultural expression.

This is not to say that the topic of art's relationship to intellectual property has not been written about within academia. Perusal of law journal publications over the last three decades reveals that appropriation art in the context of various infringement lawsuits and other case studies has been widely discussed. Yet the scant amount of writing on IP in art history/theory/criticism is paralleled by the relatively superficial

manner in which legal studies address art. While the intention is sincere, most law journal authors paint the history and theory of modern and contemporary art in broad brushstrokes, often reducing complex concepts to stereotypes. The shortcomings I am pointing out in both art and law scholarship are understandable in that they originate from seemingly disparate academic disciplines that, however, are in greater need of exchange given the increasingly inseparable nature of art and IP law today.

The following five chapters attempt such an exchange. Drawing from the history and theory of art over the past several decades, legal history and case law, and critical, poststructuralist and media theory, the following pages perform two primary tasks. First and simplest, they provide the reader with a detailed account of the historical development of copyright, trademark and artists' moral rights laws in the United States—the three areas of intellectual property law most pertinent to art today. Second, the theorization of appropriation in art, as well as the creative intentions of selected appropriation artists, are revisited in the context of the evolution of intellectual property law. By rethinking the theory and practice of appropriation through IP law, notions such as artistic critique, agency, autonomy and avant-gardism will be scrutinized, leading finally to fundamental questions: what is the role of appropriation in art today? What is its legal viability? What sorts of legal and ethical obligations do artists have to the images and other materials they appropriate?

While my research cannot account for all of contemporary appropriation art's practical methods, artistic intentions or audience interpretations, the hope is that the

case studies I focus on will trigger a reassessment of the ways that the practice has been received. This, in turn, can help formulate approaches that retain the critical positioning for which much appropriation work has been historically championed. In a sense, what I am ultimately asking of appropriation art is an extension of a question often directed at contemporary art in general—or even more broadly, of intellectual life today: what is the status of art or critical thinking, of aesthetic resistance, at a time when the very notion of critique seems passé?[7] In order to attempt answers, the following chapters will hold not only the ideals of justice but also the ideals of art to high standards.

With the exception of the first, all chapters examine specific cases in which artists have faced court battles over the legality of their appropriation work. The first three chapters focus exclusively on copyright law, while the fourth and fifth chapters address artists' moral rights and trademark law, respectively. Chapter one, "The Pictures Generation, the Copyright Act of 1976, and the Reassertion of Authorship in Postmodernity," provides the historical and theoretical foundation for the two chapters that follow. It traces the parallel introduction of new copyright legislation in 1976—the last major revision occurred in 1909—and the "Pictures Generation"—some of the first postmodern appropriation artists—in the late 1970s. After recounting how the Pictures Generation was critically received at the time, and how a discourse of "appropriation art" was formed, the chapter then sets out to use the changes in copyright law to problematize one of the central premises of the Pictures Generation's

"poststructuralist" work: the critique of authorial originality. I end the chapter by claiming that, rather than point to the "death of the author" in late twentieth century art, the Pictures Generation instead heralded a reassertion of authorial self-determination. It is, paradoxically, in postmodernist appropriation art that we find the figure of the romantic author lurking, a figure defined by disregard for the status quo and a penchant for drawing creative inspiration from within. The lasting radicality of the Pictures Generation is less its subversion of original expression than its foreshadowing of the intellectual property battles looming on the horizon in the Unites States, battles that the first wave of postmodern appropriation were mostly able to avoid, through what I term "institutional para-regulation."

The second chapter, "The Battle for Fair Uses Part I: The Mass Author and the Artist," is the first of two chapters that focus specifically on appropriation art as litigated copyright infringement. Through first detailing various lawsuits brought against artists such as Andy Warhol, Barbara Kruger and Mr. Brainwash, the chapter argues that appropriation art has often established a hierarchy of authorial modes. That is, a significant amount of the visual materials artists appropriate have originated from "non-art" sources; advertising, photojournalism, and other mass-produced imagery are accorded a "higher meaning" through their transformation into fine art. By incorporating the work of "mass authors" into their works, "artists" claim a privileged status. This status forms much of the basis for the argument that appropriation art falls under under copyright's fair use doctrine, which states that under certain

circumstances, secondary uses of copyrighted materials without permission from primary authors is allowable. This attempt to justify appropriation legally is analyzed in relation to the shift both in the notion of "critique" in postmodern art in the late '80s and the ways in which courts have interpreted the fair use doctrine throughout the twentieth century. The chapter's case study is the 1991 landmark ruling in *Rogers v. Koons*. In the lawsuit, artist Jeff Koons unsuccessfully attempted to claim that his use of an image taken by photographer Art Rogers in order to produce Koons's sculpture *String of Puppies* was fair. The chapter scrutinizes Koons's court defense in relation to the way the artist promoted the work during its exhibition, with the discrepancy between the two indicating precisely the ambivalent "crisis of critique" found in much of postmodern appropriation art.

Chapter three, "The Battle for Fair Uses Part II: Subjectivism, Crisis and the Law's Postmodern Turn," continues parsing the fair use doctrine, and in particular its development after *Roger v. Koons*. Having traced the evolution of the fair use doctrine in the previous chapter, chapter three addresses its "transformative" model, which courts have increasingly employed to assess the degree to which artists transform original expressions towards "new insights and understandings."[8] In essence. the question under the transformative fair use model becomes: how much must artists transform materials in the process of their appropriation before they become bonafide primary expression themselves, and not merely derivatives of the original image? This leads to an even more elemental question: what constitutes "change"? Is it measured

as a formal operation (e..g., taking a photograph and transforming it into a painting), or one based more on an artist's conceptual intention (e.g., recontextualizing an advertising image simply by placing it into a museum setting)?

The case study here is *Cariou v. Prince* (2013). In this copyright infringement lawsuit, photographer Patrick sued artist Richard Prince for appropriating almost the entirety of Cariou's book *Yes Rasta* in order to produce a set of paintings entitled *Canal Zone*. Central to the case was the fact that Prince claimed to have no real intentions when he appropriated Cariou's images; for Prince, the paintings had no overriding meaning. Nonetheless, the federal appeals court found Prince's appropriations to be mostly fair use, concluding that artistic intention is less of a factor than whether a "reasonable viewer" understands the artworks as something different in purpose from the original images. Ultimately, I argue that the decision in *Cariou v. Prince* marks a "postmodern" turn in copyright law, in which audience reception takes precedence over authorial intention. In Barthesian terms, we might call this dynamic the legal "birth of the reader" after the "death of the author."[9] However, hampering this seemingly progressive change of attitude within courts that have tended to approach art conservatively is the continued deferential treatment of the romantic author. With the ruling in favor of Prince, the concern is that the artistic service to criticality has diminished. In the short term, artists who rely on appropriation in their practices may breathe sighs of relief given that a pro-appropriation precedent has been

set. However, in the long term, whatever criticality remaining in the appropriation gesture runs the risk of giving way to a new formalism.

Chapter four, "Institutional Appropriation and the Politics of Collaboration," sets aside copyright issues pertaining to appropriation and instead looks to the concept of artists' moral rights as they apply to the unauthorized alteration of art works. European in origin, artists' moral rights concern legal entitlements granted to artists over their creations regardless of their status as property. Moral rights adhere to certain works of art even after they have been sold, and even if the originating artist relinquishes the copyrights in them to other parties. Moral rights prevent the owner or custodian of an art work, such as a collector or museum, from modifying it; such an action would be looked upon as damaging the creator's honor or reputation, by inviting interpretation of a new expression that was not intended. In the United States, artists' moral rights fall under the Visual Artists Rights Act of 1990 (VARA).

It was in 2007 that the artist Christoph Büchel filed suit against the Massachusetts Museum of Contemporary Art, claiming that his rights under VARA had been violated when the museum continued assembling and publicly promoting a sculptural installation of his against his wishes. Büchel had abandoned the collaborative project, titled *Training Ground for Democracy*, when irreconcilable creative differences arose between the artist and Mass MoCA. The chapter reverses the commonly received relationship between appropriation art and intellectual property law: from the legally risky practice of reassigning meaning performed by

artists in their appropriating acts to a type of "appropriation" performed by an institution on an artist's work. The circumstances surrounding *Mass MoCA v. Büchel* are made all the more complex insofar as Büchel's practice is itself one based on found objects, a type of appropriation rooted in the legacy of Duchamp's readymade. Essentially the dispute involved disagreement over Mass MoCA's budgeting, acquisition and placement of Büchel's raw materials. After first recounting the events that led up to *Mass MoCA v. Büchel*, the chapter then provides a historical overview of the evolution of artists' moral rights leading up to VARA. Finally, the chapter argues that in eventually ruling in favor of Büchel, the federal court reinforced the notion of romantic authorship within a collaborative context, one in which the concept of project ownership isn't always clear. Meanwhile, I contend that Mass MoCA's "appropriation" of Büchel's installation, while controversial, represented a type of institutional critique that radically questioned the very definition of art itself, a questioning that has historical ties to appropriation as a critical gesture since Duchamp.

Finally, the fifth chapter, "The Yes Men: Parody in Aesthetics and Protest," examines appropriation practices and trademark law. The chapter takes leave of the contemporary art world, instead looking at artistic activism and what has come to be known as "tactical media." The case study in the chapter involves the Yes Men, a collaborative group known for public interventions that call attention to various social and political issues through media subterfuge. In 2009, the Yes Men organized a

fraudulent press conference, pretending to act as representatives of the Unites States Chamber of Commerce, the largest corporate lobbying firm in the country. The Yes Men issued a surprise statement that reversed the actual Chamber's position on climate change, which up until that point had been pro-business and anti-regulation. To appear at least temporarily convincing, the Yes Men built a fake web site and issued a phony press release that both bore the Chamber's corporate logo. Angered over its misrepresentation in the media, the Chamber sued the Yes Men for trademark infringement.

The chapter first takes stock of the notion of "appropriation" as a practice and discourse within contemporary art. As the preceding chapters have demonstrated, the accommodation of appropriation work by both the institution of art and the law over the last several years has been both a blessing and a curse. On the one hand, artists in the current moment have perhaps more opportunity than ever before to take and reuse the visual culture around them as source material without legal repercussions. The art world has long since validated appropriation art, and courts have only become more progressive in their acknowledgment of the reality of today's copy-paste procedures and aesthetics. On the other hand, such allowance comes with a caveat: that appropriation art remain just that—"just art," with the implication being that it have little or no consequence on a status quo characterized by neoliberal economic agendas and a culture of endless affirmation. Consequently, appropriation with critical and political resonance must work at both the level of signs and the technological

structures that circulate them. In my estimation, it is in practices such as the Yes Men's that we glimpse a type of appropriation specifically intended to effect societal change.

The Yes Men's appropriation tactics are complicated by the fact that trademark law differs significantly from copyright in terms of fair use. Trademark law specifically applies to interstate commerce, and the notion of consumer "confusion" resulting when competing brands share too much similarity with one another. In *Chamber v. Yes Men*, that confusion was almost total, in that the activist group's version of the Chamber's logo was indistinguishable from its source. Indeed, the Yes Men's "identity corrections" rely entirely on confusing the public, who initially mistake their counter-messaging for the real thing. By analyzing the intent behind trademark law and the Yes Men's appropriations, the clear-cut divisions between commercial and political speech begin to breakdown. The chapter concludes by scrutinizing the methods by which tactical media pursues its goals, and the ways it employs many of the very same "business" practices it claims to criticize.

It is my hope that after finishing the chapters, the reader will come away with a much more nuanced understanding of IP as well as appropriation art's relationship to it. And with this new understanding, artists, art historians, and theorists of art can better formulate new directions for appropriation as a critical cultural practice.

Chapter 1

The Pictures Generation, the Copyright Act of 1976, and the Reassertion of Authorship in Postmodernity

I. Introduction

It was 1977, and a young, aspiring artist living in New York City by the name of Richard Prince had decided that to continue making his art, he was going to steal its source material.[1] Prince had been working a day job the two years prior in the tear sheet department of Time Inc.'s publishing wing, Time Life, and it was his experiences there that provided the impetus for his decision. His duties at Time Life had included ripping out articles from various magazines and sending them to their respective editors as proof of publication (a standard procedure in the industry at the time). After filing the tear sheets, Prince was left with magazines containing only advertisements. And in them he envisioned his art, which he would produce by photographing the ads and re-presenting them as his own. Abandoning his earlier collage and conceptualist photo-text based work, Prince instead opted for a strategy more directly Duchampian in concept (i.e., injecting the quotidian with aura by recontextualizing it as "art"), but

Warholian in technique (i.e., pilfering images from American consumer culture). Prince called this process of taking pictures of pictures "rephotography."[2] His first rephotographs were a series four interior shots of living rooms purloined from furniture ads in New York Times Magazine **[PLATE 1]**. Others, including the Marlboro cowboy images for which he is probably best known, soon followed **[PLATE 2]**.

Also in the late 1970s, another New York artist, Sherrie Levine—Prince's age and recently transplanted from the Bay Area—was shifting her art practice toward image appropriation. Levine had already been experimenting with repurposing found visual materials, but it was after meeting Prince and seeing his work that Levine embarked on a similar, unabashed *taking* of photographs. She briefly flirted with the incorporation of commercial imagery into her collages **[PLATE 3]** before turning to the wholesale usurpation of images drawn from the canon of modernist photography itself.[3] In 1981 Levine produced the body of work that would give her notoriety and seal her reputation into the present: the *Untitled (After Edward Weston)* series, appropriated directly from one of modernist photography's great protagonists, Edward Weston **[PLATE 4]**. This series set the stage for what may now be regarded as an institution of "appropriation art."[4]

Sherrie Levine and Richard Prince would continue lifting from the image banks of art history and consumer culture and likewise establish themselves as preeminent "appropriation artists," despite occasional disavowal of the label.[5] However, in the late 1970s and early 1980s, Levine and Prince were by no means the

only artists to reuse the mechanically-produced images of visual culture so ubiquitous in late twentieth-century Western society. Rather, they were but two practitioners within a wider artistic moment, one primarily specific to New York City at that time, and one populated with a number of artists interrogating representational devices through varying appropriation strategies. Dara Birnbaum, Barbara Bloom, Troy Brauntuch, Sarah Charlesworth, Jack Goldstein, Sylvia Kolbowski, Jeff Koons, Barbara Kruger, Louise Lawler, Robert Longo, Allan McCollum, and Paul McMahon were, in addition to Levine and Prince, some of those affiliated with what came to be known as the "Pictures Generation."[6] All of these artists, at one point or another beginning in the late '70s, took copyrighted pictures—intellectual property—and called it their art.

Of course the Pictures Generation itself can be set within a wider history of appropriation tendencies in art. There are precedents to be found in European and American modern art, beginning at the turn of the twentieth century, with artists' incorporation of mass media and other industrially fabricated materials becoming the leitmotif around which new formal languages developed. Examples include Pablo Picasso's and Georges Braque's reuse of newsprint and other mass-circulated detritus toward "scatological allusions and new formal morphologies;"[7] Marcel Duchamp's introduction of the Readymade as a critique of the European painting establishment; and, Berlin Dada's photo-collage attacks on bourgeois values and fascism.[8] Postwar, Pop Art prefigures '80s appropriation, with Andy Warhol and Robert Rauschenberg,

among others, integrating mass media imagery into their paintings and sculptures. Beginning in the early 1960s, the gradual removal of Warhol's hand in the overall art production process in favor of a division of labor at The Factory anticipates the anti-author/deskilling critique advanced by New York appropriation artists and their critics fifteen years later.[9]

With Pop Art's emphasis on techniques of reproduction (rather than modernist notions of "original production") providing a recent historical context,[10] I return to Levine and Prince, for their early works, perhaps more than their Pop Art predecessors or Pictures Generation cohort, have centered around the unmodified copy. They are reproductions in the most fundamental sense. From a copyright point of view, they are also the most problematic, which is the reason they are the focus of this chapter. For instance, Prince's *Untitled (Cowboy)* (1980) series and Levine's *Untitled (After Edward Weston)* (1981) series are virtually identical in comparison to their sources (Marlboro cigarette advertisements and Weston reproductions). It should be noted that these examples evidence indications of some "creative alteration," with the most obvious being the excision of ad copy from Prince's cowboy. And both Levine and Prince appropriated from what were already halftone reproductions, whose dot patterns are only accentuated through each artists's enlargement and printing processes. Lacking in resolution, the artists' images are furthermore less faithful to the color balance of the source versions, due to the use of various film stocks and the impossibility of exactly matching the environmental and material conditions of the

original productions. Recommending Prince as more than a mere copyist, curator Lisa Phillips would write in 1992 that, "To the viewer, Prince's alterations may have seemed minimal, even non-existent, but there was in fact dramatic transformation."[11] Yet the notion that either Prince's or Levine's early works are sufficiently transformative enough to garner "fair use" exemption status is—as far as copyright law developed since the late 1970s is concerned—rather dubious.[12]

Indeed, is it remarkable that Levine's and Prince's rephotographs escaped legal scrutiny given that, in the three decades since the artists first exhibited them, the assertion of authorial rights over intellectual property and the increase in infringement litigation across the cultural spectrum have been dramatic. Threatened and actual lawsuits over unauthorized music sampling,[13] alleged improper reuses of corporate brands,[14] and technologies that generally facilitate reproduction[15] are now commonplace.[16] However, while there has been the occasional and noteworthy lawsuit involving appropriation art that is eventually judged to be in violation,[17] anyone having perused art fairs and biennials, museum exhibitions, art galleries, academic programs and arts magazines over the last three decades could not have helped but sense that appropriation art, far from being a taboo activity, operates openly and ambitiously. Put simply, there is a lot of copying going on in contemporary art, despite the otherwise litigious climate within which much cultural expression operates today.

But can the fact that Prince's and Levine's earlier appropriations skirted legal entanglements (indeed, they continue in the present to be publicly exhibited, critically

reviewed, and purchased for large sums of money) help us draw more nuanced conclusions about the legal viability of appropriation practices today? I believe that reexamining the historical context from which postmodernist appropriation art developed can provide a more thorough understanding not only of the "creative license" contemporary practices have enjoyed in the past but also the new challenges they face in today's cultural environment, one in which intellectual property plays an increasingly determining role. Yet I also believe any new understanding will stem from assessing art practices not only through art history but also through the parallel history of copyright law. Reading art and copyright law history together, I will propose a counter-narrative to the conventionally held view that Prince and Levine (and the Pictures generation in general) helped usher in an assault on originality and authenticity—what is commonly referred to, following Roland Barthes's essay, as "the death of the author." In my estimation, the opposite seems more apt: postmodern appropriation artists elevated rather than attenuated the status of the author through what I term "para-institutional protections" that would help immunize them from legal prosecution. Let me begin my analysis by first reviewing that period that marked the ascendance of a critique of authorship and modernist subjectivity in artistic theory and practice: postmodernism.[18]

II. Postmodernism and the Discursive Formation of Appropriation Art

Let us first recall the development of a discourse of appropriation art within the historical juncture that many interpreted as signaling a paradigmatic shift in modernity. The late 1970s through to the early '80s was a period during which a range of artists and intellectuals in the West were coming to terms with an emergent but elusive "postmodernism." Scholar Fredric Jameson attempted a diagnosis by stating that as a cultural category, its modes of production differed significantly from those of previous decades, in that they increasingly blurred the boundaries between high culture and more vulgar commercial forms, problematizing, as artist Barbara Kruger would wryly observe, the newspaper category "Arts and Leisure."[19] Prior to this shift, much of the narrative thrust of modern art in the United States had, by and large, insisted upon the separation between the commodified and easily digestible aesthetics of mass culture (i.e., Clement Greenberg's *kitsch*, Theodor Adorno's "culture industry") and the hermetic, self-referential, and often difficult forms of modernist avant-gardism (e.g., twelve-tone music, or, postwar, abstract expressionist painting).[20]

Seemingly implicit in the notion—what postmodern critics might call the myth—of many earlier modernist art practices was the celebration of the original and authentic self, "safe from contamination by tradition because it possesses a kind of originary naiveté,"[21] enabling a perpetually regenerative starting point from which successive art movements were born. Additionally, it was precisely claims of modern art's transcendental originality and authenticity that postmodernist art would seek to

problematize, laying bare the notion that such concepts are "discursively produced by [institutions of art such as] the museum; that subjective expression is an effect, not a source or guarantee, of aesthetic practices."[22] Postmodernist art consequently often challenged the value system of modernism through the formal appropriation of its supposed antithesis: modernity's industrially produced visual culture—an ever-expanding array of repeatable signs whose actual producers (i.e., commercial artists, designers and other creative laborers) remained mostly unknown within modernized production processes.[23] Everything, including images extracted from the tomes of art history to the latest television programming, became the raw material for many postmodern artists. And such extraction often took place via the mechanically reproductive processes of photography—mass medium par excellence—which, since its invention, had held a contested relationship with, and thus remained on the peripheries of, the traditional fine arts.

Leo Steinberg and, more recently, Branden Joseph have pointed to artist Robert Rauschenberg's incorporation of the gamut of modernity's mechanically reproducible imagery into his hybrid paintings and drawings as initiating a transition phase between modern and postmodern art **[PLATE 5]**.[24] Indeed, Douglas Crimp acknowledges Steinberg as being one of the first art historians to employ the term *postmodernism.* Steinberg used the term to describe Rauschenberg's conversion of the traditional painting surface into a printing press flatbed.[25] By using photographs copied through silkscreening and solvent transfer processes, Rauschenberg departed both from his

earlier, sculptural, combine works and conventional modes of modernist painting. Fusing the intimate brushstrokes of the singular author/artist and the anonymous mechanics of the industrially applied arts, Joseph claimed that Rauschenberg "turned on its head the [modernist] unity-driven aesthetic of his time, letting loose a proliferation of ungoverned signs that his older artist-peers had trained themselves to keep at bay."[26] This "letting loose" likewise established (and problematically so) an equivalence "between 'aesthetic' appreciation and the 'consumption' of commodities and images."[27] With Rauschenberg and Pop Art in general, it would prove increasingly difficult to continue to justify a modernist sensibility distinct from the schizophrenic late capitalist visual culture that had permeated it.[28] And it was precisely this vexed relationship to mass media and commodity aesthetics that a future Pictures Generation would inherit.

The conflation of high art and mass-produced "signs" within appropriation-based art likewise paralleled a shift in the mode of interpretation of the work of art, from a previous modernist approach that had privileged the expressive qualities of a self-contained object (think here of Greenberg's appraisal of abstract expressionism, or Michael Fried's writing on sculpture) to a postmodernist one that emphasized a textual and contingent hermeneutics of fragmentation and desire.[29] Art criticism and scholarship at this time often linked the notion of the "fragment" (e.g., the image as part of a montage; the mass-produced copy of a "one-off" work of art) to allegorical tendencies within postmodern art. Influenced by Walter Benjamin's work on the

concept of allegory as it pertained to 19th century modernity, ‘80s writers such as Craig Ownens and Benjamin Buchloh applied similar interpretations to appropriation art at the time as a way to link with the critical drive and even political commitment of historical avant-gardism such as Marcel Duchamp and John Heartfield.[30] Additionally, the use of allegory—the reading of one text through another, or the deployment of a “double coding” of signifiers towards meanings other than those literally signified—as a model to explain appropriation art’s critical interventions into the media landscape would seem appropriate given the pervasiveness of mass-produced imagery in the late twentieth century.

Specifically, Owens would argue that allegory is inherently appropriationist: “The allegorist does not invent images but confiscates them. He lays claim to the culturally significant, poses as its interpreter. And in his hands the image becomes something other.”[31] For Owens, postmodernist appropriation art functioned, by use of the fragment, to allegorize the evacuation of representation’s claim to authoritative meaning,[32] allowing for marginalized forms of counter-knowledge to arise. Along with Levine and Prince’s early work, Barbara Kruger’s appropriation of advertising and stock photography images in the service of feminist and consumerist critique is but one example typical of postmodern appropriation that can be read allegorically. Parallel to Owens but in a more explicitly Marxist vein, Buchloh would theorize postmodern appropriation as a challenge to the reifying processes of advanced capitalism.[33] Buchloh proposed that appropriation techniques allegorized the

redemption of the commodity form through a "secondary act" of depletion; the cultural sign, drained of intrinsic meaning in its initial transformation into a banal commodity, was reclaimed for critical cultural purposes.[34]

As Owens's and Buchloh's references to a general antagonism to "power," or "capitalism" indicate, part of what separated the allegorical impulses of postmodern appropriation practices from those of a previous generation of neo-avant-garde artists was the scope of critique; "The precision with which [the conceptual artists of the '60s and '70s] analyzed the place and function of the esthetic practice within the institutions of Modernism," recounts Buchloh, "had to be inverted and attention paid to the ideological discourses outside of that framework…the languages of television, advertising, and photography, and the ideology of "everyday" life."[35] It is worth stressing this point; the use by artists at that time of imagery taken from mass-produced images, *to contest the underlying ideological assumptions of mass production*, would help naturalize that media as acceptable material for contemporary art. Artists today continue to appropriate the offerings mass media provides (just two of the many examples include Paul Pfeiffer's Photoshopped videos of professional sports broadcasts, or Cory Arcangel's hacked video game installations).[36] This has had the effect of simultaneously enlarging the possibilities of creative subversion in appropriation art and further exposing artists to accusations of infringement, especially as artists themselves increasingly circulate their works through mass media (such as the internet).

Returning to the late ‘70s and early ‘80s: Levine’s and Prince’s early appropriation photographs, many critics concluded, embodied the allegorical aspects of critical art practice. Between 1979 and 1984 some of the most established voices in art history and criticism—Owens and Buchloh but also Douglas Crimp, Hal Foster, Rosalind Krauss and Abigail Solomon-Godeau—would champion the two artists as exemplars of radical postmodernist appropriation.[37] In their assessment, Levine’s reproductions—rephotographed from a mass-produced poster—of Weston’s series of his young son Neil allegorized the inherently imitative inclination of all creative expression. Her copies were only the latest in a long, iterative process, including those iterations Weston himself made by borrowing (through familiarity with classical figuration) from tropes of Greco-Roman sculpture and (through the use of a camera) from the subject matter in front of him at the time (i.e., his own child).[38] Further, for critics Levine’s *Untitled (After Edward Weston)* images exposed an essentially patriarchal narrative running through modernist photography—a refutation of “the role of the creator as “father” of his work…of the paternal rights assigned to the author by law.”[39]

As for Prince, critics claimed *Untitled (Cowboy)* allegorized the impossibility of imagining a natural western landscape without a mediating (capitalist) cultural device: the advertisement. Perhaps more importantly, Prince’s rephotographs pointed to the constructed nature of the heroic American male; it should be remembered that it was Ronald Reagan, himself a former actor who represented/re-presented the cowboy

image on both celluloid and the political stage, who became President in 1980. Thus Prince's images injected a particular political commentary: a nostalgia for a simpler, more authentic past American moment—a moment that never existed, and could only be known through its commodified representation.[40] Prince delivered, as Abigail Solomon-Godeau has it (referencing Jean Baudrillard), "a synthetic 'hyperreality,' a 'real without origin or reality'."[41]

It's worth recounting here on some of the key points of art criticism at the time as it pertains to Levine and Prince, which I eventually wish to problematize. The allegorical interpretations of both artists' works, which are traced mostly to Owens and Buchloh, are examples of the more general tendency for the critics mentioned above to claim "oppositional appropriation" as radically attacking conventional notions of authorship and originality. For example, Solomon-Godeau would write that "Levine's critical stance is manifested as an act of refusal: refusal of authorship, uncompromising rejection of all notions of self-expression, originality, or subjectivity…To refuse authorship itself functions to puncture the ideology of the artist as the bearer of a privileged subjectivity."[42] Owens's allegorical treatments underpinned appropriation art as indicative, he claimed, of "widespread crisis of artistic authorship that swept the cultural institutions of the West in the mid-1960s—a crisis which took its name from the title of Roland Barthes's famous 1967 essay "The Death of the Author."[43] Krauss would state "Sherrie Levine…seems most radically to question the concept of origin and with it the notion of originality"[44]; furthermore,

"[Levine's] use of photography does not construct an object for art criticism but constitutes an act of such criticism. It constructs of photography itself a metalanguage…exploring at one and the same time the myths of creativity and artistic vision, and the innocence, primacy, and autonomy of the "support" for the aesthetic image."[45] Finally, Crimp praises Levine, inasmuch as she "steals [images] away from their usual place in our culture and subverts their mythologies,"[46] as well as Prince, whose appropriations are "severed from an origin, from an originator, from authenticity."[47]

What is striking about much of this criticism is its appraisal of Levine's and Prince's works as essentially processes of *negation* of authorship and/or originality: "refusal"; "rejection"; "does not construct"; "subverts"; "severed" are the terms employed above. However, given the luxury of hindsight we can safely state that the works in questions were most certainly not strictly negative or "anti-author." They were not, at the very least, anonymous works. Nor were they without an eventual art world destination. Rather, they were works attributed to Levine and Prince, who were likewise celebrated as clever individuals initially within the intellectual circles of art criticism and subsequently in the commercial sectors of the art gallery system. As I will explain in more detail in later sections, Levine and Prince were validated as "original" authors of a critique of authorial originality, and in my estimation should be read as exemplars of romantic authorship. Owens would indirectly acknowledge this irony in his writing on the allegorical tendencies in postmodern appropriation art.

Aligning it with poststructuralist strategies of "deconstructing" texts or images, Owens writes

> There is…a danger inherent in deconstruction: unable to avoid the very errors it exposes, it will continue to perform what it denounces as impossible and will, in the end, affirm what it set out to deny. Deconstructive discourses thus leave "a margin of error, a residue of logical tension" frequently seized upon by critics of deconstructionism as its failure.[48]

For Owens this "tension" is what confirms the allegorical character of works of art; they necessarily tell other stories, one being the failure of transcending the critique/ complicity binary. In practical terms, however, Levine and Prince's works, bolstered by their critical reception, became yet more examples of the institution of art absorbing critique, much like the fate many avant-garde practices suffered in preceding decades.

Yet, this is not to say that these critics wholly neglected the "assertive" aspects of Levine's and Prince's appropriations. The feminist reading of Levine's works specifically figure her less as an artist appropriating in order to evacuate authorial agency than to proclaim it (i.e., as a woman, Levine usurps "authority" from a male-dominated art system). In a similar fashion, the critics' commenting on the status of the Levine's and Prince's appropriations as copyright infringements speaks to the works' pro-author positioning (i.e., as evidence, even allegories, of unrestrained artistic prerogative). Throughout the literature there are hyperbolic references to thievery and even odd legal pronouncements.[49] For instance, Crimp, above: Levine "steals away"; Crimp, further: "Their images are purloined, confiscated, appropriated,

stolen...[Levine] merely, and literally, *takes* photographs…Prince steals the most frank and banal [of images]."[50] Further, Solomon-Godeau writes, "Levine's Weston… rephotographs are quite literally illegal works of art."[51] And Krauss: "Levine's medium is the pirated print…in violation of Weston's copyright."[52] Setting aside the argument that equating the appropriation of intellectual property with the traditional sense of theft is a particularly conservative stance (and one long since debunked—unlike stealing a car, which deprives the original owner of its use, copying an image does not take the original out of circulation), we discover that critics at this time spent little time on Levine's and Prince's works as critical interventions into the authorial *ownership* of images. Artist Martha Rosler, writing in the early 1980s, foreshadows a line of thought I will elucidate in the coming pages. "The flat refusal of 'new production' (which mistakenly assumes that reproduction is no production)," Rosler contends, "of some quotational artists is deeply romantic in continuing to identify creativity as the essence of art…What does it mean to reproduce well-known photos or photos of well-known art works directly? Explanations have been inventive…Few have remarked on the way in which this work challenges the 'ownership' of the image."[53]

Even if the critical approval bestowed upon Levine's and Prince's early appropriations was somewhat unrealistic (was the work really functioning as subversively as it was described?), we would do well to remember the historical circumstances in which it was written. In the late 1970s and early '80s the United

States was mired in recession; President Reagan's attacks on organized labor and Cold War strategies, among other things, catalyzed anti-capitalist resistance, forms of which also manifested in an active and critically-minded alternative art scene. More particular to academia, there existed (at least among some of the scholars and critics mentioned) an anxiousness to leave behind older methods of art scholarship and explore newer theoretical models that befitted emerging critical cultural practices across a range of media.[54] The writings of Roland Barthes, Jean Baudrillard, Jacques Derrida, Michel Foucault, Julia Kristeva, Jacques Lacan and Jean-François Lyotard, among others—French intellectuals rigorously interrogating the Enlightenment project and its appeal to truth and the universal—provided precisely those models.[55] Therefore, regardless of whether or not one agrees with the critical assessments of Prince's and Levine's early, "poststructuralist" appropriation art, we should recognize its core affirmation of intellectual labor—reinforced by critics through a new theoretical toolset—over manual labor as the validating mechanism in the production and reception of art. This was a privileging previously evident with Duchamp and the readymade tradition, subsequently repressed by high modernism's insistence on the primacy of form and material over language, and revived with the dematerialized status of conceptual art.[56]

As I will suggest later in the chapter, the rhetorical gymnastics performed by critics in order to sanction postmodernist appropriation parallels a simultaneous set of arguments developing within copyright law that would seek to all but discard any

legitimating discourse surrounding the work of art (e.g., artistic intention, adherence with or break from art historical precedent, correspondence with theoretical models, etc.) in order to justify the re-use of copyrighted images. Instead, a new copyright protocol would minimize the role of the author, and instead opt for an "objective" analysis of an art work's properties in order to determine whether or not it stood in its own right as bona fide artistic expression. In other words, the privileging of the "text" in poststructuralist theory is, in a sense, echoed in copyright law's formal analysis of potentially infringing expressions. Thus, going forward it will be necessary to situate appropriation art's theoretical articulation within the context of U.S. copyright law, as it is the discrepancy between the two that has occasionally challenged artists in their reuse of mass-produced visual culture.

As mentioned at the outset of this chapter, those practitioners affiliated with late '70s and early '80s appropriation art in New York are often referred to as "Pictures" artists, a label assigned in reference to the exhibition *Pictures* that Douglas Crimp curated at Soho's Artists Space in the Fall of 1977. Indeed *Pictures* is often designated as inaugurating the postmodern discourse of appropriation art. However, rather than addressing the exhibition as a founding moment (although I certainly do not mean to discount it), I would like instead to situate the beginnings of postmodern appropriation within the context of legal history, linking it to an event that preceded *Pictures* by a year: the ratification of the Copyright Act of 1976. Doing so will enlarge appropriation art's social, economic and political contexts, which in turn can assist in

more thoroughly analyzing the poststructuralist moment within which appropriation art has been historicized, as well as provide an accounting of the agency conditionally afforded appropriation artists since that time.

III. The Copyright Act of 1976: Enhancement or Effacement of the Author?

On October 19, 1976, President Ford signed into law the first major revision of United States copyright since 1909.[57] The Copyright Act of 1976—which continues to provide the basis for our current copyright law—confronted a number of author's rights issues, including those relating to the technological advances that had occurred since the beginning of the twentieth century. New forms of expression, such as "electronic music, filmstrips, and computer programs" were recognized as deserving protection while copyright protection for older but nevertheless modern, mechanically reproducible media (i.e., photographs, audio recordings, and motion pictures) was maintained.[58] Addressing the accelerated manner in which cultural works were being produced (and reproduced), enhanced definitions as well as measures not previously codified were included in the new legislation.

Before examining specific changes to copyright the 1976 Act brought about, some historical context is necessary. While a detailed account of American copyright's development leading up to the 1976 modifications is beyond the scope of this chapter, any contemporary analysis should necessarily involve recounting copyright's principal rationale as it has developed over time. Legal scholars locate it within the English

common law tradition, which, through the Statute of Anne of 1710, afforded authors (rather than publishers) reproductive control over their manuscripts.[59] Since its inclusion in the United States Constitution and the enactment of the first Copyright Act in 1790, American copyright doctrine has continued this policy.[60] It has sought to balance the needs of copyright producers (i.e., authors) with those of copyright consumers (i.e., public) through a "utilitarian calculus"[61] that on the one hand encourages authors to create by providing them economic incentive to do so, while on the other hand limits that incentive through a fixed term, thus allowing texts to eventually fall into a "public domain" where anyone may use them without restriction. [62] In theory, copyright law allowing authors a limited monopoly right over their creations in the short term helps grow a rich public domain in the long term; in general, scholars contend that copyright was designed by the Framers to facilitate the cultural cultivation of an infant nation. Nothing makes this point more clearly or succinctly than the Constitution itself, which grants Congress the power "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."[63]

Since its enactment, the Copyright Act of 1976 has generated a substantial amount of debate, which centers around the degree to which it has disproportionately enhanced authors' intellectual property rights over the health of public discourse and democratic ideals. At issue has been the question of how far authors' rights (in granting monopoly control over their works) should be extended before they encroach

upon fundamental freedom of speech rights (not allowing the public to express itself when that expression entails using some or all of an existing, copyrighted work). From a certain point of view, granting overly controlling rights to authors is seen as detrimental to the common good and democracy in general; subjects, denied permission to reshape existing cultural materials because they are locked down by law, wither as passive consumers rather than blossom as active citizens. Yet from another point of view, curtailing authors' rights for the benefit of the public eliminates the incentive to create in the first place; authors, so the argument goes, won't produce if they don't stand to gain financially from work that anyone may use freely. This also results in impeding cultural enrichment in the long-term. Leaving aside the assumption here that people are ultimately creative only in order to be monetarily compensated, let us maintain for the sake of argument the necessity of compensation and the importance of some level of authorial control. This should not seem unreasonable, especially to anyone whose livelihood depends in some form on the benefits intellectual property rights provide. As Lawrence Lessig states, "the point…is not that the aims of copyright are flawed. The point is that some of the ways in which we might protect authors [have] unintended consequences for the cultural environment."[64]

Indeed, several legal scholars charge that the 1976 Copyright Act fortified an "ideology of authorship" that was already sufficiently robust.[65] Since that time, authors' rights have "burst from their moorings,"[66] granting ever greater exclusivity, which in turn has fueled the notion of copyright being an absolute property right rather

than a limited use right in the service of public interest.[67] While I'd like to scrutinize this notion later on, it is true that the 1976 Act seemingly expanded authorial rights in several ways. Three of the most significant examples of this expansion are: the enlargement of what sorts of expression qualified for copyright; the increase in the length of time given to an author's copyright; and, authors' monopoly over not only their expressions, but also over future works derived from them. Let us examine each of these in more detail.[68]

One of the 1976 Act's first changes beneficial to the aspiring author was the redefinition of what sorts of expression qualified for protection. An all-encompassing and intentionally generic definition, "original works of authorship fixed in any tangible medium of expression, now known or later developed" was introduced.[69] Through this phrasing the 1976 Act intended to resolve medium specific disputes that had arisen in past infringement litigation.[70] Going forward, it would make no difference "what the form, manner, or medium of fixation may be— whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form."[71]

The Act's designation "original works of authorship fixed in a tangible medium" performed two significant functions. First, it changed when a work first received protection, placing copyright at the moment of fixation (i.e., when the work "can be perceived, reproduced, or otherwise communicated, either directly or with the

aid of a machine or device") rather than registration, as previous versions of the law had stipulated.[72] Here, the cliché of any napkin doodle being copyrightable finds its beginnings. Second, it avoided language that defined copyright qualitatively. The Act's supplement, House Report No. 94-1476, reads, "This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them." Furthermore, it states, "Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take."[73] Thus the law extended copyright protection to an almost unlimited range of activities at the moment of their expression and in so doing, granted the power of authorship to new classes of creators whose only requirement was that their creations be "original,"[74] which is to say, either evincing novelty, or more simply, designating an origin, or some ambiguous combination of the two.

A second pro-author modification in the 1976 Act increased the term length of protection, from a fixed year period—previously set to twenty-eight years with an additional twenty-eight year renewal option—to the life of the author plus an additional fifty years.[75] For anonymous, pseudonymous and works made-for-hire, the term was set to seventy-five years from the date of publication, or 100 years from date of creation, whichever expired first.[76] With the requirement of registering copyrights excised, any work, upon its creation, automatically garnered protection for the longer periods, thus providing authors even more time with which to economically benefit

from their works. Considered by its drafters as perhaps the most significant revision to the copyright bill,[77] the reasoning behind the extended terms stemmed from several considerations; chief among them was the substantial increase in life expectancy. “The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his works,” the House Report states.[78] Furthermore, it argued that work falling out of copyright and into the public domain wouldn’t necessarily escape economic exploitation by somebody; “The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense.”[79]

Even while its legislators deemed the increase in term length most important, the 1976 Act’s incorporation of authorial control over derivative works, those that are “recast, transformed, or adapted” from their originals, was just as substantial.[80] The protection of derivative works applied not only to expressions created in the present, but also those possibly made in the future. For example, a novelist could prevent the production of a film based on a book she had written, because copyright law stipulated that it was to be only the original creator who may exploit the potential derivative work (and even if the novelist had no plans to release a film). According to the 1976 Act, for a derivative work to be found in infringement, it must exhibit particular elements of the protected original (e.g., the film and the book would need to share plot, characters, settings, etc.). This would nonetheless seem to allow for a fairly wide latitude in creative license; in theory, it should be possible to produce an action film

that follows the exploits of a secret agent without resorting to naming its characters "James Bond" or "Jason Bourne." However, according to law scholar Neil Netanel, both statute and case law have grown increasingly intolerant of secondary authors who "invoke an existing work's "total concept and feel," without literally copying…any of the original's expression…[and that contain] only a resemblance of style, mood, and overall aesthetic appeal."[81] The right over derivative works enacted in 1976 therefore blurred the idea/expression boundary fundamental to copyright's premise,[82] and revealed the extent to which the law continued to conceptualize the author as one who created *ex nihilo* versus his or her actual tendency to derive inspiration from the external world (including previously existing works).[83]

The expansion of authorial rights in the 1976 Copyright Act and its emphasis on originality stem from what some legal scholars identify as the law's long-time deferential treatment of the "romantic author."[84] In the next several paragraphs I will outline how this figure was placed at the center of cultural production in a developing modern era. Tracing a construction of authorship during this period will aid in assessing the claim that the persona of the romantic author continues to hold sway over the logic of contemporary copyright, as supposedly evidenced by the 1976 Act's pro-author modifications. In this tracing, three motifs emerge: the "authority" over ideas through labor; those ideas being justified as property because they are original, i.e., produced through an "internalized inspiration";[85] and, the growing importance of the author's "work."

We can locate the notion of the ownership of ideas through labor in the fundamental premises grounding the historical formulation of what scholar C. B. Macpherson termed "possessive individualism," the English political and social theory Thomans Hobbes and John Locke, among others, developed in the seventeenth century.[86] Macpherson summarizes possessive individualism in the following manner: what makes man human is freedom from dependence on the wills of others; the individual is the master of his own person and capacities; individuals enter into social relations which are in essence relations between sole proprietors (i.e., market relations).[87] As Macpherson describes, Hobbes and Locke theorized the subject as "authoring" his or her own life and therefore possessing it as a form of "property." And this possession was not only over the self but also over the self's interaction with the natural environment (i.e., the "capacities" and "labor" mentioned above endow the subject with a another type of property relation).

Granting that all free individuals have proprietorship in their own bodies, in 1690 Locke declared that "Whatsoever then [man] removes out of the state that nature hath provided…he hath mixed his *labour* with, and joined to it something that is his own…thereby makes it his *property."*[88] Macpherson's work reminds us that it's important to contextualize Locke, for the quote here is less to do with "empirical" conceptions of labor and ownership in his time than with explaining an origin within an idealized state of nature from which private property (particularly land parcels in seventeenth century England) could be made to seem rational and moreover moral.

Nonetheless, Locke's meditations remain as important markers in the naturalization of the concept of private property now so deeply embedded in contemporary notions of intellectual property. A passage from Hobbes, written several years before Locke, explicitly links the individual's ownership over the labored environment with authorship: "He that owneth his words and actions, is the Author…the Right of doing any Action, is called Authority."[89]

As legal scholar Peter Jaszi describes, the concept of possessive individualism had already been instilled within English social thought by the time of the Statute of Anne's enactment.[90] Yet even a general absorption of the tenets of possessive individualism amongst authors, publishers and lawmakers at the time cannot entirely explain how the concept translates specifically to labors of the mind. This is to say: how were ideas equated with private property? In describing the early formation of the author-subject, scholar James Boyle claims the transformation would come from the difference between non-creative ("unoriginal") and creative ("original") labor. "It is the *originality* of the author," Boyle asserts, "the novelty which he or she adds to the raw materials provided by culture and the common pool, which justifies the property right."[91]

Originality as a pre-condition of authorship (and therefore ownership) emerged at the dawn of the modern era, when new political and economic systems were eroding established European social orders, thus allowing alternative modes of cultural production to emerge. For example, in the eighteenth century writers increasingly

jettisoned the patron model of compensation which had existed since the Renaissance, instead relying on the direct sales of their works to a growing literate public.[92] This change in the mode of distribution of the cultural work operated in parallel with a new perspective on creative ideation associated with Romanticism. Particularly for English poets, the turmoil of the French Revolution and the effects of emerging industrialization at home provided fertile soil from which sprouted not only a reconsideration of the inner self's potential, but also a wariness for the banality of mechanized, commodified life.[93] For scholar Martha Woodmansee, this philosophical shift manifested itself in two ways: first, craftsmanship and obedience to classical training were reduced in importance or abandoned altogether in favor of the "element of inspiration." Second, inspiration, rather than being conceptualized as coming from outside or above (i.e., the trained craftsman as a mere conduit for preordained truths or divine will), was instead internalized and then emanated from the writer him or herself.[94] This capacity for original genius, for creating "something unprecedented, or in the radical formulation that he [or she] prefers,"[95] transformed the writer into the *author*. As we will see later on, this distinction becomes important for visual artists, especially in postmodern appropriation practices that intentionally manipulate the established separations between mass-produced culture and "high" art according to artistic prerogative.

Yet the figure of the original genius still doesn't fully explain just how ideas, original as they may seem but nonetheless inherently abstract, became property. For

this to happen, ideas would have to manifest themselves materially. Jaszi situates this conversion within the continued development of English copyright law after the Statute of Anne. Gradually the author was defined through the "work," which was initially understood as the external objectification of his or her subjectivity, the material extension of a unique personality.[96] The work—an embodiment of the author's intellectual labor—self-justified his or her private property right, which was enforced through protecting copies of the author's published texts. Authorial originality and its corresponding physical manifestation as publication were treated as equivalents, and for much of the eighteenth century in both England and the United States, the "work" referred simply to exactly that which was printed, which is to say the verbatim content the author had supplied in print form. At this stage, unauthorized appropriation of existing works did not necessarily constitute infringement; as the demand and thus circulation of texts increased, and would-be authors responded in kind not solely by pirating books wholesale but by abridging, adapting, translating, or otherwise modifying them (ostensibly feeding the cultural domain, in addition to reaping profit). Because of prevailing attitudes at the time, which conceived of a strict, one-to-one correspondence between an author's idea and its material expression, abridgments, translations and the like were often considered works in and of themselves; after all, their production too necessarily involved degrees of intellectual labor.[97]

Within U.S. copyright law this narrowly-defined relationship between author and work did not shift in any significant way until the second half of the nineteenth century.[98] However, eventually the scope of what constituted the "work" expanded beyond the literal text. By the early twentieth century, court rulings began severing the link between the author's originality and its manifestation as an expression. As a result "the work" came to be conceived more as an intellectual endeavor from which myriad material derivatives could be produced. This change in outlook occurred in parallel with the rapid expansion of market-driven reproduction and distribution of cultural commodities, and the degree with which similar (but not identical) secondary works could adequately "substitute" an original. For example, in the case of translations, American legal scholar Eaton S. Drone's 1879 text *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* testifies to the transformation of the concept of the work: "The translator, then, simply transfers a literary production from one language to another. The translation is not in substance a new work. It is a reproduction in a new form of an existing one…The body and substance of the translation are the body and substance of another work."[99] Privileging the work's substance rather than its form—a substance ideologically celebrated as inspired genius—appeared to bestow further privilege upon the author, whose "original" intellectual labor (and property) was now of the utmost importance.

And while this philosophical shift might have helped reinforce the figure of the romantic author within the doctrine of copyright, it also paradoxically had the long-

term consequence of shifting copyright's emphasis away from any authorial "genius" and towards formal analyses of the productions themselves. As copyright law uncritically embraced the ideology of authorial originality (for example, deducing that since everyone is unique in their own person, any works they produce will potentially have something uniquely irreducible to them), it nevertheless eventually mitigated its novel or innovative aspects in favor of recognizing the author merely as the work's point of origin, regardless of the degree of "originality" or uniqueness the author intended. Meanwhile, the elements that made up the work were disaggregated and subjected to judicial interrogation in order to determine their degree of derivation—what elements of the romantic author's "total vision" were in fact "original," and what elements were not. As scholar Marci Hamilton notes, legal disputes involving secondary, potentially infringing works have come to involve dissecting "every text into its constituent parts: ideas, facts, unoriginal expression, public domain material, pre-existing copyrighted material, and finally original expression."[100] In short, in the modern era and especially given the proliferation of mechanical reproduction and the commodification of culture, the work displaced the author—who had become a cipher of sorts—as the central determining character in copyright doctrine.[101]

This shift becomes important when we return to appropriation art and its emphasis on artistic intention and concept rather the aesthetic treatment of the formalized work of art. It's worth reminding the reader at this point of the peculiar affinity between poststructuralist critiques of authorship and work-centric notions of

copyright. In both, the emphasis is placed in audience reception and interpretation of the "text." However, whereas for art criticism the lack of any significant aesthetic transformation in appropriation art would herald a new way of understanding art, according to copyright's analyses of the object itself, a copy of a Weston or a Marlboro cowboy would almost certainly be ruled a derivative. This disparity is, I claim, what turns postmodernist appropriations critique of authorship on its head. It recasts the artist not as a critic of conventional authorial modes but rather as their champion, as I explain below.

If this notion of the eventual subordination of the author to the work in modernity is acknowledged, then the apparent expansion of rights in the 1976 Copyright Act indicates, as Hamilton suggests, not deference to but disdain for the romantic image of the author.[102] In this view, expanded author's rights, while perhaps appearing to champion what might be an antiquated figure from a pre-industrial past, act as a foil for copyright's actual purpose: providing the means for fluid and expanding intellectual property markets in a post-industrial economy, in which the financial value of culture is increasingly decoupled from material production.[103] "The American copyright system rewards the original elements *of a work*," Hamilton states. "Neither the identity of the author nor the quality of the author's experience denote that which is copyrightable."[104]

Indeed an "ideology of the work" can be extracted from the three examples mentioned earlier (the redefinition of what qualified for copyright; the term length

extension; derivative rights) in reference to the 1976 Act's expansion of author's rights. A closer examination of them will reveal not so much an expansion of author's rights as an expansion of "work's rights" acting under the aegis of the denuded figure of the romantic author. From a work-centric perspective, the 1976 Act's broadening of the definition of what sorts of expression garnered protection reinforced the corresponding "equalization" of cultural expression that mass production brought about (i.e., the shift from specialized, artisanal modes of production to industrial where quantity more than quality of goods translated into monetary value, often for the benefit of large business interests). With only the vague requirement that a work be "original," any type of production, "every note to your spouse, every doodle, *every* creative act that's reduced to a tangible form" gained protection.[105] Acting as a "cultural leveler,"[106] copyright defined "Football fixtures…in the same terms and…the same rights as *Finnegan's Wake*,"[107] diminishing the innovation and autonomy associated with romantic authorship. With "Football clubs and heroes of modernism… considered on the same terrain,"[108] all cultural expression had inherently become a vehicle for private enterprise. Before the law, judgements of taste submitted to market potential in the service of the production of commodities.

The 1976 Act's term length extension can also be interpreted as privileging the work, for it took into consideration the longevity of not only the author but also his or her creations. "The tremendous growth in communications media has substantially lengthened the commercial life of a great many works," the 1976 House Report states;

"A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years."[109] Here the justification for longer terms might be understood as expressing a concern for "serious" works, though the Act's earlier disqualification of such a requirement[110] has only kept the wide gamut of expression, serious and otherwise, under private control for greater periods of time, ensuring a maximum return on investment.

As for the derivative right laid out by the 1976 Act, it too can be understood as furthering copyright's work-centered rationale. This is evidenced in the abundance of merchandising made possible by the corporate exploitation of copyright's derivative provision. For example, the cycle of production with which most Americans today are familiar: the movie becomes the action figure becomes the theme park ride becomes the lunchbox. Copyright thus serves as a type of "textual Homestead Act,"[111] whereupon the author stakes claim in an idea potentially capable of growing a variety of enriching intellectual "produce," but, in the logic of mass production and the sanctioned derivative, tends instead toward inferior strains of the initial "crop."

In the last several paragraphs I have attempted to lay out the ways in which the 1976 Copyright Act has, through its various revisions, privileged either the author or his or her work. To be sure, the issues I have raised involving the scope of protected expression, term length, and derivative works do not exhaust the debate over the nature of authorial rights, nor do they adequately encapsulate the complexity of the statute. With this in mind, I conclude this section by addressing two provisions defined

for the first time in the 1976 Act—the fair use and work-made-for-hire doctrines—with the latter specifically suggesting an effacement of the romantic author more than any of the previous examples. Let us first address the more ambiguous of the two, fair use. Since fair use will play an especially important role in the next two chapters, I will only provide a sketch here as it relates to the work-centric rationale of copyright.

The concept of fair use, codified federally for the first time in the Copyright Act of 1976, is intended as a "safety valve" to copyright's monopoly grant. Under certain conditions, it allows secondary authors the use of a primary author's expression without his or her consent, "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[112] In practical terms, fair use allows, for instance, a book critic to include passages of an author's text for the purposes of a review. The extent to which it also allows artists to appropriate existing content in the creation of new works of art is one of the most serious issues at the intersection of art and law today. While less than perfect, the fair use clause nonetheless forms an integral part of copyright's continued attempt at balancing an author's property rights with the general right to freedom of expression for the benefit of the public sphere.

It could be argued that by establishing a legal mechanism that potentially affords secondary authors the ability to incorporate elements of existing (protected) work, the fair use doctrine further compromises the "total vision" of the romantic author. While not a guarantee by any means, fair use has allowed for the legitimate

reuse of certain works of authorship; appropriation artists accused of infringement have often invoked a fair use defense, with varying degrees of success (as the next two chapters will demonstrate). In such cases, as Hamilton points out, the process of legitimation has tended to entail a work-centric view of copyright, in which the "original" elements of both the primary and secondary works are singled out and scrutinized in order to determine any infringement, which therefore privileges a formalist analysis of the work rather than an analysis of authorial intention. Yet as Boyle notes, even if the concept of fair use might appear to challenge the primacy of the author, it actually helps perpetuate the romantic authorship paradigm by requiring any fair use to demonstrate its "transformative" qualities. In other words, the work in question must prove the extent to which it makes something original out of the process of derivation. Or, as Boyle states, "Authors may only be trumped by *other* authors."[113] However, even conceding Boyle's point, it must be acknowledged that the concept of fair use begins with the premise that creative expression often results from a process of accretion. To some extent, then, fair use responds to, even encourages, an expressive public, and supports its larger claim to agency outside of the romantic authorial mode. The same cannot, unfortunately, be said of the work-made-for-hire doctrine, which not only opposes the model of romantic authorship, but also seeks to break the authorship-ownership bond completely.

Mentioned only in passing in the 1909 Copyright Act,[114] work-made-for-hire was given a thorough treatment up front in the 1976 revision, defining the doctrine as

> (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[115]

The Act then further defined the terms "supplementary work" and "instructional text," including examples of each,[116] before describing authorship rights in work-made-for-hire:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.[117]

Through the articulation of work-made-for-hire, the 1976 Act provided legal buttressing for a twentieth century economic structure already dependent on the division of labor, furthering oligopolistic tendencies within the domain of late modern cultural production. Far from facilitating a romantic conception of authorship, copyright's work-made-for-hire doctrine has essentially helped corporate business interests seize control of individual agency, returning the author to his or her place as a "just another cog in the wheel"[118] in the fabrication processes of a culture industry awash in new creative tools and transmission technologies. Work-made-for-hire provided a booster shot for the copyright market at the outset of an information economy,[119] but it had again become the publishers (i.e., corporate media), not authors (i.e., actual content creators), who would benefit from the dosage—an eerie echo of the status of the author in England during the enactment of the Statute of Anne. And, as several commentators have suggested, it is not just individual authors who have

been deprived; since 1976, the public domain, and the free exchange it embodies, has suffered at the hands of corporate copyright—nothing created after that date will be easily available for public use until the end of the twenty-first century.[120]

Understanding copyright in the late 1970s as a complex array of legal provisions that tended to privilege the work over the author provides an alternate ground to the 1980s art criticism mentioned at the outset of the chapter from which to assess the poststructuralist variant of appropriation art appearing at that time. In some respects, the "death of the author" proclaimed by poststructuralism and allegorized in appropriation art had already become reality in American copyright law by the 1980s. Copyright's effacement of the author at large within postmodern society reveals the specific discursive frames—that is, those in art and literary history and theory that celebrated the myth of creative genius—upon which appropriation art critical of originality and authenticity was contingent. Returning now to the early careers of Richard Prince and Sherrie Levine, I shall offer a reevaluation of them as critical practitioners in the context of the degradation of the romantic author precipitated by the 1976 Copyright Act.

IV. Conclusion: Appropriation Art as the Re-centering of the Author-Subject

Appropriation art's critique of the ideology of the original and authentic author was premised on an assumption that such a figure, esteemed in the high art of bourgeois life since the advent of modernity, remained at the center of contemporary

art production. And to some extent this was (and still is) accurate; appropriation art challenged a discourse of the transcendent, autonomous subject that had begun with eighteenth century romanticism and persisted within some areas of modern art, particularly abstract expressionism in the 1940s and '50s and neo-expressionism in the 1980s.[121] Levine's and Prince's use of appropriated material starkly asserted that within the postmodern condition, the construct of the author-subject was not only deeply problematic, but also perhaps irrelevant altogether. The original work of art had become unnecessary; the copy adequately stood in its place and performed its legitimizing function.

As previously discussed, critics interpreted Levine's and Prince's appropriation of images as constituting a radical critique of the categories of originality and authenticity within the social construction of authorship. Writing in the early the 1980s, Hal Foster heralded poststructuralist appropriation art as critical to the "recoding"[122] process within postmodernity's debates over the construction of meaning. Setting appropriation art in relation not only to the construction of the social or ideological codes of representation but also to the actual federal United States Code and its then newly amended copyright clause, perhaps Foster's characterization can be taken quite literally. And while it is very doubtful Levine and Prince intended their works as direct rebuttals to the 1976 Copyright Act—if for no other reason than that the law had only been in effect a short time before the appropriations that established the two artists were produced[123]—they can nonetheless be read as "preemptive strikes"

against the *legal* construction of authorship and moreoever, to the ownership of the image.[124] In addition to suggesting the loss of determinate meaning that had hitherto been supplied through appeals to originality and authenticity, Levine's and Prince's works speak to the virtual impossibility of authorship in the contemporary era outside the paradigm of the derivative work sanctioned through copyright law. In theorizing appropriation's "redemption" of the commodity object, Benjamin Buchloh perhaps comes closest in acknowledging appropriation art's critique of the derivative processes of cultural production. The "division of functions" put upon the mass-produced image in its transformation into a commodity—exactly the procedure the appropriation artist reverses through the reclamation of the object "as art"[125]— implies a productive apparatus made possible through a division of labor. In other words, the original image's conversion into a mass-produced commodity necessarily entails the labor of a range of actors (e.g., the photo printer, the book editor, the advertising designer, the printing press operator, etc.), each of whom assumes, in some proportion, the role of the "author" during the object's journey into the market.

Read through the lens of copyright's de-individuation of the author, then, Levine's and Prince's anti-establishment gestures invite a reading somewhat at odds with a poststructuralist critique that de-centered the author-subject. Rather than undermining any romantic notion of authorial originality in a postmodern culture of the copy, the *Untitled (cowboy)* and *Untitled (After Walker Evans)* works reasserted the very productive mode upon which romantic authorship is based—one premised on

the author's singular ownership of the work through his or her labor. In Lockean terms, Levine and Prince acted upon the (mechanically reproduced) environment around them, defiantly re-centering themselves as possessive individuals, as the authorities over their expressions against the backdrop of a massive and impersonal productive apparatus churning out derivative images whose actual creators could not be readily traced.[126] In this formulation, the degree of aesthetic novelty in each artist's technique becomes superfluous; Levine and Prince merely employed those processes familiar to the nameless technicians working in the creative industries: cutting, cropping, enlarging, editing, printing.[127] What is novel is that, by mixing their labor with their surroundings "in the radical formulation that [the artists preferred]", Levine and Prince took individual control of the mass-produced images they appropriated—Levine from a Weston promotional poster and Prince from magazine advertising—and in so doing, reaffirmed the ground upon which romantic authorship is based.

In this control thus lies the contested core of Levine's and Prince's actions. For with control comes the ability to insert and thereby manage meaning, creating discourse—what Foucault termed the "author-function."[128] Any value that Levine's and Prince's appropriated works had as examples of a counter-hegemonic discourse would have been underscored by their status as likely copyright infringements. In the work-centric, formalist eyes of the law, their work would almost certainly not have constituted "original works of authorship," but rather been determined to be derivative copies (i.e., an "objective" comparison between the appropriations and corresponding

originals would have yielded little difference). Consequently, Levine's and Prince's provocations should have invoked the wrath of the appropriated images' copyright holders. And yet exhibition (and collection) of their "rephotographs" was permitted, even encouraged, much to each artist's benefit. Eventually, Levine and Prince, whose works appeared the most antagonistic towards prevailing conventions of authorship, were to be validated as authors par excellence not only by a group of critics employing a newly acquired theoretical language, but also by a contemporary art world that had never been entirely convinced of the so-called death of the author, and could provide a "second tier" of lax copyright regulation in the name of "culture."

Indeed, in the years following Prince's *Untitled (cowboy)* and Levine's *Untitled (After Edward Weston)* series, the Pictures movement, and appropriation art in general, was subsumed under the rhetoric of the uniquely creative individual associated with romantic authorship. Interviews, criticism (including that by critics mentioned previously) and promotion brought credibility and fame to postmodern appropriation artists, "casting their achievements as individual accomplishments,"[129] thereby affirming their position as "legitimate" authors within the very mass media they had sought to criticize. Meanwhile, art world consumers were presented with commodified representations of avant-garde resistance, which seemingly retained political consciousness but replaced active social challenge.[130] Witnessing the neutralization of appropriation art's critique through its theorization and subsequent "stylization" in the media, critic Richard Bolton offered a somber diagnosis: "This

once critical practice, posed against the mass media, has become a media version of critical practice…the "progressive" avant-garde has been brought into harmony with the "progressive" form of the commodity and the "progressive" structure of late capitalism."[131] By the end of the 1980s, appropriation art had become, as Douglas Crimp states, "Just another academic category—a thematic—through which the museum organizes its objects."[132]

Fast-forwarding thirty years to Prince's 2008 retrospective *Spiritual America* at New York's Guggenheim Museum, the full extent of Prince's celebration in romantic terms is evident. In the opening pages of the exhibition's catalog, Prince is described as an artist who

> makes it new by making it again. Although his photographs, paintings, drawings and sculptures are primarily appropriated and recycled from popular culture, they convey a deeply personal vision. His selection of mediums and subject matter, as well as the cropping, editing, and sequencing of images, suggest a uniquely individual logic…with wit and an idiosyncratic eye, Richard Prince has that rare ability to analyze and translate contemporary experience in new and unexpected ways.[133]

It is important to note that this introduction was penned by a chief executive of Deutsche Bank, the exhibition's major sponsor, for corporate interest in the arts has played a pivotal role in maintaining the artist as a romantic figure, one who "afford[s] the hunger, empty, desolate, and lonely side of each of us a measure of consolidation, relaxation and reassurance."[134] Filling in the vacuum created after the drastic reduction of government arts funding beginning with the Reagan administration,[135] corporations have used the artist as a public relations tool to both align themselves with the progressive, humanist values associated with art and reach new consumer groups. The

romantic artist is naturally attractive for the corporation, because he or she embodies the same ethos that drives free market commerce: enlightened self-interest.[136]

Recognizing the underlying motives corporations have in aligning themselves with progressive, even critical art that on the surface appears to conflict with their property interests may at least partly explain how Prince was able to evade any legal skirmishes over his early appropriations work, in particular his *Untitled (cowboy)* prints. Within the walls of Prince's retrospective, there was more than one corporation's support on display. It should be remembered that his *Untitled (cowboy)* series was appropriated entirely from magazine advertisements of Marlboro cigarettes. Phillip Morris USA (whose parent company, Altria Group, Inc., donated to the Guggenheim in 2008[137]) owns the Marlboro brand, and, importantly for our purposes here, the copyrights to all of Prince's cowboy images. Their tacit approval of Prince's appropriations might have contradicted the maximum control logic that typifies most intellectual property regimes, but perhaps Philip Morris's desire to associate itself with artistic innovation outweighed its own commitment to brand management. Perhaps allowing Prince's free reign over Marlboro's cowboys formed part of its branding strategy; after all, its products gained free, if indirect, advertising, and moreover, its corporate image was enhanced, something especially important for a tobacco company with a less than stellar public reputation.[138]

Prince's *Untitled (cowboy)* series then presents a dialectic of sorts: any criticality the photographs furnish is dependent upon their own status as

institutionalized—which is to say negated—criticism. Prince assumes the role of the antagonist, and Phillip Morris/Altria dutifully accepts the role as the antagonized, with the museum as mediator. And yet, there is still a central character unaccounted for—the photographer who actually took the cowboy images. In the case of *Untitled (cowboy)* from 1999 **[PLATE 6]**, it was commercial photographer Jim Krantz who, producing work-made-for-hire, took the photo for Phillip Morris, sometime in the late 1990s.[139] In Prince's reassertion of singular, authorial control over the mass produced image, he becomes Krantz's surrogate, the self-possessive author that Krantz cannot be. This however can only provide cold comfort, for Prince has never acknowledged Krantz, who has been, for all intents and purposes, replaced twice over now as the author of the photograph. And finally, under Prince's authority, the image travelled full-circle; advertising-became-art-became advertising, when the same Krantz image lined Manhattan streets in posters and banners that promoted Prince's exhibit **[PLATE 7]**.

Levine's *Untitled (After Edward Weston)* series has had no less help from a type of institutional para-regulation. Levine's appropriation of Weston's 1925 images of his son Neil was perhaps a riskier challenge, for she was not taking from a monolithic corporate art patron but from her own domain of art—from a canonized figure in modernist photography. Levine's claim to the images, had a case gone to court, would have pitted her First Amendment rights directly against Weston's copyrights. And such a case had initially been a possibility; Levine's exhibitions of her

appropriations in New York in 1980 caught the attention of the Weston estate, who contacted the artist. The details are vague,[140] but by 1981 Levine had moved to on appropriating the work of Walker Evans, whose photographs for the Farm Security Administration during the Great Depression were owned by the government and thus resided in the public domain free for use.

But 1981 was also the year that Edward Weston's archive and copyrights, including those of the portraits of his son Neil, were sold to the recently opened Center for Creative Photography at the University of Arizona in Tuscon. As an educational institution, the Center spends "a lot of time encouraging fair use, discouraging censorship, and preserving the work of artists such as Weston so that they can be appreciated by generations to come."[141] It is certainly aware of Levine's use of Weston's images, but has, like Phillip Morris with its Marlboro images, given tacit approval of the appropriations. Since 1981, the *Untitled (After Edward Weston)* series have not only been exhibited but also reproduced in a variety of journals, magazines, art history books and, pertinent for our contemporary digital moment, online image databases that attribute Levine as the author. In addressing the limits of what may be produced, Amy Rule, Head Archivist at the Center, writes, "We might go after someone using [Weston's] images to sell laundry soap, but I doubt that we would try to stop an artist's exploration of legitimate aesthetic issues."[142]

Within the narratives I have just presented, there appears to be a veneer of artistic freedom; Prince and Levine seem to have "gotten away with it." And not even

with the proviso that their appropriation art not be used to sell something, as Prince's posters and banners mentioned above demonstrate. Their sort of blatant appropriation art is, if the examples I have laid out are any indication, limited to selling itself as a superficial concept of transgression. Already sanctioned by both museum and corporation, such a concept is limited to the imaginary realm provided by—to revive Herbert Marcuse's term—"affirmative culture." Recalling his response in the 1930s to the apparent displacement of political struggle into the fairly innocuous realm of cultural consumption coinciding with the very real threat of a rising fascism, Marcuse word's continue to resonate. "What counts as utopia, phantasy, and rebellion in the world of fact," he would write, "is allowed in art…It displays what may not be promised openly and what is denied the majority."[143] This assessment inverts the appropriation artist's self-asserted authority over their materials, for it is not the artist who decides how the law functions within art (culture), but the laws regulating Marcuse's "world of fact" that decide how art functions within society. "To pose real trouble for the author in copyright doctrine," scholar Jane Gaines concludes, "Sherrie Levine would have to reproduce her own copies of Edward Weston as postcards and then sell them—the stiffest test of 'free commercial speech.'"[144]

Yet for all of Marcuse's wisdom, much has changed since his meditation on the affirmative character of culture. The European fascism he wrote against indeed collapsed, replaced in the West generally by a democratic but also capitalist consumer society predicated on the importance of the individual. For many leftist intellectuals,

in particular those from France so influential to American postmodern art historians and critics, the notion of "total revolution" was discarded, especially after 1968, in favor of a micro-politics of resistance and a discourse of ethics across all social sectors, including culture.[145] Thus, for example, Michel Foucault examined disciplining mechanisms within the prison and hospital settings, while Michel de Certeau analyzed the subtle, subversive gestures found within "the practice of everyday life."[146]

Along similar lines, within British Cultural Studies there was also the resuscitation of Antonio Gramsci's notion of hegemony, which was used to theorize, in Marxist terms, the porous boundary between subjugator and subjugated, as well as the political agency typically denied to the consumer-subject otherwise scorned by Marcuse (and Adorno).[147] Subcultural production was therefore looked upon not simply as another commodity opportunity for advanced capitalism, but as a site for potential counter-hegemonic struggle. All of this is to say that with the recognition of the cultural domain as immanent political terrain, subversion and recuperative institutionalization were thus conceived of as poles of an ongoing power dynamic. Thus, another quote again from Marci Hamilton, while strikingly similar in syntax to Marcuse's critique of affirmative culture, offers the opposite diagnosis. Appropriation art, she states, has the "unique capacity to permit individuals to live through worlds they have not and even cannot experience in fact and thereby to view and judge their own world from a new perspective."[148] What Hamilton points to is the potential for

appropriation art, by recycling banal commodity images (that are also private property), to generate critical discourses, which can alter modes of thinking, and which in turn can alter modes of doing. While Hamilton's argument may seem a bit vague—it could be applied to art in general, as an engine for change—it is nonetheless not unreasonable to surmise that a critique of intellectual property as seen in continued appropriation practices today finds some of its first protagonists in the Pictures Generation.

This, in my estimation, is the legacy of early postmodernist appropriation art: it produced a discourse, one that I believe remains extremely relevant in the context of the continued intellectual property disputes today and the uncertainty many artists face when they borrow pre-existing materials. But, as my retracing of the recuperation of postmodernist appropriation art into the institution of art hopefully shows, it is not a discourse containing elements of a poststructuralist critique of authorship (the "death of the author") that perseveres. It is, rather, a discourse of authorial agency, of a reassertion of authorship, which continues to inform us; especially now given the paradoxical condition wherein twenty-first technologies that facilitate copying are hampered by legal obstructionism. Because the discourse of postmodern appropriation art stays with us, and is supplemented through a continued theory and practice of appropriation art in all spheres of cultural production, we might even go so far as to state that Sherrie Levine and Richard Prince were the original law breakers.

I end with another quote from Jane Gaines. Writing in 1991, she states, "As yet, we have too few ethnographies of the use of popular icons in their travel from the avant-garde to the popular and back again…it would be a mistake…to look to the law instead of to use and custom as the primary indication of how ideological domains are configured."[149] This chapter has been my attempt at just such a study, however incomplete it may be. In it, I have tried to look to custom, use and the law, analyzing the parallel histories of appropriation strategies in art and copyright law's transformation since the late 1970s and the ways each approached the construction of authorship. Setting Richard Prince's and Sherrie Levine's early work against the revisions of the Copyright Act of 1976, I have attempted to link the postmodern avant-garde to a reassertion of the author-subject, even as the discourse that enveloped the Pictures movement at the time nurtured a critique of originality and authenticity. What I find remarkable in examining the period's criticism is its insistence upon the superiority of the "poststructuralist" variant of appropriation, given the fact that it is now the rise of remix culture and the collage format, which often appropriate from disparate, even arbitrary sources—similar to what scholar Hal Foster criticized in the early 1980s as "neoconservative"[150]—that have become the flash points in the struggle over the reins of cultural production, as new generations of technologically savvy producers (e.g., YouTube collagists, sample-based electronic music producers, etc.) enter the domain of cut-and-paste culture, an aesthetics of deregulation, and possible legal discrimination.

Chapter 2

The Battle for Fair Uses Part I: The Mass Author and the Artist

> *Art is communication—it is the ability to manipulate people. The difference between it and show business or politics is only that the artist is freer. More than anyone else, he is able to keep everything—from the idea through the production to the sales point—in his own control. It is only a matter of knowing how to use the right approach at the right moment.*
>
> Jeff Koons, 1992[1]

I. Introduction

In the first chapter I focused on the appropriation practices of the Pictures Generation during the late 1970s and early 1980s. I proposed an alternative assessment of the work from that period by situating its critical reception within the context of the fundamental changes then taking place in United States copyright law. Just at the moment when poststructuralist theory begins to enter into the discourse of contemporary art, the Copyright Act of 1976 shifts the emphasis of intellectual property significantly away from authorial intention and toward a type of formalist or

"objective" analysis of the "work" itself. Thus copyright law's blow to authorial agency anticipated the "death of the author" poststructuralist discourse taken up by appropriation artists and critics at the time.

As a result, I further claimed that the lasting significance of the Pictures Generation is less its supposed critical evacuation of artistic sensibility, its staunch refusal of the unique expressive act, or its privileging of reproduction over production as a postmodernist paradigm, as important as these tendencies remain. Rather, it is the reassertion of romantic authorship through the unmasking of the normative authorship-ownership model of cultural production. As I recounted, Richard Prince's and Sherrie Levine's rephotographs hijacked, yet in a sense also liberated, their mediated sources. In other words, the artists' unabashed appropriations and claims of authority over them reminded the viewer that, to a great extent visual culture (which includes advertising and fine art alike) is authored, which is to say actually produced, through a division of labor comprising an array of technicians or "authors." Paradoxically then, early postmodern appropriation artists pirated imagery—thus foregrounding an aesthetics of the "unoriginal" or the "copy" in contemporary culture—yet in so doing, cordoned off an area from which art could, in contrast to the received wisdom of postmodernist theory, continue the modernist project of asserting an "authentic and autonomous" expression outside the restrictions on culture at large increasingly set in place by the legal strictures of copyright. I pointed to the copyright holders of Edward Weston's images recognizing Sherrie Levine's raising of

"legitimate aesthetic issues," as well as Prince's Guggenheim retrospective, as examples of what amounts to an institution of art ultimately rewarding a new, postmodern artist, one who shifts from expressive maker to intellectual "de-constructor." It is this capacity for expression by reorganizing existing materials and appealing to art's discursive function that is registered as an authentic and autonomous enterprise. It appears killing the author is precisely what provided the author with a new lease on life.[2]

I also contended that it was Prince's and Levine's validation as authors, through a system of "institutional para-regulation," that not only led to their critical and commercial success, but also in part shielded them from legal scrutiny. Consequently, some of the most brazen works of appropriation to emerge out of early postmodernist art helped set the stage for its institutionalized practice, which has continued mostly unhindered up to the present day.[3] Only recently have we seen a noticeable rise in contemporary appropriation art's collision with copyright law, and usually for infringements that seem far less objectionable than Levine's or Prince's provocative rephotographs.

Yet, however infrequent, there have been enough instances of lawsuits brought against artists for breach of copyright over the last forty years to merit further examination and likewise plot possible trajectories for the future of appropriation art. The intention of the next two chapters is to attempt just such an analysis and prognosis. While starting with examples dating back to the 1960s, I will eventually

focus on the twenty years following the rise of the Pictures generation: roughly 1988 to 2008. Two copyright infringement cases—each bookending the period and both being arguably the most significant in the rather short history of appropriation art's brush with intellectual property law—will serve as our focal points: in this chapter, artist Jeff Koons's loss to photographer Art Rogers (*Rogers v. Koons*, appeal ruling April, 1992) and in the chapter following, artist Richard Prince's triumph over photographer Patrick Cariou (*Cariou v. Prince*, appeal ruling April, 2013).[4]

If the first chapter outlined the ways in which early postmodern appropriation artists reasserted the author-subject, then this chapter will detail a legal challenge to that reassertion, issued by originating authors whose work becomes the very "raw material" out of which postmodern appropriation artists produced their secondary expressions. In the following pages, then, we will encounter a battle between two modes of authorship. The first disregards a work-centric copyright law, since it diminishes the important of the singular artist/author. The other mode upholds copyright law's focus on the work (including the derivative) as inviolable. But we will also encounter two authorial positions: one born out of the logic of mass-reproduced and widely-circulated representations, the other out of the unique, "auratic" work of art. The categorical distinctions between these two authors become more apparent when we tally those moments in postwar art in which appropriation art has come into conflict with copyright law. This is the chapter's first task. From such a compilation we will identify certain tendencies that will figure in later analyses of *Rogers v. Koons*

(and which will carry over into *Cariou v. Prince)*, with the authorial relationship to mass culture playing an especially significant role.

The chapter's second task is to analyze the ways in which the unauthorized use of intellectual property outside the art world has been both defended in and interpreted by modern courts of law through the employment of copyright's fair use doctrine. Through the study of fair use's common law origins, its "substantial similarity" and "conjure up" tests, and the federal articulation of fair use in the 1976 Copyright Act, we will parse the ways in which the legal system has addressed those instances when newly created works have incorporated varying amounts of a previously copyrighted expression. Consequently, we will discover three overarching models of interpretation employed in legal discourse: the *economic model*, which assesses a secondary work's negative impact on the primary work's market potential as a central deciding factor; the *reasonableness model*, which determines infringement based on the amount (the "essence") that the secondary work takes from the primary work; and, the *transformative* model, which analyzes the degree to which appropriating works generate "new aesthetics and understandings" in their acts of copying.[5] All three models are currently incorporated into fair use's "four factors" test, but its emphasis on the economic and the reasonableness models has ultimately harmed appropriation artists when they've gone before courts of law.

As we consider fair use's balancing criteria, the historical role of parody as a critical device will be introduced, especially as it pertains to *Rogers v. Koons*; long

before appropriation art tested the contours of copyright law, judgments involving parodic music, texts and other expressions established precedents for future decisions involving works that incorporated pre-existing materials. Since parody by definition is a genre that necessarily copies its form from a primary "target" work in order to produce a secondary meaning (indeed, all parody is a form of appropriation, though not all appropriation is a form of parody), the court's handling of cases involving its use as a defense will be particularly revealing. What will become clear is that at best, judgments involving parody have been inconsistent in their reasoning, and at worst, have all but ignored the notion that parody must often borrow significantly (if not entirely) in order to best effect its criticism. Such conclusions do not bode well for contemporary appropriation art; like parody, it too often borrows extensively. And when it has, it has sometimes suffered the consequences.

This leads to this chapter's final task: a reconsideration of the court rulings in *Rogers v. Koons*. Here two of our three fair use models—the economic and the reasonable—play deciding roles, to the detriment of Jeff Koons and his series of wood sculptures at the center of the case. Yet as I hope to show, the dominance of these two models in the Courts' rulings signals the privileging of a mode of authorship as it operates with the logic of mass production. It is not until just after *Rogers v. Koons* that our third fair use model, the transformative, provides a new discursive avenue down which a philosophy of intellectual property may travel. It is this model that I begin to explore with *Koons*, and which I continue with the next chapter in

Cariou v. Prince. But first let us first turn our attention to the last fifty years, when appropriation in art has come into conflict with copyright, precisely at that moment when artists began responding to postwar mass culture by incorporating its visual products into their expressions.

II. Even After the Great Divide, Two Authorial Modes Persist

Predating postmodernist appropriation (or, perhaps, marking its beginning), Pop artists Robert Rauschenberg and Andy Warhol were both threatened with litigation on several occasions.[6] Warhol's silk-screen canvases *Red Race Riot* (1963-4), *Flowers* (1964) and *Jackie* (1964-5) all precipitated lawsuits by photographers Charles Moore, Patricia Caulfield and Henri Dauman, respectively **[PLATES 8-13]**. Rauschenberg's collage print *Signs* (1970) included an image of a bloodied African-American man lying face-down on the pavement during Detroit's 1967 riots, taken by photojournalist Dennis Brack; the artist's *Pull* (1974) took as its primary content an image of a Mexican cliff diver, photographed by Morton Beebe **[PLATES 14-17]**. In each case, the appropriation invoked the legal wrath of the original photographer. Both Warhol and Rauschenberg ultimately settled their disputes out of court by compensating the copyright holders monetarily, as well as providing artworks in exchange for agreement that the appropriated images could continue to be used. In the case of *Pull*, Rauschenberg also agreed to credit Beebe whenever the work would be exhibited in the future.[7]

In 1980 photographer Arnold Newman complained to artist Larry Rivers because of the latter's use of the former's portrait of Picasso in Rivers's 1975 *Homage to Picasso*, with the two eventually "agreeing to work something out" **[PLATES 18 & 19]**.[8] David Salle was threatened with two lawsuits, one in 1987 for incorporating into a painting artists Mike Cockrill's and Judge Hughes's illustration of Lee Harvey Oswald's assassination, and then another in 1989 for using an image taken by photographer Kenneth Heyman as the basis for a theatre backdrop Salle had been commissioned to design. In both cases, settlements were made out of court **[PLATE 20]**.[9]

A decade later, the Mattel Corporation filed suit against artist Tom Forsythe for his series of photographs entitled *Food Chain Barbie*, which depicted Barbie dolls in various compromising positions juxtaposed amongst common kitchen appliances.[10] Mattel claimed Forsythe had infringed Mattel's copyrights, but later courts ruled that the artist's work could be considered parody and thus a fair use **[PLATE 21]**.[11] Also in 1999, the Museum of Contemporary Art in Los Angeles mounted a retrospective exhibition for artist Barbara Kruger that included her 1994 work *It's a Small World But Not If You Have to Clean It* **[PLATE 22]**. For *Small World* Kruger appropriated a picture taken in 1960 by German photographer Thomas Hoepker of a woman named Charlotte Dabney.[12] Both Hoepker and Dabney sued Kruger, the former for copyright infringement, the latter for infringing Dabney's right of privacy. Kruger eventually prevailed over both plaintiffs on a technicality of sorts, with the court ruling that the

artist's use of the image was neither copyright infringement (under German law Hoepker had let his copyright expire, which put the image in the public domain in the U.S.) nor an invasion of Dabney's privacy (Kruger's public, five-story banners were ruled art in and of themselves, and not simply advertising for her show, which needed to be demonstrated in order prove the privacy violation).

Photojournalist Lauren Greenfield sued artist Damien Loeb in 2000 for his appropriation of a photograph of hers in Loeb's 1998 painting *Sunlight Mildness* **[PLATES 23 & 24]**. She filed the suit after Loeb went ahead and used Greenfield's photograph even though she had previously denied his initial request to incorporate it into his work. The painting juxtaposed Greenfield's photo of four Los Angeles teens cruising in a convertible with an image of a South African execution scene. A settlement was eventually reached in 2001, which included monetary compensation to Greenfield and retitling the painting to credit her image as one of its sources.[13]

In October 2003, photographer Andrea Blanch sued the artist central to this chapter, Jeff Koons, for appropriating a fashion photograph she had taken for Allure magazine **[PLATES 25 & 26]**. Koons copied the image of a woman's well-manicured and sandaled feet as part of a large collage painting that photo-realistically depicted other women's feet as well as pastry items set against a pastoral landscape. Claiming his 2000 painting *Niagra* "comments on and celebrates society's appetites and indulgences, as reflected in and encouraged by a ubiquitous barrage of advertising and promotional images of food, entertainment, fashion and beauty,"[14] Koons was able to

convince the court of the necessity of appropriating the advertising image in order to convey his message. Blanch lost with a final appeal ruling in late 2006.[15]

Artist Joy Garnett found herself at the center of a copyright infringement lawsuit in 2004 after exhibiting her painting *Molotov*, which was based upon a cropped version of photojournalist Susan Meiselas's image of a Nicaraguan Sandinista fighter **[PLATES 27 & 28]**. Garnett had found the cropped image as a digital file on a web site that did not indicate Meiselas as the original author. Not knowing its source or its context, Garnett decided to use the image as the starting point for a series of paintings revolving around the myriad connotations of the term "riot." After the painting's exhibition, she received a letter from Meiselas's lawyer stating that a waiver of retroactive licensing fees for use of the image would be granted in exchange for agreement that Garnett would ask permission from Meiselas for any future exhibition of the painting. Garnett refused, though she did remove the image of the painting from her personal web site. It was not removed, however, before news of her predicament filtered through the online arts community, which mirrored the image of her painting across the internet in defense of artistic freedom of speech. Eventually Garnett and Meiselas had the opportunity to meet one another, which included a public airing of the issues involved during a 2006 conference at New York University on copyright and fair use.[16]

In 2007 Playboy Magazine contacted artist Luke Dubois after learning of his 2005 video, *Play*. The work consisted of a re-presentation of every woman's face from

Playboy Magazine's centerfolds over a fifty year period, assembled chronologically and aligned according to custom software code written by the artist. Designed to "speak to the crafted relationship between gaze, desire, and sex object," Dubois intended to "refocus and reflect the gaze back to the viewer, presenting a non-stop sequence of faces staring outward from the frame."[17] After reviewing the video, Playboy determined it to be a threat to its copyrights, and demanded Dubois henceforth refrain from exhibiting it and surrender all copies of the video. Dubois ultimately acquiesced in return for Playboy dropping its claim.[18]

A couple of years later, The Associated Press sued street artist Shepard Fairey for his alleged unlawful appropriation of one of the news organization's pictures of (at that time State Senator) Barack Obama. Without the AP's permission, Fairey used the portrait of Obama as the basis for a political campaign poster that would become one of the most iconic images of the 2008 presidential election **[PLATE 29]**. To preempt a lawsuit and moreover force a legal decision on matters of art and fair use, Fairey's lawyers submitted a request for a declaratory judgement in order to "refute the AP's baseless assertions of copyright infringement finally and definitively."[19] After two years of negotiations and a potential breach of ethics on Fairey's part, he and The Associated Press agreed to a settlement under confidential financial terms.[20]

Another street artist, Thierry Guetta (also known as "Mr. Brainwash") lost two copyright infringement suits against him in May, 2011 and February, 2013, respectively.[21] In the first case, photographer Glen Friedman filed a complaint against

Guetta for his use of Friedman's well-known 1985 image of hip-hop artists Run–D.M.C. Guetta appropriated the image in its entirety from a digital version he had found on the internet, and subsequently reproduced it in several prints and one-off artworks that were sold during his 2008 debut Los Angeles exhibition, *Life is Beautiful* **[PLATES 30 & 31]**.[22] The second case involves the photographer Dennis Morris, and his 1977 photographic portrait of punk musician Sid Vicious, which became the motif for a series of Guetta's works **[PLATES 32 & 33]**. In both *Friedman* and *Morris*, judges concluded Guetta's appropriations were not fair uses. And since May, 2012, Guetta has been embroiled in an infringement case with the estate of the late Jim Marshall, who sued Guetta after he appropriated Marshall's well-known pictures of jazz and rock-and-roll musicians such as John Coltrane and Jimi Hendrix for use in several limited-edition prints **[PLATES 34 & 35]**.[23] The lawsuit is pending.

This list of examples, while collating the more notable (and more often reported upon) cases involving appropriation artists and copyright infringement over the last four decades, is incomplete.[24] Yet we can still draw out some fundamental tendencies from them. First and perhaps most obvious, we have the predominance of photography as the primary medium in dispute. Indeed, as Fredric Jameson has noted, the presence of the photographic image as technical support in postmodernist art is perhaps its defining characteristic.[25] But it is a particular type of photograph that establishes a pattern here: one initially intended for mass reproduction and widespread circulation (this may seem redundant, as photography, by definition, almost assumes

these intentions, with some exceptions, such medical photography).[26] Even more specifically, however, the photographic image to which I am referring belongs to that realm conventionally understood as mass culture, and at times, to what in the earlier part of the twentieth century theorist Theodor Adorno dismissively referred to as the "culture industry," and art critic Clement Greenberg as "kitsch."[27] I will examine the negative connotations associated with mass culture momentarily, but for the time being, let us simply state that this type of photography appears in, among other outlets, magazines, newspapers, postcards, "coffee table" books, and print advertising in general—exactly those places in which the work of each one of the claimants in the above-mentioned lawsuits is found.

In Patricia Caulfield's complaint against Warhol, for example, the image of hibiscus blossoms the artist appropriated was originally reproduced in the June 1964 issue of *Modern Photography*, a trade magazine catering to commercial photographers and general hobbyists.[28] Charles Moore worked primarily as a photojournalist, with his images capturing the civil rights era in the United States being some of the most recognizable in modern American history.[29] Likewise, Jim Marshall's iconic photographs of music culture in the 1960s have been reproduced in magazines, books and over 500 album covers.[30] Dennis Brack, Henri Dauman, Glen Friedman, Lauren Greenfield, Kenneth Heyman, Thomas Hoepker, Susan Meiselas, and Dennis Morris all continue to operate within the domains of photojournalism, celebrity portraiture, lifestyle photography, editorial work, stock photography and advertising through

magazine covers, layouts, portfolios and books that are intended for mass production and circulation.[31] Morton Beebe's diver image is perhaps the most easily recognized as being aligned with mass reproduction: it was printed in several magazines in the early 1970s as part of a set of advertisements for the Nikon camera corporation.[32] Andrea Blanch's picture is a close second, as its title, *Silk Sandals by Gucci*, suggests. And as a news organization, The Associated Press's involvement with the production and circulation of the mass image is self-evident, as is Playboy Magazine's, although for very different reasons. The images Tom Forsythe took for his *Food Chain Barbie* series is the exception in the list, in that Forsyth posed actual toy dolls as the characters in his photographs. Nonetheless, Barbie dolls, as anyone growing up in the United States after World War II can attest, fit unequivocally within the overlap of American culture and mass production.

In describing each of our above claimant's involvement with the mass-produced image, I am also implying a certain economy of image production, sustained to a great extent by photographers and other producers working on a per assignment or freelance basis (recall Jim Krantz from the last chapter) for monetary compensation via licensing and royalties, dependent on the "bundle of rights" (i.e., the right to reproduce, the right to prepare derivative works, the right to distribute works for profit, the right to public display) copyright bestows.[33] We therefore encounter our first type of author—the "mass author," concerned primarily with producing images that circulate as widely—and legally—as possible. The mass author complies with the

rule of copyright law and is inclined to litigate against those who violate it. The mass author's rationale for this is in part, as we recall from the previous chapter's outline of copyright's fundamental premises, that use of an image without permission by secondary authors will harm the current and future commercial distribution of it, thus undermining the economic incentive copyright grants primary authors. This would in turn effectively stifle production in the short term and undermine the progress of visual culture in the long term. In most of the cases mentioned above, settlements and court rulings included monetary compensation to plaintiffs for actual or estimated lost revenues.

Our second observation (as seemingly plain as the first): for the most part, the alleged infringers in each of these cases understand themselves as "artists"—our second type of author—who appropriate mass images in order to produce "works of art" (mostly painting and limited edition prints).[34] My use of scare quotes here is not meant to deride but rather to simply emphasize the rather loaded framing such terms imply. By artist, and works of art, I refer specifically to individuals who produce (usually one-off/unique/scarce) artifacts destined for validation according to a flux of conventions established by artists, curators, academics, critics, gallerists, collectors, appraisers and conservators, all of whom contribute to the maintenance of the institutionalization of art through a system of museums, galleries, art fairs, auctions and other exhibitions spaces, scholarly research and publication, and artists' talks and

other symposia. What I am briefly describing here has been, at least since the 1960s, informally characterized as the "art world."[35]

This institution of art has had a vexed relationship with mechanically reproducible, mass culture since the latter's development in Europe and the United States from the late eighteenth through to the early twentieth centuries. Detailing the complex historical formation of such a relationship is beyond the scope of this chapter. But we can at least grasp its origins through recognizing the author's/artist's growing contempt for "lower" cultural forms (initially in the literary arena), in part as a response to newfound reliance on a consuming public. Such a public developed after the decline of royal and church patronage of art and, with the ascent of early capitalist economies, their replacement by the direct commodification of culture and the creation of various markets often catering to uncultivated notions of taste.[36] During these roughly two centuries, authors, artists and other intellectuals launched determined if intermittent efforts to cordon off art from day-to-day reality in order to resist not only the stagnation of culture produced in the academy but also the standardized and formulaic mass imagery (e.g., picture magazines, advertisements) churned out through mechanical reproduction, with the latter indicative of a burgeoning democratic and techno-rationalist order. The logic of industrial production, seemingly separate from the beautiful and disinterested sphere of bourgeois aesthetics, would increasingly condition the reception of art through media such as photography, film and radio.[37]

Perhaps nowhere is the disdain for both the public's taste in painting and the encroachment of the soulless processes of photography into the domain of art more pronounced than in Charles Baudelaire's review of Paris's Salon of 1859.[38] In his essay Baudelaire lambasts the symbiotic relationship between the unsophisticated masses, "singularly incapable of feeling the joy of dreaming," and the technically adept but creatively lacking Parisian painter, more than willing to accommodate the public's simplistic preferences. For Baudelaire, artists' use of photographic tools only compounded the production and consumption of bad taste in art, transforming painting into pseudo-objective representations at the expense of "true art."[39] Baudelaire laments:

> I am convinced that the badly applied advances of photography, like all purely material progress for that matter, have greatly contributed to the impoverishment of French artistic genius…it is simple common-sense that, when industry erupts into the sphere of art, it becomes the latter's mortal enemy, and in the resulting confusion of functions none is well carried out… More and more, as each day goes by, art is losing in self-respect, is prostrating itself before external reality, and the painter is becoming more and more inclined to paint, not what he dreams, but what he sees. [40]

Baudelaire's commentary thus serves as an early plea for the separation between the "high" sphere of art and the "low" culture of photographic image-making at the outset of modern art history, as artists resisted the industrial processes as well as the logic of the commodity that were gaining prominence at the time.

The insistence on the separation of high art from mass culture gained philosophical maturity from the 1930s to the 1950s in Adorno's and Greenberg's cultural criticism. While their viewpoints were particular to differing historical circumstances, both Adorno and Greenberg shared the demand for a rigorous approach to art that, through further processes of abstraction, might challenge the layman

otherwise acclimated to—even, perhaps, programmed by—the superficial and ideologically dubious formal codes associated with mass culture (advertising, pop music, Hollywood, etc.). For Adorno, the challenge inherent in engaging with serious works of art, the improbability of their being acceptable to status quo sensibilities demonstrated an artistic (and political) commitment that refused the dominant cultural-capitalist order.[41] Likewise, Greenberg's account of modern art's medium specificity and self-referentiality (i.e., painting's subject matter becoming its form—painting concerning itself with the "flatness of painting") also pointed to a desire to purge art of its tendency to merely narrate the external world.[42] Instead, both Adorno and Greenberg advocated for a modern art concerned exclusively with its own internal logic, thus resisting dialogue with everyday languages of representation, which could easily be co-opted in the service of repressive instrumentalization (such as advertising or political propaganda outright).

It may initially seem incongruous explaining the brief history of appropriation art's encounter with copyright law by recourse to modernist notions of high art and mass culture, given cultural and political shifts in the West over the last four decades. In that time, much of the contemporary art world has jettisoned Adorno's and Greenberg's binary orthodoxies in favor of pluralist approaches to the theory and practice of art. The works mentioned above reflect these shifts, running the gamut from postwar neo-avant-gardism (e.g., Warhol, Rauschenberg) through to "classic" postmodernism (e.g., David Salle, Jeff Koons) and then to a pastiche of postmodernism itself (e.g., Fairey, Mr. Brainwash). Indeed, from Warhol forward, much of recent art history has been theorized as a set of aesthetic practices developed, as scholar Andreas Huyssen terms it, "after the Great Divide," with sharp boundaries separating high and low culture being, as we encountered last chapter, irretrievably blurred.[43] This is due not only to the ubiquity of mass culture imagery within the

domain of art (e.g., Pop Art, Pictures Generation) but also the very fluid relationship artists have with commodity culture more generally; within a postmodern condition, the tidy categories I've introduced, "mass author" and "artist," begin to break down. Warhol's celebrity status and various explicit commercial endorsements are the model here; more current examples of the artist's collusion with the mechanisms of mass culture include: reality television show *Work of Art: The Next Great Artist*, in which contestants compete for a cash prize in addition to a solo exhibition at the Brooklyn Museum; artist John Baldessari's iPhone application *In Still Life 2001-2010*; or, Shepard Fairey's enterprising career as a whole, which comprises a mixture of museum/gallery exhibitions, curatorial endeavors, illustration and graphic design, "street art"/graffiti, as well as DJing.[44] It seems over the past few decades that the fusion of art with the culture industry has been so thorough that the former now is often indistinguishable from the latter.[45]

This intertwining of art and mass culture works from the opposite end as well. Further complicating our two authorial categories is the fact that the institution of art —from the International Center of Photography and the Museum of Modern Art, to numerous commercial galleries and other exhibition spaces—have celebrated Morton Beebe, Henri Dauman, Glen Friedman, Lauren Greenfield, Ken Heyman, Thomas Hoepker, Susan Meiselas, Dennis Morris and Arnold Newman at one time or another for their contributions to the field of photography in the postwar period.[46] While this group may not have the "brand recognition" of an Andy Warhol, Jeff Koons or Shepard Fairey, or, in plain terms, derive the majority of their income from the circulation of their work within the art world, nevertheless it would be a disservice to reductively label each of them as "mass authors." Rather, we should accept the complexity and difficulty of any attempt at categorizing cultural producers today based upon either engagement with or refusal of mass cultural forms within advanced

capitalism. It should also be noted that copyright law does not explicitly recognize any sort of high/low distinction in art. Rather it treats art—with a lower-case "a"—as part of cultural production as a whole. Copyright law has, however, implicitly privileged the mass author, a point to which I will return later.

But what has remained more or less consistent throughout a history of twentieth century art up until the present, at least in Western society, is the still autonomous sphere of art itself, ambiguously in dialogue with, but also separate from, mass culture. This is so, as scholar Peter Bürger explains, despite attempts by various avant-garde movements in the early 1900s (e.g., Dada, Constructivism, Surrealism, etc.) to destabilize the institutional status of art. For Bürger, the historical avant-garde challenged art's institutionalization in order to realign aesthetic practice with the praxis of everyday life—in effect unshackling the modern subject from the chains of bourgeois ideology or other repressive regimes of control, and likewise triggering a revolutionary shift in social relations.[47] Furthermore, Huyssen points to the historical avant-garde's enthusiastic employment of the technologies (e.g., photography, film, graphic design) and visual vocabularies (print magazines, advertising) of mass culture towards this social transformation. "By incorporating technology into art," he writes, "the avant-garde liberated technology from its instrumental aspects and thus undermined both bourgeois notions of technology as progress and art as 'natural,' 'autonomous,' and 'organic.'"[48]

Even though, as both Bürger and Huyssen argue, the historical avant-gardes were unsuccessful in their assaults on bourgeois culture—the institution of art ultimately recuperated avant-gardist iconoclasm and displayed its expressions to audiences as evidence of enlightened cultural values—they nonetheless "brought about, without this being their intention, what would later be characterized as postmodernism: the possibility of a reappropriation of all past artistic materials."[49]

Bürger is referring here to the avant-gardist rupture of the "continuous and ongoing process of renewal,"[50] the evolution of stylistic *-isms* based on material forms, that had come to define the historical progression of modern art. This reappropriation included "trivial and mass art" forms as well,[51] as in the case of Dada photo collage, whose technique would be rejuvenated, albeit in a different cultural and political context, by Pop Art.

Bürger is well-known for a view that criticizes postwar neo-avant-gardism as essentially the neutered re-staging of historical avant-garde strategies.[52] But his use of the term "reappropriation" above is important, for it establishes a continued antagonistic project between the historical and neo-avant-gardes. Granted, the debates surrounding intellectual property law now were almost certainly not in the general consciousness of artists in '20s and '30s. But by forcing the reconsideration of materials that might be legitimized as art, the historical avant-garde also naturalized the appropriation of private property for artistic purposes. In other words, in the name of art, a kind of "stealing" became permissible.

Contemporary appropriation art is, then, an amalgam formed through a dialectical engagement with the forms of mass culture. On the one hand, it exists within the historical framework of an institution of art premised upon a rhetoric of autonomy. Furthermore, even with a discourse of postmodernism and art practiced "after the great divide," the art world maintains a hierarchy of authors, with those who work primarily within the channels of mass culture and its wide reproduction of photographic images relegated to a secondary position in relation to those who appropriate the same imagery in works that seemingly fulfill the "higher purposes" of art. Here, the appropriating artist views the mass author not as an independent or expressive creative producer, like herself, but merely as a mute servant of the culture industry, whose copyrights can therefore be ignored. As Joy Garnett describes her

appropriation of Susan Meiselas's rebel fighter: "All of my paintings are based on photographs…I searched the Web for images of figures in extreme emotional or physical states. I saved the most promising images in folders on my computer desktop, and I let them sit for a while so I could forget where I found them."[53] Or, perhaps more frank in tone, Richard Prince's 2007 statement, before Patrick Cariou's lawsuit: "I never associated advertisements with having an author."[54]

On the other hand, the act of incorporating mass-produced images in art still contains at its core an element of avant-gardist meta-criticism of the entrenched commodification of culture. Viewed from this perspective, appropriation art is less a gesture against culture industry particularities than antagonism towards the overall commodification process and the attendant legal restrictions increasingly attached to it (i.e, the art's critique is one of "form" rather than "content"). Additionally, appropriation of intellectual property in contemporary art continues avant-gardist disruption of the labor norms of creativity. Just as Duchamp undermined the notion of artistic skill by foregrounding intellectual labor as the basis of art, so too have appropriation artists today challenged the preconception of the manual labor involved in creative production. And such a challenge takes on further weight as labor value is correlated with economic value. This explains why the accusation of "stealing" is often leveled at appropriation artists: they don't perform the "work" necessary to make their art, but instead opt to copy someone else's (such as the images a commercial photographer takes). Of course works of art, distinct from mass-produced forms in their unique and precious qualities, are often the most expensive of cultural commodities, which, while not completely foreclosing such a critical stance, certainly strain it. As we shall see with the *Koons* case (as well as the *Prince* case in chapter 3), part of the defense's difficulty rested in the fact that the artist is among the most commercially successful today.

So far I have laid out claims in this section by emphasizing the importance of appropriation as it pertains to a political economy of cultural production. But there is also a moral dimension at play here in our rift between mass author and artist. This is to say that claimants, more than litigating solely on the basis of lost revenue, often feel that appropriation isn't, on principle, "right" or "fair." Yet there is a more subtle position being taken in such a moral standard, having to do with the desire to retain stable meaning in the photographic image. Despite the rhetoric of postmodernist destabilization of the image-sign over the last few decades—to which I shall return in chapter 3—and its pointing to the fact that photography, however objective, can only be, itself, an interpretation of reality, vestiges of the effort to fix meaning in the photographic event remain.[55] "There is no denying in this digital age that images are increasingly dislocated and far more easily decontextualized," writes Susan Meiselas, in her rebuttal to Joy Garnett's explaining why she appropriated the image of the Sandinista for *Molotov*. "Technology allows us to do many things, but that does not mean we must do them. Indeed, it seems to me that if history is working against context, then we must, as artists, work all the harder to reclaim that context. We owe this debt of specificity not just to one another but to our subjects, with whom we have an implicit contract."[56] And as one commentator observed, regarding *Cariou v. Prince*, "It irks [Cariou] that the images were used out of context, 'he (Prince) made them look like zombies, it's a racist piece of art.'"[57] Thus even in one of our primary cases, there was more involved than simply a plaintiff's claim of financial hardship; the "implicit contract" with the photographed subject—in Cariou's case Rastafarians, as we'll see next chapter—had been broken.

In this section I have attempted to show that the recent history of appropriation art's entanglements with copyright law exposes the continued tension between two authorial modes, the mass author and the artist, in place since the division between art

and mass culture at the outset of the modern era. Formed by different relationships to the modes of cultural production over the past two centuries, the mass author and the artist each adhere to fundamentally different creative philosophies. Their adversarial relationship persists despite the acceptance of photography into the domain of art in the twentieth century, especially with the rise of postmodernist cultural practices and the broadening of previously delineated authorial roles.

Copyright law attempts a mediation between our dueling authors, as we shall see in the next section. There we will take momentarily leave of discussion of appropriation art per se in order to analyze the legal doctrine those accused of intellectual property infringement have often employed as a defense: fair use. Through charting the historical development of fair use in copyright law, we'll discover that the doctrine is structured by both economic and moral considerations. This ultimately has had the effect of reaffirming the dichotomy between mass authorship and art, and, in my estimation, privileging the former while casting doubt on the agency of the latter.

III. The Economic, Moral and Transformative Aspects of the Fair Use Doctrine

In the first chapter I described some of the fundamental changes to copyright law set into motion with the passing of the Copyright Act of 1976 but I omitted the 1976 Act's arguably most significant addition, the articulation of the doctrine of fair use. The concept of "fair use," as it is conventionally understood, recognizes that in the production of culture and the communication of ideas there will arise circumstances when the use of copyrighted materials by secondary authors without permission should not only be tolerated but, moreover, encouraged. Such allowances fulfill copyright's fundamental directive, which is to "stimulate activity and progress

in the arts for the intellectual enrichment of the public."[58] Fair use, as Second Circuit Court of Appeals Judge Pierre Neval states, is the legal mechanism acknowledging that "all intellectual activity is in part derivative," and that "there is no such thing as a wholly original thought or invention."[59] Overprotecting authorial rights—treating them as absolute property entitlements rather than limited rights for the encouragement of building culture—would stifle the very processes copyright was enacted to protect. But what's the difference between "fair use," which should be legally protected, and derivative use, which constitutes an infringement of copyright law? In order to answer to this question, we first need to understand fair use's origins.

The criteria for fair use has shifted substantially over the last three centuries, extending all the way back to England's first copyright law, the Statute of Anne of 1710.[60] During the eighteenth century, English copyright litigation primarily concerned book publishing. As legal scholar Matthew Sag notes, abridgment (the shortening of lengthy texts into more digestible versions) was a common if occasionally contested practice.[61] Copyright's scope at that time was much narrower by comparison to today's standards, with authors granted rights essentially only to the exact and entire reproduction of their books. This is to say that copyright was understood more as a limited publishing privilege; abridgments, translations, adaptations or compilations of already-existing texts were generally considered to be independent works of their own and furthermore a utility to public learning, and thus "fair."[62]

For the next one hundred years, various court cases brought by litigants claiming copyright infringement sorted out "bonafide" abridgments from those that only "colorably" altered texts merely to duck the prohibition against verbatim copying.[63] To aid in such determinations, judges gradually implemented a set of distinctions that might help guide otherwise very context-specific disputes. These distinctions addressed the amount and purpose of copying between the original and secondary text; the market impact on the original by the secondary text; and, how much the secondary text built upon the first, resulting in a new or enhanced use. For example, if it were determined that there was excessive copying between texts, it could also be reasoned that the potentially infringing work could therefore serve as a market substitute for the original, thus likely depriving the primary author of hard-earned income (i.e., abridgment or adaptation as piracy). Yet if the copying was more restrained, further investigation had to be made in order to ascertain whether it was of the most essential portions, with the effect of either supplanting the original or creating a work with a different purpose. Conversely, lack of any obvious correspondence between texts often dovetailed with the determination that secondary authors instead had added their own creative interpretations during the abridgment, translation or compilation process. Indeed, that secondary authors might inject their own "labor, judgement and learning" in the act of borrowing, yielding a new or improved work, would almost certainly grant them exemption from infringement.[64] And this might be the case even in more severe instances of copying—for example in

abridgments that borrowed heavily but nonetheless, in their creation, exhibited the "fair exercise of a mental operation" that served a different purpose (and market).[65] Such uses, despite possible economic injury to the plaintiff, were thought of as beneficial to the public and thus overrode an infringement claim. In sum, practically since the passing of the first copyright law, there has been a philosophy of fair use that has co-evolved alongside it. Yet we should continue to be mindful that in the eighteenth century, the practice of abridgment and the like, anything short of exact copying, was for the most part both legally and morally acceptable.

These fair abridgment guidelines carried over into American copyright law as well. The ruling in *Folsom v. Marsh* of 1841 is often cited as the origin point of the fair use doctrine in the United States.[66] The case involved a dispute over excerpts from George Washington's collected letters that the defendant used in a biography of the President, which the plaintiff had previously published as a multi-volume set. In making his determination, Justice Joseph Story laid out several fair use considerations, writing:

> In cases of copyright, it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions; whereas, in other cases…we must often…look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[67]

Taking into account the nature, type and amount of copying, and, importantly, any negative impact on the plaintiff's market, Justice Story ruled in favor of plaintiff Folsom.

The finding against the defendant in *Folsom v. Marsh* is ironic inasmuch as Story's ruling is often pointed to as the basis of our modern fair use doctrine, and likewise an elaboration of what is generally regarded as one of the major legal mechanisms that guards against copyright protection's over-expansion.[68] Yet as legal scholar Oren Bracha explains, Story's enhanced criteria had the effect of actually enlarging the scope of copyright. "Formerly, infringement was limited to near-verbatim reproduction and all other subsequent uses were considered legitimate," writes Bracha. After *Folsom v. Marsh*, "all subsequent uses became presumptively infringing unless found to be fair use."[69]

To understand this expansion and the idea that subsequent uses were presumptively unfair, we have to not only examine legal decisions but also revisit the changes in general attitude towards authorial rights in the second half of the nineteenth century. From chapter 1, the reader will recall that this period witnessed a decoupling of the author from the "work" (i.e., the author's actual, physical expression, at this point in book form) with the latter superseding the former as the central determining consideration in copyright. This separation revolved around the commodification of culture and the rise of a more complex system of markets, and the degree with which derivative cultural offerings exploded the narrower notion of "original" expressions. Sag provides another dimension to this shift within the context of our fair use discussion thus far, by suggesting that, through the earlier defense of their copyrights against abridgments, authors eventually came to realize the inherent market value of

derivatives of their own works.[70] This tendency developed alongside a steady move away from conceptualizing copyright as merely a publishing privilege and towards more of a sovereign property right over an intangible "intellectual object" or "essence that could take a manifold of concrete forms" (i.e., not simply a single book, but other versions with similar content).[71] George Ticknor Curtis, one of the United States' prominent lawyers and legal theoreticians in the mid-nineteenth century and an early pro-author advocate, sums up the logic of expanded authorial rights in the age of nascent derivative markets. "However imperfectly the subject may have been regarded in former time," he wrote in 1847, "it is now…to be regarded as settled, that whatever is metaphysically part or parcel of the intellectual contents of a book, if in a just sense original, is protected and included under the right of property vested by law in the author."[72] In summary, we encounter a three-part shift: 1) from copyright's focus on the "originality" of the author to the "originality" of the work; 2) with such refocus, primary authors realizing the economic value of secondary derivatives (previously conceived by law as works in their own right); 3) a call by primary authors for a broadening of their rights to include the intellectual "substance" of their works, which would cover derivatives and thus prevent secondary authors from exploiting variations of of primary works.

From the latter half of the nineteenth century and into twentieth, attitudinal shifts eventually resulted in change to statutory law. Revisions to United States copyright in 1870 granted authors the additional right "to dramatize or to translate

their own works,"[73] and in 1909 copyright law was again modified, allowing authors to

> translate the copyrighted work into other languages or dialects, *or make any other version thereof*, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.[74]

With these changes, the practices of abridgment and translation—so prevalent in the 100 years prior—were essentially abolished. Instead, copyright awarded authors a "broad set of powers to dominate numerous aspects and uses of the intangible object of property."[75] The full capacity of the derivative was finally codified, as I recounted in chapter 1, into the Copyright Act of 1976 with its expanded coverage of expressions that are "recast, transformed, or adapted" from their originals.

Taking into account, then, the enlargement of author's rights, Story's articulation of fair use procedures subsequently served as a guide not so much for shielding but rather scrutinizing possible infringements, opening them to "qualifications and uncertain inquiries."[76] This scrutiny of secondary uses was symptomatic of an economy-centric feedback loop. That is, the drive to secure all value for the cultural work in a blossoming field of derivative markets prompted a reconsideration of that work as an abstract creation that could take on myriad forms. Consequently, multiple forms of the same intellectual "essence" intensified efforts to reconsider untapped markets as derivative ones, ready for exploitation by the original work.[77]

Even still, as Bracha points out, fair use consideration rested primarily on actual or possible commercial harm to the copyright holder. Thus, determining copyright infringement depended on an *economic model* of fair use, irrespective of the actual content of the borrowings. In other words, courts were less concerned with what secondary authors were trying to communicate than with the substituting effects their secondary works had on the primary work's market). The first of three models of copyright I will be discussing, the economic variant in the late nineteenth and early twentieth centuries is particularly important, for it allows room to contemplate a type of cultural expression that often appropriates extensively from an original source (implying a proclivity towards market substitution), but that nonetheless has neither the intention nor effect of supplanting commercial use: parody.[78] Long before the rise of any discourse of the readymade or appropriation in modern and postmodern art, parody as a critical device played an important role in the voicing of democratic dissent in emerging American culture.[79] While not the same thing,[80] both parody and appropriation in art share the formal tendency of often borrowing wholesale from primary sources in order to activate their meaning. Understanding how courts in the U.S. have treated copyright cases involving parody can thus help in our understanding of the legal challenges faced by contemporary appropriation art in general, and *Rogers v. Koons* in particular.

The earliest American parody infringement cases were argued within the first decade of the twentieth century. They concerned vaudeville performers impersonating

then-popular singers through the appropriation of portions of their songs.[81] At the time, courts found that where the alleged infringements constituted little or no commercial threat, and were moreover potentially valuable social expressions, they were fair uses. We can surmise, therefore, that the economic model continued to hold significant sway in the court's rulings. Yet, as scholar Charles Goetsch argues, these early examples should be regarded as anomalies—and perhaps not even as parodies in the strict sense—insofar as each decision hinged in part upon how little of the plaintiff's songs each defendant used in their mimicry (with the implication that the more taken, the more likely the secondary work might substitute the original).[82] More rigorous tests of the legal fitness of parodies that appropriated more fully from their targets would not occur for several decades.

From the mid-1950s through to the mid-'70s, U.S. courts increasingly assessed infringement cases by focusing on the amount of content parodists had taken from a protected source. How much of the source material secondary authors appropriated, irrespective of market substitution factors (and even if there were none) thus introducing a new, *reasonableness model* to fair use.[83] During this period, several District and Appeals Court rulings treated parody more or less as any other "substantially similar" appropriation.[84] Conceiving of extensive copying as intuitively unfair, courts ruled against parodists when they borrowed more than what was necessary in order to reasonably "conjure up" their originals. Even while recognizing that parodies are by their very nature expressions that copy in great amount, judges

nonetheless imposed a threshold on such borrowing by mandating that parodists use only what is absolutely necessary in order to remind audiences of the originating expression.[85]

Perhaps the most conspicuous example of courts employing the reasonableness model and its conjure-up standard is found in the District and Appeals Court decisions in *Walt Disney Productions v. Air Pirates*.[86] The dispute began when, in 1971, the Disney corporation filed suit against a band of Bay Area cartoonists known as the Air Pirates, for publishing two comic books that year depicting Mickey and Minnie Mouse, as well as other Disney characters, engaging in various illicit activities such as sex and smoking marijuana. The narratives in both comics were intended to lampoon what the Air Pirates considered to be the wholesome but conformist values Disney foisted upon American public consciousness. As such, the defendants argued, the cartoons were fair use. And yet, despite the fact that the Air Pirates' publications were sold through smoke shops and adult book stores and therefore did not compete with Disney's marketing towards children, and even with Disney unable to demonstrate to the court that the Air Pirates were causing specific financial harm to its franchises, judges nonetheless ruled the parodists had exceeded the copying threshold. "The essence of this parody did not focus on how the characters looked," the Appeals Court's decision states,

> but rather parodied their personalities, their wholesomeness and their innocence…arguably defendants' copying could have been justified as necessary more easily if they had paralleled closely (with a few significant twists) Disney characters and their actions in a manner that conjured up the

> particular elements of the innocence of the characters that were to be satirized…here the copying of the graphic image appears to have no other purpose than to track Disney's work as a whole as closely as possible.[87]

Thus the Judges in *Walt Disney Productions v. Air Pirates* ruled that while the defendants had altered the imaginary psychological or social space within which Disney's characters interacted from an innocent to a debauched one, they failed to transform the physical appearance of the characters themselves, instead using them in their popularly-known form, which militated against a finding of fair use. In 1980, after years of continued injunction attempts, appeals and contempt charges—not to mention substantial attorney's fees—Disney agreed to drop the matter while the Air Pirates agreed not to draw more counter-cultural versions of the entertainment company's cartoons. [88]

Aside from what some commentators have noted, in retrospect, to have been "veiled attempts by judges…to vent their outrage at mimicry that they consider[ed] tasteless and offensive," the rulings in *Walt Disney Productions v. Air Pirates* and other similar cases at the time indicate that the reasonableness model has essentially acted as a mechanism privileging the moral rights of primary authors.[89] I explore the moral rights aspect of copyright in more detail in chapter 4, but at the very least we can establish here a similar philosophy between fair use's reasonableness model and, as I described in the previous section, the inclination of some authors to safeguard the semiotic integrity of their images through infringement litigation. The reasonableness model thus infers an author-centric view of copyright. Yet even from a point of view in

which copyright is conceived a work-centric, comparative analysis yields the same result: there is a limit to how much a secondary work can copy from its primary source. If history is any indication, it appears modernist insistence on the stability of images extends in copyright jurisprudence from the plaintiff to the bench.

Yet in describing either the economic or moral dimensions of fair use determinations in the second half of the twentieth century, I should be careful not to place too much emphasis upon them. Today's copyright law is imperfect, but it cannot be reduced to an either/or equation. Since the *Air Pirates* lawsuit, courts have increasingly come to recognize parody as a "productive" and therefore legitimate fair use, aided in part by a multi-pronged approach to the doctrine incorporated as statutory law in the Copyright Act of 1976.[90] Up until that point, judge-made law (i.e., "common law") determined the boundaries of the fair use defense.[91] With the 1976 Act, Congress codified fair use federally, and furthermore furnished a set of guidelines, known as the "four factors," for consideration in fair uses cases. Borrowing heavily from Justice Story's opinion in *Folsom v. Marsh* more than a century earlier, the fair use clause in the 1976 Act reads:

> The fair use of a copyrighted work…for purposes such as criticism, comment, news reporting, teaching…scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work…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.[92]

Congress intended the fair use clause to function as a general framework, and not as a strict set of rules "frozen" into the statute.[93] Thus judges today are tasked with interpreting the four factors holistically, and may, furthermore, add their own criteria on a case-by-case basis.[94] In keeping with this approach, consideration as to whether any copying in question was done for profit or non-profit purposes should not signal that for-profit uses are presumptively unfair and non-profit uses fair. Likewise, copying substantially—taking the bulk of a given source—does not preclude a finding of fair use, nor does only minimal copying guarantee it. Rather, all four factors are to be weighed in relation to one another in order to develop a comprehensive determination in what are unique circumstances.[95]

After the 1976 Act, fair use's economic and reasonableness models became just two factors—specifically factors three and four, the "amount used" and the "market effect"—to be measured in an overall infringement calculus. But it is Second Circuit Court of Appeals Judge Pierre N. Leval's influential 1990 treatise "Toward a Fair Use Standard" that further attenuated their importance, and moreover established a new, *transformative* model of fair use.[96] In criticizing the idiosyncratic and inconsistent opinions handed down by courts (including his own) throughout the modern history of fair use, Leval sought to bring the doctrine back into alignment with copyright's core principle: "to stimulate activity and progress in the arts for the intellectual enrichment of the public." While taking measures to insist that fair use not

be reduced to a singular logic (i.e., amount of copying as well as market impact should continue to inform any ruling), Leval nonetheless argued that assessing whether or not secondary uses could be shown to be *transformative*—"[adding] value to the original…in the creation of new information, new aesthetics, new insights and understandings"—should be of primary importance.[97]

It is with the United States Supreme Court's 1994 ruling in *Campbell v. Acuff-Rose Music* that the transformative model of fair use entered into mainstream copyright jurisprudence.[98] The case involved Miami hip-hop artists 2 Live Crew, who copied portions of Roy Orbison's classic 1964 tune *Pretty Woman* in order to produce their own raunchy, parodic version. 2 Live Crew sampled *Pretty Woman*'s main guitar riffs, and also copied the song's overall structure. Orbison's publisher Acuff-Rose Music sued for copyright infringement, claiming 2 Live Crew's parody fair use claim was not applicable because their song was made with for-profit intentions within the pop music market. The Supreme Court Justices disagreed, however, ruling that "parody has an obvious claim to transformative value…the 2 Live Crew song 'was clearly intended to ridicule the white-bread original' and 'reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences.'"[99] Significantly, the Court also established 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."[100]

Such a ruling, handed down from the highest court in the land (though specific to parody in popular music), would seem to herald an enhanced view of fair use within copyright, one in which the transformative potential of appropriation as a mode of cultural expression is awarded wider latitude. Indeed, in the years following *Campbell*, two lawsuits mentioned earlier—*Mattel Inc. v. Walking Mountain Productions* and *Blanch v. Koons*—were decided in favor of artists Tom Forsythe and Jeff Koons, respectively, with the judges wrapping their decisions within a rhetoric of appropriation art's transformative value. "By developing and *transforming* associations with Mattel's Barbie doll," the Appeals Court judges in *Mattel* declared, "Forsythe has created the sort of social criticism and parodic speech protected by the First Amendment and promoted by the Copyright Act."[101] And in *Blanch*, the Court stated, "The painting's use does not "supersede" or duplicate the objective of the original, but uses it as raw material in a novel context to create new information, new aesthetics, and new insights. Such use, whether successful or not artistically, is *transformative*."[102]

But the law has not always treated appropriation art kindly, and it is here we may conclude our discussion of the historical development of fair use in order to look more closely at how the doctrine was applied in *Rogers v. Koons*. In examining the case in more detail, it becomes clear that while Jeff Koons sought to contextualize his art within a tradition of appropriation's "transformative" value in modern art, his defense strategy nevertheless failed to convince judges who had not yet embraced the

new model of fair use. This had the effect of keeping the court's decision within a fairly conventional hermeneutics of parody (and its difference from satire). In my estimation, Koons's sculpture is not a parody, but it is no less transformative for it not being one (i.e., parody only constitutes one way in which copyright protected material might be creatively "transformed"). And while the final ruling against Koons may have unsettled some in the art world at the time insofar as it cast doubt upon a technique so intrinsic to postmodernist art, its application was in a sense delimited by its particularity, and thus deferred the question of appropriation art's general status under the law. It is this deferral that will be addressed in the next chapter in *Cariou v. Prince*.[103] For the time being, let us focus on the manner in which Jeff Koons sought to persuade the courts of his appropriation of a mass-produced postcard in order to assemble a series of limited edition fine art sculptures.

IV. String of Lawsuits

In October 1986 Jeff Koons began production on a series of twenty sculptures under the theme *Banality*.[104] It marked the first time Koons would realize a set of works without depending entirely on ready-made objects.[105] Instead, the artist commissioned Italian and German artisans to fabricate a set of porcelain and wood sculptures that, while alluding to the disposable kitsch trinkets of modern consumer society, displayed handiwork reminiscent of craft skills associated with pre-industrial production. Through the *Banality* series Koons sought, on the one hand, to align

himself with the Duchampian legacy by injecting the low-brow aesthetics of mass culture into the domain of high art, while on the other, to problematize the efficacy of such a strategy by foregrounding production values (e.g., the hand-made wood detailing and paining) associated with the ornate, precious and scarce. For Koons, the series was uplifting, even spiritual.[106] It represented, as scholar Katy Siegel states, the "dimming of an old definition of culture, and its replacement by an unashamed, affirmative vulgarity, an opulent populism."[107]

The critical messaging within Koons's work has often been a point of debate, and nowhere was it more put to the test than in a salvo of copyright infringement lawsuits launched against the artist after he exhibited the *Banality* series in 1988.[108] In each case, plaintiffs accused Koons of blatantly exploiting their intellectual property without permission in order to realize his set of highly polished (and highly priced) sculptures. And it was the first suit, filed by Art Rogers in late 1989, that set the tone for the others.[109] Rogers, a photographer, claimed that Koons had unlawfully used his 1980 black-and-white photograph of a married couple posing with a litter of eight German Shepherd puppies—Rogers titled it simply *Puppies*—as the basis for a life-sized polychromed wood sculpture depicting the same subject, which Koons titled *String of Puppies* **[PLATES 36 & 37]**. Indeed, in the discovery phase of the case, it was revealed that Koons had purchased a postcard of Rogers's photo in 1987 at a "tourist-like card shop"; that he had torn Rogers's copyright notice off the card before forwarding it on to his fabricators; that during the production process, Koons

repeatedly instructed them to craft the sculpture exactly "as per the photo"; and, that he sold all three *String of Puppies* sculptures in the edition for a total of $367,000.[110]

Despite the acknowledgment that he directly copied the original image, and the seeming audacity of his actions, Koons argued in his testimony that *String of Puppies* exemplified the venerated avant-gardist position that "the mass production of commodities and media images has caused a deterioration in the quality of society [and] 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."[111] Koons's lawyers thus defended *String of Puppies*'s tongue-in-cheek garishness as a parody of a society overwhelmed with kitsch consumerism, which was exactly the type of expression for which copyright's fair use doctrine was designed, i.e., as a form of social commentary. In essence, *String of Puppies* embodied Koons's right to free speech.

Neither the District Court nor the Second Circuit Court of Appeals agreed. In their view *String of Puppies* failed to satisfy the basic definition of parody.[112] According to his own explanation, the courts pointed out, Koons used Rogers's image as the vehicle for a satire of consumer society in general but did not specifically criticize *Puppies* itself. Parodies are typically recognized and appreciated precisely when their viewers are able to differentiate between the source expression and its ridiculing copy; it is the contrast between the two that provides critical if comedic resonance. Because Rogers's photograph was not the clear target of Koons's attempted

parody, there was no need to conjure it in the first place; any arbitrarily chosen "commodity object" refashioned in Koons's neo-kitsch style could have sufficed. As the Circuit Court concluded, "If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use—without insuring public awareness of the original work there would be no practicable boundary to the fair use defense."[113] A ruling in Koons's favor would therefore set a a dangerous precedent for the future of fair use. Ultimately, *String of Puppies* was ruled a derivative work; Koons's other lawsuits resulted in the same outcome.

It is important here to set the *Koons* rulings, first handed down in late 1990 and then again, on appeal, in early 1992, in relation to the discourse of the transformative model of fair use introduced by Judge Leval at around the same time. Given that neither the term "transformative" nor any concept similar to it appears in either decision, it is not unreasonable to conclude that the courts at that point had not yet adopted the new model.[114] Indeed, their rationale rejected any claim to "a higher or different artistic use"—implying a rejection of appropriation art's capacity for generating "new information, new aesthetics, new insights and understandings," and instead relied upon a combination of the accepted economic and reasonableness models of fair use. Denying Koons's parody claim, the courts in turn opined that the artist's sculpture was too substantially similar to Rogers's photo. "Here," the Circuit Court stated,

> the essence of Rogers' photograph was copied nearly in toto…it is not really the parody flag that appellants are sailing under, but rather the flag of piracy…We find that no reasonable jury could conclude that Koons did not exceed a permissible level of copying under the fair use doctrine.[115]

And such piracy, the courts furthermore maintained, would injure Rogers financially. The District Court concluded that finding *String of Puppies* to be a fair use would undermine Rogers's ability to sell "art rendering rights" for his photograph in the future, while the Appeals Court felt that were Koons to prevail, there would be nothing to prevent him from commercially exploiting derivative images of his own sculpture, which could interfere directly with the market of Rogers's original postcard. [116] Both scenarios, however, seem unlikely. It's difficult to envision widespread, unauthorized use of Rogers's photos by emboldened artists following a decision in Koons's favor, especially given that, according to court documents, Rogers had previously expressed no interest in an art rendering rights market.[117] Moreover, while it may be possible to imagine a setting—say, the Museum of Modern Art's gift shop—in which Rogers's black-and-white postcard would have sat on the same rack alongside a color postcard of Koons's sculpture, in retrospect we should question the reasonable expectation of such a possibility. It's more likely that any image reproductions of *String of Puppies* would have appeared as ephemera other than postcards, such as in an artist monograph or exhibition catalog, which would not have negatively impacted the market for Rogers's original photo.[118] Yet neither past conduct not future intention figured into the judges' rulings. Rather, merely the recognition of

potential markets in the abstract regardless of further context determined their decision.

Thus the District and Appellate Courts' rationale in their employment of the economic model of fair use thus reminds us that legislators forged the 1976 Copyright Act as a "democratic" leveler, insofar it does not distinguish between different types of authors (i.e., mass author, artist) producing for different types of markets.[119] However, that the judges focused upon the amount Koons had appropriated and its potential detriment to Rogers's derivative market opportunities, and furthermore failed to consider the context—the institution of art—within which the artist's sculptures operated, is troubling. It demonstrates that at this time, copyright law jurisprudence, while seeming to provide equal treatment to authors in general, assumed that their natural trajectory would be the logic of derivative commodity and mass production that, as I described earlier in the chapter, has formed the core of both copyright law and the doctrine of fair use from their very beginnings. The Courts did not take into any real consideration the notion that *String of Puppies* existed as a limited edition of sculptures executed, in some respects, in order to comment upon the very cultural status of the mass-produced commodity object.

To help further elucidate the Courts' stance on the reasonableness of Koons's appropriation—how it was deemed an act of "piracy," we should also consider the disparity between the sober, critical rhetoric his defense team employed during the case and the positive, self-actualizing "philosophy of kitsch" the artist espoused in his

promotion of the *Banality* series upon its initial public exhibition. Contrasted with a parodic positioning judgmental of the banal-kitsch commodity form responsible for the "deterioration of society," Jeff Koons stated, at the launch of the *Banality* series,

> I do not start with an ideal that is elevated above everybody. I start with an ideal down below and give everybody the opportunity to participate and move together…it's about embracing guilt and shame and moving forward instead of letting this negative society always thwart us.[120]

If we take Koons at his word, however vague or lofty it may be, then it seems that rather than criticize kitsch through parody, he instead indicates here an intention to lift it, redeem it, *transform* it, into the realm of high art. For some art historians or critics, such an intention might seem disingenuous (an accusation often leveled at Koons). While the artist might have proposed that, in the realm of high art, the "lifting up" of kitsch aesthetics is a provocative gesture, the idea that kitsch is a debased form of culture is highly conventional in the art world at this point in time, due in no small part to the history of appropriation strategies in twentieth century art.[121] Nonetheless, by arguing parody, Koons attached himself to the necessity of having to conjure up Rogers's original in the mind of the viewer. The parody defense was thus, in retrospect, misplaced, though not for the reasons elucidated by the judges. That is to say, *String of Puppies* can be read less a parody of kitsch than an ironic satire of the institution of art itself, and likewise no less—at least before the eyes of the law—transformative. This distinction is vital, for it establishes the notion that appropriation art's transformative value need not be restricted to the critical device of parody, but

may include, as Judge Leval wrote in 1990, "symbolism, aesthetic declarations, and innumerable other uses."[122]

Perhaps Koons's lawyers felt a parody claim, given its legal precedent in modern copyright law, would have made for a stronger defense than an appeal to the transformative capacity of appropriation. By the same token, it is not at all certain judges would have been better persuaded by what would have been, at that time, a novel approach to fair use. But even after his appeal loss, Koons maintained his claim to *String of Puppies*' transformative effect: "It was only a postcard photo and I gave it spirituality, animation and took it to another vocabulary."[123] Setting aside Koons's sense of self-importance, we can, at the very least, note that his "doublespeak"—the seeming simultaneous celebration and critique of commodity fetishism—typifies not only Koons's approach to art in particular but also the slipperiness of determinate meaning that has been a hallmark of postmodern aesthetic theory. It is also an instability that, as I mentioned earlier on, has sometimes frustrated both producers of original works and a legal system that attempts to embrace context and nuance but is ultimately based on "objective," bright-line rules. Here, Koons's parody claim allowed the courts entrance into the murky territory of artistic subjectivity, supplying them with a set of "stable" parameters (i.e., parody and satire as they are traditionally defined) against which artistic intention could be measured. Because of the specificity of Koons's defense strategy, the courts did not (indeed had no obligation to) provide any further guidance that might help delineate the contours of fair use as it applies to

appropriation art beyond the scope of parody, thus leaving unanswered the question as to whether appropriation, in all its contemporary permutations, is a legally viable aesthetic practice. Such a question would rise once again in 2008 with Richard Prince's *Canal Zone* series of paintings, to which the next chapter is devoted.

While the transformative model of fair use is explored more fully in the next chapter, a note should be made here about the difficulty with copyright law granting leniency to appropriation art that is deemed "transformative." As well-intentioned as Judge Leval may have been at the time he wrote his influential treatise, his criterion—transformative works are those that create "new information, new aesthetics, new insights and understandings" is vague at best, and leaves wide room for interpretation. Furthermore, Leval's assertion that transformative cases include parody but also "symbolism, aesthetic declarations, and innumerable other uses" does little to clarify the distinction between "transformed" derivatives and "transformative" (and thus original) secondary works. Does simply modifying elements of an original work, and putting it into an art context, make it transformative? Parody, at least, can be said to have some relationship to a general audiences (i.e., is intelligible as a form of debate or critique of society). But this is not necessarily the case in appropriation art, which justifies its borrowing mostly to an art world elite, even as it claims fair use in the name of enriching the public. The key questions are therefore: for whom is appropriation art claimed to be transformative, and, crucially, who decides how it should be interpreted? What for Jeff Koons was clearly a transformative work of art

was, for Art Rogers, merely a derivation of his puppies photograph, containing no new insights or understandings. Ultimately judges agreed with Rogers. However, are they the most qualified to make such decisions?

V. Conclusion

In this chapter I have attempted to map postmodern appropriation art's early entanglements with copyright law using two sets of coordinates. One set placed appropriation art within a lineage connecting it to modern art's evolution as an autonomous aesthetic project through the process of its own institutionalization. It is through this tracing that I put forward the "mass author" and the "artist," each historical subjects existing in reaction to the emergent commodification of culture at the outset of modernity. I argued that although the boundaries separating these two figures has become increasingly porous particularly in the postwar period, they nonetheless remain, especially where copyright infringement litigation is concerned. I thus introduced these two authorial categories in order to establish positions within what I would subsequently plot as the second set of coordinates, that is, appropriation art in relation to the development of copyright's fair use doctrine and its economic, reasonableness and transformative models. Using both of these artistic and legal historical contexts, I then sought to provide a reassessment of *Rogers v.* Koons, one of the most important copyright infringement cases to occur at the height of postmodernity.

It stands to reason that were *Rogers v. Koons* to be tried in today's courts, a different decision would be reached, in light of the emergence of the transformative model of fair use over the last twenty years. As I recounted earlier, at the time of the case's proceedings no notion of a transformative model existed beyond Judge Leval's then newly-published essay on the topic. Court records indicate it had not yet entered into the accepted line of thinking within U.S. copyright law. Since the ruling, analyzing the transformative aspects of alleged copyright infringements across the cultural spectrum has become much more commonplace, as examples such as *Campell v. Acuff-Rose Music* demonstrate.

This is not to say that *String of Puppies* is immune from criticism or even, for some, that it is good art. For all of Koons's champions, he has his share of detractors. Backlash against Koons for masking his own brand of commodity fetishism and blatant self-promotion by an appeal to some sort of cultural critique is well-known within the art world. Indeed this was perhaps the biggest challenge Koons faced: how to convince the courts that, as an artist who had effectively "erased any operative distinction between commerce and the old, disinterested, aesthetic ideal, enacting a 'euphoric celebration of art and the market'", he should be judged not through the banal consideration of derivative economics but rather as a participant within the venerated if hermetic institution of art.[124] Ironically, the art world in which *String of Puppies* was situated, and the context in which judges—largely unfamiliar with art theory and criticism—now might determine the work to be transformative, is perhaps

the setting least amenable to claims that the sculpture lends new insights or understandings, given that artistic commentary on commodity aesthetics is not a novel pursuit at all. This again leads to the questions: new insights or understandings for whom and by whom?

Perhaps, then, *Koons's String of Puppies* serves as a less-than-ideal example that nonetheless argues a fundamental point: that increasingly after World War II and certainly by the mid-1980s, media- and commodity-infused appropriation art works had attained a level of meta-critique.[125] This is to say that they did not derive their meaning merely from the objects or images they appropriated (i.e., *String of Puppies* is not coextensive with a warm, fuzzy "Hallmark" moment). Nor did appropriation works seek meaning through hermeneutic inversion (i.e., through parody, the original object or image is ridiculed by being presented as its opposite). Rather, *String of Puppies* occupies a liminal space; it is a commodity object commenting on the status of commodity objects in contemporary consumer culture, caught at the junction between two previously divergent but later colliding value systems bifurcated at the outset of modernity. One of these, promoting the defense of cultural production as intellectual property and the logic of the derivative, would contribute to the development of our current copyright law. The other, representing avant-gardist iconoclasm and its subsequent recuperation and celebration, would help contribute to the development of the modern institution of art. While over the last forty years the institution of art has embraced postmodernist tendencies within its own sets of theories

and practices, the next chapter suggest that copyright law too has made a "postmodern" turn.

Chapter 3

The Battle for Fair Uses Part II:

Subjectivism, Crisis and the Law's Postmodern Turn

> *I am interested in making art that transforms something that already existed without involving myself in the original intent of the message. I ultimately believe that artists should be as free as possible in their studio because art is about freedom of expression and not being restricted.*
>
> Richard Prince, 2009[1]

I. Introduction

In the last chapter, I introduced the principle of fair use in relation to postmodern appropriation art. I also recounted fair use's historical development leading up to its incorporation in the 1976 Copyright Act. I then outlined the ways courts have applied the doctrine in various infringement cases. Most of my analysis was spent on *Rogers v. Koons*, a case from the early '90s that tested the contours of fair use as it applied to appropriation art and parody. Since *Koons*, a "transformative" model of fair use has gained prominence within federal court opinions. In this chapter, I will continue examining "transformative" fair use, this time in the case *Cariou v.*

Prince. But before proceeding, I should address what may at first seem to be a flaw in the reasoning last chapter. That is, the astute reader will have gathered that in some respects my summary of the 2005 ruling in *Blanch v. Koons*, which comes after *Rogers v. Koons* and likewise establishes a rhetoric of the transformative as it applies specifically to appropriation art, renders unnecessary any forthcoming analysis of 2009's *Cariou v. Prince,* and the idea of a "postmodern" turn in copyright. In the former case, Jeff Koons prevailed over plaintiff Andrea Blanch not by presenting a parody defense, but rather one based upon the merit of aesthetically transforming a Gucci advertisement into a collage painting which, in Koons's estimation, enabled new meditations on the role of fashion imagery in public visual culture. And, as noted in the previous chapter, the appellate court agreed: it found that Koons's appropriation-based painting *Niagara* contained "new insights and understandings" different from the original and thus declared it a transformative fair use.

Legal scholar Peter Jaszi has recently proposed that the ruling in *Blanch* further solidifies not just judicial acceptance of a transformative-based fair use defense, but moreover a turn towards legitimizing postmodernist notions of the de-centered authorial subject in copyright jurisprudence, in which cultural appropriation, less beholden to the primacy of the modern, property-entitled author, is awarded "greater space for the free play of meaning among audience members and follow-on users who bring new interpretations."[2] But closer examination of the case reveals the economic and reasonableness models of fair use introduced last chapter still lurking,

and the continued need to further assess appropriation art's destabilization of the legal standards of authorship.

Like most recent fair use decisions, the court in *Blanch v. Koons* looked to all four fair use factors in order to make its determination, even as it placed emphasis on the first, which concerned the transformative aspects of Koons's appropriation. What facilitated the transformative claim was the finding that the copying was minimal, and, furthermore, did not constitute a market threat. As Judge Stanton concluded,

> Blanch has no right to the appearance of the Gucci sandals (perhaps the most striking element of the photograph), and Koons appropriated nothing else of the photograph except the crossed legs…Koons's *Niagara* is not a substitute for Blanch's photograph, and is in no way competitive with the it. *Niagara*'s market is one the photograph had no chance to capture.[3]

In essence, Koons took only what was necessary, thus satisfying the reasonable, "conjure up" standard, and furthermore, did so in a way that did not compromise the market for the original. We thus witness trace elements of the reasonableness and economic models of fair use contained within the decision.

Yet what is perhaps most significant in *Blanch* is the fact that Koons was able to convince the court of his appropriation of Blanch's photo in large part through explaining his artistic intention. No doubt prepped by a legal team that had learned its lesson in *Rogers v. Koons*, the artist walked the court through his creative thought process, including what, how, and why he copied (and did not copy) from Blanch's photo. Koons emphasized the transformative use he made of *Silk Sandals*, thus demonstrating, as I mentioned in chapter 1 when briefly discussing fair use, a capacity

for originality out of a process of derivation. Far from subverting the romantic authorial mode, Koons "merely succeeded in slotting himself more firmly into it."[4] And while declining assessment of Koons's work qualitatively, the court's acceptance of the artist's rationale underscored copyright law's sometimes deferential treatment of the romantic author, as well as the modernist predisposition towards the stabilized sign (i.e., *Niagara* as a cultural object properly signifies what its creator claims is its signified—its "comment on and celebration of society's appetites and indulgences."[5]

Thus Jaszi's forecast, though well-reasoned, is premature.[6] For his use of *Blanch v. Koons* to illustrate a postmodern turn in copyright relies upon a both District and Circuit court judges accepting Koons as the authority over his work's meaning (i.e., the romantic author's vision is the "proper" read of the painting). Consequently, perhaps any discussion of the transformative model of fair use as it applies to postmodernist art should begin with questioning the role that authorial intentions still seems to be playing even in a work-centric conception of copyright. Such a view also requires rethinking the cultural sign as inherently *unstable*. With this in mind, and for reasons that will become more apparent in this chapter, *Cariou v. Prince* is a more apt case in which to probe the boundaries of postmodernist appropriation art. This is to say, its rulings go a long way toward answering key questions raised by the *Blanch v. Koons* case: what if an artist (i.e., Richard Prince) doesn't claim any specific meaning, critical or otherwise, when arguing for the fair use of his appropriations, instead casting them, to use Leval's words, as "aesthetic declarations," meritorious in and of

themselves? Are the works any less transformative? Or are they, then, merely derivatives of the original work? Is this decided through artistic intention, audience reception, or judicial interpretation? And, what, ultimately, are artists' not only legal but also ethical obligations to the images (and engendered meanings) they appropriate? To more accurately measure the legal viability of postmodernist appropriation art under current copyright law, a case study is needed that can begin to answer these questions. *Cariou v. Prince* provides just such an opportunity, and thus it will serve as our primary object here. Just like both *Rogers* and *Blanch*, *Cariou v. Prince* was heard in the United States District Court, Southern District of New York as well as the United States Court of Appeals for the Second Circuit (both in lower Manhattan). The chapter is broken down into four sections: analyses of claims brought to and decisions made by each court, and the implications of each decision for the practice of appropriation art.

In the first section I begin by detailing the copyright infringement lawsuit lifestyle photographer Patrick Cariou brought against artist Richard Prince. This discussion includes the arguments each side presented before the District court, as well as Prince's verbal and written testimony. In Prince's statements, he makes no appeal to the anti-authorial critical discourse that was used to validate his work, and ensure his career, at the outset of '80 postmodernist art. Instead, he reverts to the most traditional concepts of authorship, claiming his own alignment with the long history of the artist as a romantic figure.

It is precisely this unbridled artistic subjectivity, without critical intent or even recognition of Cariou's original photographs, that District court judge Deborah Batts quashed with her ruling that found Prince liable for copyright infringement. In deciding that Prince's paintings violated copyright law, Judge Batts established a new, bright-line rule in the application of the fair use doctrine. And her decision contained much broader consequences than the rulings in either *Rogers v. Koons* or *Blanch v. Koons*, for it went beyond a hermeneutics of both parody (and its difference from satire) and a general critical commentary of society. According to Batts's decision, to be considered a fair use, *any work that borrows from another must necessarily refer, in its "meaning," back to its source*. Such a decree gave many artists, art historians and curators great pause, for her determination essentially cast doubt on the legality of the whole history of appropriation in modern and contemporary art.[7] It would seem the ruling in *Cariou v. Prince* initially signaled a step backwards for the transformative model of fair use.

As retrograde as Judge Batt's opinion may have been for many in the art world, there is a curious parallel between its rationale and that of much of the art theory and criticism surrounding postmodern appropriation art. We can gain a deeper understanding of the impact of *Cariou v. Prince* by contextualizing it historically within a discourse of art theory and criticism over the past two decades. This, then, is the chapter's second task. Since the court rulings in *Cariou v. Prince* hinged in large part upon whether or not Richard Prince's appropriations were sufficiently

"transformative," we would do well to place the art works within the context of a "crisis of criticism" (we could also call it a "crisis of transformation") characteristic of certain types of appropriation art in the late 1980s and afterwards. I am referring here to the practices and critical literature emerging in the wake of the initial theorization of Pictures-era "poststructuralist" appropriation. There is a striking congruence between the uncritical decoupling of the signifier/signified characteristic of practices in the late '80s and '90s and the legal rhetoric of original/derivative in Judge Batts's decision. By returning to certain concepts popular in art criticism during this period (i.e., Hal Foster's notion of a "stylistic pluralism," Jean Baudrillard's "simulacra" and Fredric Jameson's "pastiche"), I hope to show that Batts's decision is in a sense the legal manifestation of what art historians and cultural theorists had earlier criticized as a reactionary or neoconservative form of postmodern art. This is to say: an artwork that does not address the significance of its own appropriated content is not only culturally or politically problematic but also—given Judge Batts's opinion—legally at risk.

The third section of the chapter continues with description and examination of Prince's Circuit court appeal, which involves a legal "sleight of hand" as the artist insists that his paintings are protected through fair use. In order to challenge the District court's requirement that secondary work refer back to their original sources, Prince's appeal takes great pains to distinguish between *artistic intent* and the *messaging of the work*. While the former relies on an explication of the artist's subjectivity (i.e., Prince's sworn statements, which Judge Batts found unconvincing),

the latter, Prince's defense team argues, is determined through the "interpretive communities" formed around the work's reception. In other words, while maintaining Prince as the authority over his creative process, the "messaging" argument nonetheless foregrounds the agency of the decoding subject—the "reasonable observer." The result is a legal reiteration of the concept of the death of the author/ birth of the reader rhetoric common in poststructuralist theory in particular, and discourses on postmodernist culture in general.

With the Circuit court's reversal of the District court's ruling and Prince's apparent legal "win," I contend in the final section that we are finally witnessing a postmodern turn in copyright jurisprudence. Yet we also encounter a type of contradiction, in which that turn, premised upon the destabilized concept of the sign, is teased out of what appears to be the judges' formal analysis of Prince's paintings. The court also embraces Prince as the "genius" persona (who all the while refuses to assign determinate meaning to his works), ensconced in what some art critics or scholars would regard as the problematic narrative arc of modern art. While remaining quite critical of the artistic posturing Prince takes up, I will ultimately advocate in favor of the liberty to appropriate—to "play within fields of floating signifiers"—he demands. But, while the artist may have prevailed in the short-term, the long-term impact the appellate court ruling will have on artistic practices is concerning—not from the standpoint of legal viability, but rather because the appeals court decision works toward absolving artists of the need to critically question the images, objects and texts

they appropriate. I want to insist on the idea of the artist's, if not legal, then *ethical* responsibility towards the images he or she uses. *Cariou v. Prince* may move appropriation artists closer to an unconstrained artistic freedom sought after for many years, but that does not relieve them from the duty of maintaining what I will call a "semiotic integrity" within their practices. To do otherwise would, in the last analysis, counters the key directive at the core of copyright: "the encouragement of progress in the arts."

II. No Rasta

We encountered Richard Prince in both of the previous chapters. Considered a central figure in the early formation of the Picture generation, Prince's practice has become essentially synonymous with the term appropriation art. Over the past three decades his photographs, paintings, sculptures and writings have, almost without exception, appropriated elements from existing, vernacular visual culture. By the mid '80s, Prince had largely abandoned the rephotography for which he garnered critical and commercial acclaim. In its place, began including painterly elements in much of his work, which has culminated in several series of paintings that have increasingly displayed expressionist tendencies even while retaining various traces of a photographic vocabulary.[8] I will return to Prince's "post-Pictures" work later in the chapter as I examine more closely the late '80s appropriation work to the notion of critique.

Prince's 2008 series *Canal Zone* consists of thirty large-scale collage paintings, almost all of which were produced through acrylic paint processes applied to ink jet enlargements of appropriated photographs scanned from different sources and printed directly onto canvas.[9] Of the photographic sources, which include pictures culled from German nudist books, classic erotic magazines, music magazines, [and] anatomy books, portraits of Rastafarians amidst leafy Jamaican landscapes comprise the bulk of the collaging.[10] More precisely, in twenty-nine of the paintings, Richard Prince appropriated at least forty-one images from French photographer Patrick Cariou's 2000 book *Yes Rasta*.[11] Several of the paintings in the *Canal Zone* series are heavily abstracted as a result of the artist's layered painting process, while others appear virtually identical, in their primary figuration, to the reproductions in Cariou's book, with only minimal alterations made **[PLATES 38-41]**. None of the *Yes Rasta* images were used with Cariou's permission.

Prince exhibited twenty-two *Canal Zone* paintings at the Gagosian Gallery in New York's Chelsea arts District from November 8th to December 20th, 2008.[12] In the ensuing months Gagosian sold eight of them for a total of over $10 million, while seven more were traded for other artworks with an estimated worth of $7 million.[13] In addition to exhibiting the paintings, Gagosian also produced a catalog for Prince's show, which included an essay by controversial author James Frey.[14]

For his part, during the 1990s Patrick Cariou spent six years living in Jamaica, befriending and eventually photographing various Rastafari communities.[15] Cariou

assembled the "classical" black-and-white portraits of Rastas situated within their local habitats into *Yes Rasta*, which, according to the book's inside cover, "reveal[s] a strong, simple people whose style and attitude are as distinctive as their dreadlocks."[16] In his later deposition testimony, Cariou stated that he did not "want [the] book to look pop culture at all."[17] *Yes Rasta* is the second of a seemingly ongoing series of documentary photography projects for Cariou.[18] One edition of 7,000 copies of the book was published; as of January 2010, 5,791 copies had sold. *Yes Rasta* went out of print, with remaining copies available directly from the publisher.[19]

In early December of 2008 Cariou discovered Prince's *Canal Zone* exhibit at Gagosian through a newspaper advertisement.[20] Incensed that Prince had appropriated almost the entirety of the *Yes Rasta* book, Cariou served Richard Prince and Gagosian Gallery with a cease-and-desist notice on December 11, which went unheeded.[21] On December 30, 2008, Cariou filed a copyright infringement lawsuit against both parties. Initially, the suit also named Rizzoli International Publications, the producer of the *Canal Zone* exhibition catalog; Cariou later dismissed all claims against Rizzoli after it backed out of planned future publication and distribution of the catalog.[22] Cariou claimed that Prince, in collusion with his gallery, used the *Yes Rasta* images without authorization. Additionally, Cariou claimed financial injury due to Prince and Gagosian exploiting the photographs to the detriment of Cariou's ability to further market them.[23]

Richard Prince did not attempt a settlement. Instead, as Jeff Koons had done years before, Prince chose to defend his appropriations through the legal process by claiming fair use. The artist's memoranda addressed the fair use doctrine's "four factors test" point by point.[24] Here I will summarize Prince's four claims in order from what I consider are their weakest to their most compelling rationales.

Regarding factor two, the "nature of the copyrighted work," Prince's lawyers asserted that Cariou's photographs, in an attempt to capture as accurately or "factually" as possible Rastafarians in their native surroundings, were less "expression" than "information," and were therefore entitled to little, if any, copyright protection.[25] As for factor three, the "amount and substantiality of the portion used," again, marginalizing Cariou's originality by casting *Yes Rasta* as a singular "compilation" art work rather than a set of uniquely creative photographs, Prince's lawyers argued that Prince did not appropriate the whole book, but rather only what was necessary in order to fulfill his artistic vision.[26] Furthermore, the artist altered Cariou's images in every instance he used them for the *Canal Zone* paintings; there could be no mistaking Prince's one-off, colorful and enormous works with Cariou's black-and-white, mass-reproduced book images.

The bodies of work differed not only in appearance but also in their modes of production and consumption. That is, according to Prince's lawyers, the fourth factor —"the effect of the use upon the potential market for the copyrighted work"—was insignificant and thus bolstered Prince's fair use claim. While Cariou's market

consisted primarily of purchasers of coffee table photo books (and, indeed, *Yes Rasta* had gone out of print by the time Prince began his appropriation of its images), Prince's market comprised an elite group of art collectors and major museums. Prince's reputation as one of the most well-known appropriation artists in the world with a long exhibition record contrasted sharply with Cariou having only twice presented his work in a gallery context and selling in total six photographic prints to friends since *Yes Rasta*'s publication in 2000.[27] "As there is no similarity between the styles…mediums, price ranges or the markets of Cariou and Prince," Prince's attorneys stated, "the *Canal Zone* paintings in no way compete with the *Yes Rasta* [sic], and certainly are not a substitute for them."[28]

We can parse out, in Prince's defense team's presentation of factors two, three and four, a desire to satisfy fair use's historical reasonableness and economic models. But it is the defense's presentation of the first factor, "the purpose and character of the use," where we encounter an appeal to the transformative model of fair use, to which the reasonableness and economic models subordinate. In other words, once the work(s) in question are determined to be transformative, other factors, such as commerciality, or amount taken of the original, become less significant in an overall infringement evaluation.[29]

To explain the *Canal Zone* paintings' purpose and character, Prince's lawyers drew upon his deposition and affidavit statements. In them, the artist explained that the thirty paintings evolved primarily from two events between 2005 and 2007: a trip to

his birth place, the region of Panama that in 1949 was an unorganized U.S. territory called the Panama Canal Zone, and Prince's work on a film treatment recounting the tale of survivors of a nuclear holocaust stranded in a tropical setting. Drawing from these inspirations as well as his love of punk rock, "Prince imagined a make-believe, post-apocalyptic enclave, the Canal Zone, in which bands and music are the only things to survive."[30] Prince used appropriated imagery culled from his collections of books and magazines to portray each of the characters in his narrative. Additionally, the artist's own recent *de Kooning* paintings—tributes to the abstract expressionist painter—were the sources from which much of the *Canal Zone* series' figure rendering borrowed stylistically.[31] Prince also aspired to pay homage to past modern masters such as Picasso and Warhol, by painting "primitive masks" over many of the Rastas' faces, as well as by introducing serial repetition as an aesthetic trope throughout the series **[PLATE 42]**.[32] Drawing from these various artistic techniques and range of influences, Prince's lawyers ultimately argued that the artist's works were undeniably transformative, in that they "create a fictionalized world that transforms the individual raw elements used…into a completely new expression and a different message that has nothing to do with capturing as accurately as possible the Rastafarian culture in native landscapes in Jamaica."[33] Prince's "new expression," then, did not supplant Cariou's originals, but instead endowed them with novel "meaning, or message" in alignment with the transformative model of fair use.[34]

From Prince's fair use bid, we draw two observations. First, the producer categories I introduced last chapter—the "mass author" and the "artist"—persist. Indeed, we encounter an authorial tension similar to that in *Rogers v. Koons*: well-known, controversial artist appropriates the imagery of a relatively unknown lifestyle photographer, producing works of art that command very high prices; photographer in turn sues the artist for breach of copyright; artist defends his work on the grounds that it falls under copyright's fair use doctrine. And as in *Rogers v. Koons*, there was a similar tendency in *Cariou v. Prince* for the defense to draw a clear distinction between an artist and a mass author, with the former, because of his stature, entitled to a creative license that trumps the authorial agency of the latter. In arguing fair use, Prince's defense strategy consisted of belittling the plaintiff's artistic credentials, casting him as a second-rate producer of cheap and disposable books, valuable to the extent that they serve as the "raw ingredients" in the creation of "unbelievably looking great painting."[35] It is from this elevated platform of the artist that Prince proclaimed his work as transformative.

The second observation is that, on the one hand, clearly Prince's lawyers felt his greatest chance for success would come from an argument undergirded by the transformative model of fair use. This would seem logical, given its acceptance as the fundamental determining factor not only by the Supreme Court in *Campbell v. Acuff-Rose Music* but also, in contexts more specific to art, the court decisions in *Mattel Inc. v. Walking Mountain Productions* and *Blanch v. Koons*.[36] On the other hand, in

professing the transformative qualities of the *Canal Zone* paintings, Prince's lawyers tried an altogether different tack compared to these previous cases' fair use arguments. That is, rather than argue parody, or a type of commentary that necessitates not only extensive use of the original but also assumes an intertextual and dialogic relationship between primary and secondary works, the attorneys claimed that it was Prince's unique, creative vision alone, bearing no consideration for the "original intent" of Cariou's photographs, that signaled the transformative nature of the paintings.[37]

The reasoning behind Prince's appropriations thus marks something of a paradigm shift in fair use defenses. For even in cases based on a rhetoric of transformative use (e.g., *Campbell*, *Walking Mountain*, *Blanch*), defendants have sought to meet the burden of justifying their use of one set of materials over another, which Prince did not do. In parody cases, this is straightforward: secondary users appropriate specific images and other cultural texts precisely in order to expose their highfalutin aspects. By definition, parody is not effective without the specific use of an original (and its context); no other is adequate. And even in *Blanch*, although it's arguable that any number of advertisements other than Blanch's could have achieved an effect similar to the one Koons sought in the execution of *Niagara*'s commentary on consumer culture, the sandaled feet Koons ultimately appropriated stood as an archetype of glamorous advertising. It was important to Koons's concept that his source material came from the pages of fashion magazines.

Yet, as the epigraph to this chapter states, Prince's argument relied on his denial of any critical relationship with his source material. Instead, his criteria for choosing certain images for appropriation over others was simply whether or not he "love[d] the way they looked."[38] For Prince, it seems his unadulterated creative whims, put into the service of depicting "a fantastical, post-apocalyptical world set in a place which no longer exists, while paying homage to master painters," sufficiently justified the transformative claim.[39]

Cariou's lawyers were quick to seize on this radical if not audacious fair use strategy. Their counterarguments rebutted each of Prince's claims: the nature of the *Yes Rasta* photographs, contrary to their being described as merely informational, "fit squarely within the core of copyright protection," as numerous court rulings throughout the twentieth century had made clear.[40] Additionally, that Prince did not appropriate the entirety of *Yes Rasta* did not mitigate the fact that he had borrowed substantially from the copyrighted images within it. "To hold otherwise," Cariou's attorneys stated, "would mean that it would be permissible for someone to pirate one song from an album as long as the entire album was not copied."[41]

The rebuttals to Prince's address of the first and fourth fair use factors—the purpose and character of the use and impact of the use on the original's market—overlap, and so I will summarize them together here. First and most importantly, Cariou's team asserted Prince's paintings were emphatically *not* transformative, insofar as they did not seek to comment on or refer back to Cariou's photographs.

They might have been artistic, but, Cariou's lawyers argued, citing the opinion in *Rogers v. Koons*, "If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use…there would be no practicable boundary to the fair use defense."[42] Indeed, as the string of lawsuits against Koons in the late 1980s and early '90s demonstrated, appropriation art that does not allude to its sources is not fair use. Only in lawsuits where defendants successfully argued their work to be a critical response to the source material—such as in *Blanch v. Koons*—was the fair use justification granted.[43]

But it was more than past legal precedent, Cariou's defense team contended, that established the derivative, not transformative, nature of Prince's paintings. It could be shown by real-world examples that because the works only minimally altered Cariou's originals they, in effect, acted as substitutes for them in the market. The economic impact of the *Canal Zone* exhibition upon Cariou's photographs was clearly negative, as evidenced by an exhibition of *Yes Rasta* prints that was cancelled following the opening of Gagosian's show. In the fall of 2008 gallerist Christiane Celle contacted Cariou, expressing interest in presenting prints taken from *Yes Rasta* as the inaugural exhibition of her new, New York location. Though never finalized, the two informally agreed to a future show, as well as running a second edition of the book. Print prices would vary from $3,000 to $20,000 depending on size.[44] However, upon learning of Prince's Gagosian show in November, Celle subsequently called off plans with Cariou, stating "[I]f it's done already I'm not going to do a Rasta show…I

could not do anymore [*sic*] the Rasta because it was already in Chelsea."[45] For Cariou's lawyers, that Prince so heavily borrowed the look of *Yes Rasta*'s images, without critical intent, and did so in a way that demonstrably hurt Cariou's potential exhibition sales, necessitated a finding of copyright infringement.

Judge Deborah Batts agreed with Cariou's lawyers, and on March 18, 2011, found Prince liable for copyright infringement.[46] Batts struck down all four of Prince's fair use justifications. Regarding the claim that Cariou's photos lacked creativity and in being merely informational were not protectable, the judge stated, "Unfortunately… it has been a matter of settled law for well over one hundred years that creative photographs are worthy of copyright protection even when they depict real people and natural environments."[47] The judge further found that when Prince did not appropriate the entirety of one of Cariou's photos, he borrowed its primary content (i.e., the centered Rasta figures), amounting to a taking "substantially greater than necessary."[48] Judge Batts also found that Prince had harmed not only the actual market for Cariou's photos—Celle's gallery show cancellation and loss of print sales—but also their potential market. That is, because Prince did not license the images from Cariou, an important revenue stream had been foreclosed, even if it was one that Cariou had not yet exploited in other contexts. In essence Prince had essentially prepared derivative works without paying the customary price.[49]

Perhaps most importantly, Judge Batts found that Prince's paintings were not transformative but rather derivative, insofar as they simply recast, transformed or

adapted Cariou's original photographs.[50] Noting that the examples listed in the fair use clause's preamble,—"criticism, comment, news reporting, teaching […] scholarship, [and] research"—contain, at their core, "a focus on the original works or their historical context," Batts concluded that Prince's paintings were transformative only insofar as they "in some way comment on, relate to the historical context of, or critically refer back" to Cariou's images.[51] Since, according to his deposition and affidavit statements, Prince emphatically rejected his work having any correspondence with Cariou's, and instead conveying a fantastical, post-apocalyptic tropical setting, the whole *Canal Zone* series constituted copyright infringement. Batts also found Gagosian Gallery "liable as vicarious and contributory infringers" for its part in publishing the *Canal Zone* catalog as well as facilitating Prince's exhibition without inquiring as to whether he received permission for the images he appropriated.[52] Finally, in a rather dramatic move, Judge Batts ordered Prince and Gagosian to deliver all unsold painting and exhibition catalogs for "impounding, destruction, or other disposition, as Plaintiff determines."[53]

III. Crisis of Critique, Crisis of Transformation

Judge Batts's ruling that Richard Prince had infringed Patrick Cariou's copyrights threw the art and law worlds into a frenzy. Rigorous debate over Prince's appropriation of Cariou's images had been mounting since Cariou filed his claim at the end of 2008, but it was Batts's decision that really prompted the punditry.[54] Critics,

curators, gallerists, artists, lawyers, legal scholars, writing in print publications, press reports and the blogosphere all—for the most part—decried the verdict, claiming that it would have a "chilling effect" on appropriation-based practices.[55] As had been forecasted twenty years prior with the *Puppies* rulings against Koons, a seemingly ominous future for appropriation art lay ahead.[56] Yet appropriation practices did not subside in the period after *Rogers v. Koons*; rather they expanded. *Cariou v. Prince* revived the anxiety surrounding appropriation art's legal standing. Given the new precedent Judge Batts's decision set—that any appropriating work necessarily refer back to its source in order to be considered for fair use exemption—that anxiety was warranted. Not only did the ruling call into question the legality of appropriation works in museum collections across the country, in many ways it also signaled a step backward for fair use and in particular its not-yet mature transformative model. But I'd like to submit that Judge Batts's opinion was not so foreign to art world sensibilities. In several respects, it is the juridical manifestation of the strain of art theory and criticism we encountered in chapter 1, which holds art to the project of critique. Thus, I turn now to examining the ruling in relation to postmodern cultural criticism at the zenith of its formulation in the '80s and '90s.

Recall that in chapter 1, I contextualized the Pictures generation within what scholar Hal Foster delineated as two strains of postmodernist art: one "neoconservative," the other "poststructuralist."[57] For Foster, by the mid 1980s the poststructuralist critique of authorial originality as well as the Marxist-infused

ideology critique of mass media—both impulses attributed to early Pictures practices —had often yielded only a "political resignation" to and "fetishistic fascination" with image consumption.[58] The repetition of the image through the critical gesture of appropriation served, at best, to contain it within the institution of art and at worst, to enter it back into circulation as an "enhanced" commodity-sign in the service of advanced capitalism's recuperation of oppositional cultural practices.

An ambivalence about the theory and practice of appropriation art—a crisis of critique— thus marked much of the 1980s. Generally speaking, Foster's and other critics' "theories of the postmodern" took as their starting point the urgent need to examine culture given the central status of the commodity-sign in a post-industrial consumer society. While I'm unable to outline the major themes in the vast body of postmodern theoretical literature here, two of its more somber articulations associated with the reproduction of mass culture (within which appropriation would fit squarely) should be mentioned: Fredric Jameson's notion of *pastiche* and Jean Baudrillard's theory of *simulation*, which are related concepts insofar as each attempts to account for cultural production within a postwar, increasingly image-driven capitalist economy. I introduce Baudrillard and Jameson specifically because their work as cultural theorists was integral to both art historians and critics at the time, especially Foster.[59] Additionally, some of the appropriation artists at the time drawn to the notion of "simulation" as a way to conceptually ground their work.[60]

In chapter one I discussed Jameson's concept of the postmodern—a condition with a tendency to collapse clear distinctions between high (modernist) and low (kitsch) culture. With "shock of the new" avant-gardism canonized—itself becoming "classical"—as so many "masks and voices stored up in the imaginary museum of a now global culture,"[61] the critical capacities of cultural expression had been thrown into question, with Jameson concluding that ultimately postmodernist practices, in their use of past styles as "codes," could only be *pastiches* of them.[62] For Jameson, pastiche should be distinguished from parody. While both are premised upon the imitation (if not direct appropriation) of an existing style or trope, for Jameson it is the latter that retains its critical power by way of a continued, stable semiotic relationship with its target. In other words, as I recounted previously when describing Koons's *String of Puppies* defense, parodies are understood as such when audiences, familiar with the object or gesture being criticized (and all that it signifies), are able to extract from it the opposite meaning. Or, to take another example—the *Air Pirates* lawsuit from last chapter—a sex-and-drug crazed Mickey Mouse resonates because of our understanding that the cartoon character ordinarily signifies wholesome values. Familiarity with the parody's target implies a baseline norm of interpretation (i.e., a general consensus on the "meaning" of Mickey Mouse). Yet as Jameson's quote above suggests, it is this norm that has been effaced, through the neutralization of avant-garde subversion and the commodification of virtually every aspect of culture, leaving

a condition in which only "blank" parody—pastiche, an intertextual play among exchangeable signs—becomes the dominant characteristic.[63]

Jameson's notion of pastiche can be understood as exemplifying what Jean Baudrillard described more generally as a postmodern culture of "simulation." Baudrillard extended the theory of the destabilized sign to virtually all facets of social life, arguing that technologically-mediated consumer society had become inundated with a series of free-floating signifiers (e.g., television, film, advertising) whose interchangeability as commodity images guaranteed their indeterminacy, and, in his view, inability to faithfully reference anything but their own artificiality. Moreover, society's supersaturation by unstable commodity-signs divorced from any referent (i.e., the "real") signaled that a logic of simulation now constituted actual, lived experience (what Baudrillard termed the "hyperreal," or what Jameson might have described as the "perpetual present").[64] "Simulation thus begins with a liquidation of all referentials," Baudrillard writes, "It is not a question of imitation, nor of reduplication, nor even of parody. It is rather a question of substituting signs of the real for the real itself."[65] In summary, for both Jameson and Baudrillard, the demise of the stable sign sentenced the postmodern subject to a life of semiotic fragmentation in the processes of communication and meaning-making. Unable to adequately represent (a now lost) reality, she could only participate in the reproduction of an unending chain of signifiers without origin that had become reality.

Jameson's and Baudrillard's descriptions of the state of cultural production in postmodernity are compelling, though their totalizing accounts contain a certain fatalism that leaves little room for artistic agency. I once again summon Hal Foster, who notes, "The dissolution of the sign is not as final as Jameson suggests; there are always resistances to factor in, let alone other stories to consider."[66] One such story, then, is this: the "crisis of critique" reported by cultural theory or art criticism did not translate into a diminishment of appropriation practices; rather, I claim, it began a process of "subjectivizing" them, which is to say appropriation art after the 1980s entered a phase in which artists treated the found images and objects of mass culture as so many detached signs available for manipulation according to creative inclination. The result can be understood as a departure from the critiques of authorship in earlier postmodern art, towards what scholar Lucy Soutter describes as a revived bid for authenticity among artists.[67] This tendency has not simply displaced the overtly critical/political authorial voice (see, for instance, the continued appropriation work of Hans Haacke and Jenny Holzer) or simulationist pastiche (of which Mr. Brainwash is our present-day example). Rather, "subjectivist" practices have enlarged and nuanced appropriation art's possibilities as well as its readings.[68]

One of the tendencies within subjectivist strains of current appropriation art is the foregrounding of mass culture accumulation, resulting in what I will call an "aesthetics of collecting." There are certainly historical precedents; Warhol's Brillo boxes come to mind. Yet within this subjectivist appropriation art, mass culture forms

are used as raw material towards a unique artistic vision that most often departs significantly from the original images or objects. In other words, whereas Warhol's stacks of Brillo Boxes still resemble the original soap crates, artist Jason Salavon's data manipulations **[PLATE 43]** bear little formal similarity to the Hollywood films he appropriates. Or, perhaps more well-known, Christian Marclay's ambitious videos **[PLATES 44 & 45]**, with their obsessive micro-edits, depart radically from their original sources.[69] The aesthetics of collecting in appropriation art I am outlining here finds its musical counterpart in "remix" sample culture.[70]

If we ascribe a collector's tendency to subjectivist strains of contemporary appropriation practices, then Richard Prince ranks as our *collecteur extraordinaire*. Throughout his career, Prince has consistently re-presented his own collections of magazine advertisements, cowboys, comics, jokes, muscle cars, pulp fiction, celebrity memorabilia and cancelled checks as his art.[71] "[Prince] has always gravitated towards repetition, groupings and categories," curator Nancy Spector writes, "[his move from Manhattan to upstate New York] has allowed him to ramp up his activities as a collector to the point that they have merged with and become indistinct from his artistic pursuits."[72]

Prince's predilection for collecting has developed in parallel with his turn from towards works that encompass more of the artist's expressive hand (i.e., he's become something of a "remixer"). As I recounted earlier in this chapter, large-scale, gestural paintings that combine appropriated photographic elements and pop ephemera have

played a significant part in Prince's practice over the last two decades. Prince's move to collaged, expressionist painting can be read as reflecting his desire to establish distance from the late '70s poststructuralist discourse affixed to much Pictures Generation work in the late 1970s, and to assert a more modernist authorial subjectivity. As Prince related during his deposition:

> And there was that essay by Roland Barthes called Death of an Author [*sic*]… and I think I got caught up in it…you know, it's academic…it's something that takes place in October Magazine [*sic*], which I don't particularly like… I'm much more interested in trying to make art that stands up next to Picasso, De Kooning, and Warhol.[73]

Prince's statements here certainly reinforce the notion of postmodern pastiche/ simulation, as if producing work that stood up "next to Picasso, De Kooning and Warhol" was simply a matter of stylistic mimicry irrespective of the historical context within which each of these earlier artists is situated. Mapping a stereotypical arc of modern art, and then inserting himself into it has become for Prince a formula. But perhaps more troubling than Prince's clichéd modernism is the explanation of his creative process, which dispenses with even a modicum of responsibility towards the Cariou photos he appropriated. Unlike Jeff Koons who, twenty years prior, steadfastly if somewhat arrogantly claimed fair use of Art Rogers's photo through parody (endowing an "ordinary postcard" with higher meaning), Prince justified his appropriation of Cariou's images purely on the grounds of the artist's tastes:

> It's just a question of whether I like the image…my intentions were always to make great art…I liked the [*Yes Rasta*] pictures…I don't have any real interest in what the original intent is because…what I do is I try to…change it into something else that's completely different…I'm trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene…

> in any artwork I don't think there is any one message. I'm not a political artist.[74]

In Prince's own words, we're provided with not only stark evidence of the reassertion of romantic authorship (as discussed in chapter 1), but also an authorial voice that embodies the carefree embrace of a multitude of floating signifiers available for appropriation and reconfiguration in line with a neoconservative pluralism.

However, as Hal Foster would note in the mid '80s, "Style is not created of free expression but is spoken through cultural codes."[75] Written as a polemic against neoconservative postmodernism, Foster's statement could just as easily have appeared in Judge Batts's District court opinion against Prince. Each in their own way—Foster employing poststructuralist-infused academic language and Batts using the legal wording of fair use—are taking the postmodern artist to task for an irresponsible practice of appropriation. What for Foster marked the difference between neoconservative and poststructuralist appropriation is, for Batts, what distinguishes "transformed" from "transformative" works: combining the formal elements of multiple artistic signs while neglecting their content, versus critical interrogation of that content (what in semiotics might be called an interrogation of the signifier/ signified relationship).[76] While we might state that Prince recognizes or even responds to Cariou's Rasta images, he does so without any acknowledgment, let alone critical analysis, of Cariou's representational categories. With parody—a common example of commentary or criticism in a courtroom context—there is initial recognition of a unified, if contingent, signifier/signified relationship. The transformation from original

to parody problematizes this supposed unity (i.e., the pretty is made to seem ugly, the highfalutin is made to seem absurd, and so on), which likewise triggers a reevaluation of the original sign's ability to adequately represent its referent. Yet according to Prince's testimony, his use of the Rasta images was not made in order to interrogate Cariou's method of representing the Jamaican communities he encountered, or to comment generally on the fetish—particularly ascribable to Western artists since the beginnings of modern art—of portraying subaltern people. Rather, combined with Prince's tropical landscapes, nude figures, and expressionist brush strokes, Cariou's "classical" Rastas become Prince's "rock band" Rastas. But "Rasta" as a representational category is not questioned; as signs the Rasta images are taken as given, with their relationship to an idealized referent remaining essentially intact.[77] Following the lawsuit, Prince would brag:

> I don't want to talk about where the Rastas came from. Like most images I work with they weren't mine. I didn't know anything about Rastas. I didn't know anything about their culture or how they lived. I had plenty of time to find out. What I went with was the attraction. I liked their dreads. The way they were dressed…gym shorts and flip-flops. Their look and lifestyle gave off a vibe of freedom. Maybe I'm wrong about the freedom but I don't give a shit about being wrong.[78]

In addition to tracing parallels between Judge Batts's opinion and postmodern art criticism, we can also understand the decision as one that reinforced intellectual property norms and the logic of derivative market protection discussed last chapter. By ruling that Prince's *Canal Zone* paintings constituted copyright infringement, Batts sent the message that primary authors retain the exclusive right to control the subsequent re-presentation of the works they create, in the service of future economic

exploitation of nascent derivative markets. If Cariou wanted to license his images for alternative expressions, even those which may not align entirely with his own artistic sensibilities, that's would be his prerogative and his alone.[79] In Batts's view, only the expression intended as a direct confrontation with an original work, which requires an acknowledgment of the original's context, would be granted a say in the court of fair use. Such a narrow definition of the transformative model of fair use can certainly be interpreted as conservative. And yet, as much as it may have seemed antithetical to the idea of freedom of artistic expression and the progressive values that that freedom implies, the ruling in *Cariou v. Prince* can also be thought of in terms of safeguarding the critical project of appropriation in art—the judicial equivalent of what art critics advocated in their articulation of poststructuralist, postmodernist appropriation art. Here Batts reserves the "right" of fair use for appropriation that analyzes and critically comments on culture. And as much as critics from the '80s may have eventually cast appropriation art as a capitulation to art world market forces and the logic of the late capitalist condition it sought to expose, there is something to be said for an insistence on a form of art that continues resistance of the status quo. This is especially important today, given the market-driven conservatism found not only in much contemporary art but also in the larger spectrum of United States policy (health, education, social welfare).

In the conclusion to this chapter I will return to the relationship between fair use, freedom of expression, and the notion of "progress" in the arts. In the meantime,

there is one aspect of the District court's reasoning that warrants further scrutiny. That is, in evaluating the merits of Prince's transformative use claim, Judge Batts relied in large part upon the artist's testimony, which avoided any connection with not only Cariou's original intent in making *Yes Rasta*, but also artistic meaning per se. "Prince testified," the opinion states,

> that he has no interest in the original meaning of the photographs he uses… that he doesn't "really have a message" he attempts to communicate when making art…Prince also testified that his purpose in appropriating other people's originals for use in his artwork is that doing so helps him "get as much fact into [his] work and reduce the amount of speculation."…That is, he chooses the photographs he appropriates for what he perceives to be their truth— suggesting that his purpose in using Cariou's Rastafarian portraits was the same as Cariou's original purpose in taking them: a desire to communicate to the viewer core truths about Rastafarians and their culture.[80]

Simply put, the *Canal Zone* works were derivative of Cariou's photographs because Prince himself said they were.

The assumption in Batts's reasoning—that works of art only carry the meanings their makers intend them to have—is problematic, if perhaps understandable, given that artistic intention would be one of the few measures available to a judge otherwise reluctant to employ her own subjective readings in order to come to a determination. At least since Supreme Court Justice Oliver Wendell Holmes proclaimed in 1903 that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations," courts have tended, however imperfectly, to separate legal from aesthetic judgements.[81] Yet, determining whether or not a work is sufficiently transformative to be considered a fair use, whether or not it contains new insights,

meanings, or messages, cannot be done though interrogating artistic intention alone. Rather, how art is received, and the ways it is interpreted, must also be given careful consideration. This is exactly the line of reasoning Prince's attorneys introduced when they appealed Judge Batts's decision. It is to analysis of the appeal that we now turn.

IV. In the Zone

On October 26, 2011, Prince's legal team filed a brief appealing the District court's ruling with the United States Court of Appeals for the Second Circuit.[82] In it they argued that Judge Batts's opinion applied a misinterpretation of copyright law and the transformative model of fair use.[83] This argument took two approaches: first, that nowhere in the wording of the Copyright Act does it require that authors explicitly comment or criticize the works they appropriate in order for their uses to be considered fair. Second, that even if this were the case, Prince's works would still be fair use insofar as they may indeed comment on Cariou's photos; how commentary or criticism should be measured, Prince's lawyers stressed, is not solely through intention as gathered from an artist's statements, but, in the final analysis, through audience reception. The first point is more technical, while the second, though not without legal precedent, nonetheless the more radical, and the one that precisely establishes *Cariou v. Prince* as the exemplar of what I earlier described as a postmodern turn in copyright. I will now examine each point in more detail.

"The District court," Prince's brief stated, "was wrong in holding that a work must comment or criticize the original work in order to constitute fair use. Nothing in Section 107 [of the Copyright Act] requires such a result."[84] Rather, Prince's lawyers opined, *Campbell v. Acuff-Rose Music*—the case, the reader will recall from last chapter, in which the U.S. Supreme Court established the preeminence of the transformative model—makes clear that the uses mentioned in the preamble to the fair use clause (criticism, comment, news reporting, teaching…scholarship, or research) should "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."[85] Thus, the crucial question is not whether or not appropriating works comment on or criticize their sources (although the examples in fair use's preamble indicate they may), but rather whether or not they are "productive uses" that do not displace the original work but instead "[add] something new, with a different purpose or different character, altering the first with new expression, meaning or message."[86]

Prince is on record as stating that, in appropriating Cariou's photos, he did not concern himself with the photographer's original intentions (i.e., Prince did not consider himself a "political artist"). But this is not the same thing as disclaiming intention altogether. The court records also show that Prince repeatedly sought to differentiate his work from that of Cariou: "I look at pre-existing images of all types and see what I can contribute to make something new, distinctive and hopefully

visually beautiful with one or more messages to be found in the work by the viewer."[87] Through the variety of techniques mentioned earlier in the chapter (enlargement, ink-jet printing, acrylic overlay, etc.) Prince felt he had produced a body of work with a "strikingly different message." Beginning from Cariou's "classical," "noble" and "romantic" portrayal of a "pure, idealistic, utopian, religious community, living in a paradisiacal, natural setting, removed from contemporary secular culture" Prince produced "massive paintings…dramatically…revealing reggae rock stars, erotic nudes, and a post-apocalyptic world in which music, sex and drugs are culture's surviving artifacts."[88] For Prince's defense team, there was no question the *Canal Zone* paintings met the established criteria for being transformative: they completely altered Cariou's original photos, bringing new, productive expression with an altogether different purpose.

Yet even if the standard for determining the transformative nature of Prince's works required that they comment on or refer in some way to the context of the original source, the paintings would still qualify, for they might very well be understood as commentaries—even parodies—of the *Yes Rasta* images. This is to say that for Prince's lawyers, Judge Batts erred not only when she narrowly defined the criteria for transformative-ness, but also in her method of assessment. Just as the *Campbell* opinion laid the groundwork for a definition of the transformative, so too did it establish a methodology for evaluating the transformative: art works accrue meaning through the publics they constitute, and because the creation of art works (in

theory) serves the common good, it is the public's reasonable perception, and not simply the artist's intention, that should be considered when evaluating fair use.[89] And, Prince's lawyers asserted, "it is 'apparent from a viewing,'…that Prince's works have a 'sharply different' purpose and effect from Cariou's photographs."[90] Moreover, this "sharply different" purpose could be interpreted as critique:

> In creating these collaged paintings, Prince transformed what Cariou considers to be "classical portraiture" into scenes of a post-apocalyptic world…that may be reasonably perceived by an observer as satirizing not only Cariou's documentary subjects, but our own sex- and drug-crazed culture…Where Cariou's photographs convey the natural beauty of the Rastafarians' tropical home, Prince crudely collages the images together with torn edges and marks of transparent tape, critiquing the naïve vision of that beauty. He also comments on a society that would more readily associate Rastafarians and marijuana with rock-and-roll music than with religious harmony.[91]

Whether the *Canal Zone* series transmits Prince's "apocalyptic vision," or embodies, through quick-and-dirty parody a type of "postcolonial" critique of fetishistically representing "otherness," or some other meaning in between, for Prince's defense team one thing was certain: the only conclusion almost impossible to draw would be that Prince's paintings merely superseded Carious photographs in meaning and purpose. Any reasonable observer could see that they were, on the contrary, transformative.

Of course who exactly constitutes the "reasonable observer" becomes the fundamental question. Prince's defense team would eventually provide an answer, but first laid out the larger repercussions if such a figure were not factored into the analysis. To ignore the reasonable observer would not only damage Prince in the present case but also establish a flawed logic that artists would potentially have to

sidestep through insincerity (or downright perjury) with regard to the intentions and meanings behind their own work. In other words, if it were required that the "message" of an art work be evaluated solely through an artist's subjective intent, then to surmount any accusations of infringement, artists could simply explain their work in a way that satisfied the court's requirement of referentiality. Or, conversely, such a requirement would unduly punish those artists less articulate than others in their ability to explain themselves.[92] "In evaluating [Prince's] expression," the artist's lawyers demanded, "a Court should consider first and foremost the actual speech that is on trial—in this case, his paintings, not his testimony."[93] Ultimately, according to the defense, the transformative qualities of Prince's paintings are best decided by both looking at them and "examining whether there is a "different community" that has formed around them.[94]

And, indeed, that "different community," the defense argued, was readily apparent. Further proof that the paintings functioned in a new, completely different manner than Cariou's *Yes Rasta* pictures lay in the fact that they were one-of-a-kind, expensive artworks operating in a market and catering to a collector base very different from the market and general consumer of mass-produced, coffee table books. It was the (high end, blue chip) art world that understood Prince's works as new expressions, or at least did not interpret them as derivative in nature.[95] The lawyers explained the one seeming exception to the "different community" argument—gallerist Christiane Celle—by stating that Celle cancelled the proposed exhibit of

Cariou's Rasta images because she mistakenly thought that Cariou had collaborated with Prince on *Canal Zone*, and assumed that Cariou not returning her phone calls signaled that he was not interested in continuing their professional relationship.[96]

Taken altogether, the defense team concluded that because the intentions behind Prince's paintings were different than those behind Cariou's photos, because two bodies of work take manifestly different material forms, because they were each received by different publics and constituted different markets, Prince's *Canal Zone* works should not be judged as derivatives of Cariou's *Yes Rasta* images, but rather seen as transformative, fair use original works of art. Finally, at the very least, the paintings should have been judged individually, rather than in aggregate. Only a painting-by-painting analysis could render a fair judgement, especially given the wide range in which Carious photos were (sometimes extensively, sometimes minimally) used.[97] Indeed, one of the works in the *Canal Zone* series didn't even contain a Cariou image but was nonetheless cast into the lot as an infringement.[98]

In their own appeal brief, Cariou's legal team reaffirmed Judge Batts's infringement ruling. Their primary counterargument lay in idea that case precedent did not favor the defendants. They claimed that in past cases both won and lost, including *Mattel Inc. v. Walking Mountain Productions*, *Rogers v. Koons* and *Blanch v. Koons*, artists have always presented a justification for their appropriations. It is only after hearing such justification and weighing them against other factors (including analysis of the work in question) that judges make their determinations. Without the core

requirement of *a reason* for appropriating a particular image/text/music over others, "secondary works cannot constitute fair use."[99] Cariou's lawyers cited the Circuit court itself, which had, years prior, ruled against Jeff Koons precisely because he could not justify his use of Art Rogers's puppies image specifically. "As this Court explained," Cariou's brief states, "'We think this is a necessary rule, as were it 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.'"[100] Indeed, if all that was required was an artist's claim to "a higher or different artistic use… would be no practicable boundary to the fair use defense."[101]

The Circuit court ruling in *Cariou v. Prince* would be precedent-setting. While in the past courts had suggested that the transformative model does not necessarily require that secondary works "comment on, relate to the historical context of, or critically refer back" to their sources, at the same time no case had come up to rigorously test the model's boundaries.[102] It seems almost a given—and case precedent only reinforces the generalization—that any artist, in claiming fair use, would want to fortify that defense with a precise accounting of the reasons for an image's appropriation. The "I appropriated it because I wanted to, and I changed it so much that it's clearly a fair use" defense simply hadn't been tried before.

For each side, and the cultural (and economic) spheres they represented, the outcome would be significant. On the one hand, if the District court's decision were upheld, it would in all likelihood have altered the direction, at least to some degree, of

Prince's practice. But the broader change to creative production would most likely come from within the "middle tier" of contemporary artists. I am referring to artists who have name recognition within art's institutional channels, who may have had solo exhibits at medium-sized museums and are represented by non-blue-chip galleries, who are "rising stars" but who also teach full- or part-time in the arts as a major source of their income. Middle tier artists are more at risk because they and their work are much more known than the art student or young, emerging artist, yet do not have the economic security an artist such as Prince enjoys. Middle tier artists would most likely not be able to effectively challenge, let alone absorb the loss of, a copyright infringement claim brought against them.[103] Thus, artistic self-censorship could have become a factor with an infringement ruling.

And this "chilling effect" is only from the standpoint of art's production. From the position of its exhibition, Prince being found liable would almost certainly have had adverse long term effects on art museums and other similar exhibition venues that regularly present appropriation works—either newly commissioned works or those from permanent collections—to the public. Indeed, no fewer than ten distinguished museums and arts foundations submitted legal briefs in support of Prince's appeal.[104] In their view, such a narrow interpretation of fair use, and moreover that Judge Batts also found Prince's gallery Gagosian "vicariously liable"[105] for the artist's infringements, would force litigation-fearing art exhibitors to

> identify whether a given piece of art appropriates another work outside the public domain, assess whether the new artwork constitutes fair use (and

> perhaps secure a legal opinion to that effect), and finally determine whether permission was obtained by the artists to use the original work in the new piece…This new burden would interfere with the educational mission of non-profit museums in presenting art based on an evaluation of artistic merit; it is not required or envisioned by the Copyright Act; and it often would be difficult, if not impossible to meet…The inherent uncertainty and enormous problems in applying the District court's fair use analysis to selected artworks, which often involves fine legal distinctions, could effectively deter museums from obtaining or displaying Appropriation Art, even though the curators' professional judgment of artistic value and educational significance would lead to a different conclusion.[106]

On the other hand, were Prince to prevail, the commercial photography licensing industry, dependent on secondary users for generating revenue, would likely be left at least somewhat handicapped. This point was made clear by the American Society of Media Photographers (ASMP) and the Picture Archive Council of America (PACA), both trade organizations that support photographers and who, like their art museum counterparts did for Prince, filed a brief advocating for Cariou and reaffirming the District court ruling.[107] In it the ASMP and PACA argued that, "Without Cariou and others who make original copyrighted images, Prince's own works could not exist"; Prince's appropriations being judged fair use would lessen the likelihood of at least some photographers continuing in their trade, knowing that licensing schemes are easily subverted by secondary user who claim their non-licensed uses to be transformative.[108] Granting Prince fair use would potentially embolden future appropriators, opening the flood gates for them to "operate without a license" and likewise severely disrupting the entire logic of image licensing. With copyright's financial incentive eroded, "All photographers and archives would be harmed, and the symbiotic relationship that should exist between those who generate new copyrighted

works and those who seek to use such works in their subsequent works would be undermined."[109]

With the Circuit court deciding the fate of Prince's *Canal Zone* paintings, and providing a resolution of the decades-long debate surrounding the question of when appropriation works constitute either "transformed derivatives" or "transformative fair uses," the latest chapter in the saga of mass author versus artist would also be written. I laid out these authorial categories in the last chapter, noting that historically, courts have tended to rule on the side of market expansion and mass-commodity production, notwithstanding the fact that copyright is often thought of as a doctrine designed to balance authors' rights. This is to say that when artists have been faced with infringement allegations, they have not often prevailed. However, with the development over the past two decades of the transformative model of fair use, we witness a gradual move away from a pro-market expansion stance and towards further consideration of appropriation techniques as valid modes of contemporary expression. Even as cultural theory and criticism has gradually abandoned the term "postmodernism" in contemporary discourse (now often employing the term in an historical sense), a "postmodern" turn in copyright jurisprudence is about to arrive.[110]

V. Conclusion: the Verdict

On April 25, 2013, the United States Court of Appeals for the Second Circuit mostly reversed Judge Batts's decision. The three-judge panel ruled that the District

court applied an incorrect standard in assessing Prince's fair use claim, and furthermore concluded that twenty-five of the thirty *Canal Zone* works constituted fair use. The remaining five paintings were remanded to the lower court for reconsideration.[111]

The appellate court concurred with Prince's defense team's assertion that secondary uses need not fit solely within the examples listed in the fair use doctrine's preamble (i.e., criticism, commentary, news reporting, teaching, scholarship, research). "The law imposes no requirement," the appeal opinion states, "that a work comment on the original or its author in order to be considered transformative."[112] Rather, what constitutes transformative-ness is precisely uses that, as Judge Leval wrote two decades earlier, are "productive and…employ the quoted matter in a different manner or for a different purpose from the original."[113]

The Circuit Court opinion also established a bright-line rule regarding how productive and different uses are identified. The court again sided with the defense, establishing that while Prince's testimony was important, "What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so."[114] Thus analysis of the work itself, in comparison with its original source, serves as the primary basis for evaluation in fair use cases. Thus the judges deemed that while Cariou's photos were "serene and deliberately composed

portraits and landscape photographs depict[ing] the natural beauty of Rastafarians and their surrounding environs,"[115] Prince's "crude and jarring" paintings, came off as "hectic and provocative."[116] In terms of materials, that Cariou's black and white book-size photos clearly differed in scale and media from Prince's 8-foot color paintings further convinced the judges.[117] Given the comparison of the works, the court ruled the first fair use factor, the "purpose and character of the use," in favor of Prince.

With the first, core factor weighted towards the defense, the rest of the opinion's factor analysis followed a similar trajectory. In addressing the second factor, the judges recognized that while Cariou's photos were creative in nature and fully entitled to copyright protection, this fact bore "limited usefulness" in the overall fair use calculus given the transformative purpose of Prince's paintings.[118] The third factor, which evaluates the "amount and substantiality" of the secondary use, also favored Prince insofar as the court recognized that "the law does not require that the secondary artist may take no more than is necessary…The secondary use 'must be [permitted] to "conjure up" at least enough of the original' to fulfill its transformative purpose."[119] Finally, the court determined that the fourth factor, which examines the effect the secondary use has on the original's actual and potential markets, also favored Prince. "Prince's audience is very different from Cariou's," the ruling concluded, "and there is no evidence that Prince's work ever touched—much less usurped—either the primary or derivative market for Cariou's work."[120] The sale of *Yes Rasta*, already out of print when Prince embarked on the *Canal Zone* series, was not negatively impacted by the

sale of the artist's one-off paintings to high-end collectors. Nor would Cariou's future sales of either gallery prints or derivative licensing fees suffer injury (both of which, as the record indicated, Cariou had never seriously pursued).

In the final analysis, the Circuit court granted Richard Prince's fair use claim to all but five of the *Canal Zone* paintings, which were deemed "to close to call" and thus remanded back to Judge Batts for reconsideration under the corrected fair use standard. Patrick Cariou petitioned the Circuit court *en banc* for review of the case, but was denied on June 10, 2013. Cariou's further appeal to the United States Supreme Court in November 2013 was also denied.[121] In March 2014, Cariou dropped his lawsuit against Prince over the remaining five paintings after the two parties reached a confidential agreement.[122] Because a settlement was reached before the District Court reheard the case, the fair use status of the last five paintings remains unknown (though since Cariou dropped the lawsuit, Prince is free to do with them as he pleases).

In light of the ways the Second Circuit Court addressed the four fair use factors in *Cariou v. Prince*, I argue here that what we encounter is an ascendence of a "postmodern turn" in copyright law. At almost every turn, the appellate court rescinded prior determinations, effectively eviscerating the economic and reasonableness models of fair use, and instead clearly designating the transformative model of fair use as paramount. And by placing such emphasis on the transformative, the court's ruling acknowledged legally what is increasingly understood across the

cultural spectrum today: the derivative nature of creativity, and copying as a legitimate artistic technique.

What further constitutes a postmodern turn in copyright law is its equivocal relationship with the figure of the romantic author. On the one hand, the Circuit court validated the romantic author (i.e., Prince), who treats the world of mass media as a field of open-ended possibility, who extracts images at will in order to subject them to his alchemical "transformation." Yet, in so doing, the court took artistic intent (or even, in Prince's case, a professed lack of intent other than satisfying his own creative whims) almost as given, while the romantic author's vision eventually was subordinated to a formal analysis of the work, in keeping with the work-centric model of copyright I introduced in the first chapter. However Prince may have been construed, it was the formal differences of the paintings themselves from Cariou's photos that were of importance. Thus, we also encounter an attenuation of sorts of the romantic authorial mode.

Yet, what marked an even more drastic change from the previous work-centric conception of copyright was the court's reliance on the "reasonable viewer" to ascertain the transformative nature of the *Canal Zone* works. This is quite a dramatic shift, in light of the ruling twenty years prior when the same Circuit court rejected Jeff Koons's claim to a "higher" purpose, finding him liable for infringing Art Rogers's puppy image in large part because Koons's stated intent did not match his parody defense. *Cariou v. Prince* is remarkable even in the context of a post-transformative

judicial environment such as that in *Blanch v. Koons*, in which Koons's testimony played such a significant role in the shaping of the Circuit court's views on the transformative value of the artist's appropriations. With the concept of appropriation art's "transformative" nature now given such wide latitude, and furthermore with the assessment of fair use performed with lessened regard for artistic intent and increased focus on viewer interpretation, twenty-first century copyright jurisprudence may well be catching up to the sensibilities of late twentieth-century, postmodernist appropriation art.

At the very least, the Circuit court's decision affirmed legal scholar Laura Heymann's recent provocative declaration that "everything is transformative," and that fair use is best judged from a reader-centric stance that recognizes the reality of the re-contextualizing aspects within cultural production today.[123] Heymann states that courts would do well to embrace not merely the death of the author proclaimed by Roland Barthes so many years ago, but also what Barthes noted as its converse—the "birth of the reader," in which the meanings and effects of cultural works are forged squarely in the hands of those who receive them.[124] More specifically, Heymann suggests that fair use adopt an analytical model not unlike that of literary criticism's "reception theory."[125] Especially in its later, poststructuralist-infused articulations as championed by academics such as Stanley Fish, reception theory posits that it is a qualified, "interpretive community" that is best able to activate cultural texts.[126] With their training and fluency in a specialized discourse, and with their awareness of the social,

economic and cultural contexts within which texts circulate, interpretive communities can act as reasonable observers, reaching a general consensus about the reading of a work, and avoid the illusion that insists on innate, objective meaning (as sometimes pronounced through authorial intention) as well as the collapse of interpretation into atomized, subjective judgments. Reception theory and the notion of interpretive communities originate in the academic study of the field of literature, but their basic premises can be mapped onto other areas of cultural production, such the visual arts. It is precisely the art world, or at least some segments of it that, as a qualified, interpretive community, is best able to "reasonably" perceive Richard Prince's paintings and assess the degree to which they transformative.

However, while we can understand the Circuit court's reliance on the "reasonable observer" as indication of the privileging of viewer reception over authorial intention in determinations of the transformative, the appeal opinion in *Cariou v. Prince* should not be taken as an unproblematic, wholesale embrace of the agency of the reader. As Heymann notes, "A reader-centric mode of interpretation cannot wholly free itself from the influence of the author: an implicit statement by Andy Warhol that "this soup can is art" is likely to be reflected among readers to a greater extent than a similar statement by an unknown artist."[127] In its explication of the four fair use factors, the Circuit court judges employed the reasonable observer measure to the fourth, economic factor, by acknowledging that Prince's works catered to a "very different audience" than those of Cariou; that is, celebrities and high-end art

collectors, owners of Prince's art, who obviously have an interest in making sure the artist's paintings are understood as transformative. And it is Prince's longstanding reputation as top-tier contemporary artist, critically and commercially successful, that precedes any interpretation of his work. This has the effect of "classing" the interpretive process, as well as maintaining the high/low, mass author versus artist distinction. In the judges' estimation, Prince's works constituted fair use less because other artists or academics, well-versed in the history and theory of appropriation art interpreted them as such, than because the rich and famous had already validated them.[128]

Yet even if we accept the court's use of the reasonable observer test in assessing economic factors, increased difficulty arises when it is applied to the first fair use factor, the purpose and character of the copying. This is to say that, with the judges casting themselves as "reasonable viewers," they mocked the value of a viewer reception or interpretive community understanding of transformative fair use, instead showing their willingness to ventriloquize an imaginary, actual viewer. Restricted not only in their limited awareness of the discourse of appropriation art going back decades, but also to their duty as arbiters of the law—to "objective" evaluations—the judges' conclusions remained within simplistic, medium-specific aesthetic description (i.e, Prince's large-scale "crude and jarring" paintings versus Cariou's smaller "serene" photographs). This had the effect of, ironically, draping an otherwise postmodern turn in copyright law with a type of analysis more akin to formalist art

criticism. The District Court judges did cite Prince's testimony as evidence of his different approach to art-making, but was reluctant to wade further into either their own relationship with art, the subjective territory of artistic intent, or the context-dependent analysis that a carefully considered interpretive community might supply.

The limitations I describe became evident when the judges could not reach a consensus on five of the paintings: those in which Prince only minimally altered Cariou's imagery (see, for example, *Graduation* **[PLATE 41]**, whose fair use status was sent back to the District court, in comparison with *Specially Around Midnight* **[PLATE 42]**, which was found to be sufficiently transformative). In this respect, Judge Wallace, the lone dissenter on the three-judge panel, took a more sophisticated, if humble viewpoint in the decision. While agreeing with the other judges that the District Court had erred in its application of fair use, he nevertheless also saw the panel's own "reasonable" perception of the art works as arbitrary. Rather than make what, according to Judge Wallace, could only be unprincipled determinations, the court should have remanded all thirty of the works back to the District court, where more facts, and perhaps reasonable viewers in the form expert witnesses (i.e., interpretive communities) could have been introduced.[129] Perhaps a more robust assessment process could have involved not only expert testimony taken from museum officials or art collectors, but also from art critics and historians (many of whom, it must be said, might describe Prince's paintings as utterly banal and derivative in comparison to the history of critically engaged appropriation art).

Thus I believe that while the Circuit Court was right to overturn the District Court's narrow interpretation of fair use, it did not go far enough in articulating its own conception of the "reasonable observer." As a result, two of the three judges for the court did little more than make determinations based on their own aesthetic tastes, leaving the distinction between transformative original expressions and transformed derivative expressions unclear. And while *Cariou v. Prince* may seem to signal a greater legal tolerance for appropriation art, upon closer inspection the ruling should actually alarm artists working with copied content. As a recent Harvard Law Review article notes, "Without a clear standard, judges may be likely to decide according to taste, and artists will have no principled method of conforming their actions to the law *ex ante*. Future courts would be wise to clarify the contours of these two overlapping doctrines [i.e., transformative/derivative], lest appropriation art be left in uncharted waters, subject to the shifting winds of judges' artistic appraisals."[130]

There is another, related problem I wish to address concerning the judges' disregard of Prince's intent and instead reliance on the reasonable observer test of transformative fair use. Such a test not only de-emphasized the thought processes behind Prince's creative approach but set a standard for the de-intellectualization of appropriation as a mode of artistic practice generally. When courts look upon a genre of art whose historical importance is so intimately tied into its own discursive formation, to its understanding as a largely conceptual and critical pursuit, solely in terms of aesthetics, they do a disservice to the very goal of copyright—the promotion

of *progress* in the arts. Increased artistic "freedoms" should not necessarily be equated with artistic progress. The advancement of art occurs in tandem with the advancement of communication between artists and public, when works enter into dialogue and debate with one another. Much of that dialogue rides on artistic intent and concept. By granting that Prince's paintings were fair use, the court effectively cast appropriation as a type of artistic practice that merely reshuffles the deck of an already glutted mediascape and re-presents novel, decontextualized permutations. The precedent set in *Cariou v. Prince* should not absolve cultural producers from their responsibility toward the images, texts and sounds they appropriate, for maintaining a "semiotic integrity" in the name of progress in the arts. The ruling sends the message that appropriation artists need only "transform" materials aesthetically, without appreciation for their sources, for the law to consider their works to be "transformative."

At the very least, Prince's win is ultimately a loss for the legacy of the Pictures Generation. Any embers of criticality still glowing within the postmodern project of appropriation art have been extinguished. When once Prince's works were heralded as radical commentaries on authorship, originality and commodity fetishism, now they simply parrot both modern and postmodern appropriation art. The artist's paintings have been deemed legal by one of the highest courts in the land. Their monetary value is now matched by their value as legally sanctioned art. They are safe. As if to prove this point himself, Prince in effect agreed to pay "licensing fees" for Cariou's images

when he settled the case with the photographer over the five remaining *Canal Zone* paintings, thus submitting to the intellectual property regime he treated with disdain for so long.

Perhaps it's in other spheres of visual cultural practice that appropriation retains its strength as a creative and critical device. In chapter five, I trace the deployment of appropriation in artistic activism through analyzing "tactical media," and a trademark infringement case in particular, *U.S. Chamber of Commerce v. Yes Men*. But before that, in chapter four I examine just how naturalized both appropriation art and the figure of the romantic author have become within U.S. intellectual property law, as I take leave of copyright and instead turn to artist's moral rights, in the case *Büchel v. Mass MoCA*.

Chapter 4

Institutional Appropriation, Moral Rights and the Politics of Collaboration

> *The rule of thumb in our business, since Marcel Duchamp declared it and it became an accepted fact, is that art exists when an artist says it's so. They're the ultimate makers, the ultimate arbiter of whether or not their work is art.*
>
> Joseph Thompson, 2007[1]

I. Introduction

In the first three chapters I focused primarily on appropriation art, from its '80s, postmodernist iterations up until its more recent forms, and its relationship with U.S. copyright law. In various case studies I argued that while copyright can be construed as a "work-centric" law, its interpretation in courts of law have nonetheless privileged the figure of the romantic author. In this chapter I continue my analysis of the romantic authorial mode, but from a different perspective. That is, the following pages will set aside artistic agency as it pertains to copyright, and instead concentrate on the concept of artists' *moral* rights. In analyzing *Cariou v. Prince*, the last chapter

raised the issue of the implicit moral responsibility of appropriation practices in the contemporary moment, especially given that so much appropriation work descends from the critical and political "moral high ground" that characterized much of late '70s and early '80s postmodernism. Appropriation's more recent tendencies towards post-critical, formalist decontextualization—think here of Prince's reluctance to assign meaning to his paintings, and furthermore of the appellate court validating such a stance—implicitly absolves artists from taking certain moral positions in the works they produce. This chapter confronts morality in artistic expression explicitly by examining how the concept of moral rights laws have developed in the United States. My concerns in this chapter stem less from a critique of authorial or artistic intention than from questioning moral rights laws that protect the assumed inalienability of the individual artist's creative gesture.

While the general themes of appropriation and artistic freedom will continue to ground the forthcoming analysis, the concept of cultural production as intellectual *property,* with its attendant economic considerations, will be set aside in order to evaluate artistic expression as an almost "sacred" embodiment of the artist's personality. Such expression thus ostensibly exceeds both the banality of art's pecuniary worth and its social utility. While artists' moral rights comprise, at least in the United States, a subset of copyright law, they adhere to a tradition altogether different from that upon which the Founding Fathers drew in crafting the Constitution's copyright clause.[2] Moral rights are a recognition that "non-economic

interests of authors are…worthy of protection because of the presumed intimate bond between authors and their works."[3] Thus, moral rights relate, if simplistically, to the "reasonableness model" of copyright's fair use doctrine, as I outlined in chapter three. Yet it should be stressed that artists' moral rights share little else in common with copyright law. Moral rights pertain to artistic "integrity" and "honor," and thus reside, at least in their earlier, European formulation (which I will discuss shortly) at the pole opposite from copyright law in that the latter is focused on the "objectivity" of property relations. Indeed, because their value is not based upon economic interests, moral rights, according to legal scholar Sarah Louise Rector, "do not fit comfortably within the American intellectual property regime."[4] The following case study will explore, among other things, the still-debated nature of moral rights in American jurisprudence.

The case study in this chapter is *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel* (District Court ruling 2008, Circuit Court ruling 2010). It involves the Massachusetts Museum of Contemporary Art (Mass MoCA), which commissioned the Swiss artist Christoph Büchel to produce a massive installation on-site in 2006. For various reasons to be explained in more detail, during the production phase of the project problems arose between the museum and the artist, until Büchel eventually withdrew from the assignment. Not wanting to abandon what had been completed, and anticipating the artist's backlash against a perceived improperly executed artwork, Mass MoCA preemptively sued Büchel in order to force a judgment

declaring the legality of exhibiting the work-in-progress. Büchel counter-sued, claiming Mass MoCA's planning and presentation of the project, made without his approval, violated the artist's moral rights under the 1990 Visual Artists Rights Act.

In order to understand the implications *Mass MoCA v. Büchel* has for authorship and modes of appropriation in contemporary art, we will need to consider the case from multiple angles. Thus the chapter will contain three sections. The first details the circumstances of the case, providing a context not only for understanding the type of production-intensive, grandiose appropriation practice for which Büchel is known, but also the pedagogical and collaborative approach to art-making and exhibiting upon which Mass MoCa has staked its institutional reputation. After providing the necessary background information, the specifics of the rise and demise of *Training Ground for Democracy* will be laid out, including the grievances each side presented against one another. The section's narrative ends with artist and institution facing off before a federal court.

The second section traces the historical development of artists' moral rights in the United States. Beginning with the pre-modern split between common and civil systems of law, the section goes on to describe the French origin of the concept of moral rights, leading up to the signing of the Berne Convention in the late nineteenth century. The Berne Convention established a global standard for authors' rights amidst the growth of mass production and distribution (which was, in its time, mostly books). Only at the end of the twentieth century did the U.S. become a signatory to the

agreement, and even then it determined to institute it own code of artists' moral rights: the Visual Artists Rights Act of 1990 (VARA). The section concludes by examining VARA's strengths and limitations as compared to the European conception of moral rights.

Employing scholar Suhail Malik's recent art-theoretical framework, the third section critically examines the ways in which the federal courts interpreted VARA during *Mass MoCA v. Büchel*. In a sense the case brings the development of appropriation and authorial agency since postmodernity full circle: if in the past three chapters I detailed the rise, legal challenges and eventual validation of appropriation practices, and moreover a "postmodern turn" in copyright jurisprudence, this chapter focuses on the artist not as defendant but rather as claimant—one who employs the law as a means to assert his artistic autonomy. In *Mass MoCa v. Büchel* we will encounter a scenario in which, ironically, an artist very much embedded within the legacy of the Duchampian readymade (with its own critique of the myths of original authorship) brings a lawsuit against a museum for violating his moral rights—for "appropriating" his work in an inappropriate way. Far from being prosecuted for his appropriations, the artist himself prosecutes in their name. In this case we also encounter an institutional exhibition space transformed from a site providing logistical and exhibition support for works of art to one that attempts to outright author the projects it contains. However, for reasons I will take up later, I argue that Mass MoCA's supposed authorship takes on a character altogether different than the type of

Duchampian gesture so intrinsic to appropriation over the last several decades. I will return to this role reversal—artist as facilitator, museum as artist—more specifically later on, but for the moment it should be stated simply that the case study here epitomizes the legal legitimation of intellectual labor at the core of contemporary appropriation practices. Yet it does so through the same privileging of the romantic conception of authorship we encountered in previous chapters, which comes at the expense of limiting contemporary art's potential as a change agent. Let us now turn to the circumstances surrounding *Mass MoCA v. Büchel*.

II. Training Ground for a Lawsuit

Founded in 1999, the Massachusetts Museum of Contemporary Art, located in North Adams, Massachusetts on thirteen acres of a renovated nineteenth century factory complex,[5] is touted as the "largest center of contemporary art in the world."[6] Its massive spaces lend themselves to large-scale artistic projects that would otherwise be difficult to realize. The museum's premier exhibition space, the gallery in Building 5, is approximately the size of a football field **[PLATE 46]**, [7] and it was in Building 5 that Christoph Büchel's installation was to be installed.

Large galleries constitute only one of the unique ways in which Mass MoCA supports contemporary art. The museum also embraces an open policy regarding the processes of art-making, proclaiming a mission to "catalyze and support the creation of new art, [and] expose…visitors to bold visual and performing art in all stages of

production…[Mass MoCA strives] to make the whole cloth of art-making, presentation, and public participation a seamless continuum."[8] Envisioning itself less a "box than a platform," Mass MoCA brings artists to its campus for extended stays, where projects are conceived and fabricated with museum support staff and resources. Additionally, "Visitors to the museum…can also observe the process leading up to the final products."[9] It is an emphasis on collaboration as well as the desire to foreground the "dynamic interchange between the process of making art and it presentation" that would prove problematic in the argument and judgement phases of *Mass MoCA v. Büchel*.[10]

Christoph Büchel is a Swiss artist primarily known for enormous, "immersive" art installations that viewers experience almost as elaborate "films sets" or "simulated domestic and public spaces gone wrong."[11] Obsessively detailed, Büchel's constructions transform spaces ranging from the traditional white cube gallery to defunct warehouses and other derelict sites into physically demanding and anxiety-inducing narrative experiences. To grasp the full extent of some of Büchel's installations, participants must often traverse narrow passageways, climb ladders, or crawl on their hands and knees through small wall openings.[12] Over the past several years, Büchel has created, among other environments, a circa 1980s U.S. military missile bunker, a black-economy recycling plant and immigrant living quarters, and a museum-cum-sex club; the artist is also in the process of burying a jetliner fifty feet underground in the California desert.[13]

Büchel's art works are primarily comprised of the detritus of the contemporary disposable world: old appliances, vehicles, musical instruments, potato chip bags, etc. **[PLATE 47].** From a purely formal perspective, his practice stretches back to Duchamp's readymade; he is, broadly speaking, an appropriation artist. Yet Büchel's installations allude only occasionally and obliquely to the ontological status of art itself, or the institutional critique of art's processes of validation, which provided much of the philosophical core for appropriation in art Duchamp to postmodernism. As one of Büchel's commentators notes, "A century on from Duchamp's invention of the readymade, artists no longer need rely on the art system's visible syntax to transubstantiate bits of life into art…the institution of art lives immaterially in the heads of anyone who recognizes it."[14] Rather than employing appropriation as a mode interrogating the politics of representation, Büchel instead treats the readymade "as is" in the service of designing hyper-realistic environments that attempt to speak directly to themes of freedom and security, fanaticism and fear, Western consumerism and marginalized labor, and the general bifurcation of the social sphere. In this respect Büchel might be thought of as a twenty-first century artist working within in the Realist tradition. In an effort to showcase a certain "reality," Büchel seeks to channel larger-than-life affect, which—however politically motivated his views and art are—runs the risk of slipping into spectacle. The artist's installations transport viewers into bizarre, imaginary worlds that, on the one hand, come off as entirely realistic, while on the other hand essentially operate under the safe understanding that they are not.[15] In

their less successful stagings, Büchel's projects are confined to the realm of entertainment and the logic of an attention economy; in their better moments, they provide for phenomenological encounters that may raise political consciousness by way of psycho-sensory overload.[16]

Given his penchant for colossal, carefully-crafted installations, Büchel's collaboration with an organization such as Mass MoCA, with its ample exhibition space and commitment to artistic experimentation, would have seemed a perfect opportunity. "I thought that [Büchel] was potentially an interesting fit for Mass MoCA," recounts Joe Thompson, Director of Mass MoCA, "given the way that he works and his use of space."[17] After exploratory email exchanges between Büchel and Mass MoCA curator Nato Thompson throughout 2005, the museum and the artist reached a general agreement that they would work together towards the realization of a large solo exhibit.[18] Büchel visited Mass MoCA in the fall of 2005 to acquaint himself with the museum's galleries as well as the staff that would assist him with the installation. After crafting an initial proposal in the spring of 2006,[19] Büchel returned to Mass MoCA in late August in order to prepare a schematic model of the project.[20] At this point, Mass MoCA staff, including Joe Thompson, Nato Thompson and a fabrication crew, began

> working with the artist to understand ideas, to collaborate on the modes and means of production, to work out the schedule, to determine which space [would] ultimately be used for the particular show, to determine the amount of time that [would] be given to the installation prior to the opening of the show, [and] to determine the resources that [could] be brought to bear.[21]

After much discussion, Büchel decided on the the installation's central premise:

> "Training Ground for Democracy," essentially a village, was to have contained several major architectural and structural elements integrated into a whole, through which a viewer could walk (and climb). It was based on existing mock-up villages and virtual reality training software that the U.S. army has designed to train its members to tackle real-life battle situations in the war on terror and the Iraq war. These mock-up villages are fictitious test sites in which political positions and identities can be sampled and exchanged. "Training Ground for Democracy" was to adapt this role-play for its visitors, who would be given the opportunity to "virtually" change their own various identities in relation to the collective project called "democracy": training to be an immigrant, training to vote, protest, and revolt, training to loot, training iconoclasm, training to join a political rally, training to be the objects of propaganda, training to be interrogated and detained and to be tried or to judge, training to reconstruct a disaster, training to be in conditions of suspended law, and training various other social and political behavior.[22]

It was determined the gallery in Building 5, Mass MoCA's largest space, would house *Training Ground for Democracy*. With all of the components assembling Büchel's central idea—including several large sea shipment containers, a mobile home, a two-story house, a movie theatre, tall cinderblock walls, an array of vehicles, and thousands of individual objects—the exhibit was to be the most complex Mass MoCA had ever attempted **[PLATES 48 & 49]**. In order to realize Büchel's vision, the museum "agreed to acquire, at Büchel's direction but its own expense, the materials and items necessary for the project." Furthermore, after the completion of the exhibition, the installation would come into Büchel's possession, and he would retain copyright titles to the work.[23] An opening date of December 16, 2006 was established. At the end of August 2006 Büchel left Massachusetts to address other matters, and the

museum commenced immediately with what it would describe as "the ultimate scavenger hunt."[24]

It is at this point that accounts of the fate of *Training Ground for Democracy* diverge. According to the museum, the original, mutually-agreed upon plan called for the work's materials gathering stage to commence in early summer 2006, during which time Büchel, with the help of museum staff, would spend over a month in Massachusetts collecting the artifacts needed for the installation. Because Büchel did not arrive at Mass MoCA until that August (and stayed only for one week), the project had already fallen behind schedule.[25] Throughout the fall Büchel directed the project long-distance, making revisions and additions to *Training Ground* and thus adding another layer of complexity to the museum's interpretive mission.[26] "[T]he absence of the artist from the site and the level of generality of his commands," states Mass MoCA's account, "required the museum to act to some extent on its own, attempting to follow the artist's broad directives subject to his later approval, disapproval, or suggestions for modification."[27] This remote back-and-forth process between artist and institution throughout fall 2006 negatively affected the rapport between them, the project's schedule and, importantly, its cost estimation. Mass MoCA was quickly exhausting its allotted $160,000 budget.[28]

Büchel, along with his assistants, did return to North Adams to work on *Training Ground* at the end of October 2006. With a daunting task list, the opening date quickly approaching, and *Training Ground* still far from completion, the museum

—at Büchel's urging—eventually agreed to postpone the opening of the show until early March.[29] Büchel worked on the installation until December 17, after which he left to Europe for the Christmas holiday.[30] After that, Mass MoCA employees continued assembling *Training Ground* according to his instructions, believing Büchel would return in early January to finally complete it. However, by this point the relationship between the artist and the museum had become strained beyond repair. Every email exchange seemingly ended in accusations from Büchel; eventually he refused to return to Mass MoCA unless the museum agreed to relinquish all control over *Training Ground*'s completion and moreover establish a "special bank account" into which all project funds would be deposited and to which only Büchel would have access.[31]

Throughout the early months of 2007 Joe Thompson pleaded with Büchel to return to Mass MoCA to finish *Training Ground*, at one point writing to him, "There's a lot of power in the galleries, and we've made great strides."[32] Meanwhile, Mass MoCA's crew plodded along in its implementation of the exhibition in Büchel's absence. Eventually, Mass MoCA ran out of tasks to complete, and could proceed no further. By this point Büchel had ceased communicating with the museum altogether. With a great deal of time, energy, and money spent on *Training Ground* (costs had ballooned to over $300,000)—not to mention the 150 tons of materials sitting in its Building 5 gallery and no artist in sight—Mass MoCA had reached an impasse.[33] On March 28, Mass MoCA delivered its ultimatum to the Büchel: either he return to

complete *Training Ground for Democracy*, or remove the materials from Building 5 and reimburse the museum for expenses incurred. If Büchel refused these options, Mass MoCA would either "take appropriate action to recoup…expenses" or "make the unfinished installation safe to the public…and allow visitor access."[34]

Büchel rejected Mass MoCA's offer. On May 21, 2007, the museum simultaneously filed a Complaint for Declaratory Relief with the United States District Court for the District of Massachusetts[35] and announced that it was canceling *Training Ground for Democracy* and instead mounting an exhibit titled *Made at Mass MoCA* in a space adjacent to the Building 5 gallery.[36] *Made at Mass MoCA*, billed as "a documentary project exploring the issues raised in the course of complex collaborative projects between artists and institutions," displayed photo documentation of previous, successful Mass MoCA collaborations as well as press accounts related to the Büchel dispute. The small show required visitors to walk past *Training Ground* in its unfinished state.[37] Mass MoCA's filed its complaint in order for a judge to determine whether or not the museum was legally entitled to "make the abandoned materials and partial constructions of [the installation] accessible to museum visitors as an open back lot workshop" without treading on Büchel's rights as an artist.[38] While awaiting a ruling, Mass MoCA decided it would conceal *Training Ground* from public view by covering gallery 5 passageways with tarpaulins in order to obstruct views of the project's contents **[PLATE 50]**.

This is, of course, only one side of the story. From Büchel's perspective, it was Mass MoCA that, from the beginning of the relationship, took several misguided steps that ultimately led to *Training Ground*'s failure. From the three week delay at the outset of the project (Mass MoCA had not, at that point, de-installed the work in the gallery left from the previous exhibit) to a consistent breakdown in communication, the artist took what the museum considered the iterative, trial-and-error processes of artistic collaboration as severe project mismanagement.[39] During the times Büchel was present in North Adams to the complete the work in the fall and winter of 2006, he discovered that the installation had veered far from his intended course, and that much of the scheduled work had either not been completed or was executed improperly and therefore needed to be redone. In several instances, Mass MoCA did not procure the objects Büchel requested, instead purchasing items that he did not ask for, thus further depleting the budget and extending the schedule unnecessarily. Even when it did acquire the appropriate items, Mass MoCA did so at high prices.[40]

The museum's inability to raise funding for *Training Ground* compounded the perceived mishandling of the project and its budget. Joe Thompson's September 2006 email to Büchel, stating that Mass MoCA had not succeeded in securing additional financing for the project exemplifies as much. "I'm terrified about the costs," Thompson writes. "So far, we have zero in sponsorships, nada…if you have any ideas for that, let me know, as I really have to get to work on that right away."[41] Thus Büchel felt he was being put into the awkward position of assuming both artistic and

fundraising roles. Büchel did pass along suggestions for possible financial support, but was adamant that Thompson not reach out to the artist's gallery, Hauser & Wirth, for the reason that any agreement would ultimately come out of Büchel's future sales (in other words, Büchel would be essentially bankrolling his own exhibit). Nonetheless, after Christmas 2006 Thompson appealed to Hauser & Wirth for financial support. The gallery ultimately denied Thompson's request, stating that while it was ready to commit $100,00 for the project, it would not do so without Büchel's approval.[42] It was when the museum notified Büchel's gallerists that it had run out of money in late 2006 that the artist pulled out of the project, stating he would only return when his demands for full artistic and budgetary control were met.

Mass MoCA's attempted negotiations with Hauser & Wirth unbeknownst to Büchel is but one example adding to the artist's increasing concern that the museum was determined to wrest *Training Ground* from him and realize the project with or without his input. Büchel complained that he

> had to constantly negotiate over every detail. The museum treated the project as though it was [Büchel's] wish list for Christmas, eliminating necessary and key elements that were always listed as part of the artwork from the beginning. The museum acted, as [though] they knew more about the artist's vision then the artist himself.[43]

Perhaps the clearest indicators that Mass MoCA intended to see *Training Ground* through even without Büchel's guidance are that, despite Büchel's withdrawal and demand that the museum not show the work-in-progress to anyone, Mass MoCA not only continued the installation without the artist's acquiescence well into 2007 but also

provided tours of the ongoing work to "art critics, reporters, collectors, curators" and even some politicians.[44] For Büchel these actions were the last straw. *Training Ground* had become a deformed version of his artistic vision, and one with which he no longer wished to be associated. To make matters worse, with the fiasco pored over publicly by the arts press, Büchel felt his name and reputation had become indelibly tarnished. Büchel also interpreted both the *Made at Mass MoCA* show and the tarps covering *Training Ground* as thinly-veiled attempts at embarrassing him—at showing the art community just how difficult of an artist he was to work with, while Mass MoCA portrayed itself as an innocent and respectful "pro-art" institution.

Büchel fired back at Mass MoCA's May 2007 court complaint with a volley of his own. In early July 2007 the artist filed a response to the museum as well as a set of counterclaims which, among other things, asserted that Mass MoCA had violated the artist's moral rights under VARA.[45] Specifically, Büchel claimed that his rights of attribution and integrity had been infringed due to the museum both associating his name with the tainted *Training Ground* exhibit and "intentionally distorting" his artistic vision by continuing the installation without his approval. We will delve into integrity and attribution rights in more detail in the next section, but in concluding here, important questions introduced by each party's court filings should be raised: who has rights to a project collaboratively produced, and furthermore, one that is unfinished? Perhaps even more fundamentally: do VARA protections even extend to unfinished works of art? In order to get closer to answers, we must first have a better

understanding of the origins of moral rights, including their European and American articulations, and then assess their place in modern American law.

III. Moral Rights Across Continents, Across Courts

Unlike United States copyright which, as the reader will recall from chapter one, finds its origins in the English common law tradition, the concept of an author's moral rights is firmly rooted in continental European civil law.[46] Even before the formation of both modern systems of law and market economies, authors safeguarding their work was based more upon maintaining reputation and prestige than status within a commercial context.[47] And just as authors' entitlements developed in eighteenth century England under the influence of Locke, Hobbes, and the notion of labor as property, so too did a philosophy of authors' rights emerge in eighteenth and nineteenth-century Europe based in part on natural law and the writings of Immanuel Kant and Georg Hegel, who correlated an author's rights with products of the mind as well as the highest attainment of self-determination, irrespective of the marketplace.[48] In both Germany and revolutionary France, Kant and Hegel had profound effect on the notion of *droit moral*, or an author's moral right, separate from utilitarian economic rights. As legal scholar Cheryl Swack describes, Kant distinguished between "ordinary" commodity objects and books, the latter which Kant regarded as having a status that transcended that of property because they expressed an author's "personality" or "inner self."[49] While the concept that creative expression is an

embodiment of an individual's persona did not begin with Kant, it is his writings on authorship particularly in relation to authorial rights and book publishing that influenced German and French jurists at the time. Importantly, in his 1785 essay *On the Wrongfulness of Unauthorized Publication of Books*, Kant was careful to differentiate between "rights to things" and "rights in personhood."[50] "I believe," Kant would write, "there are grounds for regarding publication not as dealing with a commodity in one's own name, but as carrying on an affair in the name of another, namely the author." Thus, Kant argued that as owners of a physical manuscript copy or book, publishers could treat their property as they pleased (i.e, a right to a thing), with the exception of republication, which could only be done with the permission of the author (i.e., a right in personhood). So while Kant wrote against book piracy—a growing concern among authors and publishers in late eighteenth-century Europe—he did so not from the perspective of theft of property but rather of disregard for the author's will, for the fundamental right to set the terms of an author's communication with the public.[51] Later, in his 1797 essay *What is a Book?*, Kant further clarifies that unauthorized publishing is not an infringement of property but rather a "speech act that had been compromised,"[52] and in so doing lays the groundwork for an early formulation of authors' moral rights:

> Why does unauthorized publishing, which strikes one even at first glance as unjust, still have an appearance of being rightful? Because on the one hand a book is a corporeal artifact…that can be reproduced (by someone in legitimate possession of a copy of it), so that there is a right to a thing with regard to it. On the other hand a book is also a mere discourse of the publisher to the public, which the publisher may not repeat publicly without having a

> mandate from the author to do so…this is a right against a person. The error consists in mistaking one of these rights for the other.[53]

Hegel, too, associated intellectual work with a person's self-actualization of "Spirit," towards greater self-consciousness and freedom.[54] For Hegel, property was not merely a byproduct or means for attaining human freedom but rather the manifestation of fulfilling liberty itself. "A person," states Hegel,

> must translate his freedom into an external sphere in order to exist as Idea… The rationale of property is to be found not in the satisfaction of needs but in the supersession of the pure subjectivity of personality. In his property a person exists for the first time as reason…If emphasis is placed on my needs, then the possession of property appears as a means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first existence…of freedom and so is in itself a substantial end.[55]

While Hegel acknowledged that inalienable mental labors are eventually transformed, in the process of their fixation, into external, alienable objects for commodification, he nonetheless maintained the idea that they never relinquish their intrinsic and unique creativity.[56] On the contrary, it was precisely through the circulation of unique creative works that facilitated greater freedoms in the larger social sphere:

> The purpose of a product of the intellect is that people other than its author should understand it and make it the possession of their ideas, memory, thinking, etc. Their mode of expression, whereby in turn they make what they have *learnt* (for 'learning' means more than 'learning things by heart', 'memorizing them'; the thoughts of others can be apprehended only by thinking, and this rethinking the thoughts of others is learning too) into a 'thing' which they can alienate, very likely has some special form of its own in every case. The result is that they may regard as their own property the resource accruing from their learning and may claim for themselves the right to reproduce their learning in books of their own.[57]

Over the course of the nineteenth century two sets of author's rights thus emerged in Europe: an economic right (copyright) as well as an author's "personality" or moral right.

It is French law, during its developments in the nineteenth century, that set the standard for *droit moral*, adopting protections for a "dualist" *droits d'auteur* system composed of distinct personal and economic interests.[58] By the first half of the twentieth century France had codified three distinct moral rights: *droit de divulgation, droit à la paternité,* and *droit au respect de l'oeuvre*.[59] *Droit de divulgation*, or "right of disclosure" granted authors sovereignty over determining the circumstances under which their work would first appear before the public.[60] *Droit à la paternité*, or "right of attribution" legally enforced the idea that creations should be rightfully attributed to their authors. This right required that an author's name be attached to the works they circulated (e.g., a signed canvas, a novel's credit line), as well as prohibited any other author's name from being substituted for their own. Additionally, the attribution right granted authors the ability to disassociate their name from a work of theirs that had been modified or damaged.[61] *Droit au respect de l'oeuvre*, or "right of integrity" endowed authors with the power to prevent their work from being modified or mutilated, on the grounds that doing so injured the artist's reputation.[62] As legal scholar Dan Rosen explains, all of these rights stemmed from the basic premise that an author's work, unlike that of a factory worker "stamping out cogs on the assembly line," was extraordinary inasmuch as it exhibited a unique creativity and reflected back on the author even after its completion and circulation in the broader public sphere.[63] Authors (and artists), therefore, should have a set of rights commensurate

with their continued interests in the work they produced—their reputations depended on it.

It's worth stressing here that, in a French dualist rights regime, an author's economic rights exist alongside his or her moral rights, though it was the former that eventually subordinated to the latter before the eyes of the law in the from the nineteenth century. The elevation of an author's moral rights was thought to preserve the core values of human creativity (and thus liberty): the bearing of one's "soul" through artistic expression as well as the desire to communicate with and contribute to the world.[64] Today artists' moral rights in France are extensive. They cover a broad array of creations, including literary works, choreography, music compositions, films and audiovisual works, photographs, works of art, graphic design, and software. Furthermore, in contrast to American copyrights, which are limited in duration and transferrable, French *droits moraux* are "perpetual, inalienable and imprescriptible."[65]

The almost sacrosanct importance attached to authors' and artists' rights in Europe eventually culminated in the Berne Convention for the Protection of Literary and Artistic Property, a multilateral treaty that established a unitary rights system among participating nations.[66] The Berne Convention is most easily understood as a type of international copyright law wherein abiding countries respect the authorial rights laws of other members. In 1886 delegates from several European countries convened in Berne, Switzerland and formalized the agreement in order to expand the protection of authors' expressions as well as to address the continuing problem of

international book piracy. Before Berne, there were fewer legal remedies available to authors whose works were reproduced abroad without authorization; the Convention also helped address the general problem that creative works were inconsistently afforded the same respect, legally speaking, as more conventional forms of private property.[67]

In its initial drafting, the Berne Convention reflected a particularly French emphasis on authors' rights, which extended to its inclusion, with the 1928 Rome Revision Conference, of a moral rights component.[68] "The enactment of the moral right," writes scholar Peter Burger, "signified the first time that the Berne Union [i.e., Convention] recognized a personal element in copyright."[69] Article 6bis of the Convention mandates that

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
>
> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.[70]

Clause (1) above encapsulates perhaps the two most essential moral rights: *droit à la paternité* (right of attribution) and *droit au respect de l'oeuvre* (right of integrity). And

while its articulation of moral rights is not as comprehensive as those found in French law (the right of disclosure was not included), the Berne Convention nonetheless set a precedent for the safeguarding of artistic autonomy, over and above economic determinism, in the late modern era.

It should be stressed here that the moral rights inclusions listed above augmented copyright protections already set forth in the Berne document. Although I have grounded moral in their historical and philosophical development, it's important that the essential difference between the two sets of rights—copyright/economic and moral/personality—be shown on a practical level. To illustrate such a difference, I will provide two examples, with the first borrowed from previous chapters: parody. As I outlined, from a copyright perspective parodies, which necessarily borrow from primary works, are generally understood to be fair uses. Courts have often considered parodies to be "transformative," altering the original expression with new meaning or purpose. One indicator of the transformative nature of a parody can be the relative lack of financial injury it causes on the market of the original expression. Parodies seek to comment on original expressions, not act as subtitles for them in the market. However, from a moral rights perspective, it could be argued that parodies are not fair uses, because they, to use the Berne Convention's language, "distort or mutilate" the original work, causing harm to the "honor or reputation" of the primary author.

My second example dispenses with considering copyright altogether. In the 1980s media mogul Ted Turner acquired the rights to several classical black-and-white

films, including *Casablanca* and *Citizen Kane*, which he intended to colorize and promote. One of the first films Turner colorized was director John Huston's 1950 film *Asphalt Jungle*. The new version aired on French television, despite Huston's public objections to the colorizing of films. After a drawn out legal battle initiated by the Huston Estate, French courts finally ruled that broadcasting *Asphalt Jungle* in color violated Huston's moral rights—the new version distorted the original, and injured Huston's reputation. Thus even though Huston's estate was not the owner of the film, had no control of its copyright, and reaped no financial rewards from its continued circulation, it nonetheless had a moral rights claim as to how the work should interface with the public.[71]

With the addition of moral rights in the Berne Convention, we encounter a more or less global embrace of the romantic authorial mode, in which the creative articulation of the self is awarded great protection.[72] Yet as we shift our focus now to moral rights in the United States, the stereotype of the self-absorbed "genius" creator brushes up against the relative lack of appreciation for the arts that characterizes author's rights legislation in the country's early formation. As I noted in previous chapters, contemporary legal commentators have often pointed to the privileging of the romantic author in U.S. copyright law. While I attempted to scrutinize this notion by analyzing postmodernist appropriation art, it is nonetheless not unreasonable to state that to some degree an ideology of romantic authorship runs through American law as it pertains to art, if only because of the deep influence of possessive

individualism in our society. However, we would do well to make a distinction between this individualism as expressed by the acquisition of property through labor, and individualism as the outpouring of the creative self—a notion of property via "taking" versus one via "giving."[73] This difference becomes apparent when we contrast the general cultural development of Europe with that of the U.S.

As Dan Rosen relates, from its birth the United States emphasized the production of culture with an eye toward nation-building. "The settlers were not consumed by a fascination with aesthetic achievement. Commerce was their principal concern."[74] Europeans, on the other hand, "long secure in their maturity, devoted much of their leisure time to appreciation of the arts."[75] In the U.S., artistic expression was valued insofar as it could be used to contribute to economic expansion. The simplest example indicating this tendency is the U.S. Constitution itself. Article I, Section 8—the Constitution's "copyright clause"—states, "The Congress shall have Power…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."[76] The drive towards utilization (increasingly via industrialization and standardization), rather than aesthetic appreciation for its own sake undergirded the modes of cultural production. In essence, for the United States to acknowledge moral rights in it early development would have been to go against the very core of the American notion of "progress" embedded in the Constitution.

From a practical standpoint, moral rights complicate, among other things, the work-made-for-hire exception in copyright law discussed in chapter one. The exaltation of individual expression does not entirely sit well within an economic system premised upon the division of creative labor, and it is precisely the latter that played such an integral role in the shaping of the cultural output in the United States during the twentieth century. In particular, the film and publishing industries vehemently opposed the United States' accession to the Berne Convention. They feared that the United States adopting the Convention's moral rights laws would undermine studio and editorial control over the content that writers, directors and authors produced.[77]

The United States finally acceded to the Berne Convention when Congress passed the Berne Convention Implementation Act (BCIA) in 1988, more then 100 years after the treaty's first European drafting.[78] However, the U.S. interpreted the Convention's language to conclude that the treaty was not self-executing (i.e., not immediately effective without further action), and that member nations were therefore at liberty to enact domestic legislation in order to bring themselves into compliance with the its provisions, including Article 6bis.[79] Because the U.S. considered itself as already possessing a composite of laws—including sections of both the 1976 Copyright Act and Lanham Act (i.e., trademark law) as well as "State and local laws… relating to publicity, contractual violations, fraud and misrepresentation, unfair competition, defamation, and invasion of privacy"—that dealt indirectly in one form

or another with moral rights, it felt no need to revise or create federal laws that would uniquely enforce a right of paternity or integrity. As the House Report on the BCIA makes clear, "[T]here are substantial grounds for concluding that the totality of U.S. law provides protection for the rights of paternity and integrity sufficient to comply with 6bis, as it is applied by various Berne countries…adherence to Berne will have no effect whatsoever on the state of moral rights protections in this country."[80]

Without a doubt the case that best illustrates the weakness of artists' moral rights protections within the BCIA is *Serra v. U.S.G.S.A.* (1989). In the dispute, the sculptor Richard Serra sought to halt the removal of his work *Tilted Arc*, a site-specific installation in downtown Manhattan for which the General Services Administration (a government agency in charge of bringing art to federal sites) had initially commissioned the artist to execute, but eventually wanted to relocate due to negative public reception. Serra argued against removing *Tilted Arc* on the grounds that it would violate his moral right of integrity under the Berne Convention. Despite federal compliance with the Convention at the time, federal judges concluded that dismantling *Tilted Arc* did not violate Serra's moral rights.[81]

This is not to say that political support for artists' moral rights at both the state and federal level did not exist during BCIA's deliberation. By the time the BCIA was ratified, eleven states had already enacted some version of moral rights legislation.[82] Furthermore, in 1989 Representatives Robert Kastenmeier, Edward Markey and Howard Berman introduced moral rights proposals in the House, while Senator

Edward Kennedy offered parallel legislation in the Senate.[83] The Congressmen as well as witnesses providing testimony asserted that federal support for moral rights would not only foster a positive environment in which artists might continue "capturing the essence of culture," but that in doing so, important public interests would be served.[84] "Any distortion of [art works]," witness Weltzin Blix testified, "is automatically a distortion of the artists' reputation and cheats the public of an accurate account of the culture of our time…The Visual Artists Rights Act mitigates against this and…protects our historical legacy."[85]

The proposed legislation would form the basis of the Visual Artists Rights Act of 1990 (VARA).[86] With VARA's passing, the United State federal government explicitly recognized artists' moral rights for the first time. Adopted as an amended subsection of the Copyright Act, VARA states:

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

> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.[87]

VARA would seem to mirror the Berne Convention's recognition of the rights of attribution and integrity, yet there is one key difference between the two documents: the ways each set of laws defines what types of expression qualify for attribution and integrity protection.[88] Part of VARA's passage involved amending the Copyright Act in order to define the "work of visual art," over and above the more general "original works of authorship fixed in any tangible medium of expression." While copyright protection applies to expressions such as literary works; musical works, pantomimes and choreographic works; pictorial, graphics; sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works," VARA would cover a much narrower range.[89] Essentially, VARA was written to protect only works of "fine art": painting, drawing, print, sculpture or photography (for "exhibition purposes only"), existing in a single copy, or in a limited edition of 200 copies or fewer.[90] In contrast, the Berne Convention protects

> every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.[91]

Explicitly excluded from VARA are several of the types of works mentioned in Berne: technical drawings, models, applied art, motion pictures, books, magazines, newspapers, and periodicals.[92] Such prohibitions were meant as a compromise to the mass media industries, for whom, as mentioned earlier, the enactment of moral rights would compromise control of production. As legal scholar Jane Ginsburg testified during VARA's deliberation,

> The bill recognizes the special value inherent in the original…work of art…which [embodies] the artist's "personality" far more closely than subsequent mass produced images…the physical existence of the original itself possesses an importance independent from any communication of its contents by means of copies…[an] original's loss deprives us of something uniquely valuable.[93]

Given Ginsburg's reasoning, it's doubtful the case involving *Asphalt Jungle* would have yielded the same result had it been tried in the United States. After all, broadcasting the colorized copy of a black-and-white film does not harm the original version. Even today, John Huston's "original vision" remains intact.

Legals scholars have generally applauded VARA and the United States' final recognition of a version of artists' moral rights. Yet it should come as no surprise that criticism of VARA during its early implementation also abounds. In particular, commentators note that because VARA applies only to a narrow set of expressions, it undercuts not only the Berne Convention but also the essence of moral rights altogether.[94] Others argue that even in its specificities, the Act's language is ambiguous, leaving too much open to interpretation by the courts.[95] This ambiguity is immediately evident in VARA's rather conservative list of works of art available for

protection: painting, drawing, print, sculpture and exhibition-only photography. As scholar Peter Karlen asks, "Is a mural a painting? What about a mosaic? Or a collage? Where is the borderline between a print and a poster…where is the borderline between a sculpture, on the one hand, and an environmental, landscape, or architectural work, on the other?"[96] Or, in terms of media art, where would experimental film, video art, or internet works, fall? Or performance works? And of great significance for our case study here, VARA does not provide any real guidance as far as jointly-authored works, and furthermore remains silent on the issue of whether unfinished works are even protected at all. Regarding the right of integrity, VARA does not establish any procedure—something analogous for copyright's "four factors" fair use test, for example—for use in determining what constitutes either an art work's distortion, mutilation, or modification, or a violation of artistic "honor" or "reputation."[97] In sum, VARA's language, despite its good intentions, begins from a notion of art production that does not account for intricacies that characterize practices from the postwar neo-avant period through to postmodernism.

In this section, I have provided a historical context for artists' moral rights leading up to the Visual Artists Rights Act of 1990. Moral rights generally champion a romantic conception of authorship, and VARA, despite its weaknesses, attempts a continuation of the same rationale. VARA is perhaps more explicit in its privileging of a romantic authorial mode compared to copyright law which, despite its discourse of the "transformative," tempers overt embrace of absolutist author's rights with a multi-

pronged analysis (i.e., the four factors test). In the final section, I return to *Mass MoCA v. Büchel*. Artist Christoph Büchel's sculptural installation, *Training Ground for Democracy*, would test the limits of artists' moral rights in the United States for a number of reasons: its employment of time-honored readymade appropriation strategies (which, for a court, might not merit sufficient originality), its highly collaborative nature and ultimately unfinished state.

IV. Conclusion: A Modernist Appeal for Postmodernist Appropriation Art, and an Exit

At the end of September 2007, the United State District Court for the District of Massachusetts ruled orally in favor of Mass MoCA, holding that no part of VARA's language prohibited the museum from showing *Training Ground for Democracy.*[98] The court moved that the museum was entitled to exhibit the work on the condition that it post a disclaimer stating that the unfinished project did not carry out Büchel's artistic intentions. The court also stipulated that Mass MoCA was to make no mention of Büchel's name in relation to the failed installation. As the court's subsequent written opinion would clarify,

> When an artist makes a decision to begin work on a piece of art and handles the process of creation long-distance via email, using someone else's property, someone else's materials, someone else's money, someone else's staff, and, to a significant extent, someone else's suggestions regarding the details of fabrication—with no enforceable written or oral contract defining the parties' relationship—and that artist becomes unhappy part-way through the project and abandons it, then nothing in the Visual Artists Rights Act…gives that artist the right to dictate what that "someone else" does with what he has left behind, so long as the remnant is not explicitly labeled as the artist's work. No

> right of artistic "attribution" or "integrity," as those terms are conceived by VARA, is implicated.[99]

Significantly, the court remained somewhat skeptical as to whether *Training Ground*, in an unfinished state, even fell under VARA protection at all as a work of art. It noted that VARA makes no explicit reference to works-in-progress; given this absence, the court likened the project instead to a film—a large scale, collaborative effort, and, as noted in the previous section, a type of work that is specifically excluded from VARA.[100] Ultimately, the court opined that with the definitional status of the work unclear, Büchel would have to demonstrate violations of his moral rights with "specific clarity."[101]

Büchel, however, did not convince the court. The judge pointed out that VARA, like the Berne Convention itself, does not grant artists the right of disclosure. Thus while Büchel might not have been pleased with Mass MoCA's intention to present the work as is to the public, the museum would not violate VARA in doing so. Furthermore, given that the museum had no intention of presenting the work either as Büchel's or its own, no violation of Büchel's right of attribution could be demonstrated. Finally, the court rejected Büchel's integrity claim, reasoning that merely displaying the installation did not constitute a distortion, mutilation, or modification in the "ordinary usage of those terms."[102]

Somewhat surprisingly, Mass MoCA elected to de-install *Training Ground for Democracy* only days after the court ruled in its favor.[103] Citing the fact that the prolonged debacle had affected the "limited time window available given [the

museum's] normal exhibition cycle," and considering other factors both "logistical and philosophical," Mass MoCA decided to begin removing materials immediately instead of placing them on public display.[104] While the coordination of future exhibitions—including a video projection show with artist Jenny Holzer—no doubt played a large role in Mass MoCA's decision, one cannot help but what wonder how much all the negative press attention (or the desire to avert an appeal by Büchel's lawyers) further influenced the museum's change of course.[105] Satisfied with the court's ruling, Mass MoCA was ready to move on.

Yet despite the show being dismantled, Büchel appealed. On January 27, 2010, the United States Court of Appeals for the First Circuit issued its appeals decision, which mostly reversed the lower court's opinion.[106] It first found that VARA unequivocally protects unfinished works of art. Noting that works-in-progress are not explicitly among the list of works excluded from VARA, the court reasoned that because VARA is part of the 1976 Copyright Act, *Training Ground* came under, at the minimum, copyright protection. As the ruling stated, "Where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time…[the] convergence between artist and artwork does not await the final brush stroke or the placement of the last element in a complex installation."[107] Thus, if the Copyright Act covered unfinished works, then VARA must also cover unfinished works of art.

The court then concluded that *Training Ground* qualified as a work of art. Even in its unfinished state, the work could be understood as a sculptural installation and therefore a protected work of art as VARA defines the term. It referred to VARA's legislative history mentioned earlier, when Congress, while describing "works of art," articulated that the "term 'sculpture' includes, but is not limited to, castings, carvings, modelings, and *constructions*."[108] While the court did not explicitly reject the lower court's likening *Training Ground* to a film's collaborative production, the inference can nonetheless be drawn that such a comparison was misplaced. Congress excluded films and other mechanical works from VARA partly because of their collaborative nature but also, more importantly, because of their mass reproducibility. VARA was enacted precisely to protect one-off works that, when modified, distorted or even destroyed, would be difficult or impossible to replace. Despite the disagreement as to who "authored" *Training Ground*, there was no dispute that the project, in its singularity, was a work of art (albeit in an unfinished state).

Finally, while the appellate court agreed with the lower court that Büchel's right of attribution had not been violated—if only because by that point *Training Ground* had long since been removed and therefore no misattribution could occur—it did find that there existed enough evidence in the record for a jury to find that Mass MoCA had compromised Büchel's integrity during the course of *Training Ground*'s realization. "Even during his time as an artist-in-residence at MASS MoCA," the opinion reads, "Museum staff members were disregarding [Büchel's] instructions and

intentionally modifying *Training Ground* in a manner that he did not approve."[109] The court pointed to Mass MoCA's own internal emails, entered as documents in the case, in which museum staff acknowledged that they were potentially treading on Büchel's authorial rights as completion of the installation continued in the artist's absence from the site.[110] The court also referenced the myriad press accounts of the dispute that called Büchel's honor and reputation into question. For example, *New York Times* art critic Roberta Smith wrote, *Training Ground* in its incomplete state would "certainly give people unfamiliar with [Büchel's] obsessive, history-driven aesthetic an inaccurate sense of his art, and this is indeed a form of damage." Additionally, Ken Johnson of *The Boston Globe* further cautioned that "many people are going to judge [Büchel] and his work on the basis of this experience [of the work in its unfinished state]."[111] In sum, the appellate court both affirmed in part and vacated in part the opinion of the lower court, remanding the case for further consideration.[112] However, revisiting the issues in light of the Circuit Court's reversal was not to be; after years of battling, the two parties finally settled out of court.[113]

Legal scholars, pundits and artists generally interpret the decision in *Mass MoCA v. Büchel* as a major triumph for artists' moral rights in the United States.[114] Although the case is only one of several moral rights cases tried since VARA's enactment, it nonetheless sets a precedent that clarifies and expands the doctrine's heretofore narrow scope as it's been applied. Given the decision, the ruling will almost certainly affect the ways in which artists and institutions interact with one another as

they work together in the future. The reader will recall that at the core of the dispute over *Training Ground* lies the unfortunate fact that neither Büchel nor Mass MoCA ever agreed to a written contract that would have explicitly set the terms of engagement. Going forward, it is not unreasonable to suppose that museums and other arts institutions will want to safeguard their interests, acting all the more cautiously when specifying requirements and responsibilities pertaining to the large-scale, collaborative projects they in great part fund and produce. This could even entail collaborations conditioned upon artists waiving their moral rights altogether, which is something they will probably be reluctant to do. In possession of a moral rights judgement solidly in their favor, artists—especially those, such as Büchel, who have the reputation for being "high maintenance"—may find difficulty attracting exhibition opportunities without clear expectations (and some artistic compromise) established from the beginning.[115] Giving the potential for this kind of chilling effect, Büchel's triumph is bittersweet.

At the same time, in terms of an overall improvement in artist's legal rights, the *Büchel* decision thoroughly celebrates the romantic authorial mode lurking within the legal philosophy of intellectual property today. This would seem to complicate the "postmodern turn" in contemporary copyright jurisprudence I described in previous chapters. On the one hand, the appeals court ruling for Christof Büchel serves as the further legal validation of appropriation techniques in art, inasmuch as the intellectual labor involved—the idea of art, extending back to Duchamp, as a nominating process

over and above the actual, physical execution conventionally associated with the production of art—is awarded preferential treatment. Despite Mass MoCA's significant contribution to *Training Ground*'s assemblage as far as time, money, resources, it was Büchel's inner artistic vision that won the day. As the Circuit Court stated,

> Moral rights protect the personality and creative energy that an artist contributes to his or her work…The elements of [*Training Ground*] had been chosen by Büchel…The evidence…would permit a jury to find that the Museum forged ahead with the installation…knowing that the continuing construction in Büchel's absence would frustrate—and likely contradict – Büchel's artistic vision.[116]

On the other hand, the court's accepting appropriation art's reliance on the "art as idea" paradigm is nevertheless premised upon the singular creative intelligence—the "soul" of the artist. Yes, it was Büchel's ideas, relieved of any requirement that the artist himself carry them out, that prevailed. But they were his alone. Thus if a postmodern turn in intellectual property law is one that is amenable to the derivative nature of cultural production, it still takes for granted the figure of the individual actor. As far as approaches to appropriation practices and the law, perhaps it is the recognition of the collaborative nature of meaning-making in art that contemporary courts must now reassess.

Such a rethinking is even more important in cases such *Büchel*, for without it, the foundation of so much of appropriation art's history, from the first readymades and assemblages to the Pictures Generation, is attenuated: that is, critique through a recontextualization of the art-sign. In seeking a court ruling that would allow it to

present the unfinished *Training Ground* as part of its exhibit *Made at Mass MoCA*, the museum indeed may have cast Büchel in a negative light. Yet, given Mass MoCA's pedagogical mission—its reputation for showcasing the "dynamic interchange between the process of making art and it presentation"—it could have also done so as part of a critical investigation into the politics of representation in a collaborative context. We can conceptualize Mass MoCA's "appropriation" of Büchel's installation materials as a type of institutional critique, one that lays bare the construction of authorship, and one that the institution itself performs in lieu of Büchel's assertion of a classically modernist if not outright romantic, position (i.e the autonomous, creative genius antagonistic to constraining, institutional forces).[117] In a sense, Mass MoCA was attempting to perform a type of postmodernist maneuver, shifting the meaning of the work using Büchel's own materials away from what the artist had intended, and towards a reconsideration of the symbolic ordering of objects, and furthermore reflection on the nature of artist/institution collaboration itself within a broader context. That the museum would have neither attributed the project, had it been exhibited, to Büchel nor claim itself as the author only further testifies to this strategy.

Of course, the fact that Mass MoCA's Director, Joe Thompson and *Training Ground* curator Nato Thompson are not artists (but seemingly responsible for producing a work of art) is precisely what triggered not only Christoph Büchel's but also much of the art world's hostility towards the museum. The colonization of the production of art by non-artists has been a growing concern in recent years, as

museums and other organizations have increasingly blurred the boundaries between supportive, facilitatory, promotional and production roles in the realization of contemporary art.[118] This blurring has been all the more pronounced as site-specific and participatory projects, which can require more complex logistical planning, become more prevalent.[119] Artist and writer Anton Vidokle summarizes the anxiety of art production in the age of curator-cum-artist, a figure who, Vidokle asserts, incorporates art as a subgenre of larger curatorial endeavors: "The necessity of going 'beyond the making of exhibitions'," Vidokle exclaims, "should not become a justification for the work of curators to supersede the work of artists, nor a reinforcement of authorial claims that render artists and artworks merely actors and props for illustrating curatorial concepts."[120] For Vidokle (and I imagine a good number of other practitioners), for critical art to continue, "the artist as a sovereign agent must be maintained."[121] Such a statement aligns with Büchel's defense as well as the legacy of modernist avant-garde artistic practice that pits the individual artist against art's neutralization through institutionalization. It is also a model that assumes the production of art, which is to say the production of meaning, begins—and importantly, ends—with the artist. Without the artist, there is no art, and therefore no meaning. Or is there? Following theorist Suhail Malik, it can be argued that the field of contemporary art is not one of objects (that artists produce) per se but rather of structures, made possible through a network of artists but also curators, academics, critics, journalist, collectors, etc.—what some commentators, as I noted in chapter

two, have designated as the "art world."[122] Conceiving contemporary art as less artist- than discourse-oriented, I submit that Mass MoCA's proposed, but legally problematic, appropriation of Büchel's work would have constituted a radical rethinking of authorial agency in contemporary art production, and rejuvenated the critical thrust for which appropriation strategies in art have been historicized since Duchamp's readymade. Furthermore, the museum's inclusion of *Training Ground* within *Made at Mass MoCA* would have embodied what Malik claims is art's "exit from contemporary art." In order to grasp what this entails, and how Mass MoCA's actions can be understood as such, an explication of Malik's theses on contemporary art is required. Malik's proposals are particularly helpful for our purposes here, because they take as their foundation analyses of the readymade's legacy, the efficacy of art's institutionalization, and the currency of negation/non-art gestures in art today.

I should put forward some disclaimers before delving into Malik's ideas. In addition to his descriptions and claims being rather abstract, they are also totalizing, a charge he admits to but that is nonetheless cause for suspicion. It's difficult to accept wholesale an account of art that captures the essential features of a wide range of practices today (and Malik provides no examples that might ease doubt). Nevertheless, Malik's theory helps us comprehend Mass MoCA's attempt to display *Training Ground* not as a violation of Büchel's moral rights, but as an example of the power of negation, one that might restore much-needed criticality to a concept of appropriation practices (and even contemporary art more generally). Where it is needed I will

attempt to not only provide examples of art practices or movements that illustrate Malik's claims, but also point out when Malik's theories overlap those of previous art and culture critics.

Malik characterizes contemporary art (which would include readymade and appropriation practices generally) through two claims. First, he posits that contemporary art exhibits elements of "anarcho-realist" tendencies passed onto it from earlier avant-gardism, most notably in Duchamp (more on this below). More recent influences than Duchamp might include postwar neo-avant-gardism such as Fluxus, John Cage, and performance art generally. Insofar as art continues to seek to explode the nature of art, its makers have sought practices that are more authentically "real," meaning that they denounce art's artificial limitations (its institutionalization, acedemicization, co-optation etc.) in search of an art that, borrowing from a rhetoric of avant-gardism, collapses the distinction between art and life. Anarcho-realism persists in contemporary art because art as it exists in the present moment (what Malik calls "actually existing art") is perceived to fall short of realizing this goal. Malik's second claim: contemporary art is a "meta-genre without identity." It operates on a meta level (i.e., as "art," versus "as painting" or "as sculpture") but lacks a further coherent identification precisely because the anarcho-realist quest, launched at the outset of modernism and early avant-garde movements, has obliterated the ontological status of art. In short, anarcho-realist tendencies have produced an art that can be anything named as such (with the implication, however, that it must be the artist who does the

naming) in its chase after an elusive freedom from artificial limitations. No longer bound by medium or content specificity, art takes on all manner of forms and subject matter (including the absence of form or subject matter). Its overarching, meta identity, or genre, rests in its indentity-lessness or genre-lessness. Malik's ideas echo in some respects Arthur Danto's notion of the collapse of obvious art/non-art distinctions in early and mid-twentieth century appropriation-based practices, as well as Peter Bürger's claim that "the post-avant-garde free use of artistic material was proclaimed as the postmodern liberation of anything goes."[123]

Like Bürger and art historian and theorist Thierry de Duve before him, Malik locates the culmination of anarcho-realism and its attempted collapse of the art/non-art distinction in Duchamp and the readymade, from which—with the exception of the detour through medium specific, Greenbergian modernism—subsequent contemporary anarcho-realist practices have developed.[124] The Duchampian moment is the pivotal one, for with its acceptance by the institution of art it once and for all dispenses with the conventional evaluative criteria of art; a general axiom of what art is or is not is therefore lost; the idea of art as a corrosive force that challenges any and all forms of reified identity or meaning itself becomes the new evaluative criteria.

Anarcho-realist tendencies, the desire by artists to do "something that's more social, more collaborative, and more real than art," as Dan Graham has stated, are, according to Malik, precisely contemporary art's difficulty.[125] Having been established as the paradigm of art in the early twentieth century and then revived in the postwar

period in the United States and Europe, they now, in their institutionalized form, only fuel the further proliferation of criteria-less judgments, producing ever-finer degrees of particularity that belie any objective sense of art's "necessity, essence, definition or categorization."[126] And it is the unrelenting pursuit of an art more real than current, actually existing art that creates a vicious cycle of insecurity among artists, yielding only more particular and indeterminate art in a pursuit for the real without end. The constant negation of contemporary art dialectically maintains contemporary art, which Malik thus characterizes as "post-negational."[127]

We can compare Malik's post-negational contemporary art with the criticism Jean-François Lyotard leveled at "slackening" artistic values in the 1980s.[128] Lyotard equated "postmodern art" with what might otherwise be considered avant-gardism in modern art; in his formulation, postmodernism therefore comes before modernism —"it is not modernism at its end but in the nascent state."[129] For Lyotard, postmodernist art attacks conservatism, conformity, and the "mainstreaming" of experimentation in the arts in modernity. Postmodernist art "puts forward the unpresentable in presentation itself," that which cannot be captured or explained in the rationalizing, market-driven evaluating processes of Western society.[130] Perhaps Lyotard's notion of artists presenting the "unpresentable" and Mailk's idea of the artistic search for the "real" overlap. In both models, there seems to be a desire to transcend art's status quo. However, while Lyotard's postmodernist art is transhistorical (i.e, an experimental phase in art always precedes its normalization) and

furthermore a "war" waged on modernity's predilection for concepts that totalize, unify and fulfill grand narratives about the human condition, Malik's contemporary art, pinned to the present moment, has internalized the search for unity, for the real, for the bridge between art and life. In its failure to close the gap, Mailk's criteria-less contemporary art is similar to Lyotard's lament of pluralist cultural values in the late twentieth century—an "anything goes" mode of representation where experimentation has given way to innocuous stylistic hybridization.

For contemporary art to properly address the complexity of the contemporary moment—its determinate points of politics, injustice, struggle—Malik claims that art needs to "exit" from both its push against the limitation of artificiality (i.e., that actually existing art is not "real enough") and its metageneric state (i.e., its criteria-lessness). Malik proposes that in order to achieve this, art must retain negation as its primary operation (with negation being the primary mode of avant-gardism) yet avoid the impasse produced through the incorporation of negation via Duchampian anarcho-realism. This is to say: art must "negate post-negational art without recourse to an idealized real," meaning art should embrace its own insincerity, its inauthenticity—its artificiality, but without performing a kind of compensatory function. Examples of the latter might be the work of Hans Haacke or Fred Wilson, and similar "politically correct" art practices. In this view, art is not spontaneous, expressive, autonomous, or utopian, but rather ordered and instrumentalized. Consequently, affirming art as a both

negative and artificial practice brings it to the realm of determinacy, where it becomes entangled with and better addresses the complexities of a de-idealized *now*.

In thinking through what *Training Ground for Democracy*'s inclusion within *Made at Mass MoCA* might have been, something like a non-Duchampian negational art exercise comes into focus. On the one hand, Christoph Büchel's practice exemplifies Malik's concept of post-negational art. *Training Ground*, in its meticulous found object installation, would have been Büchel's grandest attempt up until that point to transport viewers into a an immersive (i.e., "more real") environment while remaining ultimately as realistic representation within an institutional context. While it's impossible to know how *Training Ground* would have been received in its completed state, it's not unreasonable to imagine that there would have been a range of responses to the work, due to the indeterminate nature of the work's allowing visitors to play out their own versions of "democracy."

On the other hand, by pushing to exhibit the unfinished project that would have been *Training Ground*, Mass MoCA was, in the most literal sense, attempting to negate the status of the work of art—to present "non-art," as it was caught up in the intricacies and irreconcilable differences between an artist and an institution within the institutional context itself. Here Mass MoCA's "real" stands in stark contract to Büchel's "real": shipping containers, vehicles and mobile trailers existing not as symbols of some open-ended notion of "a training ground for democracy," but as a bunch of actual junk—the readymade undone. Far from striving for an idealized,

authentic experience (it was very aware of the impossibility of exhibiting the work as it should have been), Mass MoCA sought to present the artificial, constructed result of a collaboration gone awry. And in its embrace of this artificiality, Mass MoCA's exhibiting *Training Ground* would have most likely not been received as indeterminate. On the contrary, the museum's specific goal—"exploring the issues raised in the course of complex collaborative projects between artists and institutions"—would entailed instrumentalizing whatever the installation was toward determinate ends, which would, moreover, have meant implicating Mass MoCA itself as a contributor to the exhibit's demise. *Made at Mass MoCA* could be thought of as an instructional moment for anyone going to see what failed installation art looks like. In essence, *Made at Mass MoCA* would have conveyed the message *Look here, this is not art, but rather an example of what happens when disagreements about what art should be cannot be resolved within a given situation. That situation includes budgetary, time and resource constraints. There is more to art than the artist's idea and/or technical proficiency. The actual realization of art, in this case a collaboration between an artist and a museum, is artificial.*

There is a critique of authorial agency at play here as well. Such a critique operates in two ways. First, if it had been successful in presenting the non-art assemblage of objects formerly known as *Training Ground for Democracy*, Mass MoCA would have exposed the normative division of labor in the production of much contemporary art, not unlike, as I claimed in chapter one, the ways in which Sherrie

Levine and Richard Prince appropriations pointed to the division of labor in mass-reproduced culture and the logic of the derivative. Yet this aspect of the critique remains within the boundaries of authorship as it is conventionally understood. It lodges a complaint against a hierarchy of creative agents but doesn't take into account the ways in which non-creative entities produce art or culture. The second half of the critique thus focuses on the ways in which the artist support structures normally associated with non-creative labor actually contribute significantly to the production of art. In this respect, rather than reassert the romantic authorial mode as I suggested Levine and Prince did, Mass MoCA would have called the very notion of authorship in question. It would have presented a non-work of art, authored by no one—it would have given credit neither to Büchel nor to itself. This act of "institutional appropriation," I argue, would have constituted a radical critique of authorship and the artist as the sovereign locus of creative agency. In fact the consequences of such a critique were too much for the art (and legal) world to handle.

The artistic community's backlash against Mass MoCA, the museum eventually taking down *Training Ground*, and the appeals court's reversal in favor of Büchel shows us just how deeply entrenched the ideology of romantic authorship in both law and art is, despite the law's recent acceptance of appropriation practices that challenge conventional notions of authorship. Even if appropriation art post-*Cariou* may fare better under the law, it does so under the stipulation that the model of the singular, romantic artist remains intact (as prime examples, Prince and Koons, through

their transformative works, stand alongside those they appropriated as romantic authors in their own right). When a case such as *Mass MoCA v. Büchel* radically challenges key assumptions within authorship, and in so doing also potentially questions the very core of contemporary art itself as a special, idealist category of human expression, the rhetoric of the collapse of the art/non-art distinction—art can be anything—so integral to a theory of modern and contemporary, is exposed as the fiction it is.[131]

Seeking a way to further reclaim the critical and political urgency in current appropriation practices, I proceed, in the next chapter, to analyze a recent case against art-activist group the Yes Men. The chapter takes leave of both copyright and moral rights laws, considering instead appropriation as it applies to U.S. trademark law. While examining the underlying principles in trademark law, the case study also looks at the Yes Men's creative methodology, one premised upon collaboration and anonymity, which again complicates the trope of the singular, romantic genius. The chapter also touches upon the Yes Men's wholesale, "untransformed" appropriation techniques, reminiscent of the Pictures Generation work discussed in previous chapters, though towards a type of engagement that has more in common with Malik's call for instrumentalized, unidealized aesthetic intervention in the present.

Chapter 5

The Yes Men: Parody in Aesthetics and Protest

I. Appropriation Art and the "Artistic Critique"

In the first three chapters I traced the development of appropriation practices in relation to copyright law from the late 1970s into the first decade of the twenty-first century. In chapter one I argued that although the Pictures Generation of artists (as well as the critics who supported them) legitimated appropriation as a critical technique, in retrospect we can think of their practices less as "killing off" the author then as a reassertion of authorial agency at the outset of a postmodern condition. The critical positioning of the Pictures Generation through "poststructuralist" strategies was very important in that it problematized many of the received notions of modernism. However, such strategies were either largely recuperated by the institution of art or—as I showed in chapter three in *Cariou v. Prince*—even outright denied by artists seeking to proclaim their own unique artistic sensibility.

This insistence on the uniqueness of artistic subjectivity in contemporary appropriation art is further illustrated in *Mass MoCA v. Büchel*. As I recounted previously, the case illustrates the further validation of the romantic author (i.e., the "soul of the artist") at the intersection of contemporary appropriation art and intellectual property law. *Mass MoCA v. Büchel* is significant in that it not only set a precedent for artist's moral rights in the United Sates, but also showed just how far appropriation has veered from one of its original missions: to critically interrogate the ideological and institutional forces at play in the production of commodity objects and images in contemporary culture. Where once appropriation art sought to unveil fictions, it now embraces theatricality. Where once appropriation artists were commended for dealing the authorial figure a fatal blow, they now sue to protect their singular authorial visions. Certainly neither Büchel's work nor his positioning before the court represents the entirety of approaches to appropriation in art today. Nonetheless, given the trajectory of artistic prerogative I have mapped out over the previous four chapters, it's not unreasonable to ask: what is the status of appropriation as a critical tool in art today? Is part of the difficulty in assessing critique in appropriation, on the one hand, its institutional limitations and, on the other, the fact that outside of the art world, scores of critical appropriation practices (that may or may not be understood as "Art") have emerged out of a quickly changing technological condition?

Part of this chapter details the development of such a change, which will support my argument that, given new and inexpensive media technologies empowering producers worldwide in the continued challenge to prevailing conventions of ownership through authorship, a rejuvenated, "ridiculing" or parodic appropriation, reminiscent of eighteenth and nineteenth century has appeared. The types of appropriation practices I refer to are notably lacking in the irony or cynicism of postmodernist art. Just how new types of critical appropriation practices, including those produced collaboratively, often under the guise of a pseudonym, function "tactically" outside the confines of conventional art-institutional channels, will be the emphasized in this chapter.

But a few more words concerning appropriation art in a post-Pictures moment are in order. Much of what I have attempted to trace in previous chapters concerns a certain "critical impasse" that has haunted a now thoroughly institutionalized or recuperated appropriation art **[PLATE 51]**.[1] This impasse becomes apparent when reviewing the last three decades of the history of appropriation art and realizing that its practitioners were working—to use a charged term—"autonomously." Now, autonomy is a complex concept within the discourse of modern art; unpacking it definitively is beyond the scope of this chapter.[2] Yet we can at least begin to understand appropriation art operating within the general logic of autonomy as theorized by Adorno, which seeks to sequester the cultivated, fine or "high" arts in general away from any overt social functioning, from any "use value." Viewed dialectically, art's

purpose in society is precisely it's lack of purpose; through such a withdrawal from the trappings of an otherwise administered and commodity-driven reality, art critically reflects on the "true" state of affairs that afflict modern life.[3]

It may seem to be an unusual (if not altogether contradictory) move to situate postmodernist appropriation art theoretically by employing one of the sharpest tools in the toolbox of modernist aesthetic theory. Yet we can make the necessary link between appropriation art and autonomy through scholar Peter Bürger's writing in the mid-1970s on the avant-garde. For Bürger, Adorno's logic of autonomy becomes that of legacy, which is to say modernist avant-gardism and its strategy of either Schoenbergian hermeticism or Dadaist anti-art become the accepted, institutionalized "given" that conditions future critical art practice.[4] It is quite doubtful that Adorno would have considered postmodernist appropriation as a legitimate "autonomous" art; formally speaking, it eschews aesthetic novelty and instead adopts the everyday visual language of consumer culture and is thus already tainted by instrumentalizing messages. Nonetheless, it has performed primarily within the context of a stabilized institution of art, which, as a social system, grants appropriation practitioners the creative "license" I referred to in chapter one when describing early Pictures work. In other words, a condition in which "the *objet trouvé*…[has lost] its character as antiart and becomes, in the museum, an autonomous work among others," endows artists with a kind of legal autonomy as it pertains to the intellectual property they use.[5] And with the license granted, an abandonment of critique set in, which, as we saw in chapters

two and three, manifested in late ‘80s appropriation practices that distanced themselves from what art historian John C. Welchman describes as “deconstructive and task-oriented…didacticism,” in favor of a poetic irony and formal ambiguity that at times invoked the ire of art critic and attorney alike.[6]

This declaration, then, of legal autonomy, this refusal to abide by laws established in a legally regimented society, illustrates what scholars Luc Boltanski and Eve Chiapello refer to as an “artistic critique” of capitalism. Writing a sociohistorical account of labor relations through capitalism’s development in France over the eighteenth and nineteenth centuries, the authors’ use of the term “artistic critique” should be taken in the most general sense (perhaps “creative critique” might also suffice). Such a critique manifests as indignation arising from pervasive feelings of disenchantment, inauthenticity, and oppression within the daily operation of modern life.[7] “This critique,” Boltanski and Chiapello write, “foregrounds the loss of meaning and, in particular, the loss of the sense of what is beautiful and valuable, which derives from standardization and generalized commodification, affecting not only everyday objects but also artworks…and human beings.”[8] From such a state of affairs emerges the artist, “free of all attachments, [making] the absence of production (unless it [is] self-production) and a culture of uncertainty into untranscendable ideals.”[9]

Following Boltanski and Chiapello, even if artists in the 1980s using appropriated materials ultimately furnished only, in the strict sense, already “produced” and therefore “inauthentic” art objects, they nevertheless heralded the

critique of authorship as symbolically self-determining (i.e., "self-production") and therefore "authentic." In this sense, then, we can locate a perhaps unexpected common thread within modernist and postmodernist art: a claim to, if not outright authenticity, then at least a claim to an exclusive artistic privilege. Modernism sought it through, by and large, either the bracketing off of art from the banality of an increasingly instrumentally rational world (i.e., the avant-gardism of Adorno) or the attempted collapse of the institution of art altogether and the re-coupling of art and life praxis (i.e., the avant-gardism of Bürger). Meanwhile, postmodern art demonstrated authenticity through an engagement with mass-produced, commercial imagery in the name of individual agency.[10]

By the early 1990s, the triumph of artistic critique over the legal constraints of intellectual property within art was becoming increasingly plain, as evidenced by the rapid expansion of appropriation as a technique **[PLATES 52 & 53]**. As artist and scholar Lucy Soutter writes,

> Appropriation has become the dominant trend in contemporary art practice…no longer [signifying] anything in particular; not the death of the author, not a critique of mass-media representations, not a comment on consumer capitalism. On the contrary, it seems that appropriation is a tool of the new subjectivism, with the artist's choice of pre-existing images or references representing a bid for authenticity (my record collection, my childhood snaps, my favorite supermodel).[11]

As I detailed in chapter three, Richard Prince's later works would embody the "subjectivist" strain of appropriation art. And even in the case, as I noted last chapter, of Christoph Büchel's attempt at a hazy critique of "democracy," there is nonetheless

an appeal to the "authentic experience," through the accumulation and re-presentation of pre-existing materials.

The relative autonomy of the art world—even as it has continued to chisel away at the wall historically separating high and low culture—and the purported authenticity of the works of art it produces—even as they enter into mechanical modes of production and reproduction via appropriation—attest to the absorption and neutralization of the artistic critique within contemporary art. As early as 1983, Douglas Crimp lamented appropriation's entrance into the canon of legitimate (i.e., non-radical) artistic practice, a move he ironically helped produce through his early advocacy of the Pictures Generation artists. Those artists have recently been defined, by the Metropolitan Museum of Art no less, as a group representing the last "movement" in art.[12]

If, as scholar Chantal Mouffe states, "artistic critique has become an important element of capitalist productivity," is appropriation as a critical gesture with any kind of political resonance viable?[13] In part the answer depends upon how it is framed as a critical practice, how it is expected to function in the world. If it is positioned as a practice designed to further champion the cause of artistic autonomy and authenticity —a new "subjectivism"—expressed through the institution of art, then perhaps its recuperation is a settled, if imperfect, matter.[14] The desires of artists to express themselves through the appropriation of mass media in order to produce all manner of content have, with some notable exceptions, been easily enough accommodated within

our society.[15] With its synthesis of high/low cultural references, appropriation in art has now been subsumed within a larger and more general phenomenon known as "remix culture," which, while sometimes legally contentious, nonetheless continues to expand across wide fields of creative production, reverberating throughout the physical and virtual networks of cultural capitalism.[16] And since the defenders of an open, "free" remix culture measure its value by the number of artistic permutations circulating at any given moment, they tend to place the emphasis of their arguments the culture of appropriation in the act, not in the effect. That is to say, it matters less what the appropriated/remixed message is, than the fact that one is generated in the first place. An a priori value is placed on the act of appropriation itself, as a demonstration of artistic freedom.

It's difficult to argue against the allowance of artistic expression per se. To do so, as control critics such as Lawrence Lessig point it, is to foreclose the very ideals of free speech, of a tolerant, progressive society. This assumes, of course, that more appropriations, or remixes—free expressions—lead to greater tolerance or progress. Such a condition can also reinforce the negative dialectic frequently pointed to as one of the "crises" within postmodernity itself: the act of fulfilling the desire for authenticity through creative expression contributes to the reproduction of reified social relations. The cliché persists: resistance is futile; as several theorists have proffered in recent years, there is no "outside" to a now-global cultural-capitalist order.[17] However, if we recalibrate the terms and spaces of appropriation's

engagement, I argue that a tradition of critical, politically subversive appropriation in the twentieth century, extending from John Heartfield's collage work in the journal *AIZ* to Situationist détournement to Hans Haacke's intervention at the Reichstag, continues today.[18]

A recalibration of this sort entails a shift of focus on two levels. First, if there is no "outside" from advanced capitalism's cultural outlets, then perhaps is it precisely among the technological structures that sustain not only it but also, more importantly, the economic and governmental logic of a neoliberal society where critical, politically resonating appropriation practices are to be encountered. Indeed, the type of appropriation I intend to investigate in the following pages is often affiliated with a set of theories and practices known as "tactical media," a mostly electronic form of art and activism that developed out of anti-globalization sentiment in the mid-1990s.[19] Two of its primary theorists, Geert Lovink and David Garcia, describe tactical media as

> what happens when the cheap 'do it yourself' [DIY] media, made possible by the revolution in consumer electronics and expanded forms of distribution (from public access cable to the internet) are exploited by groups and individuals who feel aggrieved by or excluded from the wider culture…tactical media [is] a media of crisis, criticism and opposition. This is both the source [of its] power, and also [its] limitation…But tactical media are based on a principle of flexible response, of working with different coalitions, being able to move between the different entities in the vast media landscape without betraying their original motivations… To cross borders, connecting and re-wiring a variety of disciplines and always taking full advantage of the free spaces in the media that are continually appearing because of the pace of technological change and regulatory uncertainty.[20]

The rallying cry tactical media shares with other progressive movements—*another world is possible*—has rerouted its practitioners from the more traditional art

exhibition space.[21] Outside such institutional locations (but still very much inside the networks of global capital) it often deploys appropriation as a vehicle for more direct social and political engagement in a wider public sphere. Thus our second shift requires that we cease associating appropriation with artistic criticism per se, and instead frame it in terms of *social* criticism—a concept I once again borrow from Boltanski and Chiapello, and one to which I shall return in more detail shortly.

My primary case study in this chapter will be The Yes Men, a collaborative group whose recent appropriationist projects have garnered considerable attention in the arts press, the blogosphere and the mainstream media. They are regarded as among the most prolific of media tacticians. I will focus specifically on the Yes Men's recent legal entanglement with the United States Chamber of Commerce. Erupting in late October 2009, the case involves the Yes Men's appropriation of the Chamber's intellectual property for use in a public protest against the lobbying firm. Within weeks of the incident, the Chamber filed a lawsuit against the Yes Men for, among other things, trademark infringement. After a drawn out process, the Chamber withdrew the lawsuit in June 2013.[22]

My intention in the following pages is to render my own verdict on the Yes Men case by employing a range of theoretical tools—drawn from sociology, art criticism and legal theory. Through my exploration, I hope to open up a discursive passageway that leads from the aesthetic to the political. The journey will bring us to an analysis of the form, artistic intention and social context of the Yes Men's Chamber

intervention, using scholar Linda Hutcheon's work on parody and postmodernism. Her expanded definition of parody's various modes will help us to conceptualize it beyond the often dry, utilitarian definitions found within the law, thus aiding our understanding of the ways in which the Yes Men are, on the one hand, returning to "classical" modes of parodic ridicule while, on the other, charting unknown (and legally risky) territory by employing new modes of "stealth" appropriation.[23] Their work, and appropriation in tactical media in general, may very well be ushering in a new period in the history of appropriation in critical cultural practices, one in which the urgency of circumstances today (specifically regarding climate change, the Yes Men's focus of late) makes the ironic detachment of postmodernism seem self-indulgent and threadbare. While the Pictures Generation may well have been the last movement in a history of postwar art, appropriation as a tool in the service of resistance and social transformation is far from exhaustion.

II. Appropriation in Tactical Media, and the "Social Critique"

Within the last ten years, we have witnessed the resurgence of a critically engaged appropriation whose formal techniques of almost exact copying initially evoke works from the late '70s and early '80s (e.g., Sherrie Levine, Richard Prince, Jack Goldstein, early Jeff Koons). Many of these more recent appropriations appear, like their postmodern predecessors, to copy blatantly in order to provoke. Yet, while these new appropriation projects may share formal tendencies with earlier postmodern

artists, their political content (and context) is very different. In this respect they have more in common with Heartfield and Haacke, as well as the "advertising activist" Michael Lebron and the Billboard Liberation Front.[24] In addition to projects by the Yes Men, other examples of "tactical appropriation" include: artists Eva and Franco Mattes' 2003 hoax publicity campaign to rename Vienna's Karlsplatz park to "Nikeplatz;" Danish collective Superflex's usurpation of market logic through its "If Value, Then Copy" series of projects **[PLATES 54 & 55]**; and more recently, artist Ken Ehrlich's 2010 faux web site in which he, under the guise of then controversial University of California President Mark Yudof, tendered his resignation.[25] In each of these examples, artists have appropriated signs, symbols, and various forms of intellectual property**,** but not with the goal of expressing their own autonomy or authenticity as creative individuals, as with subjectivist strains of appropriation art, such as Richard Prince. Instead, they rely on a wholesale, direct and often very public appropriation deployed in the service of what Boltanski and Chiapello describe as the "social critique" of capitalism.[26] The social critique is expressed specifically as indignation over the growing inequalities in social and economic life, this despite the modern world of abundance afforded by mass production and unprecedented wealth creation.[27] Furthermore, it is at times antagonistic to an artistic critique insofar as the latter runs the risk, in its search for the autonomous and authentic, of retreating into individualist solipsism. The social critique, then, strives to address problems such as inequality, poverty and domineering corporate and state interests.[28]

Before further explaining how tactical media shapes its social critique, I should address what could be perceived as a shortcoming in Boltanski's and Chiapello's notion of "critique." It should be stressed that Boltanski and Chiapello write from the discipline of sociology, and for someone familiar with a history and theory of modern and contemporary art movements, their explanation of "artistic" and "social" critique can seem reductive. To be sure, artistic and social critique as concepts are very broad —they are Boltanski's and Chiapello's summary observations of criticism of capitalist development over two centuries—and as such cannot, in any great detail, account for the nuances specific to the domain of art, and even more particularly to the various debates over the autonomy of art versus its social function in modernity that have existed at least since Kant's and Schiller's writings on the aesthetic.[29]

For a theorist such as Adorno, commitment to artistic or social critique were two sides of the same coin—one could not be performed without also performing the other. "Art," states Adorno,

> is social not only because of its mode of production, in which the dialectic of the forces and relations of production is concentrated, nor simply because of the social derivation of its thematic material. Much more importantly, art becomes social by its opposition to society, and it occupies this position only as autonomous art. By crystallizing in itself as something unique to itself, rather than complying with existing social norms and qualifying as "socially useful," it criticizes society by merely existing, for which puritans of all stripes condemn it.[30]

Thus, for Adorno, what Boltanksi and Chiapello describe as an artistic critique of capitalism would have already contained within it a social critique of malformed society. In other words, the artistic search for the "authentic" amidst a standardized

and administered society indicts the social injustices that constitute that society. To instrumentalize art, to make it "active" in the service of social criticism is to adopt the same means-ends rationality that Adorno found so repugnant in twentieth century. I will return to the point again at the end of the chapter, but for the time being I will state that while I find Adorno's argument compelling, nevertheless its melancholic abandonment of artistic agency as it seeks to address the social seems out of place in an early twenty-first century that is defined less by a culture industry than by what scholar Mackenzie Wark terms the "vulture industries," corporations who reap profit from the creative content "autonomous" producers themselves make and upload to the internet.[31] Additionally, environmental destruction as an effect of global capitalism (which is the condition the Yes Men combat through their tactical appropriations) requires a type of resistance that an Adorno-influenced position is ill-equipped to handle. In my estimation, it is in a type of social critique of capitalism as a form of activism where the most resonant appropriation practices can be found.

Many tactical media practitioners, as both products of and responders to postindustrial society and neoliberal globalization,[32] often direct their critical, creative energies against power structures through appropriation as a type of media subterfuge. Such an approach was significantly influenced by the writings of French theorist Michel de Certeau and his account of the "practice of everyday life."[33] Writing in the aftermath of May 1968 and the intellectual Left's disillusionment with the seemingly flawed concept of "total revolution," de Certeau introduced a model of contingent,

makeshift micropolitical action by positing ordinary acts of consumption as potentially constituting a hidden form of self-empowered production and consequently resistance to a technocratically administered order.[34] In other words, the manner in which consumers "misuse" their products to fit everyday desires, which may not necessarily align with any intended use value, could be considered a subversively creative process. We can posit tactical appropriation as a second order act of consumption—to employ one of de Certeau's terms, a "poaching" of objects and signs—and therefore a critical act of re-production.[35]

We would do well to scrutinize de Certeau's theoretical terrain, for in it we find the kernels of a prescription for creative autonomy within a post-industrial condition, which can be linked back to what Boltanski and Chiapello would later describe as the artistic critique of capitalism. Indeed, as scholar Tom McDonough points out, de Certeau's articulation of a tactical poaching must nevertheless be understood as a "largely private and atomized form of opposition, and one that is content to leave existing power relations intact."[36] McDonough problematizes de Certeau within the context of Situationist activity, contrasting the micro-gesture with that group's insistence on a "resolutely public and at least implicitly collective practice," one in which property is not merely passively reconfigured for individual pleasures but re-appropriated altogether in an explicit challenge to existing power structures, at least in the aesthetic or symbolic domain.[37] So while theoretical elements of tactical media practices may be traced to de Certeau's notion of creative consumption as criticism,

equally if not more relevant to them, given their often open antagonism to existing power structures, is Situationism and the notion of détournement, a technique that did not at all "make do" with status quo systems of representation and property relations but explicitly and publicly transgressed them. "Détournement," wrote Guy Debord and Gil Wolman, "…clashing head-on with all social and legal conventions…cannot fail to be a powerful cultural weapon in the service of a real class struggle."[38] And in a later passage from Debord's and Wolman's "User's Guide to Détournement," we find a description of Situationist practice that very much evokes today's tactical media and its staging within the social arena, and in particular the Yes Men's employment of the business suit as disguise (which will be explained later in the chapter): "…ultra-détournement, that is, the tendencies for détournement to operate in everyday social life…Outside of language, it is possible to use the same methods to detourn clothing… Here again, we find the notion of disguise closely link to play…everyone will be free to detourn entire situations by deliberately changing this or that determinant condition of them."[39]

Nevertheless, de Certeau's theories of small-scale, decentralized resistance found favor among an emerging group of media-savvy and socially conscious producers, the Yes Men among them, in the mid-1990s. This interest in de Certeau might be partially explained by the parallel of political disenchantment between young intellectuals in post-'68 France and artists and activists in Western societies in the '90s (and in the United States in particular). In the case of the former, the failed student and

worker revolt, and the subsequent emergence of an ever-stronger French state capable of accommodating dissent led many, including de Certeau, to disassociate themselves from the grand narratives of utopian collective emancipation and the essentialist binary of left/right politics.[40] In the case of the latter, the demise of the Soviet Union caused any real alternative to the West's social and political systems to fade from view, replaced by calls for an inevitable "end of history"[41] via acquiescence to some mixture of mass democracy and free market capitalism as mankind's "neoliberal" destiny. As Geert Lovink notes, this produced an

> ambiguity of more or less isolated groups and individuals, caught in the liberal-democratic consensus, working outside of the safety of the Party and Movement, in a multi-disciplinary environment full of mixed backgrounds and expectations. Lacking a big picture and liberated from the leftist dogmatism and ghetto group psychology, their new shapes of protest [took] viral forms, spreading with the speed of light.[42]

To counter the insidious strategies of neoliberalism—its coordinated and sustained "manipulation of power relationships" issued from an isolated, "base," of operations[43] (usually the transnational corporation, and sometimes conjoined with the state political system)—many media practitioners latched onto de Certeau's notion of the *tactic*, which, as he states, "insinuates itself into the other's place, fragmentarily, without taking it over entirely…it is always on the watch for opportunities that must be seized…it must constantly manipulate events in order to turn them into opportunities."[44] We may take de Certeau's "base" here literally (e.g., a business's headquarters—for example the U.S. Chamber of Commerce's location in Washington D.C.), or figuratively (e.g., the embedded corporate logic within decentralized global

capitalism). Against the strategic advantage afforded by the domination over a (geographical, political, economic) territory emerged a theory and practice of tactical media, a de-territorialized repurposing of the semiotic regimes that structured and maintained the social inequalities and exploitation within advanced capitalism.

I should make clear that tactical media as a set of critical cultural practices is not exclusively synonymous with social justice. Indeed, in its initial formation, tactical media's notion of working toward an "autonomous zone," away from "the terminal State, the megacorporate information State, the empire of Spectacle and Simulation" as writer Hakim Bey puts it, was of central importance, while responsibility to a greater social body was less defined.[45] Still today, in much tactical media work there is no simple separation between expression of an autonomous life praxis (which may even include forms of collective living), away from the talons of late capitalism and its commodification of virtually all aspects of living, and a commitment to a larger social good. In other words, in its expression of indignation over capitalist enterprise, tactical media's balance of individual and collective responsibility is often complex. As Boltanski and Chiapello note, it is "virtually impossible to combine…different grounds for indignation and integrate them into a coherent framework."[46] Yet it is important to recognize the potentially problematic nature of a quest for "autonomous existence," inasmuch as it can become yet another variant of the desire for authenticity, i.e., the artistic critique, which late capitalism continually strives to recuperate. In my estimation the difficulty with thinking tactical media as a practice

seeking autonomy is its relative non-engagement with a world that it sees as beyond repair (i.e., a version of Adorno's argument). However, there are tactical media practices, the Yes Men among them, whose goal is direct political engagement and consciousness-raising. I will consequently continue to frame tactical media within the context of its social critique of capitalism through various appropriation techniques.

In some respects, artistic and social critique, as general categories, parallel the more art-related context of the historical avant-garde, and in particular Peter Bürger's critique of the avant-garde's social efficacy.[47] We may interpret Bürger's provocative conclusion—a lament over the ultimate institutionalization of avant-gardist activity, the latter's failure to reintegrate art with the everyday workings of social praxis—as symptoms within the broader tendencies of artistic critique and social critique: capitalism's accommodation of the former but reluctance to realize the latter. Bürger, remarking upon the artistic production of the early twentieth century (e.g., cubism, dada), extended his analysis to postwar "neo-avant-gardism" (within which the Pictures Generation could be said to belong), and concluded that it was doomed from the outset simply to repeat the finally ossified gestures of the pre-war avant-garde and, having become wholly institutionalized, lacked the ability to address concerns raised regarding art and its relationship to a broader social sphere. Taking Bürger's work to its logical conclusion, the question of art's social responsibility remains inadequately resolved.[48] Whether we're discussing the contemporary art world or cultural practices outside of its purview, when being "artistic" or "creative," when clichés such

"thinking outside the box," or "think different" have been internalized as conventions within advanced capitalism's modes of production, they do so at the expense of attempts at actually addressing the social imbalances inherent to advanced capitalism itself.

Bürger's diagnosis appeared, in 1974, at that moment when critics were witnessing a post-'68 culture industry steadily encroaching upon the institutionalized domain of high art. But as Benjamin Buchloh ardently argued upon the publication of *Theory of the Avant-Garde*, Bürger's thesis that an historical avant-garde failed in its mission to bridge the gap between art and life should not be taken as the foreclosure of a critical project. Rather, it can mark the beginning of one, into practices centered on "new strategies to counteract and develop resistance against the tendency of the ideological apparatuses of the culture industry to occupy and control all practices and spaces of representation."[49] In retrospect, most of the neo-avant-garde practices to which Buchloh was referring—for example, those of Sigmar Polke, Gerhard Richter, Michael Asher, Daniel Buren and Dan Graham—have been unproblematically integrated into the canon of late twentieth century art. As such, the efficacy of their resistance to a "culture industry" is dubious.[50]

Nevertheless, like Buchloh, I want to insist on the value of critical cultural practices as they continue to resist hegemonic power structures. The difference today is that while Buchloh's formulation of the culture industry is borrowed to a great extent from Adorno's notion of postwar, commodified mass media, I want to advance

the notion that contemporary resistance is not antagonistic to mass media, but rather indifferent to it; it appropriates mass media symbols, systems and technologies as a means to an end. While this could also describe much of the postmodern art written about in previous chapters, it's important to also recognize tactical media's mostly indifferent stance to art's institutional condition. Whether or not the Yes Men can even be characterized as "artists" is open for debate, and something I will return to later in the chapter. For the Yes Men, it is mostly the internet space that is appropriated. The necessity of making the connections between social critique, avant-gardism and tactical media becomes clearer when we further examine the extent to which contemporary art is itself a branch of the culture industry and an embodiment of the artistic critique.

In tandem with the continued development of a neo-avant-garde in the post-war period, the growth of contemporary art in both breadth and depth has been exponential. The "art world," especially in the last two decades, has become precisely that: a thoroughly world-wide enterprise adhering to its own self-interested logic as a field—a builder of both of cultural and economic capital. Yet even with the global expanse of the institution of art, it still represents just one segment of an even more deeply permeating cultural capitalism, now well past its 1968 infancy.[51] Another way to contextualize the capitalist recuperation of creativity is to observe that Joseph Beuys' utopian dictum that "everybody is an artist" has since been warped into an entire "creative class" ethos reliant to a large degree on the logic of intellectual

property.[52] In light of the current state of cultural production, and an art world that largely participates in a global culture industry, we should retain a healthy skepticism of neo-avant-gardism. I would like to propose that we "think with Bürger against Bürger," which is to say we should adopt his criteria for assessing avant-gardist tendencies today while discarding his dismissal of it based on that criteria.[53] In other words, while the avant-garde's relationship to the institution of art is historically very important, we don't need such a relationship to conceptualize avant-gardism today. If tactical media can be called avant-gardist, it is not because it seeks to collapse the institution of art. Rather, it bypasses it, towards more direct political confrontation with the social and economic forces that shape society. What remains relevant in Bürger is the core premise of his analysis, which is, as Jochen Schulte-Sasse describes, the "implicit assumption that art has a socially consequential role only when it is somehow related to a socially relevant discussion of norms and values and thus to the cognition of society as a whole."[54] Additionally, in the case study here, the Chamber of Commerce accused the Yes Men of crossing a line from symbolic, "artistic" forms of protest to overt impersonation of the Chamber itself (i.e, a "non-art" that brushed too closely to "real life"), which could demonstrate the avant-gardist project of bridging the art/life gap.

To return now to our broader categories: the artistic and social critiques, here employed as part of an analysis of critical appropriation practices, are still useful as concepts because they can not only encompass the cumulative range of creative

production, but also open up once again the question of the social function of avant-garde artistic practice. They can be used to gauge the institution of art, mainstream, popular culture (sites where the artistic critique has historically been situated), as well as the great proliferation of amateur aesthetics and digital DIY culture in place in the 1980s and especially apparent since the exponential growth of technological advancement beginning in the 1990s.[55] And it is in these sectors, I believe, where we may locate avant-gardism today, and interrogate it in terms of its relation to the social critique.

Within contemporary DIY culture—from which tactical media emerges—we see exemplified a certain "Benjaminian" shift of media practices on a mass scale.[56] But it is not the continued rise of popular media production that is tactical media's primary concern (for that, albeit in an imperfect form, has been helped along by capitalism's accommodation of the artistic critique). Rather, it is the critical interrogation of the political and economic forces that shape contemporary, everyday life that is foregrounded. Given an awareness of neoliberal capitalism's effects on a number of fronts (e.g., "War…prisons, poverty, health crises, environmental disaster, and so on"[57]), several tactical media artists, including the Yes Men, have focused their efforts on consciousness raising in order to agitate a resistance to the reproduction of self-interested exploitation and inequality.[58] In its tendency to critically intervene in social praxis through its specific methods of appropriation, tactical media has been

successful at the very least in generating controversy outside the institution of art. Its recent skirmishes with the law are testament to this.[59]

III. (Mis)appropriating the U.S. Chamber of Commerce

For more than a decade the collective of artists and activists known as the Yes Men has used appropriation tactics to publicly humiliate corporate and state power brokers in order to "focus attention on the dangers of economic policies that place the rights of capital before the needs of people and the environment."[60] The Yes Men term their particular brand of appropriation "identity correction," which consists of the group blatantly copying, repurposing and then re-presenting the visual identities of those they target.[61] Identity corrections often take the form of stealthily crafted web sites and press releases, and appear almost identical to their legitimate counterparts. Only their messaging is altered, which consists of "official-sounding" statements that nonetheless range from hyperbolic and absurd free trade initiatives to complete policy reversals. Because this counter-messaging is circulated electronically, its rapid and widespread coverage (i.e., its "going viral") is practically assured. Among others, the Yes Men have "corrected the identities" of the World Trade Organization, McDonald's, Haliburton, the U.S. Department of Housing and Urban Development, Dow Chemical, the *New York Times*, the *New York Post*, the Canadian government, Apple Computer, Chevron, Exxon and General Electric.[62]

Much of the time the Yes Men's spoof communications are understood for what they are: criticism carried out in a clever manner against powerful state and business interests. But this is not always the case. In 2000 organizers of a legal seminar in Salzburg, Austria actually mistook the Yes Men's imitation World Trade Organization web site for the real thing, and through it sent an email to WTO Director Mike Moore, inviting him as a speaker. The Yes Men's Andy Bichlbaum, posing as Moore's substitute, flew to the conference and presented a paper, "Trade Regulation Relaxation and Concepts of Incremental Improvement: Governing Perspectives from 1970 to the Present." During his time at the podium, Bichlbaum mocked the trade organization by introducing new potential measures for increased worker productivity, including the outlawing of siestas in Spain and Italy, and allowing the sale of election votes directly to the highest bidder.[63] The seminar's audience received Bichlbaum's performance with some confusion, but after the fact (i.e., when the prank was uncovered) it generated a substantial amount of both positive and negative publicity for the Yes Men. The WTO prank was an instructional moment for the group, which realized the power of the professional persona, one who, believed to be legitimate and therefore possessing the "truth," was allowed great latitude in his or her speech acts. Since 2001, the Yes Men have included a performative component in almost all of their identity corrections **[PLATE 56]**.

In October of 2009 the Yes Men embarked on a mission to lampoon the U.S. Chamber of Commerce, the largest business lobbying group in the United States,

whose stance against global warming science had been well publicized. As they had done in previous interventions, the Yes Men registered a related internet domain name, and subsequently built a couple of web pages that copied verbatim the look and feel of the actual Chamber website, including its registered trademarks. The Yes Men inserted into their site wording that reversed the lobbying group's position on climate change, stating that, going forward, the lobbying firm would be "throwing its weight behind strong climate legislation."[64] In conjunction with their website, the Yes Men also issued a similarly worded fictitious press release, which went out to a slew of media outlets **[PLATES 57 & 58]**.

A few days after uploading their phony web pages, the Yes Men, posing as representatives of the Chamber, called a conference at the National Press Club in Washington, D.C. There they would reiterate the Chamber's newfound stance on climate change. "Hingo Sembra," supposedly the assistant to the Chamber's President, walked up to a podium bearing the Chamber's logo and began his presentation **[PLATE 59]**.[65] Mr. Sembra continued on uninterrupted for thirteen minutes, until Eric Wohlschlegel, an actual representative of the Chamber, stormed into the room and decried the Yes Men's announcement as "fraudulent press activity, and a stunt."[66] At first playing coy and thus initiating a brief game of "who is the real Chamber of Commerce?", Andy Bichlbaum eventually admitted the hoax before a dozen perplexed reporters, but maintained he represented "the position the Chamber of Commerce must take."[67]

The Chamber therefore short-circuited the full impact of this faux press conference, but not before some public relations damage had been inflicted. News of the Chamber's turnaround position flooded out across multiple media channels, including a few television networks, whose on-air commentators caught themselves mid-sentence trying to correct what they had originally reported as the true story of the Chamber's about-face.[68] Even with the incident eventually being framed as a prank by most news outlets within a day or two,[69] the continued online presence of the Yes Men's fake web site insured that the Chamber's denial of climate change science remained in the spotlight.

The Chamber wasted no time in its response to the Yes Men's intervention. The day after the press conference, it sent the Yes Men's internet service provider a cease-and-desist letter, claiming the group was unlawfully exploiting its trademarks.[70] However, the Yes Men's attorneys replied by refusing the demand, stating that the group had appropriated the Chamber's intellectual property as a form of political parody protected by the First Amendment.[71] At the end of October, the U.S. Chamber of Commerce filed a lawsuit against the Yes Men, claiming, among other things, trademark infringement.[72]

The Chamber asserted that through copying the entirety of its trademarks without any alteration, the Yes Men engaged in an act of *misappropriation*—effectively becoming the Chamber, and, in bad faith, acting on its behalf.[73] Described as "nothing less than commercial identity theft masquerading as social activism,"[74] the

Yes Men were accused of causing the Chamber real economic harm (it had to spend time and money retracting the story) as well as damage to its reputation. Moreover, the Chamber claimed the Yes Men used the stunt purely for self-promotional purposes. As it happens, the prank dovetailed nicely with the release that week of the group's newest film at the time, *The Yes Men Fix the World*.[75]

The gravity of the Yes Men's alleged wrongdoings is perhaps better understood by very briefly reviewing the historical rationale behind trademarks in the modern period. The Lanham Act of 1946, on which current U.S. trademark law is based, was the result of a laborious process that lawyers and a collection of state lawmakers began in 1905 after growing increasingly aware of the changing nature of business in the country. They recognized that "trade is no longer local, but is national,"[76] and that robust and competitive interstate commerce relied upon a regulatory framework at the federal level for the brand names under which goods were being sold. The Lanham Act was named after representative Fritz G. Lanham of Texas, who had played a pivotal role in the shaping of modern federal trademark law.[77]

Textbook accounts of trademark frame its function in the following manner: companies employing a trademarked name, logo or slogan in order to identify themselves in the market are essentially sending a message to the public that the products it is buying are of a specific origin. Trademark law recognizes that this message is the exclusive property of the sender, and cannot be used by other market competitors. But trademarks ideally function not only as legal safeguards for

businesses that have invested resources into a particular mode of production (i.e., they lessen the chance of unfair competition through piracy), but also as facilitators of consumer protection. In other words, trademarks help *buyers avoid confusion* by providing indicators they can use to differentiate products or services that they may not otherwise be able to perceive without first purchasing those products or services.[78] In this respect, trademarks carry the reputations of their owners; they can be incredibly important symbols of an organization's values and vision.[79] And since the Chamber of Commerce is in the business of fostering business itself, it seems clear enough why they would want to protect their trademarks so vociferously. "Because the Chamber's *business* is policy advocacy (it does not manufacture any goods)," its lawyers state, "it is vital to its financial and reputational interest that the public is *not* confused about the Chamber's policy positions and advocacy activities." [80]

Of course, how trademarks should function in theory is not necessarily how they function practically. They may be designed to look after business and buyer interests alike, but they also continue to facilitate the producer/consumer dichotomy intrinsic to the free enterprise system. Producers are "protected" in that they are granted a certain monopoly use of a specific symbol, slogan or other semiotic device, while consumers are "protected" insofar as the commercial landscape in which they interact is more clearly defined for them. Far from being critically questioned, the roles of producer and consumer are instead further engrained as seemingly natural categories, with "rules" that are not to be transgressed. Adding to the insidious social

relationship between trademark producers and consumers, is the fact that, since the passage of the Lanham Act, the United States economy itself has gone through significant transformation. It has shifted from a system focusing on the production of material goods based on needs (where trademarks furnish indicators of a product's quality) to one based on trans-materiality and desire (where trademarks, now detached from any specific product, are valuable in and of themselves and furnish "sign value"). In one simple example, we can posit the shift in the consumption of footwear over the last several decades. Looking to satisfy the need to protect one's feet, in past times consumers might have chosen a make of shoe that was advertised as more durable than the rest. Over time, the need for shoes is replaced with a desire for certain brands that are stylish or trendy. Eventually the reputation among certain brands (let's say Nike) becomes such that it's less about the construction of the shoe to fulfill a need than the name itself, which has since crossed over into other commodity forms more or less removed from the original intent to provide quality footwear. Nike jackets, watches, coffee mugs, and the like, goods whose actual quality is questionable (but also beside the point), become ubiquitous. The trademark then, as scholar Rosemary Coombe suggests, is the "quintessential self-referential sign or postmodern cultural good," in that its worth stems not from its ability to aid in commodity production but in the "production of consumers to produce demand."[81] It is in this condition of global branding and lifestyle, in which names, not goods, whet consumer appetite, that we see the full effect of the "psychological function of symbols."

Yet like copyrighted materials, those bearing trademarks can be used without the authorization of their owners for purposes of comment, criticism, education and reporting. As we recall from the first chapter, copyright law calls this doctrine "fair use," and although fair use as a legal concept differs somewhat in the context of trademarks,[82] its fundamental principle—the freedom of expression granted by the First Amendment—remains the same. The appropriation of the Chamber's trademarks, the Yes Men claim, falls well within the group's right to express itself.

What makes trademarks especially easy (and important) targets for criticism is their place within the public sphere. We know the consumer society of cultural capitalism all too well; brands supersaturate our everyday visual experience. We cannot escape trademarked signs and symbols, which makes them, perhaps more than other type of intellectual property, well-suited for appropriation and critique. According to the Yes Men's lawyers, the group's appropriation of the Chamber's trademarks belonged to a "long and storied tradition of satiric comment" that has "enhanced political debate."[83] More specifically, the Yes Men's Chamber intervention was framed as an act of *parody*. This is framing was very intentional; as we will see in the next section, parody occupies a special position at the intersection of First Amendment and intellectual property law.

IV. Parody

Historically, United States intellectual property law has recognized parody as a form of free speech and therefore justified fair use. Parody has served generations of commentators (extending back before the birth of the United States itself) seeking to ridicule the ways in which individuals and institutions, often times in positions of power, present themselves publicly. It accomplishes this by "imitating another work, *esp.* a composition in which the characteristic style and themes of a particular author or genre are satirized by being applied to inappropriate or unlikely subjects, or are otherwise exaggerated for comic effect."[84] Implied in this classic definition of parody is its intent to judge; it can also, like satire, contain a moral component, "ridiculing," as scholar Linda Hutcheon states, "the vices or follies of humanity, with an eye to their correction."[85] Yet unlike satire, which might appropriate forms for use as "weapons" in the critique of general social tendencies, conditions or conventions, parody, at least as far as the law is concerned, must be shown to "target" particular expressions. In this sense it must be *intramural*, making clear a one-to-one relationship between the commenting text and the text upon which the comment is being made.[86]

The logic behind the need to demonstrate parody, and not satire, in a court of law was illustrated in Koons's *Puppies* lawsuit. The reader will recall from chapter two that Koons's defense team argued his appropriation was parody and therefore a fair use; but in describing his intention, the artist claimed his appropriation was a comment on the "deterioration of society in general," not any specific comment on the

actual photo from which he based his sculpture. In other words, Koons's appropriation was used as a weapon, not a target; it was extramural (satire), not intramural (parody).[87] Koons's loss was due partly to the fact that he didn't adequately establish why it was *Rogers's particular photo* that was necessary in order to make his artistic statement. Indeed, any photo deemed sufficiently kitsch could have sufficed in making the same statement. And because Rogers's photo was not commonly known, or obviously coded as kitsch—it could very well be read "straight" as a sincere, sentimental image—there was not enough of a connotative (what Hutcheon might call ironic) difference between Koons's appropriation, despite its formal transformation (i.e., turning the photo into a sculpture), and the original work. Abrogating the need to establish a relationship between parodying and parodied texts would open the floodgates for the allowance of any arbitrary expression to be appropriated for commentary on whatever subject matter the appropriator deemed fit (and this is precisely the foundation for the crisis of critical interpretation we encountered last chapter).

Applying notions of parody as target and weapon to the Yes Men's Chamber intervention presents a challenge. On the one hand, the group's appropriation of the Chamber's trademarks—verbatim copies appearing on the impostor web site and press release—does not appear intended as comment on them directly (i.e., on their formal qualities, their wording, their connotative value, etc.). The appropriations are not "about" the trademarks at all and thus are not operating intramurally in the strict sense.

On the other hand, they aren't operating entirely extramurally either; the appropriations do not seem intended as larger statements about some general condition or tendency. There is no question, by the Chamber's own admission, that the Yes Men intended to target the organization through the appropriation of its trademarks. For the sake of argument, then, if we concede that the Yes Men did parody the Chamber, theirs is a "satiric parody," or perhaps, "parodic satire."[88]

That the Yes Men's appropriations do not fit neatly within a classical definition of parody—that they don't seem to operate wholly as either targets or weapons—is due largely to the ambiguity of their form. The appropriations do not exhibit what both the classic definition and Hutcheon state are the tropes historically associated with parody: "exaggeration, understatement, or any other comical rhetorical strategy."[89] Nor do they exhibit any "legally safe" mark, such as a disclaimer, that would establish their status. In fact, the appropriated trademarks are exact duplicates of their targeted counterparts.[90] Because they are identical, it is, on a surface level, difficult to understand them as parodic in intent. And this is precisely what forms the crux of the Chamber's complaint:

> The Defendant's "works" went far beyond mere "imitation" of the style of the Chamber to deliberately and deceptively impersonate the Chamber by every possible means. And rather than treat a serious subject in a nonsensical or comedic manner, the Yes Men conducted their activities with utmost seriousness over an extended period.[91]

The Chamber's statement implies two things. First, that parody should always make itself known as such, that it should use obvious formal indicators as "reveal

mechanisms" in order to distinguish itself from what it is targeting. Second, that the parody's origin should be clear. By each side's account, the Yes Men's appropriations were initially read not as having originated from them, but from the Chamber itself. In this respect, the Yes Men acted, in some sense, as pirates, or counterfeiters, in that they were hoping to pass off as legitimate (at least for a short period of time), something that was not. And this, in short, caused confusion.

Confusion, however, is the very hallmark (indeed, "trademark") of the Yes Men's practice—it is the effect for which they continually strive. The group has built a reputation on its ability to hoodwink public and private figures alike through cleverly designed pranks that leave witnesses wondering what is to be taken as truth, and what should be understood as make-believe. It is these "parafictions,"[92] as scholar Carrie Lambert-Beatty terms them, that have the potential not only to put political pressure on organizations such as the Chamber, but also to precipitate critical dialogue in a public sphere where a deluge of scripted and approved messages has left it in a state of atrophy. It is precisely because of its ruse that the Yes Men's intervention was so effective; difficult to imagine are more "conventional" forms of protest, in front of the Chamber's offices, that could have achieved the same results: the use of picket signs, for example, bearing exaggerated logos unequivocally mocking the lobbying group.[93]

What the Yes Men are defending then is the creation of confusion—it's temporary nature is something I'll discuss further below—by their appropriations as an acceptable consequence (and indeed desired result) of a political speech act. This is

a crucial distinction, for although trademark law is designed precisely to combat confusion, it does so within a particular domain: commerce. This is different from, for example, copyright law, which grants exclusive rights to expressive creative works in general. Trademark law does not grant an exclusive right, but rather protects symbols specifically within the context of the marketplace—of commercial speech. As the Lanham Act states:

> Any person who shall, without the consent of the registrant—
>
> (a) use *in commerce* any reproduction, counterfeit, copy, or colorable imitation of a registered mark *in connection with the sale, offering for sale, distribution, or advertising of any goods or services* on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive…shall be liable in a civil action by the registrant for the remedies hereinafter provided.[94]

The specification of commercial intent when determining trademark infringement is further manifested within the language used in the methods of determining if infringement has occurred. As we recall from previous chapters, the 1976 Copyright Act introduced a four-part balance test within its fair use clause to aid in establishing whether or not an expression might be considered an infringement. Trademark law often uses a similar, multi-pronged test, known as the "Polaroid factors," named after a precedent-setting 1961 Second Circuit Court case involving the Polaroid Corporation.[95] The Polaroid factors include: 1) The "strength" of the plaintiff's mark; 2) the degree of similarity between plaintiff's and defendant's marks; 3) the proximity of the products or services; 4) the likelihood that plaintiff will bridge the gap; 5) evidence of actual confusion; 6) defendant's good faith in adopting the mark; 7) the quality of defendant's product or service; and 8) the sophistication of the

buyers.[96] In the third factor, "proximity" refers to location within the marketplace; in the eighth, "sophistication" indicates consumer ability to discern different products similarly marketed. Additional references here to "products," "services," and "buyers" reinforces the commercial aspects of speech that are at issue. But it is the sixth factor —the defendant's good faith—where ideological divergence most noticeably occurs. To be sure, the Yes Men were aware of the Chamber's trademarks, and used them with the specific intention of impersonating the organization and creating an atmosphere of confusion, thus acting, in a sense, in bad faith. But they were not doing so to confuse for the sake of commercial gain. The Chamber's claim necessarily hinges upon imagining the Yes Men as a market rival, engaging in unfair competition through deliberate trademark theft. But as their lawyers succinctly state, "The Yes Men are not the Chamber's competitor; they are its critic, and the use of the Chamber's mark 'is not in connection with a sale of goods or services—it is in connection with the expression of…opinion *about* [the Chamber's] goods and services.'"[97]

Indeed, examining the Yes Men's hoax through the prism of trademark law doesn't fully capture its symbolic complexity. Nor, ultimately, does comparison with works of postmodernist appropriation art seem adequate. Using intellectual property law or visual art as vehicles for analysis tends to situate the signifier/signified relationship of parody strictly within the domain of the visual image or object (i.e., the Chamber's logo), at the expense of accounting for what may be termed a "semiotics of the performative." Theorizing the parafictional aspects of contemporary art, Lambert-

Beatty lays the foundation for just such an account. She argues recent interventionist practices such as the Yes Men's exhibit what British philosopher J.L. Austin designated in the 1950s the "doctrine of the Infelicities."[98] Austin's doctrine first takes as a prerequisite the notion that, in their utterance, speech acts don't so much simply *say* things as sometimes *do* things. One of his classic examples is the wedding vow, which doesn't so much report on marriage as actually perform the act of getting married. "Unhappy" or infelicitous utterances are those that, as Lambert-Beatty states, "don't take"; they are speech acts that end as technical failures (e.g., an actor reciting a wedding vow as part of a script is not actually getting married).[99] In the case of the Yes Men's impersonation of the U.S. Chamber, we might understand their faux-press statement as an infelicitous speech act, in that while they may have performed a reversal of the Chamber's previous climate change policy, that didn't necessarily make it so. Yet as Lambert-Beatty describes, because of their appropriation of the Chamber's position of authority (over and above the simple taking of its logo), the Yes Men complicated the very distinction between felicitous and infelicitous speech acts.[100] Through their "identity correction," there was, at least briefly, a period where the Yes Men's performance "took," with reports of the Chamber's change of position filtering out into the media.

But while Lambert-Beatty's use of the happy/unhappy utterance as a model to describe the parafictional might also help us understand the complex performativity of the Yes Men's speech act, it does not entirely explain parodic intention, which is

important for our purpose here. This becomes clearer when we look further at the two subcategories Austin defines within his doctrine of infelicity: the "misfire," wherein because an utterance is performed incorrectly, it is not achieved and is thus voided; and the "abuse," wherein an utterance is performed according to plan and thus seemingly put into effect but done so insincerely.[101] An example of a misfire might be President Obama's botched oath of inauguration (delivered incorrectly the first time by Chief Justice John Roberts, Obama was sworn in again in a private ceremony two days later).[102] An abusive infelicity might be making a promise to somebody without any intention of keeping it.[103] In the former example, participants and spectators alike understood the speech act as the sincere attempt by appropriately designated persons at a conventional procedure that would yield the result of inaugurating the next President of the United States. In the latter example, abuse occurs when the promising party has an intention different from the expectation set into motion by their performative utterance itself.

Returning to the Yes Men's Chamber impersonation, it seems to fall between the categories; on the one hand, their fake press conference was halted half-way through its proceedings by an actual Chamber representative (i.e., it "misfired"). On the other hand, the Yes Men knew from the outset they had no intention (indeed no real authority) to carry out the policy reversal it publicly performed on the Chamber's behalf, and thus "abused" their position. We can thus use both the misfired and abusive concepts of the infelicitous utterance to argue both for and against the Yes

Men's attempt at parody. A pro-Yes Men argument might go something like: *there is no question our speech act was intended as anything other than the parody it was; that the Chamber interrupted it mid-stream and denounced it as a "stunt" confirms this*. On the other hand, a pro-Chamber argument might sound like: *it was clear the Yes Men intended to deceive the press conference's audience by pretending to be the Chamber itself; luckily, we were able to put a stop to it before too much damage had been done*.

To better grasp the parodic dimension of the Yes Men's intervention, we must assess what Linda Hutcheon calls its *énonciation*. In addition to analyzing (art) objects themselves, she claims, "we also act as decoders of encoded intent…parody involves not just a structural énoncé but the entire *énonciation* of discourse [including]…an addresser of the utterance, a receiver of it, a time and a place, discourses that precede and follow - in short, an entire context."[104] Following Hutcheon, we can state that while the Yes Men certainly appropriated the Chamber's trademarks, that initial gesture formed but one part of a much more ambitious, performative program. They also rented a conference room; purchased business suits; hired fake news reporters to intermingle with the actual journalists covering the press conference; and finally, engaged in a little role playing, knowing that their intervention would transpire in front of cameras and note-takers capturing their every word. More than appropriating the Chamber's trademarks, the Yes Men seemingly appropriated its entire symbolic suite, its, to use an orthodox term, "productive apparatus."

Crucial for our understanding of the context of the Yes Men's *énonciation* is, as Hutcheon notes above, timing, or what might also be thought of as "duration." A necessary requirement of the Yes Men's tactics is that their ruses eventually be discovered, but also carry on as long as possible (which, in our information age, seemingly lasts anywhere from the 13 minutes it took the Chamber to end the hoax to a few news media cycles). Whatever the duration, it is at the point of revelation of the hoax, at the moment of recognizing the difference between fiction and reality, that has the potential to carry the most critical force. Thus the longer the ploy can linger among news outlets as "truth," the greater the potential public reaction when a position or policy reverts back to its pre-intervention state.

The durational element, however, can also work against alleged trademark infringements. Trademark law, as well as the Polaroid and other tests mentioned earlier, do not establish temporal limits to the concept of confusion.[105] If general, public confusion can be established, even confusion that lasts only a short period of time, then there remains the possibility of a finding of infringement. To help understand the durational aspect of the Yes Men's intervention, we must look to the other components that comprise the Yes Men's "encoded intent."

Enlarging the analytical lens to allow for a wider enunciative context, something akin to a classic definition of parody comes into focus. Setting aside the ambiguity of the trademark appropriation for a moment, it is the comical rhetoric, in the form of the sarcastically poetic tone peppered throughout the statement Andy

Bichlbaum performed for the press conference audience, that provides evidence of parody.[106] Even more telling were the reactions of the news media that the episode in its entirety caused. First its (erroneous) reporting of Chamber's newfound change of position; then, the news media's struggle for journalistic accuracy as it fumbled the facts; and finally, a recanting of the original story followed not only by admitting to the prank—the Chamber was not the only victim it seems—but also debating both the Chamber's opposition to climate legislation and the reliability of professional news-gathering.[107] Thus with the incident finally and widely reported as a hoax, it becomes clear the Yes Men's intervention might have confused initially, but always with the opposite as its goal: giving clarity and putting pressure on the Chamber and its stance on climate change. In the last analysis, revelation and critique, not confusion, drive the Yes Men's tactical appropriation. Moreover, it is hoped that the target of the parody itself helps to perform this revelation, by having to deny statements attributed to it (and often having to further elucidate its actual position) to television, internet, and newspaper audiences around the world—which, much to the Chamber's chagrin, is exactly what happened.

V. Conclusion: The Business of Activism, or the Critical Corporation

In June 2013, the U.S. Chamber withdrew its lawsuit against the Yes Men. Although it is not entirely clear why the business organization dropped the case (it did not release a press release about its decision), perhaps it reconsidered the merits of its

case and found it to be a losing battle, or at least one that would only bring further negative attention. Of course, never letting an opportunity for further comedic critique pass by, the Yes Men staged another faux press conference on the steps of the Chamber's office upon hearing its decision to withdraw the suit. Posing as themselves this time, Yes Men Andy Bichlbaum and Mike Bonanno read a statement proclaiming that the Chamber would be offering "free lunch" to anyone who cared to walk inside the building.[108] Yet the Yes Men did not even need such a gimmick to let it be known that they had, in effect, triumphed; just weeks after the original prank in 2009, the Chamber issued a press release calling for a "bottom up" approach to address climate change."[109]

I'd like to finish here by returning to the notion of appropriation and tactical media. More specifically, I want to draw attention to the economic subtext in this case, which might help furnish insight about the nature of tactical media practices as they work within the very power vectors they seek to resist and critique. Such a subtext was revealed in the Chamber's particular angle of attack in its accusation of trademark infringement. In its attempt to link the Yes Men's appropriations with commercial speech and thus prove bad faith and unfair competition, the Chamber focused its claims on the group's financial operations. The Chamber's legal briefs pointed to the Yes Men's legally registered status as a corporation, as well as their online merchandising, as evidence not of political activism but of an ongoing entrepreneurialism.[110] More specifically, the Chamber alleged that the Yes Men's hoax

press conference was a deliberate ploy designed "to promote their commercial movie venture…Their…identity theft enterprise [has generated] a substantial cash flow… they['ve] received at least $500,000 to finance and distribute their recent movie."[111]

It should be noted that there is nothing illegal (or even unethical) per se about raising money in order to continue to struggle for causes that are believed to be just, regardless of political persuasion. Within trademark law particularly, money earned from the use of another party's trademarks does not guarantee a ruling of infringement for the plaintiff. As the Polaroid factors show, there are several aspects to consider when determining trademark cases, with confusion, as it relates to unfair competition, playing a significant role. Thus it is difficult to interpret the Chamber's claim that, in effect, the Yes Men are "laughing all the way to the bank," as anything other than cynical. Rather, it would seem the Chamber is using trademark infringement as a foil to silence a voice that is in particular exposing publicly the often unpopular position the Chamber has taken regarding climate change, and in general criticizing the logic of neoliberalism. Yet the Chamber's legal documents and their illumination of the Yes Men's commercial activities do render two things apparent: one, that there are often business realities involved in activist expression; and two, that insofar as tactical media practices such as the Yes Men's generate what Pierre Bourdieu termed "symbolic capital"—which is to say as their interventions attract support that can be parlayed into economic gain—there can be no simple separation between political and commercial speech in them.[112] For the Yes Men, every prank pulled is at once an act of

protest and future film material. This problematizes their political position somewhat, for the question becomes: in the art of propaganda, which is the bigger commitment—the message, or its crafting? In other words, at what point in its (increasingly high value) productions do the Yes Men run the risk of into merely providing entertainment, while providing only superficial critique of its targets?

By their own account, the Yes Men are anything but profiteers, at least in the financial sense of the term. They claim that whatever funds they raise are channeled back into their projects, and if sales figures are any indication, they lost money on their movie *The Yes Men Fix the World*.[113] But the significant point here is less the Yes Men's financial ethics than the observation that they wage their battles deploying the very same instrumental structures, procedures and protocols characteristic of the entities they seek to "correct." Put bluntly if reductively, the Yes Men are a (granted, minuscule) corporation combatting other (usually behemoth) corporations. They advocate for a certain politics, just as their targets, such as the Chamber, do. They raise money, just as their targets, such as the Chamber, do. And with it they not only fund new campaigns but also build infrastructure for an "extended campaign."[114]

With their wide range of tools and tactics, the Yes Men's approach to critical cultural production is very much in keeping with one of tactical media's slogans, *by any media necessary*—a clever, if somewhat less aggressive, variation of Malcom X's famous "By Any Means Necessary" speeches in the mid-'60s, themselves perhaps borrowed from Jean-Paul Sartre's 1948 play *Dirty Hands*.[115] The Yes Men's

appropriations and interventions are a means to an end, and likewise raise the specter of art's use value once again, after so many years in the crypt of modern art. As critic Stephen Wright states, this is precisely what differentiates tactical media from many neo-avant-garde predecessors; whereas the latter appropriated from the realm of the "real" into that of the autonomous and "useless" symbolic space of the institution of art, the former reverses this process—making political use once again of symbols in the everyday inner workings of neoliberal capitalism, at the expense perhaps of not being recognized as artistic expression. Tactical media is then a type of "stealth art."[116]

Of course, it's not entirely clear that what the Yes Men do can even be labeled "art" in the conventional sense. They might be called culture jammers, parodists, or pranksters, but "artists" is not an entirely accurate designation. On the one hand, both Jacques Servin (Andy Bichlbaum) and Igor Vamos (Mike Bonanno) are products of art school education. Vamos is currently a professor of media art at Rensselaer Polytechnic Institute in Troy, New York. As the Yes Men they also occasionally present their "art works" in traditional exhibition contexts.[117] On the other hand, in talking with Servin, it's clear that the group's presence in the contemporary art world simply follows the logic of "by any media necessary," covering as many channels as possible in order to raise awareness of the issues that are important to it.[118] Otherwise, the Yes Men care very little about the current state of the art world or even what constitutes the category "art." I submit that the Yes Men's critical cultural practice is art—perhaps more with an "a" than with an "A" in that the group finds creative ways

to express it politics that go beyond conventional forms of both protest and parody. However the success of their projects might be measured, at the very least The Yes Men's various interventions invite viewers to ask themselves to reflect on their own politics of representation and the role artistic expression should play in society.

The Yes Men certainly made the U.S. Chamber of Commerce think about these questions. We see in the Chamber's desire to silence the Yes Men precisely its disapproval of the way the group has managed to challenge the dominant order of signs through a recoding of the sign system itself. This newfound capacity to recode may be the Achilles heel of late capitalism's representational schema as its forms become all the easier to digitally duplicate and distribute. To conclude, perhaps we may now, as far as political agency is concerned, have to finally admit a certain type of "authorial demise" threatened but not really enacted by much postmodernist appropriation art. For now the political resonance of critical cultural practice, if the Yes Men are an example, is being subsumed within that collective entity rarely posited as such—the corporate entity. Organization anonymity seems the order of the day in the fight both for and against the neoliberal ideology. Dialectically, it is precisely as a "critical corporation," both in the performative and literal legal sense, that the Yes Men assume the mantle of the social critique bequeathed to them.

Conclusion

In the preceding five chapters I have attempted to illuminate the ways in which intellectual property issues have inflected appropriation in art over the last four decades. Beginning with both the formation of the Pictures Generation and the passing of a new copyright law in the late 1970s, I reframed the first wave of appropriation artists less as critics of authorial originality than as upholders of a certain artistic autonomy amidst the post-industrial ubiquity of the (copyrighted) mass image. I subsequently moved through the 1980s, and the waning of "critique" in appropriation art. This, along with an insistence on distinguishing between "low" mass authors and "high" artists as evidenced in *Rogers v. Koons*, would eventually signal the reaffirmation of the romantic author, a clichéd creative figure deeply entrenched within art in one form or another throughout modernity.

Even in instances where artists such as Jeff Koons were penalized for their appropriations, I claimed that the romantic author figure would eventually secure its most legally validated status in the view of the contemporary judicial system. This validation was granted to Richard Prince in his fair use win over Patrick Cariou. "Subjectivist" strains of appropriation art, along with a "transformative" model of the fair use doctrine, have together given rise to seemingly new liberties for appropriation practices. However, the courts' legitimizing appropriation art, as seen on Prince's reuse of Cariou's Rastafarian images, comes at a cost. We can safely say that the *Cariou v. Prince* indicates not a continuation of postmodernism's "death of the author" rhetoric but rather a death of the Pictures Generation itself (or at least all that it stood for).

The deferential treatment of the romantic author was perhaps most clearly indicated in *Mass MoCA v. Büchel*, in which an artist known for his found object/ readymade works counter-sued an art museum for mis-representing his work. Ironically, in Büchel suing to protect his moral rights, he reinforced the very notion of authorship against which so much of appropriation since Duchamp has positioned itself. Meanwhile, Mass MoCA's attempt to exhibit Büchel's work in progress can be read as institutional critique that called the very definition of art into question. It is these types of interventions that I argue retain the critical force found in the history of appropriation-based practices from the early twentieth century until the present.

Finally, in the last chapter, I looked to the ways appropriation is used as a creative but critical tool outside of the contemporary art world. *Chamber v. Yes Men* presented a new set of issues regarding authorial agency and trademark law, and the consequences of appropriating corporate identities not as "art" per se but as cleverly, if problematically, disguised political speech. Together with the Büchel case, *Chamber v. Yes Men* represents a way of conceptualizing appropriation beyond the legality of the contemporary artist's reuse of existing signs in the context of the institution of art. In other words, in both of the last two chapters I attempted to expand the conventional understanding of appropriation.

Such an expansion seems not only necessary but also, perhaps, the only option, given that computer-aided copying procedures have been thoroughly integrated into the production of contemporary creative practices of all kinds. "Most art today," art historian Claire Bishop has noted recently,

> deploys new technology at one if not most stages of its production, dissemination, and consumption. Multichannel video installations, Photoshopped images, digital prints, cut-and-pasted files…These are ubiquitous forms, their omnipresence facilitated by the accessibility and affordability of digital cameras and editing software…In the digital era…The act of repurposing aligns with procedures of reformatting and transcoding—the perpetual modulation of preexisting files. Faced with the infinite resources of the Internet, *selection* has emerged as a key operation.[1]

In summary, we might say that almost all art today is a form of appropriation, whether it intends to identify itself as such or not. Going forward, perhaps the term "appropriation art" I have been employing throughout these chapters should thus be treated exclusively as an art historical category. It already conjures up the stereotypes

of postmodernism—mass imagery of the late twentieth century permeating art works within the institution of art. Yet since the 1990s, and especially with the development of the internet, "appropriation art" simply doesn't capture the diversity or complexity of our copy-paste condition. The term "remix" used to describe post-internet appropriation tendencies has gained currency over the last several years, but I hesitate to endorse it as an adequate substitute. Remixing indicates a creative approach originally associated with sample-based music, but now broadly applies to any sort of recombining already-existing media and in almost any context, be it Google images from the art-historical canon or YouTube videos. Furthermore, "to mix" implies a mere reshuffling of the mass-media deck towards novel formalisms (again music serves as a good example, as does '80s "neoconservative" appropriation), while de-emphasizing the legacy and continued potential of appropriation as a form of cultural critique.

The relative ease with which artists are able to copy materials today in the production of new art works stands in contrast with the art community's general lack of knowledge about how intellectual property law functions as it relates to art. A recent report published by the College Art Association reveals that artists who appropriate copyrighted works are often unfamiliar with one of the most powerful legal tools available to them: fair use.[2] Uncertainty over the intricacies of the fair use doctrine and fear of infringement lawsuits has resulted in artists taking one of three general paths: either entering into the "culture of permissions" by paying licensing fees for the use of protected materials (e.g., Koons, post-*Rogers* judgment), ignoring the law and hoping

for the best (e.g., *Cariou v. Prince*), or abandoning artistic projects altogether (i.e., self-censorship). While this last option should give all artists pause, in my view, courts' increasing recognition of appropriation art as a valid mode of expression over the last two decades should ease concerns. Whatever apprehension exists over the legality of appropriation is more often born out of ignorance and fear-mongering. To that end, CAA's report, together with a developing interest in the intersection of art and law in recent years within the art community itself, are helping artists gain increased confidence in their appropriation practices.[3] In most respects, I believe that artists having a better understanding of IP law makes for smarter, more challenging art. Yet caution must also be given. Turning the law's nuances and context-dependent gray areas of interpretation into hard and fast "formulas" for producing safe appropriation art might well run the risk of neutralizing the power of resistance that has comprised the core of appropriation practices. In 2015, CAA will draft a code of "best practices" for the arts community, helping to demystify copyright as it pertains to publishing, institutional image licensing, and the reuse of images in art works. There is something bittersweet about such an endeavor, as it is likely to both embolden artists who appropriate and convert much of the activity of art into a rules-based system, giving it a rationalized predictability like anything else under purview of the law.

Appendix (Plates)



Plate 1. Richard Prince, *Untitled (living rooms)*, 1977.



Plate 2. Richard Prince, *Untitled (Cowboy)*, 1980.



Plate 3. Sherrie Levine, *Untitled (President: 2)*, 1979.

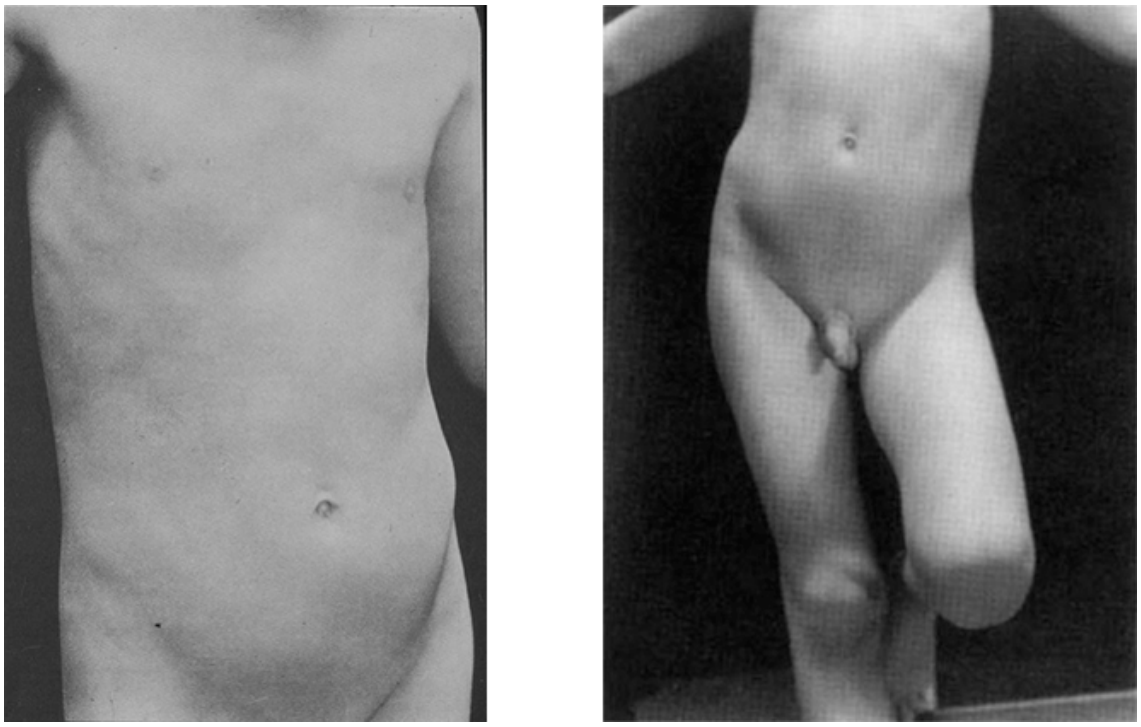


Plate 4. Sherrie Levine, *Untitled (After Edward Weston)*, 1981.



Plate 5. Robert Rauschenberg, *Tracer*, 1963.



Plate 6. Richard Prince, *Untitled (Cowboy)*, 1999.





Plate 7. Jim Krantz, *Stretchin' Out*, 1997, and Guggenheim promotional banner

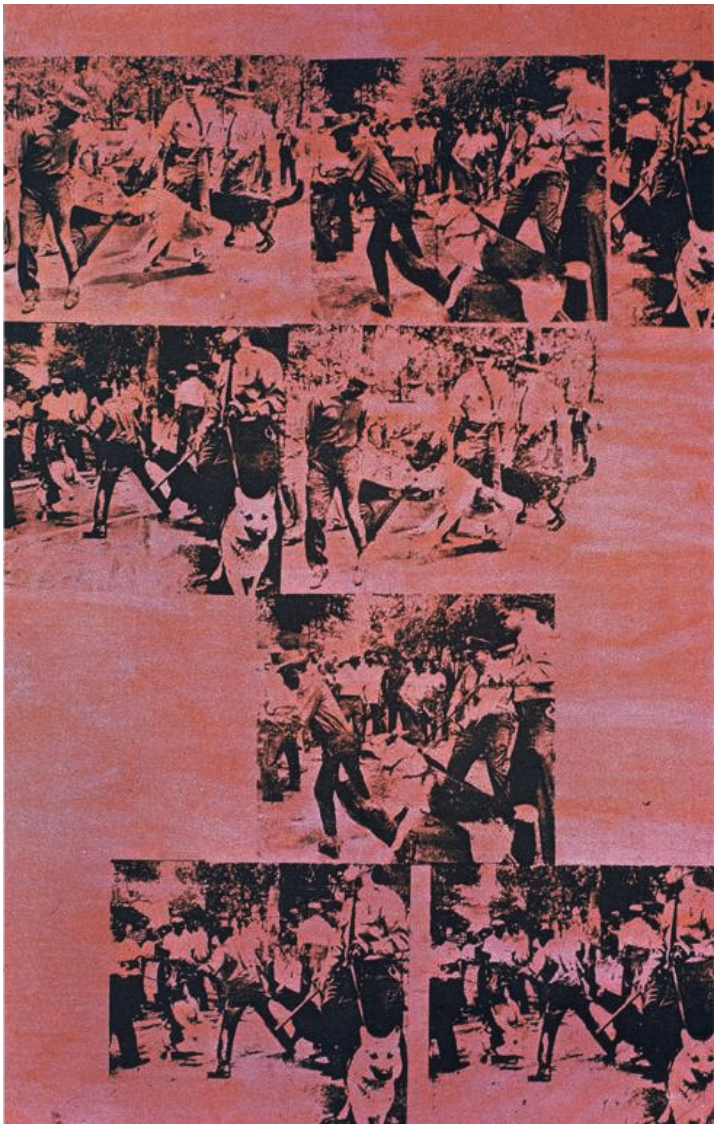


Plate 8. Andy Warhol, *Red Race Riot*, 1963-4.



Plate 9. Charles Moore, *Police Dog Attack, Birmingham*, 1963.



Plate 10. Andy Warhol, *Flowers*, 1964.



Plate 11. Patricia Caulfield, from *Modern Photography*, 1964.



Plate 12. Andy Warhol, *Jackie*, 1964-5.



Plate 13. Henri Dauman, *A Sorrowing Family Marches Together*, 1963.



Plate 14. Robert Rauschenberg, *Signs*, 1970.



Plate 15. Dennis Brack, *Scene in front of the Algeres Hotel during the Detroit Riots*, 1967.



Plate 16. Robert Rauschenberg, *Pull*, 1974.



Plate 17. Morton Beebe, *Mexico Diver*, c. 1970.

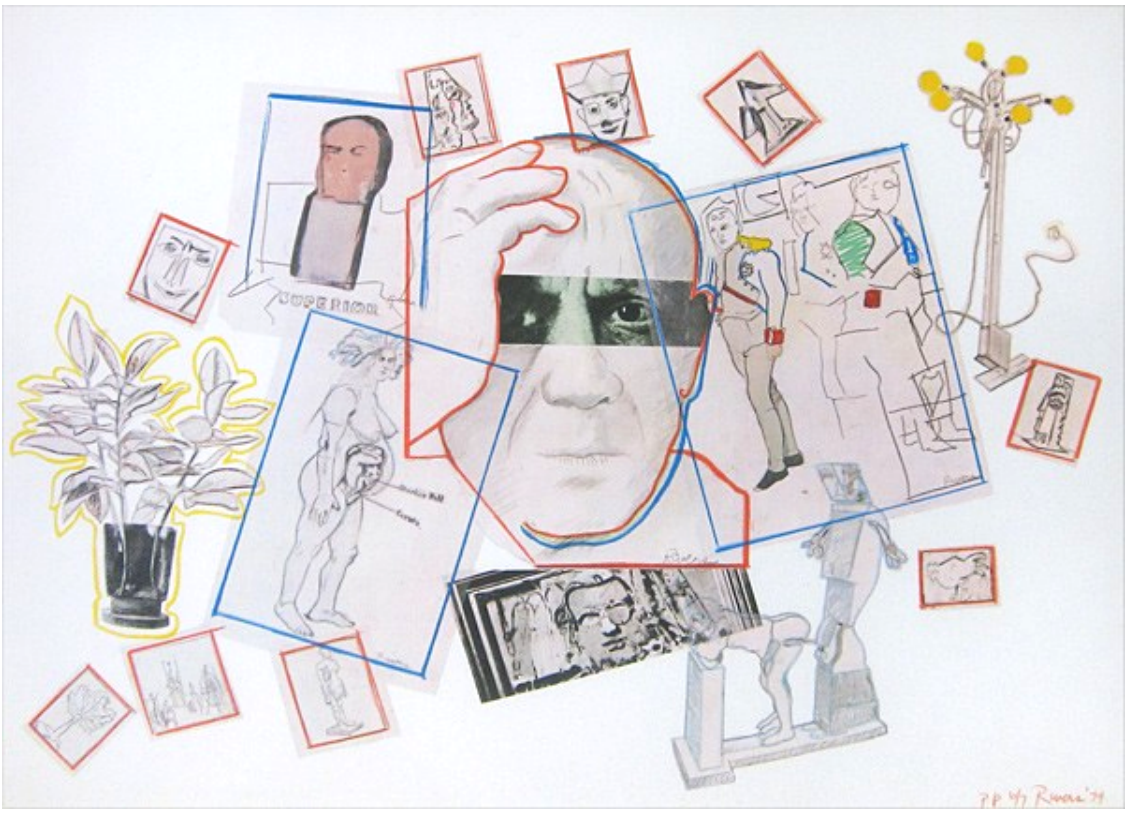


Plate 18. Larry Rivers, *Homage to Picasso*, 1975.

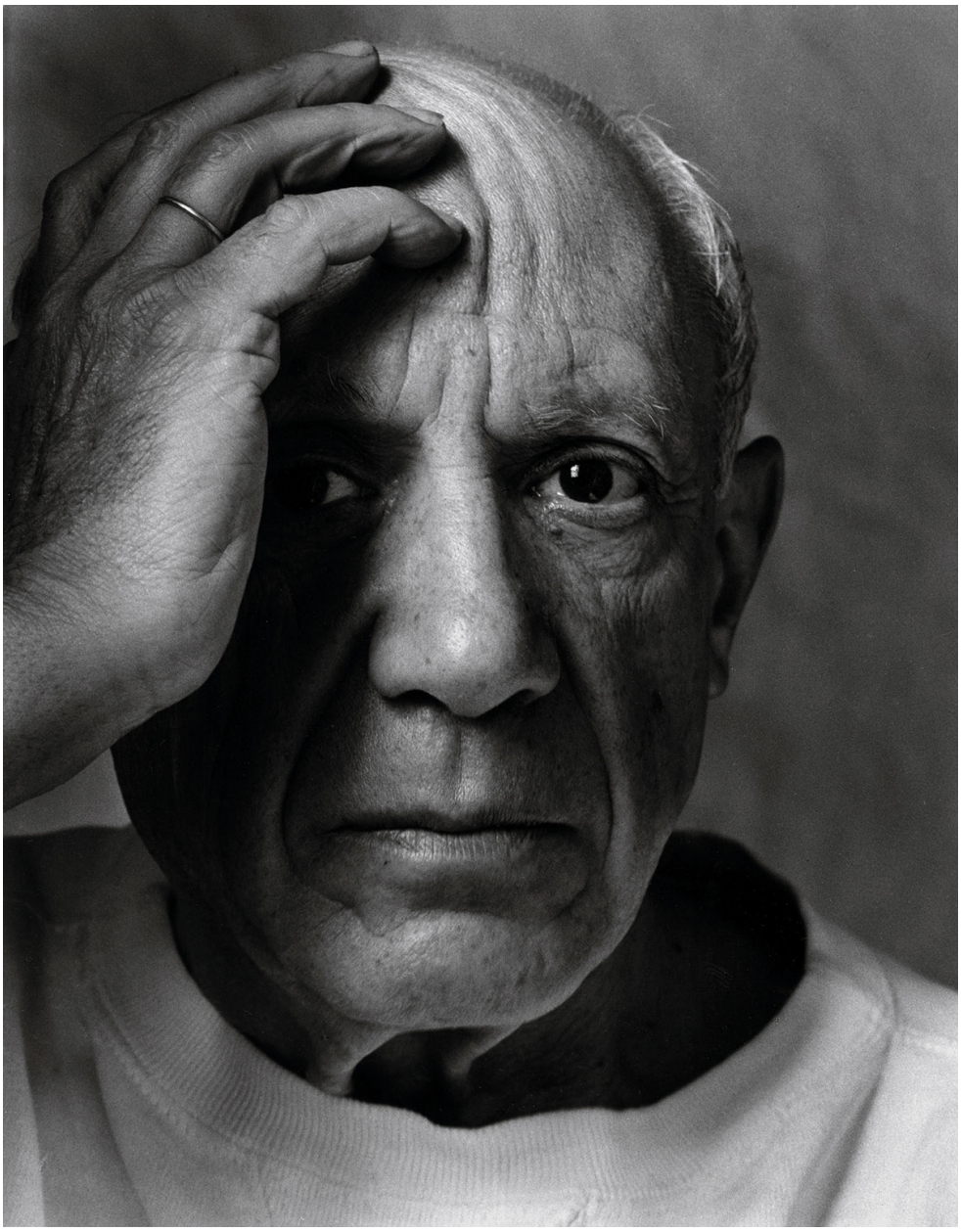


Plate 19. Arnold Newman, *Pablo Picasso,Vallauris, France*, 1954.



Plate 20. David Salle, *What is the Reason For Your Visit to Germany?*, 1984.



Plate 21. Tom Forsythe, *Barbie Enchiladas*, 1997.



Plate 22. Barbara Kruger, *It's a Small World But Not If You Have to Clean It*, 1990.



Plate 23. Lauren Greenfield, *Mijanou and friends from Beverly Hills High School on Senior Day, Will Rogers State Park*, 1997.



Plate 24. Damien Loeb, *Sunlight Mildness*, 1998.



Plate 25. Andrea Blanch, *Silk Sandals by Gucci*, 2000.



Plate 26. Jeff Koons, *Niagara*, 2000.



Plate 27. Susan Meiselas, *Sandinistas at the walls of the Estelí National Guard headquarters*, 1979.



Plate 28. Joy Garnett, *Molotov*, 2003.



Plate 29. The AP's image, left, superimposed with Fairey's illustration of Obama, right.



Plate 30. Glen Friedman, *RUN–DMC–JMJ Hollis, Queens, New York*, 1985.



Plate 31. Thierry Guetta/Mr. Brainwash, invitation used for his debut exhibition, *Life is Beautiful*, 2008.



Plate 32. Dennis Morris, *Sid Vicious*, 1977.



Plate 33. Thierry Guetta/Mr. Brainwash, 2008.



Plate 34. Jim Marshall, *Brian Jones & Jimi Hendrix - Monterrey Pop Festival*, 1967.



Plate 35. Thierry Guetta/Mr. Brainwash, *Live Today Worry Tomorrow*, 2008.



Plate 36. Art Rogers, *Puppies*, 1980.



Plate 37. Jeff Koons, *String of Puppies*, 1988.



Plate 38. Patrick Cariou, untitled image from *Yes Rasta*, 2000.



Plate 39. Richard Prince, *It's All Over*, 2008.

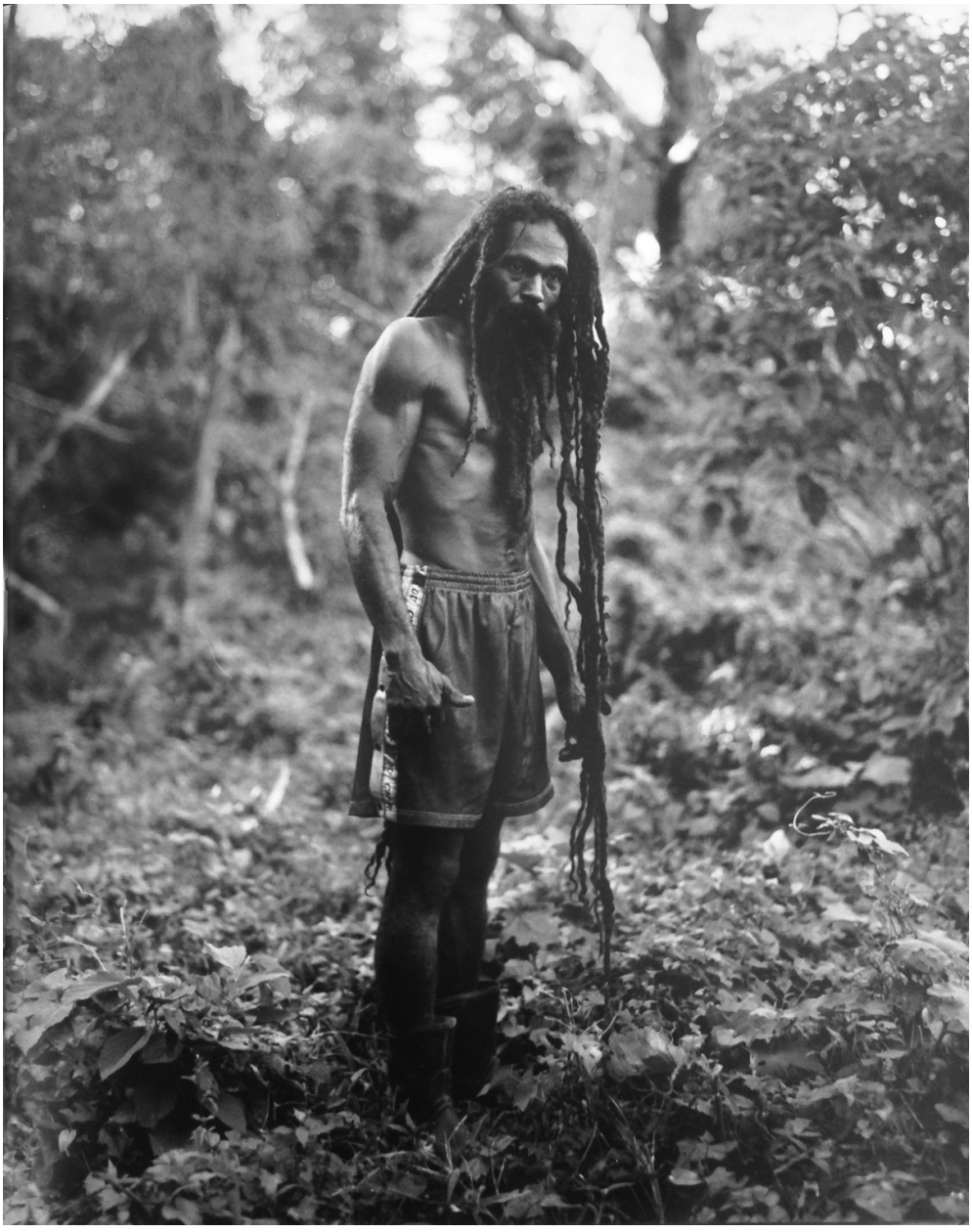


Plate 40. Patrick Cariou, untitled image from *Yes Rasta*, 2000.



Plate 41. Richard Prince, *Graduation*, 2008.



Plate 42. Richard Prince, *Specially Around Midnight*, 2008.

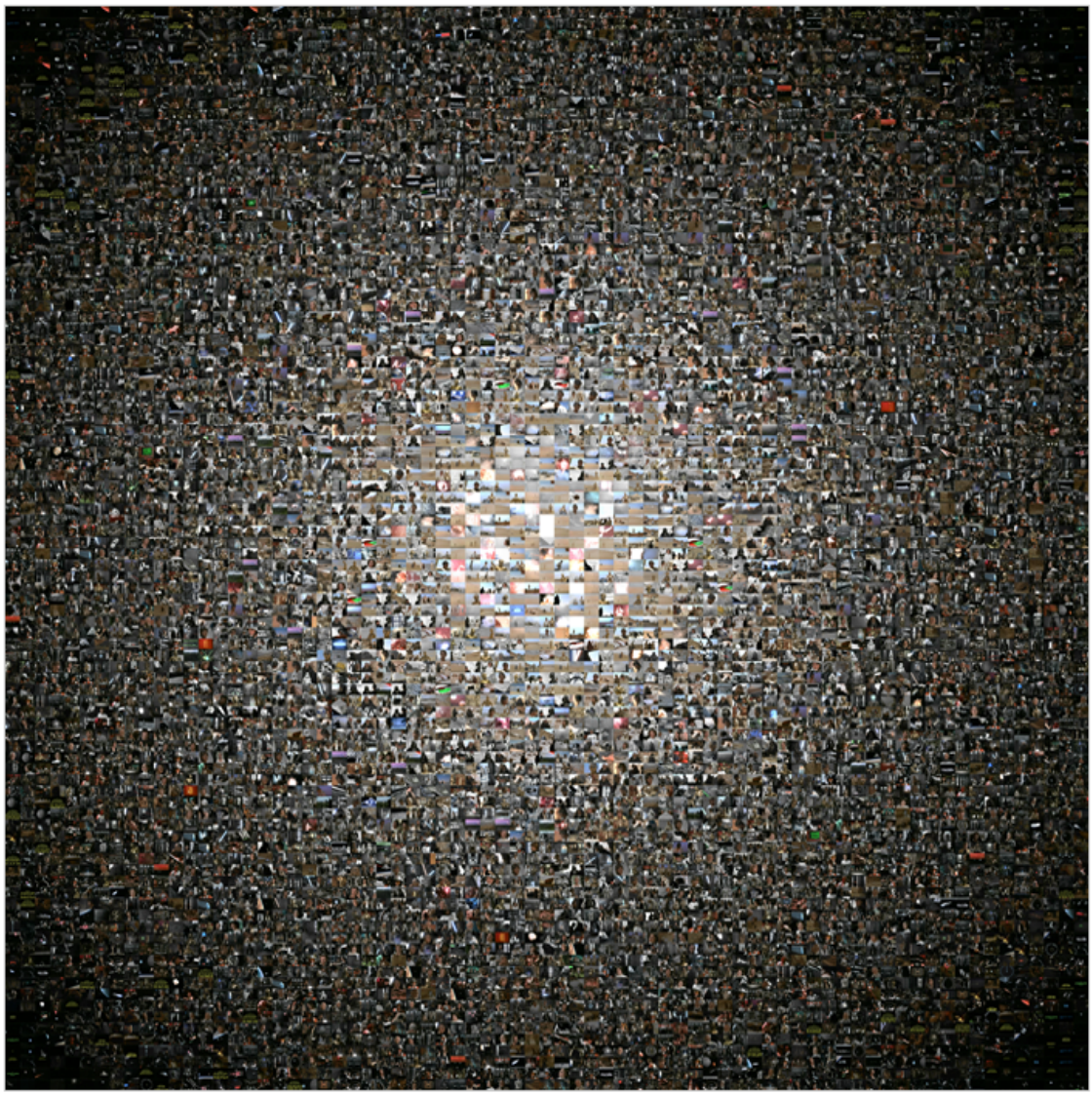


Plate 43. Jason Salavon, *The Grand Unification Theory (Part One: Every Second of Star Wars)*, 1997.



Plate 44. Christian Marclay, *Video Quartet*, 2002.



Plate 45. Christian Marclay, *The Clock*, 2010.



Plate 46. Building 5 gallery, Mass MoCA.



Plate 47. Christoph Büchel, *Simply Botiful*, 2006. Installation view at Hauser & Wirth Coppermill, London, England.



Plate 48. A mobile home, part of *Training Ground for Democracy*, being installed at Mass MoCA.



Plate 49. A two-story house being reassembled inside the Building 5 gallery at Mass MoCA, as part of Christoph Büchel's *Training Ground for Democracy*.



Plate 50. Mass MoCA staff covers *Training Ground* for Democracy with tarps.



Plate 51. Cindy Sherman's "collaboration" with MAC Cosmetics, September 2011.

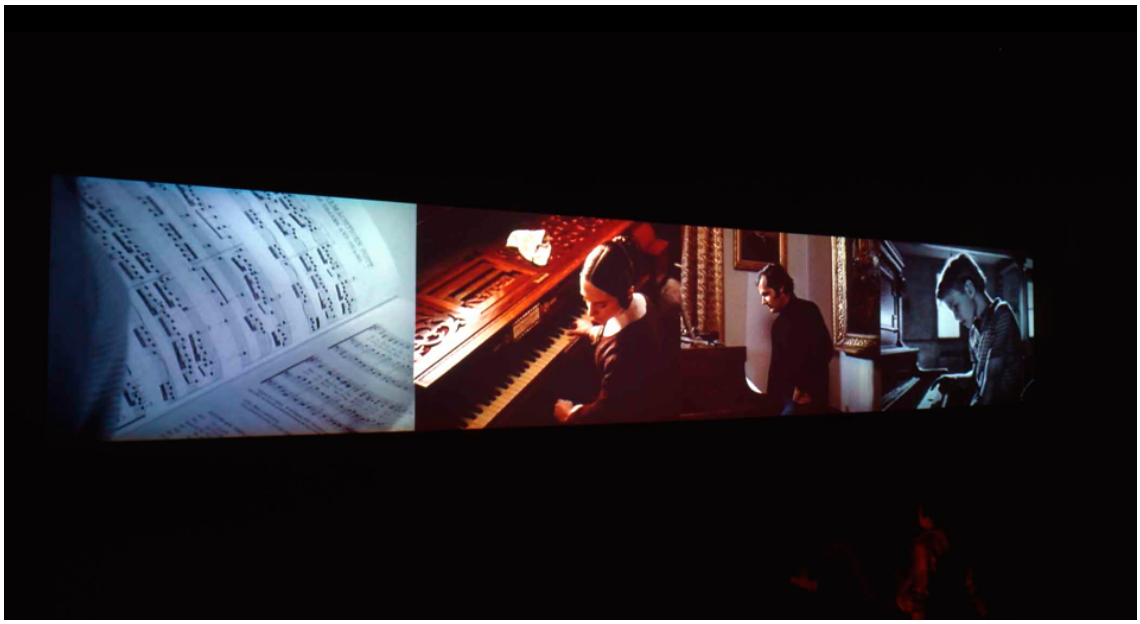


Plate 52. Christian Marclay, *Video Quartet*, 2002.



Plate 53. Jason Salavon, *Every Playboy Centerfold, The 1970s*, 2002.



Plate 54. Eva and Franco Mattes, *Nike Ground*, 2003.



Plate 55. Superflex, *Guaraná Power*, 2004.



Plate 56. The Yes Men, *Dow Does the Right Thing*, 2004.



Plate 57. Screenshot of the Yes Men's prank U.S. Chamber website.

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October 19, 2009

U.S. Chamber of Commerce Announces Free Enterprise Climate Policy
Internal Conflict Resolves in Commitment To Long-Term Prosperity

WASHINGTON, D.C.—The U.S. Chamber of Commerce is throwing its weight behind strong climate legislation, a spokesman for Chamber President Tom J. Donahue announced today at the National Press Club.

"We believe that strong climate legislation is the best way to ensure American innovation, create jobs, and make sure the U.S. and the world are on track to reduce global carbon emissions, and to provide for the needs of the American business community for generations to come," said the spokesman, Hingo Sembra.

The new position is an about-face on climate policy for the Chamber, which previously lobbied against government action. The shift comes after the defection of several prominent members of the Chamber, including PG&E, Apple, PNM Resources, and Exelon.

"We believe the Kerry-Boxer Clean Energy Jobs and American Power Act is a good start towards strong legislation," noted Sembra, adding that such legislation "should include a stiff carbon tax and correspondingly strong incentives for industries we wish to foster."

"A carbon tax means less need for legislating by Congress, a surer business environment for companies, and a simpler, competition-friendly mechanism for reducing carbon than the bill's current cap-and-trade approach," said Sembra.

The Chamber announced an immediate moratorium on lobbying and publicity work opposing climate legislation.

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The U.S. Chamber of Commerce is the world's largest business federation, representing more than 300,000 businesses and organizations of every size, sector, and region.

Plate 58. The Yes Men's phony U.S. Chamber Press Release.



Plate 59. Hingo Sembra at the Chamber podium.

Notes

Introduction

1. William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property* (Cambridge, MA: Harvard University Press, 2003), 1.

2. On the origin of the term "intellectual property," see Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago: University of Chicago Press, 2011), 275-7).

3. See Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (New York: Penguin Books, 2005); James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, MA.; London: Harvard University Press, 1997); Patricia Aufderheide and Peter Jaszi, *Reclaiming Fair use: How to Put Balance Back in Copyright* (Chicago: University of Chicago Press, 2011).

4. See Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998); Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991).

5. See McKenzie Wark, *A Hacker Manifesto* (Cambridge, MA: Harvard University Press, 2004).

6. http://www.oed.com/view/Entry/9871?rskey=7YNY8J&result=2&isAdvanced=false#eid157965 (accessed October 2, 2014); http://www.oxforddictionaries.com/definition/english/appropriate (accessed October 2, 2014).

7. On art in a post-critical condition, see Hal Foster, "Post-Critical," *October* 139 (Winter 2012): 3-8. See also Bruno Latour, "Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern," *Critical Inquiry* 30 (Winter, 2004): 225-48.

8. On the transformative model of fair use, see Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* Vol. 103, no. 5 (March, 1990): 1105-1136.

9. See Roland Barthes, "The Death of the Author," in *Image, Music, Text* (New York: Noonday Press, 1988).

Chapter One

1. I use the word "steal" here provocatively, as it points to one of the central issues pertaining to appropriation art and copyright—private property. It is also the word Richard Prince himself uses to describe his artistic practice in the late 1970s: "Rephotography is a technique for *stealing* (pirating) already existing images, simulating rather than copying them, "managing" rather than quoting them, re-producing their effect and look as naturally as they had been produced when they first appeared." My emphasis. See Richard Prince, "Practicing Without A License 1977," http://www.richardprince.com/writings/practicing-without-a-license-1977/ (accessed July 2, 2014).

2. For Prince's explanation of "rephotography," see ibid. On the events of Prince's early career, see Nancy Spector and Richard Prince, Solomon R. Guggenheim Museum, Walker Art Center, and Serpentine Gallery, *Richard Prince* (New York: Guggenheim Museum, 2007), 26-27; Lisa Phillips, "People Keep Asking: An Introduction," in Lisa Phillips, Richard Prince, Whitney Museum of American Art, Kunstverein Düsseldorf, San Francisco Museum of Modern Art, and Museum Boymans-Van Beuningen, *Richard Prince* (New York: Whitney Museum of American Art, 1992), 21-52.

3. My brief recount of Levine's biography and her meeting Richard Prince is taken primarily from an interview with the artist. See Gerald Marzorati, "Art in the (Re)Making," *ARTnews* 85, no. 5 (May, 1986): 90-99.

4. There are perhaps no better and more recent indicators of the consecration of postmodern appropriation art into the annals of art history than Richard Prince's thirty-year retrospective at the New York Guggenheim in 2007 and the recognition of the Pictures Generation at the Metropolitan Museum of Art in 2009, an artistic movement I shall be discussing in more detail later. See Nancy Spector et al., *Richard Prince*; see also Douglas Eklund and Metropolitan Museum of Art, *The Pictures Generation, 1974-1984* (New York; New Haven: Metropolitan Museum of Art, 2009).

5. As Sherrie Levine has stated, "I never aspired to belong to a school of appropriators. 'Appropriation' is a label that makes me cringe because it's come to signify a polemic; as an artist, I don't like to think of myself as a polemicist." See Jeanne Siegel, "After Sherrie Levine," *Arts Magazine* 59 (June/Summer, 1985): 141-44.

6. The labels "Pictures Generation" or "Pictures artists" reference the exhibition *Pictures* that scholar and critic Douglas Crimp curated at Soho's Artists Space in the fall of 1977. The show centered around a critique of mass-produced and often recognizable imagery through appropriation techniques. Crimp included just five artists in *Pictures* (Levine was included; Prince was not), but over time "Pictures" connoted less the particular exhibit than a method of working as practiced by a wider group of young New York artists. The list is by no means complete, and the degree to which some of these artists should be categorized as Pictures artists is debated. The list here is formulated based upon artists' practices in late '70s and early '80s New York that appear explicitly appropriationist (i.e., that used intellectual property as source material), versus "related to appropriation." In the latter category belong Mike Bidlo (who manually copied canonized modernists such as Jackson Pollock), Cindy Sherman (who referenced the visual tropes of Hollywood but did not explicitly appropriate particular images) and Philip Smith (who deserves extra note because of his inclusion in Crimp's 1977 exhibition but omission from the 2009 Metropolitan Museum of Art survey *The Pictures Generation*). Another artist worth mentioning is Vikky Alexander, who is Canadian (and lives and works in Canada) and is thus not often included in the Pictures Generation narrative despite her showing appropriation work very similar to Prince and Levine in New York at around the same time. Crimp wrote an essay for the *Pictures* exhibition catalog, which he later revised in order to address the larger current of appropriation practices at the time. See Douglas Crimp, "Pictures," *October* 8 (Spring, 1979): 75-88.

7. John C. Welchman, *Art After Appropriation: Essays on Art in the 1990s* (Amsterdam: G+B Arts International, 2001), 264.

8. On Duchamp and Dada, see William Stanley Rubin, Museum of Modern Art, Los Angeles County Museum, and Art Institute of Chicago, *Dada, Surrealism, and their Heritage* (New York: Museum of Modern Art; distributed by New York Graphic Society, Greenwich, CT, 1968), 17-46.

9. On Warhol's Silver Factory and his reliance on a system of art production premised upon a division of labor, see Arthur Coleman Danto, *Andy Warhol* (New Haven: Yale University Press, 2009); Nat Finkelstein, *Andy Warhol: The Factory Years, 1964-1967* (New York: St. Martin's Press, 1989); Steven Watson, *Factory made: Warhol and the Sixties* (New York: Pantheon Books, 2003).

10. As Douglas Crimp writes about Rauschenberg's incorporation of photography into his work, the artist "had moved definitively from techniques of *production* (combines, assemblages) to techniques of *reproduction* (silk screens, transfer drawings)." Original emphasis. Douglas Crimp, "Photographs at the End of Modernism," in *On the Museum's Ruins* (Cambridge: MIT Press, 1993), 58. On the dialectic of modernist originality and repetition, see Rosalind Krauss, "The Originality of the Avant-Garde: A Postmodernist Repetition," *October* 18 (Autumn, 1981): 47-66.

11. Lisa Phillips, "People Keep Asking," *Richard Prince,* 27. Prince himself described his rephotograhy as akin to a "musical mix," which would seem to prefigure today's remix culture. Calling it an "8-track photograph," Prince laid out his range of methods: *1) the original copy 2) the rephotographed copy 3) the angled copy 4)the cropped copy 5) the focused copy 6) the out-of-focus copy 7) the black-and-white copy 8) the color copy*. See ibid., 25.

12. The legal doctrine of fair use will be introduced later in the chapter, and then more thoroughly analyzed in the next two chapters.

13. On the (il)legality of music sampling, see Kembrew McLeod and Peter DiCola, eds., *Creative License: The Law and Culture of Digital Sampling* (Durham: Duke University Press, 2011).

14. On the consequences of appropriating corporate trademarks, see chapter 5, "The Yes Men: Parody in Aesthetics and Protest."

15. On the legal issues surrounding technologies that circumvent copy protection and thus allow for easy dupication, see Tarleton Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (Cambridge, MA: MIT Press 2007).

16. News of copyright and trademark infringement litigation frequents the mass media, and scholarly texts that provide case studies are plentiful, especially in legal journals. Within the humanities and social sciences, some noteworthy studies include Gaines, *Contested Culture*; Coombe, *The Cultural Life of Intellectual Properties*; Lessig, *Free Culture*; Siva Vaidhyanathan, *Copyrights and Copywrongs* (New York: New York University Press, 2001); Kembrew McLeod and Rudolf Kuenzli, ed., *Cutting Across Media: Appropriation Art, Interventionist Collage, and Copyright Law* (Durham: Duke University Press, 2011).

17. I explore two of the more notorious cases, *Rogers v. Koons*, 960 F.2d 301 (2nd Cir. 1992) and *Cariou v. Prince*, 714 F. 3d 694 (2d Cir. 2013) in the next two chapters. Part of the challenge in assessing the legal aspects of appropriation art is the lack of case precedent. Often times the accused artist settles out of court, thus foreclosing public access to key case documents. Even still, I want to argue that the number and general knowledge of examples hasn't had a proportional effect on appropriation-related art practices when compared to other types of cultural production (e.g. musicians, documentary filmmakers, and so on) who often submit to the threat of punishment for copyright violation and thus preemptively self-censor. For earlier art historical writing that raises questions about the relationships between Pop Art, postmodern appropriation and copyright infringement, see Martha Buskirk's "Commodification as Censor: Copyrights and Fair Use," *October* 60 (Spring, 1992): 82-109 as well as *The Contingent Object of Contemporary Art* (Cambridge, Mass.: MIT Press, 2003); see also Gay Morris, "When Artists Use Photographs: Is It Fair Use, Legitimate Transformation or Rip-off?," *ARTnews* 80, no. 1 (1981):102–106.

18. Going forward I will use the terms "author" and "artist" interchangeably. Both the literary tradition within which Barthes is situated and much of the language in copyright law are centered around authors in the basic sense: producers of the written word. This is so primarily because books and other written materials have longer histories compared to cultural output in the last century. Thus I treat "authors" as those who claim authority over the "texts" (writing but also visual art, the focus of this dissertation) they produce.

19. Frederic Jameson, "Postmodernism and Consumer Society," in Hal Foster, ed., *The Anti-Aesthetic: Essays on Postmodern Culture* (Port Townsend, Wash.: Bay Press, 1983), 127-129. On the difference between "art" and "leisure," see Barbara Kruger, *Remote Control: Power, Cultures, and the World of Appearances* (Cambridge, Mass.: MIT Press, 1993), 3.

20. This is obviously a great simplification. Other earlier movements in modern art history—Dada and Surrealism, and postwar, Fluxus—often collapsed high/low distinctions, and in some respects anticipate a later postmodernism. On the concept of kitsch, see Clement Greenberg, "Avant-Garde

and Kitsch," http://www.sharecom.ca/greenberg/kitsch.html (accessed July 4, 2014). On the concept of a culture industry, see Max Horkheimer, Theodor W. Adorno, and Gunzelin Schmid Noerr, *Dialectic of Enlightenment: Philosophical Fragments* (Stanford: Stanford University Press, 2002); Theodor W. Adorno and J. M. Bernstein, *The Culture Industry: Selected Essays on Mass Culture* (London; New York: Routledge, 2001).

21. Rosalind Krauss, *The Originality of the Avant-Garde and Other Modernist Myths* (Cambridge, Mass.: MIT Press, 1985), 157.

22. Crimp, "Photographs at the End of Modernism," in *On the Museum's Ruins*, 16.

23. Sherrie Levine, one of the central artists in this chapter, is something of an exception insofar as her early works (discussed later one) are direct appropriations of Edward Weston, a venerated figure in modernist photography. Nonetheless, Levine did not take her images from Weston prints but rather from mass-produced halftone reproductions.

24. See Joseph's collection of some of the primary texts about Rauschenberg's work, including those by Steinberg. Branden W. Joseph, *Robert Rauschenberg* (Cambridge, MA.: MIT Press, 2002).

25. Crimp, "On the Museum's Ruins," *On the Museum's Ruins*, 47. Crimp himself would use the term "postmodernism" for the first time in his essay "Pictures."

26. Thomas Crow, quoting Branden W. Joseph, in "Rise and Fall: Theme and Idea in the Combines of Robert Rauschenberg," in Robert Rauschenberg, Paul Schimmel, Thomas E. Crow, Museum of Contemporary Art, Metropolitan Museum of Art, Musée national d'art moderne, and Moderna museet, *Robert Rauschenberg: Combines* (Los Angeles; Göttingen: Museum of Contemporary Art; Steidl Verlag, 2005), 253.

27. Michael Newman, "Revising Modernism, Representing Postmodernism: Critical Discourses of the Visual Arts," in Lisa Appignanesi and Geoffrey Bennington, *Postmodernism*: *ICA Documents* (London: Free Association Books, 1989), 102.

28. I am using Frederic Jameson's notion of the term "schizophrenic" here. Jameson writes, "Schizophrenic experience is an experience of isolated, disconnected, discontinuous material signifiers which fail to link up into a coherent sequence." See Jameson, "Postmodernism and Consumer Society," in Foster, *The Anti-Aesthetic,* 137.

29. Ibid., 124-130.

30. For an historical overview of Benjamin's theorization of allegory, see Bainard Cowan, "Walter Benjamin's Theory of Allegory," *New German Critique* 22 (Winter 1981): 109-122.

31. Craig Owens, "The Allegorical Impulse: Toward a Theory of Postmodernism," in *Beyond Recognition: Representation, Power, and Culture* (Berkeley and Los Angeles: University of California Press, 1992)*,* 54.

32. Ibid.

33. Benjamin Buchloh, "Allegorical Procedures: Appropriation and Montage in Contemporary Art," *Artforum* (September, 1982): 43-56.

34. Ibid., 49.

35. In this sense, these practices can be understood as not only challenging existing power structures, but also returning agency to the producing subject long since discarded by capitalism's division of labor. Of all the analyses of postmodern appropriation art, I believe Buchloh's is the most lasting,

given the context of present battles over intellectual property between the authors and owners of cultural production. I will be returning to his point later in the chapter.

36. On Paul Pfeiffer's videos, see *Paul Pfeiffer* (Chicago: Museum of Contemporary Art, 2003); on Cory Arcangel, see his web site, http://www.coryarcangel.com/ (accessed July 4, 2014), as well as the brochure from his 2011 exhibition at the Whitney Museum of American Art, http://whitney.org/file_columns/0002/5626/arcangel_brochure.pdf (accessed July 4, 2014).

37. Most of theses scholars' essays from the period, including those that dealt with appropriation, have since been compiled into anthologies. See Owens, *Beyond Recognition*; Crimp, *On the Museum's Ruins*; Foster, *The Anti-Aesthetic*; R*ecodings: Art, Spectacle, Cultural Politics* (Port Townsend, Wash.: Bay Press, 1985); Krauss, *The Originality of the Avant-Garde*; Abigail Solomon-Godeau, *Photography at the Dock: Essays on Photographic History, Institutions, and Practices* (Minneapolis: University of Minnesota Press, 1997; 1991).

38. See Douglas Crimp, "The Photographic Activity of Postmodernism," *October* 15 (1980): 98-99.

39. Owens, "The Discourse of Others: Feminists and Postmodernism," *Beyond Recognition*, 182.

40. Abigail Solomon-Godeau, "Living with Contradictions: Critical Practices in the Age of Supply-Side Aesthetics," *Social Text* 21 (1989): 204.

41. Abigail Solomon-Godeau, "Winning the Game When the Rules Have Been Changed: Art Photography and Postmodernism," *Screen* 25 (1984): 99. On Baudrillard and the hyperreal, see Jean Baudrillard and Mark Poster, *Selected Writings* (Stanford, Calif.: Stanford University Press, 2001).

42. Solomon-Godeau, "Winning the Game When the Rules Have Been Changed," 90-2.

43. Owens, "From Work to Frame, or, Is There Life After 'The Death of the Author'?," *Beyond Recognition*, 123.

44. Krauss, "The Originality of the Avant-Garde," 64.

45. Rosalind Krauss, "A Note on Photography and the Simulacra," *October* 31 (Winter, 1984): 68.

46. Crimp, "Pictures," 85.

47. Crimp, "The Photographic Activity of Postmodernism," 100.

48. Craig Owens, "The Allegorical Impulse: Toward a Theory of Postmodernism Part 2," *October* 13 (Summer, 1980): 71.

49. Art critics or historians preemptively determining that Levine's and Prince's appropriation art is illegal or "in violation is indeed odd. The quotes read a) as if such determinations are a forgone conclusion, which disregards freedom of expression or fair use arguments); and b) as if scholars trained in the arts have any real experience with or jurisdiction over what are, in fact, decisions to be made in courts of law. More likely, the language used was meant to adds a certain "reality" to Levine's and Prince's appropriations, endowing them with a supposed transgressive quality.

50. Crimp, "The Photographic Activity of Postmodernism," 98. Original emphases.

51. Solomon-Godeau, "Winning the Game When the Rules Have Been Changed," 91.

52. Krauss, "The Originality of the Avant-Garde," 64.

53. Martha Rosler, "Notes on Quotes," in *Decoys and Disruptions: Selected Writings 1975-2001* (Cambridge, MA: MIT Press, 2004), 142.

54. The editors of the arts journal *October*, to which all of the mentioned critics and scholars have contributed, argued for its need in its inaugural, 1976 issue in the following manner: "The cultural life of this country, traditionally characterized by a fragmented parochialism, has been powerfully transformed over the past decade and a half by developing interrelationships between her most vital arts. Thus, innovations in the performing arts have been inflected by the achievements of painters and sculptors, those of filmmakers have been shaped by poetic theory and practice… [yet]American criticism continues to exist as a number of isolated and archaic enterprises…[it] sustain[s] a division between critical discourse and significant artistic practice…*October*'s structure and policy are predicated upon a dominant concern: the renewal and strengthening of critical discourse through intensive review of the methodological options now available." Rosalind Krauss and Annette Michelson, eds., "About October," *October* 1 (Spring, 1976): 3-4.

55. This list is by no means exclusive. Certainly other, earlier writers, such as Walter Benjamin and Ferdinand de Saussure, provided invaluable insight into the theory and practice of art at this time.

56. See Lucy Lippard, *Six Years: The Dematerialization of the Art Object from 1966 to 1972* (Los Angeles: University of California Press, 1997).

57. See "Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code," http://www.copyright.gov/title17/circ92.pdf (accessed July 6, 2014). While it has been occasionally modified over the past thirty years, the 1976 Act remains the general framework for current U.S. copyright law. Substantial modifications include the Sonny Bono Copyright Term Extension Act and the the Digital Millennium Copyright Act, both from 1998. The core of the 1976 Act remains intact.

58. See "Copyright Law Revision, Sept. 3, 1976 (House Report 94-1476)," p. 51, http://www.copyright.gov/history/law/clrev_94-1476.pdf (accessed July 6, 2014). See also footnote 17 of U.S. Supreme Court case *Goldstein v. California*, 412 U. S. 546 (1973), http://supreme.justia.com/us/412/546/case.html (accessed March 15, 2009). The note provides a brief but useful account of the amendments to the copyright law from its first enactment in 1790 up until 1976, and the new forms of expression each subsequent amendment included.

59. The Statute of Anne of 1710 was titled as an "Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." Under the Statute of Anne, the Stationers Company, which had controlled all book publishing in Britain by way of royal mandate, was eventually relinquished of its monopoly. Authors (who nonetheless continued to subordinate themselves to publishers by selling their manuscripts for one-time payments) were granted a "right to copy" their work for a limited term of twenty-eight years, after which it went into a public domain, free for anyone to use. The Statute effectively opened up book publishing to a free market model that attempted to separate the economic interests of authors and publishers as well as the reading interests of a growing public readership from state interests (who had previously used the Stationers Company as a censoring instrument). See the Statute of Anne, April 10, 1710, http://avalon.law.yale.edu/18th_century/anne_1710.asp (accessed July 6, 2014); Peter Jaszi, "On the Author Effect: Contemporary Copyright and Collective Identity," in Martha Woodmansee and Peter Jaszi, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham; London: Duke University Press, 1994), 32; Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford: Stanford University Press, 2003), 29-40.

60. While the Constitution grants authors limited exclusive use over their creations, its First Amendment guarantees freedom of speech (which might include the use of copyrighted material). See Amendment I, the Bill of Rights, http://www.archives.gov/exhibits/charters/

bill_of_rights_transcript.html (accessed July 6, 2014). Which of these rights has priority resides at the core of copyright debate.

61. Goldstein, *Copyright's Highway,* 138.

62. "Texts" here refers both to the literal published manuscripts for which copyright was invented in the eighteenth century, and more contemporary cultural expressions (visual art, films, music, etc.) that are "authored." See also James Boyle, *The Public Domai*n (New Haven and London: Yale University Press, 2008).

63. Article I, Section 8, U.S. Constitution, http://www.archives.gov/exhibits/charters/constitution_transcript.html (accessed July 6, 2014).

64. Lessig, *Free Culture*, 129.

65. Boyle, *Shamans, Software, and Spleens*, xii. Boyle is one of several legal scholars to have emerged in the last two decades criticizing copyright doctrine and the logic of "authored" intellectual property. See also Lessig, *Free Culture*; Woodmansee and Jaszi, *The Construction of Authorship*; Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of "Authorship"," *Duke Law Journal*, Vol. 1991, no. 2 (April 1991): 455-502; Neil W. Netanel, *Copyright's Paradox* (Oxford; New York: Oxford University Press, 2008).

66. Netanel, *Copyright's Paradox,* 55.

67. Ibid.

68. The expansion of authorial rights I am describing applies equally to conventionally understood authors—the singular writer, visual artist or music composer—and "corporate authors." Indeed, one of the subtexts underlying rights expansion involves the ways in which corporations have sought to tightly control the public's use of their creations. Disney is the one of the better-known examples. Its lobbying Congress helped ratify the 1998 Copyright Term Extension Act, which lengthened copyright's duration from life of the author plus fifty years to life of the author plus seventy. See the Copyright Term Extension Act, http://www.copyright.gov/legislation/s505.pdf (accessed July 7, 2014).

69. U.S. Code Title 17, Section 102, http://www.copyright.gov/title17/circ92.pdf (accessed July 7, 2014).

70. Previous versions of the copyright law referred specifically to authors' "texts," a nod to books being of primary concern at the outset of copyright legislation. But this left in question the protected status of emerging media that weren't literally printed materials. Several cases challenged the copyrightability of other mechanical forms of reproduction; one of the most famous is *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), in which the Supreme Court held that photography could be extended protection when "the ideas in the mind of the author are given visible expression." See http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=111&page=53 (accessed July 7, 2014).

71. "Copyright Law Revision, Sept. 3, 1976 (House Report 94-1476)," p. 52, http://www.copyright.gov/history/law/clrev_94-1476.pdf (accessed July 7, 2014).

72. Ibid.

73. Ibid., 51.

74. Of course just what constitutes "originality" problematizes the objectivity of the law. As legal scholar Alfred Yen points out, judicial jurisprudence has tended to avoid making qualitative

decisions pertaining to creative expression, with only varying degrees of success. Yen argues that any legal judgement involving aesthetics inevitably succumbs to a judgement of taste; on occasion, judges play the role of art historian or critic, just as they sometimes play the role of economist in antitrust lawsuits. The wording of the 1976 Act appears to parallel this aesthetic avoidance. See Alfred C. Yen, "Copyright Opinions and Aesthetic Theory," *Southern California Law Review* 71 (1998): 247-302.

75. U.S. Code Title 17, Section 302, http://www.copyright.gov/title17/circ92.pdf (accessed July 7, 2014).

76. Ibid. Since the 1976 Act the term lengths have increased yet again to life of the author plus seventy years, and for anonymous, pseudonymous and works made-for-hire, to ninety-five years from publication or 120 years from creation, whichever expires first.

77. "Copyright Law Revision, Sept. 3, 1976 (House Report 94-1476)," p. 133, http://www.copyright.gov/history/law/clrev_94-1476.pdf (accessed July 7, 2014).

78. Ibid., 134.

79. Ibid.

80. U.S. Code Title 17, Section 106, http://www.copyright.gov/title17/circ92.pdf (accessed July 7, 2014). See also "Copyright Law Revision, Sept. 3, 1976 (House Report 94-1476)," p. 62, http://www.copyright.gov/history/law/clrev_94-1476.pdf (accessed July 7, 2014).

81. Netanel, *Copyright's Paradox,* 60. Netanel cites court rulings in favor of plaintiffs who claimed copyright infringement even though the defendant's work did not use any of the specific components of the original.

82. One of the central debates within copyright law has been whether or not authors should control the *ideas* they send out into culture. Historically the answer has been "no"; instead authors are granted control over the material expressions that embody their ideas. As Section 102 of the 1976 Act states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." U.S. Code Title 17, Section 102 http://www.copyright.gov/title17/circ92.pdf (accessed July 8, 2014). However, the line between idea and expression, as Netanel points out, is sharper in theory than in practice; Netanel cites Second Circuit Court of Appeals Judge Learned Hand, who stated "that the line [between an idea and expression], wherever it is drawn, will seem arbitrary." See *Nichols v. Universal Pictures Corporation,* 45 F.2d 119 (1930), http://www.coolcopyright.com/cases/fulltext/nicholsuniversaltext.htm (accessed July 8, 2014).

83. With the derivative clause, we immediately see the problems appropriation art, especially its "poststructural" variant, faces.

84. Scholars have claimed that until the 1990s, copyright jurisprudence has taken the romantic author as "given" rather than as a construct because in general, the law has avoided delving into matters that involve making subjective decisions—aesthetic judgements of taste (see note 64). As scholar Peter Jaszi states, this attitude has also included much of academia. Jaszi acknowledges the parallel tracks literary criticism and critical legal studies have taken in pursuit of "deconstructing" the romantic author, and suggests the latter, in its tardiness in examining the construction of authorship, has been influenced by the former. See Jaszi, "Toward a Theory of Copyright," 457-560.

85. On internalized inspiration, see Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'," *Eighteenth-Century Studies*, No. 17, No. 4, Special Issue: The Printed Word in the Eighteenth Century. (Summer, 1984): 431.

86. On possessive individualism, see C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).

87. Ibid., 263-4.

88. John Locke, *Second Treatise of Government,* chapter 5, Section 27, http://www.gutenberg.org/files/7370/7370-h/7370-h.htm (accessed July11, 2014).

89. Thomas Hobbes, *Leviathan*, Introduction, chapter 16, http://www.gutenberg.org/files/3207/3207-h/3207-h.htm (accessed July 11, 2014).

90. Jaszi, "Toward a Theory of Copyright," 469-470.

91. Boyle, *Shamans, Software, and Spleens*, 54.

92. Woodmansee, "The Genius and the Copyright," 426.

93. As scholar Jane Gaines states, Romanticism…attempted to ameliorate the deleterious effects of the industrial revolution…rescuing the artist's work from the market…turning it into an industrial product." Gaines, *Contested Culture*, 59. A.D. Harvey grants the Industrial Revolution had some effect on the Romantics movement in eighteenth century England, but questions the degree of influence. See A.D. Harvey, *English Poetry in a Changing Society, 1780-1825* (London: Allison & Busby, 1980), 1-14.

94. Woodmansee, "The Genius and the Copyright," 427.

95. Ibid., 430.

96. Jaszi, "Toward a Theory of Copyright," 473-474.

97. Ibid., 472-475.

98. Perhaps the case that best illustrates this limited definition is *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13514), in which the author Harriet Beecher Stowe sued for copyright infringement in order to prevent a German translation of her popular novel *Uncle Tom's Cabin*. Stowe did not prevail, with the judge, in deciding in favor of the plaintiff, ruling, "A translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book." See Glynn S. Lunney, Jr., "Copyright, Derivative Works, and the Economics of Complements," *Vanderbilt Journal of Entertainment and Technology Law* 12, no. 4 (Summer, 2010): 779-817.

99. Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* (Cambridge: Press of John Wilson and Son, 1879), 452.

100. Marci Hamilton, "Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works," *Journal of the Copyright Society of the USA* 42 (Winter, 1994): 104.

101. No better examples illustrate the shift in copyright away from romantic authorship than two turn-of-the-century U.S. Supreme Court cases. In *Burrow-Giles Lithographic Co. v. Sarony* (1884), the judges' ruling validated the romantic author, claiming: "…in regard to the photograph in question, that it is a 'useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same ... entirely from his own original mental conception, to which he gave visible form by posing

the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.' These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish, and sell." However, just a few years later, the opinion in *Bleistein v. Donaldson Lithographing Co.* (1903): "The least pretentious picture has more originality…which may be copyrighted…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. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt." Thus, in the first ruling, a respect for the author's (romantic) vision; in the second, a privileging of the author's work, no matter its quality/aesthetic novelty. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=111&page=53 (accessed July 13, 2014); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=188&page=239 (accessed July 13, 2014).

102. Hamilton, "Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works," 102.

103. Ibid., 99.

104. Ibid., 101. My emphasis.

105. Gaines, *Contested Culture*, 64.

106. Lessig, *Free Culture*, 138.

107. Paul Hirst, Introduction to Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (London: Routledge & Kegan Paul, 1979), 17. Hirst's examples are drawn from English and Irish culture, but the parallels to American popular and high culture remain relevant.

108. Ibid.

109. "Copyright Law Revision, Sept. 3, 1976 (House Report 94-1476)," p. 134, http://www.copyright.gov/history/law/clrev_94-1476.pdf (accessed July 14, 2014).

110. In addition to the 1976 Act's generic definition of copyright as "original works of authorship fixed in any tangible medium of expression," the addendum House Report further states: "…definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art." "Copyright Law Revision, Sept. 3, 1976 (House Report 94-1476)," p. 54, http://www.copyright.gov/history/law/clrev_94-1476.pdf (accessed July 14, 2014).

111. See Jaszi, "Toward a Theory of Copyright," 472-478; Jaszi, "On the Author Effect," 41. Jaszi uses the Homestead Act analogy to argue that the "total" vision of the romantic author wins out over "late comers" who might happen to have similar creative ideas but who cannot exploit them without trespassing the first author's property rights. But I believe the analogy can also argue for the opposite: a state of work-centric copyright doctrine, wherein once the primary author stakes his or her claim, it can be exploited towards the production of any manner of variant expressions that may or may not be characterized as novel, original, or innovative, just as a land parcel may not have future value other than as a rent generator.

112. U.S. Code Title 17, Section 106, http://www.copyright.gov/title17/circ92.pdf (accessed July 14, 2014).

113. Boyle, *Shamans, Software, and Spleens*, 131. Original emphasis.

114. Within the Copyright Act of 1909's sixty-four sections, the phrase "work-made-for-hire" appears only twice. Section twenty-three states, "Of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years." Further, in the last sentence of the sixty-second section, it states merely, "And the word "author" shall include an employer in the case of works made for hire." No further details are given. See the Copyright Act of 1909, http://www.copyright.gov/history/1909act.pdf (accessed July 14, 2014).

115. U.S. Code Title 17, Section 101, http://www.copyright.gov/title17/circ92.pdf (accessed July 14, 2014).

116. Ibid.

117. U.S. Code Title 17, Section 201, http://www.copyright.gov/title17/circ92.pdf (accessed July 14, 2014).

118. Hamilton, "Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works," 106.

119. Writing in 1994, Hamilton notes that since the 1976 Act, works-made-for-hire, or "corporate copyright," had accounted for over fifty percent of registrations at the U.S. Copyright Office.

120. One of the most outspoken critics of corporate copyright's effects on the public domain has been Lawrence Lessig. See Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Vintage Books, 2002). See also Boyle, *The Public Domain*. If we take the average life of an author to be seventy years, then a copyrighted work created by an individual author after that date would retain protection until nearly 2100. The Act of 1998 increased the lengths by twenty years, essentially pushing copyright protection into the twenty-second century.

121. As noted by Douglas Crimp, one example of the persistence of a transcendental art discourse within the postmodern moment is Barbara Rose's curation and catalog for the exhibition *American Painting: The Eighties* at the Grey Art Gallery, New York, which opened in 1979. See Crimp, "The End of Painting," in *On the Museum's Ruins*, 88-90.

122. Foster, *Recodings.*

123. Technically the Copyright Act of 1976 went into effect on January 1, 1978. Both Levine and Prince had begun experimenting with appropriated images in 1977, while their work at the end of the '70s and into the early '80s established them within the wider postmodern appropriation movement. Furthermore, it is not known how aware at the time the two artists were of the 1976

Act, or the protocols of copyright in general. Attempts to ask Levine about whether or not she considered copyright issues when producing her first appropriations was unsuccessful; her gallery, with whom contact was made, stated that Levine's schedule didn't allow her time to answer my questions. E-mail correspondence with Ona Nowina-Sapinski, Paula Cooper Gallery, January 29, 2009.

124. "The titles she gave her pictures were frank enough *(After Joan Miro, After Kasimir Malevich)*. And when she talked about the work she was doing, she made it clear that piracy, with its overtones of infringement and lack of authorization, *was the point.*" Marzorati, "Art in the (Re)making," 90.

125. Buchloh, "Allegorical Procedures," 44.

126. In the case of Levine's appropriation, strictly speaking we could trace the original image back to Edward Weston. With some effort we could likewise trace the photographer responsible for Prince's cowboy works. But it is important to recall that Levine and Prince appropriated what were already mass-produced reproductions (in Levine's case, a portfolio of Weston images, in Prince's case, magazine advertising).

127. Recalling his early career as an employee in the tear-sheet department of Time Life, "where he clipped and filed articles for editors," Prince could be described as having been one of the "nameless technicians" of the creative industries. Spector, Prince, et al., *Richard Prince*, 26-27.

128. See Michel Foucault, "What is an Author?," in *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Ithaca, N.Y.: Cornell University Press, 1980), 137-138.

129. Richard Bolton, "Enlightened Self-Interest: The Avant-Garde in the '80s," in Grant Kester, *Art, Activism, and Oppositionality: Essays from Afterimage* (Durham, NC: Duke University Press, 1998), 41.

130. Ibid.

131. Ibid., 43.

132. Crimp, "Appropriating Appropriation," *On the Museum's Ruins*, 136.

133. Seth Waugh, Sponsor's Statement, Nancy Spector and Richard Prince, *Richard Prince.* Waugh's phrase "makes it new by making it again" is itself appropriated from a passage of Richard Prince's 1983 book *Why I Go to the Movies Alone*. Semi-autobiographical in nature, *Why I Go to the Movies Alone* describes in the third person a man struggling with his identity, his authentic self, versus his representation within a world premised on the primacy of the representation. More Baudrillardian in tone, Prince's text stands in stark contrast to Waugh's later recuperation of it, which casts no doubt as to Prince's uniqueness, originality, or authenticity. See http://www.richardprince.com/writings/why-i-go-to-the-movies-alone-pg-3-6/ (accessed July 15, 2014).

134. Bolton, quoting J. Burton Casey Sr., "Enlightened Self-Interest," Kester, *Art, Activism, and Oppositionality*, 29.

135. On the development of corporate arts funding in the 1980s in the United States and the United Kingdom in the Reagan/Thatcher era, see Chin-Tao Wu, *Privatising Culture: Corporate Art Intervention since the 1980s* (London; New York: Verso, 2002).

136. Bolton, "Enlightened Self-Interest," 30.

137. See http://www.guggenheim.org/images/content/pdf/education/2010/ar_2008_feb09.pdf (accessed July 14, 2014).

138. Prince's cowboy appropriations stand in direct contrast to Hans Haacke's 1990 painting *Cowboy with Cigarette*. In the work, Haacke's appropriated Picasso's collage *Man with Hat* but inserted contemporary tobacco related newspaper clippings in order to highlight Philip Morris's sponsorship of a Picasso retrospective at the Museum of Modern Art in 1989. Haacke's critique of corporate sponsorship in the supposedly disinterested space of the museum is therefore much more explicit that Prince's vague commentary on consumer culture, originality and simulation. Because of the pointed nature of Haacke's critique, it would most likely stand a better chance in a hypothetical copyright infringement lawsuit due to the fair use doctrine, reasons for which are explained in more detail in the following two chapters. For Haacke's work, see http://www.moma.org/interactives/exhibitions/1999/muse/artist_pages/haacke_cowboy.html (accessed July 15, 2014).

139. Randy Kennedy, "If the Copy Is an Artwork, Then What's the Original?," *New York Times*, December 6, 2007.

140. In a 1986 ArtNews interview with Sherrie Levine, Gerald Marzorati writes, "When Lawyers from the Weston estate…suggested the courts might be the proper venue to settle this epistemological argument [over whether Levine was copying Weston, or whether Weston was "copying" classic sculpture]." Attempts to clear up the nature of any legal threats by the Weston estate with Sherrie Levine were unsuccessful. See the end to note 111. Marzorati, "Art in the (Re)Making," 97.

141. Correspondence with Amy Rule, Head of Research, Center for Creative Photography, December 12, 2008.

142. Ibid.

143. Herbert Marcuse, "The Affirmative Character of Culture," in *Negations: Essays in Critical Theory* (Boston: Beacon Press, 1969).

144. Gaines, *Contested Culture*, 236.

145. See generally Julian Bourg, *From Revolution to Ethics: May 1968 and Contemporary French Thought* (Montreal: McGill-Queen's University Press, 2007); Francois Cusset, *French Theory: How Foucault, Derrida, Deleuze, & Co. Transformed the Intellectual Life of the United States* (Minneapolis and London: University Of Minnesota Press, 2008).

146. On the development of the modern prison, see Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995); *The Birth of the Clinic: An Archeology of Medical Perception* (New York: Vintage Books, 1994). On everyday gestures of resistance, see Michel de Certeau, *The Practice of Everyday Life* (Los Angeles: University of California Press, 1984).

147. See generally Graeme Turner, *British Cultural Studies* (New York: Routledge, 2002).

148. Hamilton, "Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works," 101.

149. Ibid., 237.

150. Foster, "(Post)modern Polemics," *Recodings,* 121-124.

Chapter Two

1. Quoted in Angelika Muthesius, ed., *Jeff Koons* (Köln: Benedikt Taschen Verlag GmbH, 1992), 80.

2. As I mentioned in the previous chapter, postmodern appropriation artists are frequently historicized as having been influenced by the poststructuralist theory prevalent at the time. The texts perhaps most often referenced as being influential are Roland Barthes' "The Death of the Author" and Michel Foucault's "What is an Author?". See Roland Barthes, "The Death of the Author," in *Image, Music, Text* (New York: Noonday Press, 1988); Michel Foucault, "What is an Author?" in *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Ithaca, N.Y.: Cornell University Press, 1980).

3. Here one can make a comparison between appropriation art and another postmodern cultural form: hip-hop music, which developed in New York at roughly the same moment. In both cases, aesthetic innovation succumbs to the status quo. For example, the extreme cut-and-paste aesthetics of Public Enemy's 1988 *It Takes a Nation of Millions to Hold Us Back* or Beastie Boys' 1989 *Paul's Boutique* would help usher in an era of sample-based music, whose novelty would ultimately draw the attention of copyright lawyers. From an economic perspective, both *Nation of Millions* and *Paul's Boutique* would be impossible to produce today due to the high cost of licensing. Anyone attempting such sample-laden albums now would almost certainly provoke the ire of the original copyright holders, just as it is practically guaranteed that any artist appropriating wholesale imagery today in the vein of Prince and Levine's rephotographs would face a lawsuit (indeed, *Cariou v. Prince*, discussed in chapter 3, illustrates this). The primary difference between appropriation practices and sample-based hip-hop is their respective spheres of production and circulation. While the art world and its para-regulation have helped insulate appropriation from the law and retain it as a viable technique, sample-based hip-hop, a popular culture form dependent on the logic of the mass-produced commodity, has all but stagnated due to copyright litigation. On the relationship between intellectual property and hip-hop music, see Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Durham: Duke University Press, 2011).

4. See *Rogers v. Koons*, 960 F.2d 301 (2nd Cir. 1992), http://www.ncac.org/art-law/op-rog.cfm (accessed July 19, 2014). See also *Cariou v. Prince*, 11-1197-cv (2nd Cir. 2013), http://www.ca2.uscourts.gov/decisions/isysquery/fca1ee18-7fa6-4d81-9efd-b0bdf00263bc/19/doc/11-1197_complete_opn.pdf (accessed July 19, 2014). Prince's initial loss to Cariou occurred in the United States District, Southern District of New York, the same court in which Koons argued and lost his case with Art Rogers. Both Koons and Prince appealed their respective District Court rulings to the United States Court of Appeals, Second Circuit. Koons lost his appeal, while the Second Circuit Court largely overturned Prince's District Court decision.

5. On the economic and reasonableness models of fair use, see "The Parody Defense to Copyright Infringement: Productive Fair Use after 'Betamax'," *Harvard Law Review* 97, no. 6 (April, 1984): 1395-1413. On the transformative model of fair use, see Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* 103, no. 5 (March 1990): 1105-1136.

6. The time period marking the shift from modernist to postmodernist art practices has been hotly debated, with scholars such as Jürgen Habermas dismissing a new, "post" modernism outright. While postmodernism is often historicized in the U.S. as occurring during the 1970s and '80s, scholar Andreas Huyssen traces the shift back to the "Duchamp-Cage-Warhol axis" of the 1960s. See Andreas Huyssen, "Mapping the Postmodern," in *After the Great Divide: Modernism, Mass Culture, Postmodernism* (Bloomington: Indiana University Press, 1986), 178-221. On the Warhol, Rauschenberg, and Rivers infringements, see Gay Morris, "When Artists Use Photographs: Is it Fair Use, Legitimate Transformation or Rip-Off?" *Artnews* 80 (January 1981): 102-106.

7. Warhol also agreed to pay Caulfield royalties, in the form of artwork or monetary compensation, for future uses of her image. See ibid.

8. Ibid.

9. On the accusations leveled at Salle, see John Carlin, "Culture Vultures: Artistic Appropriation and Intellectual Property Law," *Columbia--VLA Journal of Law and the Arts* 13, no. 1 (1988): 133-35. See also Julie Alane Arthur, "Jeff Koons: Artist or Thief?", *Copyright Law Symposium* 41 (1998): 117-18.

10. See *Mattel Inc. v. Walking Mountain Productions*, 353 F. 3d 792 - Court of Appeals, 9th Circuit 2003, http://scholar.google.com/scholar_case?case=7581792703482092445...ttel+v.+WALKING+MOUNTAIN+PRODUCTIONS&hl=en&as_sdt=2,5&as_vis=1 (accessed July 21, 2014).

11. Parody as it pertains to fair use will be explored in more depth later in the chapter.

12. *Hoepker v. Kruger*, 200 F. Supp. 2d 340 - Dist. Court, SD New York 2002, http://scholar.google.com/scholar_case?case=6699205217591375244&q=HOEPKER+v.+KRUGER&hl=en&as_sdt=2,5&as_vis=1 (accessed July 21, 2014). After MOCA Kruger's exhibit travelled to the Whitney Museum of American Art in New York.

13. On Greenfield's suit against Loeb see Ralph Lerner and Judith Bresler, ed., *Art Law: The Guide for Collectors, Investors, Dealers and Artists* (New York: Practising Law Institute, 2005), 1165-67.

14. *Blanch v. Koons*, 396 F. Supp. 2d 476 - Dist. Court, SD New York 2005, http://scholar.google.com/scholar_case?case=5289917297706312432&q=ROGERS+v.+KOONS&hl=en&as_sdt=2,5&as_vis=1&scilh=0 (accessed July 23, 2014).

15. See *Blanch v. Koons*, 467 F. 3d 244 - Court of Appeals, 2nd Circuit 2006, http://scholar.google.com/scholar_case?q=ROGERS+v.+KOONS&hl=en&as_sdt=2,5&as_vis=1&case=3752630071472494999&scilh=0 (accessed July 23, 2014).

16. Interview with Joy Garnett, April 26, 2012. See also her own documentation of the exchange with Meiselas at http://www.firstpulseprojects.com/joywar.html (accessed April 26, 2012). The 2006 conference was titled "Comedies of Fair U$e" with participants including scholars Lawrence Lessig, Siva Vaidhyanathan, Lewis Hyde and James Boyle, among others. Audio and slides of the event can be viewed at https://www.youtube.com/watch?v=xiO784BvVDE (accessed July 21, 2014).

17. Artist statement, http://music.columbia.edu/~luke/projects/index.shtml?id=play (accessed July 21, 2014).

18. E-mail correspondence with Luke Dubois, April 24, 2012.

19. Stanford Law School Center for Internet and Society, Durie Tangri Lemley Roberts & Kent, LLP, "Complaint for Declaratory Judgement and Injuctive Relief," http://cyberlaw.stanford.edu/biguploads/Fairey_v_AP_complaint_with_exhibits.pdf (accessed July 31, 2011). Ironically, the picture in question was taken for The Associated Press by freelance photographer Mannie Garcia, who sued the AP for its ownership claim, stating instead he held the copyright. Eventually Garcia dropped his suit claiming the ongoing process had exhausted him. See "Photographer Mannie Garcia Drops Case Against AP Over Shepard Fairey's Obama Poster," http://www.mediabistro.com/unbeige/photographer-mannie-garcia-drops-case-against-ap-over-shepard-faireys-obama-poster_b8534 (accessed July 21, 2014). Of course this recalls the type of issues at stake in the previous chapter regarding work-made-for-hire.

20. In the initial stages of the lawsuit/counter-lawsuit between Fairey and The Associated Press, the artist insisted the photo he used was not the one claimed by the news organization. After pressure from the AP's lawyers, Fairey admitted that the photo he used was indeed that claimed by the AP, and furthermore he manipulated evidence to cover up his lie. This led to his legal team at Stanford

University's Fair Use Project to withdraw from the case. Many saw this turn of events as very unfortunate because it undermined what many fair use advocates believed to be a strong case. See Liz Robbins, "Artist Admits Using Other Photo for 'Hope' Poster," *New York Times*, http://www.nytimes.com/2009/10/18/arts/design/18fairey.html (accessed July 21, 2014).

21. See *Friedman v. Guetta*, CV 10-00014 DDP (JCx)- Dist. Court, CD California 2011 at http://www.photoattorney.com/wp-content/uploads/2011/06/Order-on-MSJ.pdf (accessed July 21, 2014); *Morris v. Guetta*, LA CV12–00684 JAK (RZx) - Dist. Court, CD California 2013 at http://madisonian.net/downloads/morris_v_guetta.pdf (accessed May 21, 2014).

22. On Guetta's debit exhibit see Shelley Leopold, "Mr. Brainwash Bombs L.A.," *LA Weekly*, June 11, 2008, http://www.laweekly.com/2008-06-12/art-books/mr-brainwash-bombs-l-a/ (accessed May 21, 2014).

23. On Guetta's ongoing lawsuit see "Jim Marshall's Estate Sues 'Mr. Brainwash' and Google for Copyright Infringement," Photo District News, http://pdnpulse.pdnonline.com/2012/04/jim-marshalls-estate-sues-mr-brainwash-and-google-for-copyright-infringement.html (accessed May 21, 2014). Marshall's lawsuit also names Google as a defendant; the technology company used Guetta's work as a backdrop during a public event promoting its new music service, Google Play.

24. That so many of the cases in this list were settled out of court—therefore leaving few documents in the public record—makes the establishment of tendencies in copyright infringement cases involving appropriation art both challenging and urgent.

25. Fredric Jameson, *Postmodernism, Or, the Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991), 9. See also Douglas Crimp, "The Photographic Activity of Postmodernism," in *On the Museum's Ruins* (Cambridge, Mass.: MIT Press, 1993), 108-125.

26. As Walter Benjamin states, "To an ever-increasing degree, the work of art reproduced becomes the reproduction of a work designed for reproducibility." Walter Benjamin, "The Work of Art in the Age of Its Technological Reproducibility," in Howard Eiland and Michael W. Jennings, ed., *Walter Benjamin: Selected Writings Volume 4 1938-1940* (Cambridge, Mass.: Harvard University Press), 256.

27. See Theodor Adorno, *The Culture Industry: Selected Essays on Mass Culture* (London; New York: Routledge, 2001). See also Clement Greenberg, "Avant-Garde and Kitsch," in *The Collected Essays and Criticism* (Chicago: University of Chicago Press, 1986), 5-22.

28. On Caulfield's photograph in *Modern Photography*, see Carlin, "Culture Vultures," 128-29. See also Andy Warhol, *Andy Warhol 365 Takes* (New York: Harry N. Abrams, 2004), 11.

29. On Moore's place in photographing American civil rights history, see Douglas Martin, "Charles Moore, Rights-Era Photographer, Dies at 79," *New York Times*, March 15, 2010, http://www.nytimes.com/2010/03/16/arts/16moore.html?_r=1&scp=2&sq=charles%20moore&st=cse (accessed May 21, 2014).

30. See http://www.jimmarshallphotographyllc.com/ (accessed May 21, 2014).

31. On Dennis Brack, see http://www.brackselections.com/ (accessed May 22, 2014); On Henri Dauman, see http://daumanpictures.com (accessed May 22, 2014); on Glen Freidman, see http://burningflags.com/photographs/ (accessed May 22, 2014); on Lauren Greenfield, see http://www.laurengreenfield.com/ (accessed May 22, 2014); on Kenneth Heyman, see http://www.kenheyman.com (accessed May 22, 2014) on Thomas Hoepker, see http://www.magnumphotos.com/C.aspx?VP3=CMS3&VF=MAGO31_10_VForm&ERID=24KL5351FG (accessed May 22, 2014); on

Susan Meiselas, see http://www.susanmeiselas.com (accessed May 22, 2014); on Dennis Morris, see http://www.dennismorris.com/index.html (accessed May 22, 2014).

32. John Henry Merryman Albert, Edward Elsen, and Stephen K. Urice, *Law, Ethics and the Visual Arts, Fourth Edition* (Alphen aan den Rijn, The Netherlands; Frederick, Md.: Kluwer Law International, 2002), 450.

33. See U.S. Code Title 17, Section 106, http://www.copyright.gov/title17/circ92.pdf (accessed July 22, 2014). Section 106 states: "Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."

34. Our exception now is Shepard Fairey, whose Obama poster became one of the most widely-circulated image in the 2008 Presidential election. With that said, its original version now sits in the National Portrait Gallery at the Smithsonian, a kind of historic, "national" artwork. See "Now on View: Portrait of Barack Obama by Shepard Fairey," http://face2face.si.edu/my_weblog/2009/01/now-on-view-portrait-of-barack-obama-by-shepard-fairey.html (accessed May 22, 2014). That Shepard Fairey is variously described as a street artist, a graffiti artist, a graphic designer, and an art world operative with numerous gallery and museum exhibits complicates the mass author/artist binary I am introducing here. I will further problematize these terms when I return to notions of mass culture/culture industry/kitsch.

35. For one of the first critical reflections on the institution of art as a site for new theories of information and philosophical debate as to the category "art," see Arthur Danto, "The Artworld," *The Journal of Philosophy* 61 no. 19 (October 15, 1964): 571-584. For more sociological perspectives, see George Dickie, *The Art Circle: A Theory of Art* (Evanston: Chicago Spectrum Press, 1997); Pierre Bourdieu, *The Field of Cultural Production* (New York: Columbia University Press, 1993); Howard Becker, *Art Worlds* (Los Angeles: University of California Press, 2008).

36. On the creative struggles artists and authors often faced given emerging industrial-capitalist economies and corresponding consuming (if not entirely cultivated) publics, see Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (New York: Columbia University Press, 1994); see also Oskar Bätschmann, *The Artist in the Modern World: A Conflict Between Market and Self-Expression* (Cologne: DuMont Buchverlag, 1997).

37. See generally Benjamin, "The Work of Art in the Age of Its Technological Reproducibility."

38. Charles Baudelaire, "The Salon of 1859," in *Charles Baudelaire: Selected Writings on Art and Literature* (New York: Penguin Books, 1992), 285-324.

39. Ibid., 294.

40. Ibid., 296-7.

41. In theorizing serious works of art, Adorno primarily refers to avant-garde music. The notion is difficult to trace back to a particular Adorno text inasmuch as the idea is one of his central concepts. For one example, see "Why Is the New Art So Hard to Understand?", in Theodor W.

Adorno, Richard D. Leppert and Susan H. Gillespie, ed., *Essays on Music* (Berkeley: University of California Press, 2002), 127-134.

42. On the necessity for painting and sculpture to rid themselves of anything extraneous to the mediums themselves so that they might move toward a more immediate, pure sensation, see Clement Greenberg, "Towards a Newer Laocoon," in Charles Harrison and Paul Wood, ed., *Art in Theory 1900-2000: An Anthology of Changing Ideas* (Malden, Mass.: Blackwell Publishers, Inc., 1992), 555-60.

43. Huyssen, *After the Great Divide.*

44. "In [the 1980s], [Warhol] either designed or appeared in many purely commercial projects: a billboard and album cover for the Rolling Stones; a car painted for BMW (also done by Stella and Lichtenstein); rum ads with Margaret Trudeau; a commercial for New York Airlines; modeling assignments for a Jordan Marsh catalogue; a schlock television show, "Love Boat"; a television commercial for Diet Coke; magazine ads for an eyeglass manufacturer, for Chemical Bank, for a New York brokerage firm, and for a vodka manufacturer." David E. James, "The Unsecret Life: A Warhol Advertisement," *October* 56 (Spring, 1991): 21-41. On Baldessari's iPhone app see Paul Hiebert, "Is John Baldessari's iPhone App the Future of Art?", *Flavorwire*, June 29, 2010, http://www.flavorwire.com/102449/lacma-iphone-appjohn-baldessari-and-the-future-of-art (accessed July 22, 2014); On the TV show *Work of Art* see http://www.bravotv.com/work-of-art (accessed July 22, 2014). On Fairey's many enterprises see http://www.obeygiant.com/ (accessed July 22, 2014) as well as his Los Angeles gallery space Subliminal Projects, http://subliminalprojects.com/ (accessed July 22, 2014).

45. Indeed the possibility of critical cultural practices at all within a postmodern condition has been one of the most debated questions in art history, theory and criticism for the last several decades. For critical appraisal written around the seeming outset of this conundrum, see Benjamin Buchloh, *Neo-Avantgarde and Culture Industry: Essays on European and American Art from 1955 to 1975* (Cambridge, MA: MIT Press, 2000). More recent assessments include Hal Foster, *The Return of the Real: The Avant-Garde at the End of the Century* (Cambridge, MA: MIT Press, 1996).

46. On the accolades Morton Beebe has received over the years, see http://www.mortonbeebe.com/about/ (accessed July 22, 2014); On Henri Dauman, see http://www.daumanpictures.com/gallery/dauman/about.html (accessed June 22, 2014); on Glen Friedman, see http://burningflags.com/exhibitions/ (accessed June 22, 2014); on Lauren Greenfield see http://www.laurengreenfield.com/index.php?p=ZKDK9C65 (accessed June 22, 2014); on Ken Heyman, see http://kenheyman.photoshelter.com/about/ (accessed June 22, 2014); on Thomas Hoepker see http://www.magnumphotos.com/C.aspx?VP3=CMS3&VF=MAGO31_9_VForm&ERID=24KL5351FG (accessed July 22, 2014); on Susan Meiselas, see http://www.susanmeiselas.com/info/ (accessed July 22, 2014); on Dennis Morris see http://www.dennismorris.com/exhibitions.html (accessed July 22, 2014); on Arnold Newman, see http://www.arnoldnewmanarchive.com/index.php?option=com_content&view=article&id=1&Itemid=2 (accessed July 22, 2014).

47. Peter Bürger, *Theory of the Avant-Garde* (Minneapolis: University of Minnesota Press, 1984). The artistic efforts of the Russian avant-garde are unique in that they coincided generally with the 1917 Russian revolution. The Russian avant-garde was successful, then, in its bid to dismantle an institution of art and to merge "art and life" insofar as the entire bourgeois value system in Russia was overturned. However, the political priorities of Russian avant-gardism were themselves called into question with Stalin's rise and finally replaced by the "official" art of the Party: Socialist Realism. In this sense the avant-garde was unsuccessful in an attempt to wrest a politics of aesthetics away from instrumental and repressive regimes of control. See John E. Bowlt, *Russian Art of the Avant-Garde: Theory and Criticism, 1902-1934* (London: Thames and Hudson, 1988); Victor Margolin, *The Struggle for Utopia: Rodchenko, Lissitzky, Moholy-Nagy: 1917-1946* (Chicago: University of Chicago Press, 1997).

48. Huyssen, "The Hidden Dialectic: Avant-Garde—Technology—Mass Culture," in *After the Great Divide*, 11.

49. Peter Bürger, "Avant-Garde and Neo-Avant-Garde: An Attempt to Answer Certain Critics of *Theory of the Avant-Garde*," *New Literary History* 41 (2010): 706.

50. Ibid.

51. Ibid.

52. Ibid.; see also Benjamin Buchloh, "Theorizing the Avant-Garde," *Art in America* 72 no. 10 (November, 1984): 19-21; Hal Foster, "What's Neo about the Neo-Avant-Garde?", in Martha Buskirk, Mignon Nixon, eds., *The Duchamp Effect* (Cambridge, Mass.: MIT Press, 1996).

53. Joy Garnett and Susan Meiselas, "On the Rights of the Molotov Man," *Harper's Magazine* (February 2007): 53.

54. Randy Kennedy, "If the Copy Is an Artwork, Then What's the Original?," *New York Times,* December 6, 2007. In *Rogers v. Koons*, Jeff Koons's lawyers were even more explicit in their contempt for the mass author: "Unlike the typical copyright infringement case which involves a creative artist attempting to prevent the mass commercial exploitation of his original work, this case concerns the extent to which a mass distributor of a rather mundane photographic note card can prevent a highly regarded artist from creating a limited edition, original, provocative and critical work of art." Brief for the Defendants-Appellants, Jeff Koons and Sonnabend Gallery, Inc., United States Court of Appeals for the Second Circuit (91-7396), as quoted in Martha Buskirk, "Commodification as Censor: Copyrights and Fare Use," *October* 60 (Spring 1992): 82-109.

55. In this view, the decontextualizing strategies in appropriation art misinterpret the photograph; in more extreme instances, they might altogether reverse its intended message (recall from last chapter the argument critics such as Crimp and Foster made for "poststructuralist" appropriation art). This reversal is also the intent behind parody as it is conventionally understood. Yet parody in general has historically been allowed greater exemption from copyright restrictions because its criticism of original expressions is more easily discernible, thus qualifying it as a free speech act. It is the more ambiguous appropriations that decontextualize but do so without clearly communicating overt criticism (as in the case of much postmodernist appropriation art) that is legally problematic, as we shall see in the *Koons* and *Prince* cases in this chapter and the next.

56. Garnett and Meiselas, "On the Rights of the Molotov Man," 58. Note that Meiselas includes herself within the category "artist," further pointing to the complexity of the mass author/artist distinction.

57. Adam Lindemann, "My Artwork Formerly Known as Prince," *The New York Observe*r, March 29, 2011. http://observer.com/2011/03/my-artwork-formerly-known-as-prince/ (accessed July 22, 2014).

58. Leval, "Toward a Fair Use Standard," 1107.

59. Ibid., 1109.

60. On the Statute of Anne, see note 47 in chapter 1.

61. On the legality of abridgment in eighteenth century England, see Matthew Sag, "The Pre-History of Fair Use," http://works.bepress.com/matthew_sag/9/ (accessed July 23, 2014). Sag writes on page 13: "The liberty of subsequent authors to abridge existing works was seen as part of the sphere of public use authors admitted upon a work's publication…Abridgment, compilation and

reprinting played an important role in the dissemination of scientific, technical and cultural knowledge in the pre-modern era of copyright."

62. Ibid., 8-21.

63. In the English case *Gyles v. Wilcox* of 1741, Lord Hardwicke decreed that "where books are colorably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment." Quoted in ibid., 18.

64. Robert Maugham, *Treatise on the Laws of Literary Property*, 1828, quoted in ibid., 33.

65. Lord Chancellor Eldon, quoted in ibid., 30.

66. See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), http://copy.law.cam.ac.uk/record/us_1841 (accessed July 23, 2014).

67. Ibid.

68. See Oren Bracha, "The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright," *Yale Law Journal* 118, Issue 2 (November, 2008): 229.

69. Ibid.

70. As Sag states, "Once copyright owners were allowed to preclude derivatives to prevent competition with their original works, they quickly grew bold enough to assert an exclusive right in derivative works for their own sake." "The Pre-History of Fair Use," 37.

71. Bracha, "The Ideology of Authorship Revisited," 229.

72. George Ticknor Curtis, "A Treatise on the Law of Copyright, Boston (1847), http://copy.law.cam.ac.uk/cam/tools/request/showRepresentation.php?id=representation_us_1847&pagenumber=1_283&imagesize=big (accessed July 23, 2014).

73. *Copyright Act, Washington D.C. (1870)*, http://copy.law.cam.ac.uk/cam/tools/request/showRepresentation.php?id=representation_us_1870a&pagenumber=1_15&imagesize=big (accessed July 23, 2014).

74. Section 1, *The Copyright Act of 1909*, http://www.copyright.gov/history/1909act.pdf (accessed July 23, 2014). My emphasis.

75. Bracha, "The Ideology of Authorship Revisited," 231.

76. Ibid., 229.

77. Ibid., 228.

78. Parody may negatively impact the market of its target, but not because of substitution. Rather, it is precisely through parody's effective criticism that audiences change their minds about which types of cultural expressions are valuable to them. For example, one can imagine the parody of a film having the effect of exposing the highfalutin aspects of that film, with the consequence of fewer people wanting to view it. As Supreme Court Justice Kennedy would explain later int he twentieth century, "The Court acknowledges that it is legitimate for parody to suppress demand for the original by its critical effect…What it may not do is usurp demand by its substitutive effect." *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), http://scholar.google.com/scholar_case?case=16686162998040575773&hl=en&as_sdt=2&as_vis=1&oi=scholarr (accessed July 23, 2014).

79. See Burling Lowrey, *Twentieth Century Parody, American and British* (New York: Harcourt, Brace, 1960). Of course the history of parody in Western culture goes back centuries; see Margaret Rose, *Parody: Ancient, Modern, and Post-Modern* (Cambridge; New York: Cambridge University Press, 1993); Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (Urbana and Chicago: University of Illinois Press, 2000); Simon Dentith, *Parody* (London; New York: Routledge, 2000).

80. I am referring here to parody in its conventional sense: "an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect." *Oxford Dictionaries*, http://oxforddictionaries.com/definition/american_english/parody?region=us&q=parody (accessed July 23, 2014). I explore parody as a vehicle for criticism in chapter 4.

81. See "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," *Harvard Law Review* 97 (1983-1984): 1401; Charles C. Goetsch, "Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection," *Western New England Law Review* 3 (1980): 46.

82. Goetsch, "Parody as Free Speech," 47.

83. "The Parody Defense to Copyright Infringement," 1401-1406.

84. "Substantial similarity" is one of the first tests modern courts employ to determine if infringement has occurred. If it is concluded that the works in question are substantially similar, the next step is to analyze any fair use claims brought by the defendant. In some instances, judges have rejected fair use arguments outright if extensive copying is found, which is, as we shall see, troubling not only for cases involving parody but also appropriation art. See R.T. Nimmer, "Reflections on the Problem of Parody-Infringement," *Copyright Law Symposium* 17 (1969): 133-161.

85. On the "conjure up" standard, see "The Parody Defense to Copyright Infringement," 1403-1412. Exactly where the threshold lies is rarely if ever specified; courts do not advise as to how much of an original may be taken, but only determine whether or not whatever has been taken is excessive.

86. See *Walt Disney Productions v. Air Pirates*, 581 F. 2d 751 (1978), http://scholar.google.com/scholar_case?case=12985824547460808287&hl=en&as_sdt=2&as_vis=1&oi=scholarr (accessed July 23, 2014). See also Bob Levin, *The Pirates and the Mouse: Disney's War Against the Counterculture* (Seattle: Fantagraphics Books, 2003).

87. *Walt Disney Productions v. Air Pirates* (1978).

88. Levin, *The Pirates and the Mouse,* 216-17.

89. "The Parody Defense to Copyright Infringement," 1406.

90. In appealing the District Court ruling, the Air Pirates argued, among other things, that their parody claim should be considered within the context of the then newly-enacted Copyright Act of 1976 and its revised stance on fair use. The Appeals Court judges reasoned, however, that because the case was originally tried before passage of the 1976 Act, its fair use clause should not apply. The Air Pirates lost on appeal in 1978. See Levin, *The Pirates and the Mouse,* 199.

91. On fair use as judge-made law, see T. Barton Carter et al., *The First Amendment and the Fourth Estate: The Law of Mass Media* (Westbury, N.Y.: The Foundation Press, 2005), 314.

92. U.S. Code Title 17, Section 107, http://www.copyright.gov/title17/circ92.pdf (accessed July 23, 2014). It is ironic that the doctrine of fair use as articulated in the Copyright Act of 1976, which

guides the assessment of whether or not copying constitutes infringement, was itself copied or "appropriated" extensively from an "original" text (i.e., *Folsom v. Marsh*).

93. "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." "Copyright Law Revision, Sept. 3, 1976 (House Report 94-1476)," p. 66, http://www.copyright.gov/history/law/clrev_94-1476.pdf (accessed July 23, 2014).

94. Perusal of dozens of fair use cases over the past four decades yields the observation that judges at the District Court level through to the Supreme Court have tended to adhere to the four factors fairly methodically, and moreover have refrained from introducing any other considerations that may widen an already broad fair use guideline. But different interpretations of each factor have arisen, as we shall see in the next section.

95. Leval, "Toward a Fair Use Standard," 1111-1125. Pertaining to the false binary of profit/non-profit, Leval would state later, "The heart of fair use lies in commercial activity. Most undertakings in which we expect to find well-justified instances of fair use are commercial. These include, of course, journalism, commentary, criticism, parody, biography, and history; even the publication of scholarly analysis is often commercial. If all of these are presumptively unfair, then fair use is to be found only in sermons and classroom lectures. This would not be a very useful doctrine." Pierre N. Leval, "Fair Use Rescued," *UCLA Law Review* 44 (1996): 1456.

96. Leval, "Toward a Fair Use Standard."

97. Ibid., 1111.

98. *Campell v. Acuff-Rose Music* (1994).

99. Ibid.

100. Ibid.

101. *Mattel Inc. v. Walking Mountain Productions* (2003). My emphasis.

102. *Blanch v. Koons* (2005). My emphasis.

103. "In a decision rife with ominous implications for the practice of artistic appropriation, the U.S. Court of Appeals…denied Jeff Koons's attempt to overturn a lower court verdict of copyright infringement…the limitations on artists who wish to make works that respond to the contemporary world of existing mass-media images will be very confining indeed." Martha Buskirk, "Appropriation Under the Gun," *Art in America* 80, no. 6 (June, 1992): 37-41. And curator Barry Rosenberg writes, "The legal situation looks questionable for appropriation artists and one must wonder if acceptable boundaries can be drawn considering both the direction of art and that of the present Supreme Court." Quoted in Michael Kimmelman, "Art in Review," *The New York Times*, August 21, 1992. The grave prognoses critics gave appropriation art at the time turned out to be somewhat overstated; appropriation art as an institutionalized practice only expanded in the years following *Rogers v. Koons*.

104. See *Rogers v. Koons*, 751 F. Supp. 474 (Dist. Court, SD New York 1990), http://scholar.google.com/scholar_case?q=ROGERS+v.+KOONS&hl=en&as_sdt=2,5&as_vis=1&case=9116893010009845497&scilh=0 (accessed July 23, 2014).

105. Katy Siegel, "Banality 1988," in Hans Werner Holzwarth, ed., *Jeff Koons* (Köln: Taschen GmbH, 2009), 258.

106. "In Koons's perception, 'the subject for the show would be banality but the message would be a spiritual one.'" Judge Haight, quoting Koons's testimony, in *Rogers v. Koons* (1990).

107. Siegel, "Banality 1988," *Jeff Koons*, 260.

108. "His objects are simultaneously pure and perverse, innocent and irritating, thought-provoking and mind-boggling, and have understandably been accused of celebrating as much as critiquing consumer culture." Roberta Smith, "Rituals of Consumption," *Art in America* 76, no. 5 (May, 1988): 164. Others were less forgiving: "Mr. Koons delivers an unabashedly cynical message. His works continue to celebrate the emptiness, meaninglessness and Disneylike unreality of contemporary life…the hollowness the artist reveals seems fundamentally his own." Michael Kimmelman, "Art in Review," *The New York Times*, November 29, 1991; "His work is totally trivial and a pure product of the market. He's considered to be an heir to Duchamp, but I think it's a trivialization of all that. I think he's kind of a commercial artist." Yve-Alain Bois, quoted in Constance L. Hays, "A Picture, a Sculpture and a Lawsuit," *The New York Times*, September 19, 1991.

109. The "String of Puppies" case was one of three copyright suits against Koons at the time, all of which sprang from sculptures he exhibited in 1988 as part of his *Banality* series. The other two suits, *Campbell v. Koons*, No. 91 Civ. 6055, 1993 WL 97381 (S.D.N.Y. 1993) and *United Features Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993) were heard shortly after the ruling in *Rogers v. Koons*; they were largely patterned after the same legal rationale and reached the same verdict.

110. See *Rogers v. Koons*, 960 F.2d 301 (2nd Cir. 1992). There was a fourth, "artist proof" of *String of Puppies* that Koons kept for himself.

111. Ibid.

112. There are subtle but important differences between parody, as it is conventionally understood, and satire. Parody "targets" an original source in order to mock it (e.g., *Saturday Night Live*'s parodies of politicians), while satire employs humor, often through irony or exaggeration, to constructively criticize a state, condition, or society in general (e.g., *The Daily Show*'s "investigative journalism" lampooning the American political system and news media). We might interpret Koons's *String of Puppies* less as parody of Art Rogers's photo than as ironic satire of an insatiable art world perfectly willing to indulge in high-priced objects of bad-taste. On irony, see generally Wayne C. Booth, *A Rhetoric of Irony* (Chicago: University of Chicago Press, 1974). On parody, see note #86.

113. *Rogers v. Koons* (1992).

114. *Rogers v. Koons* (1990); *Rogers v. Koons* (1992). As legal scholar Peter Jaszi states, "When Rogers was decided, the transformativeness-based approach to fair use analysis was still a personal project of Judge Pierre Leval and not yet the law of the Second Circuit or the land." Peter Jaszi, Is There Such a Thing as Postmodern Copyright?", in Mario Biagioli, Peter Jaszi, and Martha Woodmansee, *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (Chicago: University of Chicago Press, 2011), 420.

115. *Rogers v. Koons* (1992).

116. On art rendering rights, see *Rogers v. Koons* (1990); on derivative images of *String of Puppies* competing in the market with Roger's *Puppies*, *Rogers v. Koons* (1992).

117. *Rogers v. Koons* (1990). Or, conversely, even with art rendering rights available, there would nothing preventing Rogers from denying a license to those artists whose work did not meet his approval. It's plausible Rogers would not have granted Koons a license even if he had sought one, due to the parodic or otherwise critical nature of the sculpture Koons intended to make (which

would, ironically, be all the more reason to claim fair use). When asked whether or not he would have granted a type of art rendering license to Koons had the artist sought one, Rogers states, "One of Koons's settlement conditions was not to discuss the case, so the attorney who handled my case has advised me. The best way to really get an insight into this whole thing is to ask yourself what you would do in the same situation." Email correspondence with Art Rogers, October 23, 2012.

118. In other words, I am asking to what extent Art Rogers's photo would have circulated within institutional art channels, and, by the same token, to what extent an image of Koons's sculpture would have competed in the "postcard market." For a reproduction of *String of Puppies* within the context of an artist book, see Holzwarth, *Jeff Koons*. With Koons's losses in the District and Appellate Courts, it appears a settlement was worked out that granted Koons the right to images of his sculpture.

119. As the reader will recall, the 1976 Act does not recognize "art" or "mass-produced" cultural works, but only grants copyright "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." U.S. Code Title 17, Section 102, http://www.copyright.gov/title17/circ92.pdf (accessed July 24, 2014).

120. Jeff Koons, quoted in Burke and Hare, "From Full Fathom Five," *Parkett* 19 (1989): 45.

121. On Koon's seeming disengenuousness, see note 108.

122. Leval, "Toward a Fair Use Standard," 1111.

123. Jeff Koons, quoted in Ronald Sullivan, "Appeals Court Rules Artist Pirated Picture of Puppies," *The New York Times*, April 3, 1992. Whatever claim to the transformative value within his work, Koons's statement here certainly reinforces the mass author/artist hierarchy described previously.

124. Thomas Crow, "Pop After Pop: A Roundtable," *Artforum* (October 2004), http://www.artforum.com/inprint/issue=200408&id=7664 (accessed November 3, 2012).

125. A notion of "meta-critique" can be related to appropriation art as allegory, discussed last chapter, as well as to simulation and pastiche, which will be introduced in chapter 3.

Chapter Three

1. "Affidavit of Defendant Richard Prince in Support of Defendant's Motion for Summary Judgement," https://ecf.nysd.uscourts.gov/cgi-bin/show_multidocs.pl?caseid=338136&arr_de_seq_nums=166&magic_num=&pdf_header=&hdr=&pdf_toggle_possible=&caseid=338136&zipit=&magic_num=&arr_de_seq_nums=166&got_warning=&create_roa=&create_appendix=&bates_format=&dkt=&got_receipt=1 3-4 (accessed July 24, 2014), 3-4. Note this is a restricted site; users pay for document downloads.

2. Peter Jaszi, "Is There Such a Thing as Postmodern Copyright?", in Mario Biagioli, Peter Jaszi, and Martha Woodmansee, *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (Chicago: University of Chicago Press, 2011), 420.

3. *Blanch v. Koons*, 396 F. Supp. 2d 476 - Dist. Court, SD New York 2005, http://scholar.google.com/scholar_case?case=5289917297706312432&q=ROGERS+v.+KOONS&hl=en&as_sdt=2,5&as_vis=1&scilh=0 (accessed July 25, 2014).

4. Jaszi, "Is There Such a Thing as Postmodern Copyright?", 419.

5. Additionally, Koons appropriated a source clearly understood as an advertisement, which makes distinguishing the difference between *Niagara*'s "sign function" and that of Blanch's photo that much easier. The difficulty with interpreting between competing "artistic" signs was precisely the issue in *Rogers v. Koons* and, as well shall see, *Cariou v. Prince*.

6. To be fair, the decision in *Cariou v. Prince* had not yet been made by the time Jaszi published his thought-provoking essay.

7. Reactions to the District court verdict were plentiful. See, for instance, Charlie Finch, "Richard Prince: Slippery Slope," *Artnet*, http://www.artnet.com/magazineus/features/finch/richard-prince-copyright-3-21-11.asp (accessed July 25, 2014); Edward Winkleman, "Appropriation Prohibition (or Why I Think Judge Batts Is Wrong)," http://www.edwardwinkleman.com/2011/03/appropriation-prohibition-or-why-i.html (accessed July 25, 2014); "Fair Use Doctrine Dead? A Fair Use Fridays Moment of Silence for Richard Prince," Copyright Litigation Blog, http://copyrightlitigation.blogspot.com/2011/03/fair-use-doctrine-dead-fair-use-fridays.html (accessed May 25, 2014).

8. See generally Nancy Spector and Richard Prince, *Richard Prince* (New York: Guggenheim Museum, 2007).

9. Sources differ as to the total number of art works in the *Canal Zone* series. The exhibition catalog lists twenty-two paintings, while the District court decision states that "Prince ultimately completed twenty-nine paintings, twenty-eight of which included images from [Patrick Cariou's book] *Yes Rasta*." The appeals court ruling attempts a correction, claiming "The District court's opinion indicated that there are twenty-nine artworks at issue in this case…There are actually thirty." By my count, there are thirty-two works in the series, including one photo collage made up of pages torn directly from *Yes Rasta* (*Canal Zone, 2007*, which inaugurated the series), and one collage composited as a single photograph (*Untitled*, 2008, which looks to be a photo study for a larger canvas, *Quarry*, 2008). Technically, neither *Canal Zone* nor *Untitled* are paintings, which makes for thirty total canvases. Of those, one, Ding *Dong the Witch is Dead*, 2008, does not contain any imagery appropriated from *Yes Rasta*, and thus was not at issue. See James Frey and Gagosian Gallery, *Canal Zone: Richard Prince: November 8 - December 20, 2008, Gagosian Gallery, New York* (New York: Gagosian Gallery, Rizzoli International Publications, 2008); "Appendix to the Appeals Court Decision" in Greg Allen, *Canal Zone Richard Prince YES RASTA 2: The Appeals Court Decision in Cariou v. Prince, et el., Also the Court's Complete Illustrated Appendix* (New York: greg.org: the making of, 2013); *Cariou v. Prince*, 784 F Supp 2d 337 (SDNY 2011) at http://www.scribd.com/doc/51214313/Cariou-v-Richard-Prince (accessed July 25, 2014), 4; *Cariou v Prince*, 714 F3d 694, 712 (2d Cir 2013), http://www.ca2.uscourts.gov/decisions/isysquery/e21440c7-14d9-430f-b9e6-86d626975b6c/1/doc/11-1197_complete_opn.pdf (accessed July 25, 2014), 4.

10. "Joint Brief and Special Appendix for Defendants-Appellants," http://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/100/0.pdf?ts=1350506951 (accessed July 25, 2014), 24.

11. *Cariou v. Prince* (2011), 5.

12. See Gagosian's web site, http://www.gagosian.com/exhibitions/november-08-2008--richard-prince (accessed July 24, 2014).

13. *Cariou v. Prince* (2011), 23.

14. Frey and Gagosian Gallery, *Canal Zone*. Frey gained notoriety when it was revealed that his 2003 memoir *A Million Little Pieces* was largely fiction.

15. On Rastafari as movement and culture, see Ennis Barrington Edmonds, *Rastafari: A Very Short Introduction* (Oxford: Oxford University Press, 2012).

16. Patrick Cariou, *Yes Rasta* (New York: powerHouse Books, 2000).

17. "Joint Brief and Special Appendix for Defendants-Appellants," 20.

18. For Cariou's other projects, see http://www.patrickcariou.com/main_menu.html (accessed July 25, 2014).

19. See "Joint Brief and Special Appendix for Defendants-Appellants." According to his deposition, Prince purchased a total of four copies of *Yes Rasta* during the course of producing the *Canal Zone* series: his first copy from a bookstore on the Caribbean island of St. Barth's in 2005, the remaining three from *Yes Rasta*'s publisher PowerHouse books between 2007-8. See Greg Allen, ed., *The Deposition of Richard Prince* (Zurich: Bookhorse, 2013), 171-174.

20. "Brief for Plaintiff-Appellee," http://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/148/0.pdf?ts=1350507098 (accessed July 25, 2014), 35.

21. See "Amended Complaint, Demand for Jury Trial," https://ecf.nysd.uscourts.gov/doc1/12715762336 (accessed July 25, 2014), 8.

22. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," https://ecf.nysd.uscourts.gov/doc1/12717765441 (accessed July 25, 2014), 7.

23. "Amended Complaint, Demand for Jury Trial," 4.

24. Fair use's four factors were discussed last chapter. See also U.S. Code Title 17, Section 107, http://www.copyright.gov/title17/circ92.pdf (accessed July 25, 2014).

25. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," 19.

26. Ibid., 21.

27. Ibid., 22-24; "Joint Brief and Special Appendix for Defendants-Appellants," 21.

28. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," 24.

29. Recall from the previous chapter that the commercial factor, and the potential for a secondary work to affect the market of a primary work, are less important when dealing with, for example, a parody, which is transformative. Furthermore, a parody done for-profit, if it is effective, may harm the market for the original through critique, but it may not usurp the original's market through substitution. Along similar lines, parodies must necessarily borrow significantly from their sources, so the "amount taken," if the parody is successful (i.e., if transforms) becomes less of a concern. In the final analysis, as courts after *Campbell* and *Blanch* indicate, is the transformative potential of appropriating works.

30. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," *5*.

31. On Prince's de Kooning paintings, see Spector and Prince, *Richard Prince*, 252-263.

32. "Affidavit of Defendant Richard Prince in Support of Defendant's Motion for Summary Judgement," 6.

33. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," 15.

34. Ibid., 14.

35. Ibid., 1-6.

36. For review of these cases, see last chapter.

37. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," 1.

38. Allen, *The Deposition of Richard Prince*, 192.

39. "Memorandum of Law in Support of Defendants' Joint Motion for Summary Judgment," Allen, *Canal Zone Richard Prince YES RASTA*, 14.

40. "Memorandum of Law in Opposition of Defendants' Joint Motion for Summary Judgment," quoting *Elvis Presley Enters v. Passport Video*, 349 F.3d 622, 629 (9th Cir. 2003), 16, https://ecf.nysd.uscourts.gov/doc1/12717871935 (accessed July 25, 2014), 16.

41. Ibid., 20.

42. Ibid., quoting *Rogers v. Koons* (1992), 5.

43. Ibid., 5-10.

44. Ibid., 21.

45. Ibid., 22.

46. *Cariou v. Prince* (2011), 1-2.

47. Ibid. Even someone untrained in the history of copyright's development should recognize Prince's claim as immediately dubious. Recall note #86 from chapter 1, and the cases *Burrow-Giles Lithographic Co. v. Sarony* (1884) and *Bleistein v. Donaldson Lithographing Co.* (1903), which not only recognized "factual" photographs as copyrightable, but also unequivocally granted copyright protection to even the most banal and minimally creative of expressions.

48. Ibid., 28.

49. Ibid., 28-30.

50. Recall that the 1976 Copyright Act defines a "derivative work" as one "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a 'derivative work'." U.S. Code Title 17, Section 101, http://www.copyright.gov/title17/circ92.pdf (accessed July 25, 2014).

51. *Cariou v. Prince* (2011), 16.

52. Ibid., 32.

53. Ibid., 37.

54. See note 7.

55. Not all in the art community defended Prince. For example, curator Dan Cameron and Artnet editor Walter Robinson both lauded Judge Batts's ruling in favor of Cariou. See Brian Boucher, "Experts Debate Richard Prince Copyright Suit," *Art in America*, http://

www.artinamericamagazine.com/news-opinion/news/2011-12-16/art-and-law-panel/ (accessed July 25, 2014).

56. After *Rogers v. Koons*: "In a decision rife with ominous implications for the practice of artistic appropriation, the U.S. Court of Appeals…denied Jeff Koons's attempt to overturn a lower court verdict of copyright infringement…If…the judge rules that Koons's use of the familiar Odie also fails to function as a form of criticism or commentary, the limitations on artists who wish to make works that respond to the contemporary world of existing mass-media images will be very confining indeed." Martha Buskirk, "Appropriation Under the Gun," *Art in America* 80, no. 6 (June 1992): 37-41. And curator Barry Rosenberg writes, "The legal situation looks questionable for appropriation artists and one must wonder if acceptable boundaries can be drawn considering both the direction of art and that of the present Supreme Court." Quoted in Michael Kimmelman, "Art in Review," *The New York Times*, August 21, 1992.

57. See chapter 1, as well as, generally, Hal Foster, *Recodings: Art, Spectacle, Cultural Politics* (Port Townsend, Wash.: Bay Press, 1985).

58. Hal Foster, "The Passion of the Sign," in *The Return of the Real: the Avant-Garde at the End of the Century* (Cambridge, MA: MIT Press, 1996), 91.

59. See Hal Foster, ed., *The Anti-Aesthetic: Essays on Postmodern Culture* (Port Townsend, WA: Bay Press, 1983).

60. As the artist Jack Goldstein writes of the time, "Baudrillard became an art guru for five minutes with his idea of simulation, where what is pictured becomes more important that what you are supposedly representing—it takes on a life of its own apart from any apparent signifier. We learned that we weren't representing anything, or at least nothing stable and fixed. It was just like the television screen." Richard Hertz, *Jack Goldstein and the CalArts Mafia* (Ojai, CA: Minneola Press, 2003), 90.

61. Jameson, *Postmodernism,* 18.

62. Ibid., 17.

63. Ibid.

64. Jean Baudrillard, *Simulations* (New York: Semiotexte, Inc., 1983), 2.

65. Ibid., 4.

66. Foster, "The Passion of the Sign," 77.

67. "Appropriation has become the dominant trend in contemporary art practice…no longer [signifying] anything in particular; not the death of the author, not a critique of mass-media representations, not a comment on consumer capitalism. On the contrary, it seems that appropriation is a tool of the new subjectivism, with the artist's choice of pre-existing images or references representing a bid for authenticity (my record collection, my childhood snaps, my favorite supermodel)." Lucy Soutter, "The Collapsed Archive: Idris Khan," in David Evans, ed., *Appropriation* (London: Whitechapel; Cambridge, MA: MIT Press, 2009), 166.

68. On Hans Haacke, see Walter Grasskamp, Molly Nesbit, and Jon Bird, *Hans Haacke* (London; New York: Phaidon), 2004. On Jenny Holzer, see Jenny Holzer and Robert Storr, *Jenny Holzer: Redaction Paintings* (New York: Cheim & Read), 2006.

69. On Jason Salavon's data works, see *Brainstem Still Life* (Bloomington: School of Fine Arts Gallery, Indiana University Bloomington, 2004). On Christian Marclay, see http://

www.nasher.duke.edu/exhibitions_marclay.php; http://www.lacma.org/art/installation/christian-marclays-clock (accessed July 26, 2014).

70. On remix music culture see Eduardo Navas, *Remix Theory: The Aesthetics of Sampling* (Vienna: Springer-Verlag, 2012).

71. See generally Nancy Spector and Richard Prince, *Richard Prince* (New York: Guggenheim Museum, 2007).

72. Ibid., 40-45.

73. Allen, *The Depositions of Richard Prince*, 218. For more on Prince seeking to separate himself from the critical reception of his work, see Douglas Eklund and Metropolitan Museum of Art, *The Pictures Generation: 1974-1984* (New York: Metropolitan Museum of Art; New Haven, CT: Yale University Press, 2009), 166.

74. Allen, *The Deposition of Richard Prince*, 82-245.

75. Hal Foster, *Recodings*, 128.

76. See note #48. There is an unfortunate quasi-contradiction produced when setting the definition of "derivative" and its use of the term "transformed" in relation to Judge Leval's notion of the "transformative." Superficially, the two terms, with the root *transform-* both denote change. However, transformed derivatives present their changes in form only (e.g., from a novel to a motion picture), while their content or meaning remaining the same. Transformative derivatives manifest changes to both form and content, likewise offering new meanings (which, in Leval's view, would not make them derivatives at all, but rather originals in their own right).

77. Here the charge of "appropriator" could be leveled at both Cariou and Prince insofar as they occupy the cliché privileged, Anglo-European creative subject taking up the task of representing "the other." Here I would simply, if crudely, state there is something troubling about two white men arguing over whose representations of black men are the more sincere or "artistic" expressions.

78. See the press release for *Canal Zone*'s second exhibition following the case's settlement, http://www.gagosian.com/exhibitions/richard-prince--may-08-2014 (accessed June 27, 2014).

79. In this conception of fair use, creators should be allowed to exploit whatever derivative pathways open up for them. This would seem to severely handicap fair use, inasmuch as creators would consequently maintain almost complete control over the works they create, and have the power to censor uses with which they did not agree by refusing licenses. It is reasonable to expect that someone such as Cariou would deny a license to an artist who wished to use Cariou's images in a perceived "racist" way.

80. *Cariou v. Prince* (2011), 19.

81. *Bleistein v. Donaldson Lithographing Co.*, 188 US 239 (1903), http://scholar.google.com/scholar_case?case=3277054592305773876&q=bleistein+v.+donaldson&hl=en&as_sdt=2,33 (accessed July 28, 2014). On copyrights and the difficulty judges have with aesthetic judgements, see "Copyright Opinions and Aesthetic Theory," *Southern California Law Review* 71 (1998): 247-302.

82. "Joint Brief and Special Appendix for Defendants-Appellants." Cariou's legal team filed a motion with the Second Circuit Court to dismiss Prince's appeal as "moot," which was denied. See "Motion Information Statement," http://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/51/0.pdf?ts=1350506583 (accessed July 28, 2014).

83. "Joint Brief and Special Appendix for Defendants-Appellants."

84. Ibid., 39.

85. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), http://scholar.google.com/scholar_case?case=16686162998040575773&hl=en&as_sdt=2&as_vis=1&oi=scholarr (accessed July 28, 2014). Prince's brief states, "The Supreme Court and this Court have emphasized that the reference to comment or criticism in the Copyright Act is purely illustrative." The brief's mention of "this Court" refers to *Blanch v. Koons*, in which Second Circuit Court itself also followed the *Campbell* opinion in reaching its determination in that case.

86. "Joint Brief and Special Appendix for Defendants-Appellants," 40.

87. Affidavit of Defendant Richard Prince in Support of Defendant's Motion for Summary Judgement," 3. I address the notion of the work's "messages" to be found by the viewer when I discuss the second prong of Prince's overall defense strategy.

88. "Joint Brief and Special Appendix for Defendants-Appellants," 44-50.

89. Ibid., 41. See also *Campbell v. Acuff-Rose Music* (1994).

90. Ibid., 42.

91. Ibid., 1-48.

92. Ibid., 52.

93. "Joint Reply Brief for Defendants-Appellants," http://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/194/0.pdf?ts=1350507253 (accessed July 28, 2014), 10.

94. "Joint Brief and Special Appendix for Defendants-Appellants," 52.

95. The idea that the paintings, though containing appropriated photographs, would be received as "new" is no doubt in part the result of Prince's long-established reputation as an artist and who takes pre-existing cultural materials and puts them into novel contexts. Just as no elite art collector would understand their recently-acquired Prince painting as anything other than an "original," so, too, no one looking to purchase a Cariou book would, in a confused state, stumble into a high-end art gallery and mistakenly purchase a large, one-off painting instead, despite them sharing similar visual motifs (i.e., the Rastas).

96. Joint Brief and Special Appendix for Defendants-Appellants," 22.

97. Ibid., 71-73.

98. "Joint Reply Brief for Defendants-Appellants," 26.

99. "Brief for Plaintiff-Appellee," 46.

100. Ibid., 50, quoting from *Rogers v. Koons* (1992). The reader will recall that *Koons* represents a court decision that applied a pre-transformative model of fair use.

101. *Rogers v. Koons* (1992).

102. *Cariou v. Prince* (2011), 16.

103. I thank Joy Garnett, who thinks of herself as a middle tier artist, for this description of copyright's chilling effect on art.

104. The Art Institute of Chicago, the Indianapolis Museum of Art, the Metropolitan Museum of Art, the Museum of Modern Art, the Los Angeles County Museum of Art, the New Museum, the Walker Art Center, the Whitney Museum of American Art and the Guggenheim Foundation filed a joint "Brief for Amici Curiae the Association of Art Museum Directors," http://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/125/0.pdf?ts=1350507031 (accessed July 28, 2014). The Andy Warhol Foundation filed its own Amicus Curiae brief, "Brief of Amicus Curiae The Andy Warhol Foundation for the Visual Arts, Inc., in Support of Defendants-Appellants and Urging Reversal," http://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/207/0.pdf?ts=1350507296 (accessed July 28, 2014).

105. The District court also found Gagosian Gallery liable, concluding that it must have known of Prince's reputation as an appropriation artist but did nothing to check the legality of the Canal Zone paintings. The gallery also did not comply with Cariou's cease-and-desist demand. See *Cariou v. Prince* (2011).

106. "Brief for Amici Curiae the Association of Art Museum Directors," 16-17.

107. "Brief of Amici Curiae American Society of Media Photographers, Inc. and Picture Archive Council of America , Inc. in Support of Plaintiff -Appellee and Affirmance," http://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/178/0.pdf?ts=1350507194 (accessed July 28, 2014).

108. Ibid., 20.

109. Ibid., 21.

110. On the demise of postmodernism. see, for example, Alan Kirby, *Digimodernism: How New Technologies Dismantle the Postmodern and Reconfigure our Culture* (New York: Continuum, 2009).

111. *Cariou v. Prince* (2013), 1. Of the three-judge panel, Judge Clifford Wallace, sitting in by designation from the Ninth Circuit Court of Appeals, dissented in part insofar as he felt all thirty of the works should have been remanded to the District court for reconsideration. I will discuss Wallace and the remaining five works later in this section.

112. Ibid., 12.

113. Pierre N. Leval, "Toward a Fair Use Standard," *Harvard Law Review* Vol. 103, No. 5 (March 1990): 1111. It should be noted that Judge Leval is presently a Senior Judge for the Second Circuit Appeals Court, though he was not one of the three judges who presided over *Cariou v. Prince*.

114. *Cariou v. Prince* (2013), 14. My emphasis.

115. Ibid., 12.

116. Ibid.

117. Ibid., 13.

118. Ibid., 19.

119. Ibid., 20, quoting various prior court rulings. This statement is striking, especially in relation to the past reasonableness model of fair use, and in particular to its employment in the *Disney v. Air*

Pirates suit mentioned last chapter, in which the defendant's appropriations, although parody, were found to "conjure up" too much of their sources.

120. Ibid., 17.

121. Had the *en banc* petition been granted, it would have entailed a review of the case by all of the Second Circuit's judges, not just the three who decided the appeal. On the Supreme Court's denial, see Laura Gilbert, "Supreme Court won't hear controversial copyright case," *The Art Newspaper*, November 12, 2013. http://www.theartnewspaper.com/articles/Supreme%20Court%20won't%20hear%20controversial%20copyright%20case/31025 (accessed July 29, 2014).

122. See Julia Halperin, "Prince versus Cariou copyright case settled," *The Art Newspaper*, http://www.theartnewspaper.com/articles/Prince%20versus%20Cariou%20copyright%20case%20settled/32076 (accessed July 29, 2014).

123. Laura Heymann, "Everything is Transformative: Fair Use and Reader Response," *Columbia Journal of Law & the Arts* 31 (2008): 445-66, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148379 (accessed July 29, 2014).

124. See Roland Barthes, "The Death of the Author," in *Image, Music, Text* (New York: Noonday Press, 1988).

125. See generally Terry Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1996), 47-78; Jane P. Tompkins, *Reader-Response Criticism: From Formalism to Post-Structuralism* (Baltimore: Johns Hopkins University Press, 1981).

126. See Stanley Fish, *Is there a Text in this Class?: The Authority of Interpretive Communities* (Cambridge, MA.: Harvard University Press, 1980).

127. Heymann, "Everything is Transformative," 449-50.

128. On the class dimension of the appellate court's ruling in *Cariou v. Prince*, see Andrew Gilden and Timothy Greene, "Fair Use for the Rich and Famous?" *University of Chicago Law Review Dialogue* 80 (2013): 80-104, available at http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Gilden%26Greene_Online.pdf (accessed July 29, 2014). Of course one could argue that it was first critical validation, in the form of the theorization of the Pictures Generation, that endowed Prince with a symbolic capital that was converted over time into the collector base he now maintains. It is clear that in reader response theory, there is no simple boundary between artistic intention and audience interpretation, as works pass through various layers of mediation.

129. *Cariou v. Prince* (2013). Judge Wallace: "I do not believe that the transformativeness of Prince's works—which have not been presented as parody or satire—can be so readily determined. Because this case arises after extensive discovery and argument by the parties, I disagree that we must limit our inquiry to our own artistic perceptions of the original and secondary works…I admit freely that I am not an art critic or expert…Certainly we are not merely to use our personal art views to make the new legal application to the facts of this case…I mean no disrespect to the majority, but I, for one, do not believe that I am in a position to make these fact- and opinion-intensive decisions on the twenty- five works that passed the majority's judicial observation. I do not know what additional facts will become relevant under the corrected rule of law, nor am I trained to make art opinions ab initio…I would thus remand the entire case—all thirty of Prince's paintings—for further proceedings in the District court on an open record to take such additional testimony as needed and apply the correct legal standard." As mentioned earlier, several art institutions filed statements in support of Prince, while the ASMP and PACA filed statements in support of Cariou. These are precisely the types of interpretive communities from which experts could have been called.

130. "Copyright—Fair Use—Second Circuit Holds that Appropriation Art Need Not Comment on the Original to Be Transformative," *Harvard Law Review*, http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol127_cariou_v_prince.pdf (accessed July 30, 2014), 1232.

Chapter Four

1. United States District Court, District of Massachusetts, "Deposition of Joseph C. Thompson, Volume II," 390, www.pacer.gov (accessed August 2, 2014). Public Access to Court Electronic Files (PACER) is a fee-based web retrieval service maintained by the Administrative Office of the U.S. Courts, which provides public access to federal court documents. Several of the documents cited in this chapter were downloaded from PACER. The reader will not be able to access the sources referenced without first subscribing to PACER and paying required document fees.

2. The reader will recall Article I, Section 8 of the U.S. Constitution: "The Congress shall have Power…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." See the preamble to Section 17 of the United States Code, http://www.copyright.gov/title17/circ92.pdf (accessed August 4, 2014).

3. Cyrill P. Rigamonti, "Deconstructing Moral Rights," *Harvard Law Review* 47 (2006): 355.

4. Sarah Louise Rector, "A Training Ground for Contemporary Art: Massachusetts Museum of Contemporary Art v. Büchel's Overly Broad Exclusion of Artistic Collaborations," *University of Colorado Law Review* 81 (2010): 587-88.

5. Mass MoCA, "History of the site," http://www.massmoca.org/history.php (accessed August 5, 2014).

6. Jennifer Trainer Thompson, Nicholas Whitman, Joseph Thompson, and Massachusetts Museum of Contemporary Art, *MASS MoCA: From Mill to Museum* (North Adams, Mass.; New York: MASS MoCA Publications, 2000), 12-13.

7. Mass MoCA, "Facts," http://www.massmoca.org/facts.php (accessed August 5, 2014).

8. Mass MoCA, "Mission Statement," http://www.massmoca.org/mission.php (accessed August 5, 2014).

9. Thompson et al., *MASS MoCA*, 13.

10. Ibid., 19.

11. On Büchel's art as immersive film set, see Dan Fox, "Christoph Büchel (Hauser and Wirth Coppermill, London UK)," *Frieze* 107 (May 2007): 163. On Büchel's simulated spaces, see Lauri Firstenberg, "Christoph Büchel (Maccarone, Inc., New York, USA), *Frieze* 66 (April, 2002), http://www.frieze.com/issue/review/christoph_buchel1/ (accessed August 5, 2014).

12. Visitors must also sign release forms before entering Büchel's spaces. I signed such a release for Büchel's 2003 installation at Los Angeles Contemporary Exhibitions, located in Hollywood, California. See http://www.welcometolace.org/events/view/christoph-buchel/ (accessed August 5, 2014).

13. On the missile bunker, see ibid. (accessed August 5, 2014). On the black-economy recycling plant, see Alex Farquharson, "The Double Club," *Artforum* (October, 2011), http://www.artforum.com/inprint/issue=201108&id=29033 (accessed August 5, 2014). On museum as sex club, see Jörg

Heiser, "Büchel Keeps Swinging," *frieze blog*, February 24, 2010, http://blog.frieze.com/buechel_keeps_swinging/ (accessed August 5, 2014). On Büchel's jet installation, *Terminal*, see http://www.hauserwirth.com/artists/3/christoph-buchel/images-clips/18/ (accessed August 5, 2014).

14. Farquharson, "The Double Club." Los Angeles Contemporary Exhibitions further elucidates the difference between Büchel's practice and Duchampian strategies: "These fictitious yet highly believable environments—rooms within rooms—are carefully constructed so that *the institutional framework of the art museum and all reference to the gallery context are removed*" (my emphasis). "Christoph Büchel," Los Angeles Contemporary Exhibitions, http://www.welcometolace.org/events/view/christoph-buchel/ (accessedAugust 5, 2014).

15. I write "for the most part" because Büchel, perhaps in an attempt to address the limitation that his installations, however charged, remain with the symbolic field of art, has introduced social elements into them. Two examples include the aforementioned fully-operational sex club in Vienna, and the Piccadilly Community Centre in London, which Büchel built in 2011 in his gallerist's space. The latter was both visited as an art exhibit and used as a resource providing a thrift shop, computer classes and yoga. among other things. Büchel's Center deliberately created an ambiguous social tension between its two primary audiences—art world aficionados and less-well-to-do local residents. See Ibid.

16. On the notion of an attention economy within the context of contemporary visual culture, see Jonathan Beller, *The Cinematic Mode of Production: Attention Economy and the Society of the Spectacle* (Hanover: Dartmouth College Press: University Press of New England, 2006). It's worth stressing here the fundamental differences between the "real" and the "realistic" in Büchel's work; as I explain in the third section, part of the difficulty for contemporary art lies in the collapse of these terms into perpetual indeterminacy.

17. United States District Court, District of Massachusetts, "Deposition of Joseph C. Thompson," 19, www.pacer.gov (accessed August 5, 2014).

18. Ibid., 15-37. Nato Thompson and Joe Thompson are not related.

19. "Deposition of Joseph C. Thompson," 81.

20. *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, No. 08-2199 - United States Court of Appeals for the First Circuit, 2010, http://www.leagle.com/decision/in%20fco%2020100127124 (accessed August 5, 2014).

21. Ibid., 44.

22. United States District Court, District of Massachusetts, "Answer and Counterclaims of Christoph Büchel," 2-3, www.pacer.gov (accessed August 5, 2014).

23. *Mass MoCA v. Büchel* (2010).

24. Ibid.

25. "Deposition of Joseph C. Thompson," 141-142.

26. Late and significant additions to the installation plan included a full-size jet fuselage as well as "Saddam's Compound," which replicated Saddam Hussein's house, a courtyard, and the "spider hole" inside which U.S. soldiers found the Iraqi leader hidden in 2003. See United States Court of Appeals for the First Circuit, "Brief for Plaintiff-Appellee Massachusetts Museum of Contemporary Art Foundation, Inc.," 8, www.pacer.gov (accessed August 5, 2014).

27. Ibid., 9.

28. The budget for *Training Ground for Democracy* was one the most contested points in the entire dispute, with Joe Thompson testifying that he made clear to Büchel on several occasions that all work would have to fall within the $160,000 figure. Büchel claimed that the $160,000 only encompassed a portion of the overall budget, and that no final number was established. Furthermore, it was understood that the museum would secure additional funding from outside sources. See "Deposition of Joseph C. Thompson," 85-86; see also United States District Court, District of Massachusetts, "Deposition of Christoph Büchel," 38-42, www.pacer.gov (accessed August 5, 2014).

29. *Mass MoCA v. Büchel* (2010).

30. Ibid.

31. "Deposition of Christoph Büchel," 147-156.

32. "Brief for Plaintiff-Appellee Massachusetts Museum of Contemporary Art Foundation, Inc.," 21. Thompson not only agreed to Büchel's hiring another crew to finish Training Ground, but also promised that the museum would furnish another $100,000 towards its completion.

33. Despite the mounting costs, Thompson pledged another $100,000 to complete the project in order to convince Büchel to return to Massachusetts. See correspondence between Joe Thompson and Christoph Büchel, February 6, 2007, as part of "Exhibit 17," *Massachusetts Museum of Art v. Büchel*, 565 F. Supp. 2d 245 (2008), www.pacer.gov (accessed August 5, 2014).

34. Correspondence between Joe Thompson and Christoph Büchel, March 28, 2007, as part of "Exhibit 18," *Massachusetts Museum of Art v. Büchel*, 565 F. Supp. 2d 245 (2008), www.pacer.gov (accessed August 5, 2014).

35. See United State District Court, District of Mass Massachusetts, "Complaint for Declaratory Relief," www.pacer.gov (accessed August 6, 2014).

36. See "Made at Mass MoCA," http://www.massmoca.org/event_details.php?id=315 (accessed August 6, 2014).

37. Ibid.

38. "Training Ground for Democracy," http://www.massmoca.org/event_details.php?id=144 (accessed August 6, 2014).

39. See Geoff Rogers, "Exclusive: Büchel's Statement, Part 1," *Boston Globe*, http://boston.com/ae/theater_arts/exhibitionist/2007/05/exclusive_buech.html (accessed August 6, 2014).

40. "To take but one example…one of the elements in Büchel's model was an old mobile home. Instead of buying one of several options that Büchel recommended, MASS MoCA selected a slightly less expensive model, only to find that it was too big to fit into the gallery. In the end, a mobile home that Büchel had originally recommended was purchased." United States District Court, District of Massachusetts, "Answer and Counterclaims of Christoph Büchel," 12.

41. Joe Thompson, quoted in ibid., 11.

42. "Deposition of Joseph C. Thompson, Volume II," 358-363.

43. Geoff Rogers, "Exclusive: Büchel's Statement, Part 4," *Boston Globe*, http://boston.com/ae/theater_arts/exhibitionist/2007/06/exclusive_buech_3.html (accessed August 6, 2014).

44. "Answer and Counterclaims of Christoph Büchel," 14. Joe Thompson spoke about the doomed project-in-progress with "*The New York Times, The Boston Globe, The Los Angeles Times, and Art +Auction*." See United States Court of Appeals for the First Circuit, "Brief for Defendant-Appellant Christoph Büchel," 27, www.pacer.gov (accessed August 6, 2014). Furthermore, as one commentator notes, "The delay hasn't stopped museum officials from showing off the unfinished project. Last month, museum directors and curators attending an arts conference in the Berkshires were led on a tour through Building 5. North Adams Mayor John Barrett III has been in twice, and in January, he brought along Governor Deval Patrick." Geoff Edgers, "Behind doors, a world unseen," *Boston Globe*, March 28, 2007, http://www.boston.com/ae/theater_arts/articles/2007/03/28/behind_doors_a_world_unseen/ (accessed August 6, 2014).

45. "Answer and Counterclaims of Christoph Büchel," 17-24. Büchel filed five counterclaims in all, two of which pertain to moral rights (discussed below). The remaining three alleged that Mass MoCA infringed Büchel's right to display his work publicly and to prepare derivative works—right conferred as part of copyright's "bundle of rights"—when it continued with *Training Ground*'s installation and semi-public showing. The merits of the copyright claims are worthy of a discussion which, however, cannot be made here. Instead, I keep the focus on issues relating to moral rights, since the decisions in *Mass MoCA v. Büchel* more profoundly affect them. This is to say that the district and circuit courts' opinions regarding moral rights are precedent-setting while those relating to copyright are less so.

46. A detailed account of the differences between common and civil law traditions is outside the scope of this chapter. Generally speaking, common law stems from the understanding that laws are uncodified, but instead established based upon judicial decisions over time. The development of fair use in the United States exemplifies this. As explained in chapter two, in 1841 Justice Joseph Story first defined fair use in *Folsom v. Marsh*, and it was from that precedent that lawmakers tailored the doctrine in the 1976 Copyright Act. Civil law, in contrast, is codified through the legislative process. In the civil system, court decisions follow established rules and therefore have less influence on the shaping of laws themselves. For a thorough history of the convergences and divergences of common and civil law, see Thomas H. Lee, "The Civil Law Tradition in American Constitutional Jurisprudence," http://www.law.harvard.edu/faculty/faculty-workshops/lee.faculty.workshop.spring2013.pdf (accessed August 6, 2014).

47. Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993), 48.

48. See Cheryl Swack, "Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of *Droit Moral* Between France and the United States," *Columbia-VLA Journal of Law & the Arts* 22 (1997-98): 37-71. See also Russell J. DaSilva, "Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States," *Bulletin, Copyright Society of the U.S.A.* 28 (1980-81): 7-11.

49. Swack, "Safeguarding Artistic Creation and the Cultural Heritage," 370.

50. Immanuel Kant and Mary J. Gregor, *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge; New York: Cambridge University Press, 1996), 29-35.

51. Ibid., 303.

52. Caleb Crain, quoted in Maria Chiara Pievatolo, "Freedom, ownership and copyright: why does Kant reject the concept of intellectual property?", https://www.academia.edu/586837/Freedom_ownership_and_copyright_why_does_Kant_reject_the_concept_of_intellectual_property (accessed August 6, 2014).

53. Ibid., 437-8.

54. On the notion of "Spirit," see generally Georg Wilhelm Friedrich Hegel, Arnold V. Miller, and J. N. Findlay, *Phenomenology of Spirit* (Oxford: Oxford University Press, 1977).

55. Georg Wilhelm Friedrich Hegel and Stephen Houlgate, *Outlines of the Philosophy of Right* (Oxford, UK; New York: Oxford University Press, 2008), 57-61.

56. Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford: Stanford University Press, 2010), 39.

57. Hegel, Houlgate, *Outlines of the Philosophy of Right*, 81.

58. DaSilva, "Droit Moral and the Amoral Copyright," 9-11. See also Calvin D. Peeler, "From the Providence of Kings to Copyrighted Things (and French Moral Rights)," *Indiana International & Comparative Law Review* 9 (1998-99): 449-456.

59. As DeSilva notes, *droit de retrait* (right of retraction) and *droit de repentir* (right of modification) are two additional rights in the European *droit moral* regime, although their standing in French law is disputable. They are very rarely invoked, if only because they give rise to so many practical complications in practice (either revoking works already in the marketplace, or modifying them once already circulated creates great burdens for both authors and publishers/distributors). See ibid., 23-26.

60. Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford: Oxford University Press, 2011), 55.

61. Swack, "Safeguarding Artistic Creation and the Cultural Heritage," 377.

62. DaSilva, "Droit Moral and the Amoral Copyright," 32.

63. Dan Rosen, "Artist's Moral Rights: A European Evolution, an American Revolution," *Cardozo Arts & Entertainment Law Journal* 2 (1983): 156.

64. Kwall, *The Soul of Creativity*, 40.

65. World Intellectual Property Organization, *France: Code de la propriété intellectuelle (version consolidée au 1er janvier 2014)*, http://www.wipo.int/wipolex/en/text.jsp?file_id=322949, (accessed August 10, 2014).

66. See Peter Burger, "The Berne Convention: Its History and its Key Role in the Future," *Journal of Law and Technology* 3 (Winter, 1988), http://www.nalsarpro.org/PL/Articles/Berne%20Convention.pdf (accessed August 10, 2014).

67. Ibid. See also Peeler, "From the Providence of Kings to Copyrighted Things," 451-52.

68. Burger, "The Berne Convention." Burger notes that up until 1967, the official language of the Convention was French. The Convention's 1886 signatories were Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunisia.

69. Ibid.

70. World Intellectual Property Organization, *Berne Convention for the Protection of Literary and Artistic Works*, http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726 (accessed August 10, 2014). "6bis" refers to an addendum to the document when Articles 6 and 7 already existed ("bis" is derived from Latin "twice").

71. On the moral rights issues raised by Turner's film colorization, see Sheldon W. Halpern, "Of Moral Right and Moral Righteousness," *Marquette Intellectual Property Law Review* 1 (1997): 65-88.

72. As of January 15, 2014, there are 167 state signatories to the Berne Convention. See *Berne Convention for the Protection of Literary and Artistic Works*, http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf (accessed August 11, 2014).

73. I do not mean to imply here that a "giving" model of creativity is superior to a "taking" one. Indeed, the history of modern art is replete with examples of artists who have problematically appropriated from other cultures (often non-Western) in order to make assertions of original artistic contributions. In simple terms, many modern artists "took" in order to "give." My intent is to recount how different philosophical approaches to the creative act developed in the United States compared to Europe in the eighteenth and nineteenth centuries.

74. Rosen, "Artist's Moral Rights," 180-81.

75. Ibid.

76. My emphasis. On Article I, Section 8 of the U.S. Constitution see http://www.archives.gov/exhibits/charters/constitution_transcript.html (accessed August 11, 2014).

77. See Robert J. Sherman, "The Visual Artists Rights Act of 1990: American Artists Burned Again," *Cardozo Law Review* 17 (1995): 398.

78. See Appendix K, "The Berne Convention Implementation Act of 1988," United State Code Title 17, http://www.copyright.gov/title17/circ92.pdf (accessed August 11, 2014). The U.S. had ratified the Convention in 1935, only to withdraw final compliance after the U.S. Senate realized American copyright law would have to be revised dramatically in order to align with the Convention's requirements. The U.S. finally acceding was done less out of any altruism or alignment with the rest of the world than out of self-interest. In the early twentieth century the balance of international trade in intellectual property had shifted, with the U.S. becoming a chief exporter. It therefore wanted to further protect its economic profits abroad. See Sherman, "The Visual Artists Rights Act of 1990," 396-98.

79. See clause (3) of Article 6bis above.

80. H.R. REP. No. 609, 100th Congress, 2d Session, 11 (1988), http://ipmall.info/hosted_resources/lipa/copyrights/The%20House%20Report%20on%20the%20Berne%20Convention%20Implemenation%20Act.pdf (accessed August 11, 2014).

81. See Clara Weyergraf and Martha Buskirk, *The Destruction of Tilted Arc: Documents* (Cambridge, MA: MIT Press, 1991).

82. The states that adopted moral rights laws were: California (1979); New York (1983); Massachusetts (1984); Maine (1985); Louisiana (1986); New Jersey (1986); Pennsylvania (1986); New Mexico (1987); Rhode Island (1987); Connecticut (1988); Nevada (1989). See Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, and Artists*, 3rd ed. Vol. 2 (New York: Practising Law Institute, 2005), 1266-73.

83. See *United State Code and Congressional News: 101st Congress—Second Session* (St. Paul: West Publishing, 1990), 6915-16. See also Swack, "Safeguarding Artistic Creation and the Cultural Heritage," 391; Simon J. Frankel, "VARA's First Five Years," *Hastings Communications and Entertainment Law Journal* 19 (1996-97): 9.

84. *United State Code and Congressional News*, 6915-16.

85. Ibid., 6916.

86. See United States Code Title 17, Section 106A, http://www.copyright.gov/title17/circ92.pdf (accessed August 11, 2014).

87. Ibid.

88. A detailed comparison between VARA and the Berne Convention cannot be made here. However, some notable differences should be mentioned. For example, the term of protection in the Berne Convention extends to life of the author plus fifty years, while VARA's rights expire upon death of the author. And while the Berne Convention is silent on the issue of the transfer of rights of integrity and attribution from one party to another, VARA expressly forbids the practice (though rights may waived by written instrument). Finally, VARA specifically excludes works made-for-hire from protection, while the Berne Convention does not..

89. See Section 102, "Subject matter of copyright," United States Code Title 17, http://www.copyright.gov/title17/circ92.pdf (accessed August 11, 2014).

90. See Section 101, "Definitions," United States Code Title 17, http://www.copyright.gov/title17/circ92.pdf (accessed August 11, 2014). In the case of photography, moral rights protections were granted only to prints made "for exhibition purposes." VARA does not protect photography intended for mass circulation (e.g., adverting or news images).

91. Article 2, Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf (accessed August 11, 2014).

92. See Section 101, "Definitions," United States Code Title 17, http://www.copyright.gov/title17/circ92.pdf (accessed August 11, 2014).

93. *United State Code and Congressional News*, 6922.

94. See Edward J. Damich, "The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art," *Catholic University Law Review* 39 (1990): 945-996. See also Sherman, "The Visual Artists Rights Act of 1990," 373-430.

95. See Peter H. Karlen, "What's Wrong With VARA: A Critique of Federal Moral Rights," *Hastings Communications and Entertainment Law Journal* 15 (1992-93): 905-928. This ambiguity is especially concerning insofar as VARA, a federal statute, preempts state moral rights laws, which in at least some instances contain more extensive and better defined provisions. See Edward J. Damich, "Moral Rights: A Critique of the Visual Artists Rights Act of 1989," *Nova Law Review* 14 (1989-90): 407-419.

96. Karlen, "What's Wrong With VARA," 907.

97. VARA only describes what actions do not qualify as distortions, mutilations or modifications: "(1) The modification of a work of visual art which is the result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A). (2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence." United States Code Title 17, Section 106A, http://www.copyright.gov/title17/circ92.pdf (accessed August 12, 2014).

98. *Massachusetts Museum of Contemporary Art v. Büchel*, 565 F.Supp.2d 245 (2008), http://leagle.com/decision?q=2008810565FSupp2d245_1787.xml/MASSACHUSETTS%20MUSEUM%20OF%20CONTEMPORARY%20v.%20BÜCHEL (accessed August 12, 2014). At Mass MoCA's request, the court provided an oral ruling directly after each side presented its arguments. According to Mass MoCA, every day that *Training Ground for Democracy* occupied the museum's largest gallery in a state of limbo presented future programming problems. As such it wanted a resolution to the problem as quickly as possible.

99. Ibid.

100. Ibid.

101. Ibid.

102. Ibid.

103. See "We'll Remove Training Ground," http://blog.massmoca.org/category/training-ground/ (accessed August 12, 2014).

104. Ibid.

105. In retrospect it seems Mass MoCA emerged from the dispute relatively unscathed. Yet at the time, much of the art world's criticism of the matter, from artists to critics to other institutions, was directed specifically against the museum. See, for example, Roberta Smith, "Is It Art Yet? And Who Decides?", *New York Times* September 16, 2007, http://www.nytimes.com/2007/09/16/arts/design/16robe.html?ei=512...x=1347508800&partner=permalink&exprod=permalink&pagewanted=print (accessed August 12, 2014); "A spectacular own-goal," *The Art Law Blog*, March 3, 2008, http://theartlawblog.blogspot.com/search?q=Büchel (accessed August 12, 2014); Ken Johnson, "No admittance: Mass MoCA has mishandled disputed art installation," *The Boston Globe* July 1, 2007, http://www.boston.com/news/globe/living/articles/2007/07/01/no_admittance/?page=full (accessed August 12, 2014); Charles Giuliano, "Crap Under Wrap," *Berkshire Fine Arts* http://www.berkshirefinearts.com/07-31-2007_christoph-buchel-s-tarp-art-at-mass-moca.htm (accessed August 12, 2014; Daniel Grant, "Working to Repair a Reputation," *Wall Street Journal* October 4, 2007, http://online.wsj.com/news/articles/SB119145506764448354 (accessed August 12, 2014).

106. *Mass MoCA v. Büchel* (2010).

107. Ibid., quoting the definitions in the Copyright Act. The reader will recall that copyright applies to creations "fixed in a tangible medium of expression."

108. *United State Code and Congressional News*, 6921. My emphasis.

109. *Mass MoCA v. Büchel* (2010).

110. Mass MoCA's production manager Dante Birch warned Joe Thompson that "If [Training Ground is] reviewed as a Büchel we're in deep shit." Moreover, Mass MoCA curator Susan Cross stated that "We tend to forget that whether we're doing the welding or not, there is an 'author' – an artist for whom we shouldn't make decisions…At what point, if at all, does an artist lose his right to owning the idea and his/her 'intellectual property?'…I think it is still art and still belongs to Büchel." See ibid.

111. Ibid. See also Smith, "Is It Art Yet?"; Johnson, "No admittance."

112. Although Büchel's copyrights have not been discussed at any length in this chapter, it's worth noting here that the appellate court also found that Mass MoCA had violated Büchel's right to the

public display of his work—one of the "bundle of rights" copyright confers—when it showed the installation in-progress to various the critics, supporters and politicians mentioned previously.

113. As with most out-of-court settlements, the terms were not made public. E-mail correspondence with Sérgio Muñoz Sarmiento, Büchel's counsel during the appeals phase, May 27, 2014.

114. See, for example, attorney (and Büchel's legal counsel in the District Court phase) Donn Zaretsky's *The Art Law Blog* post "Reversed," http://theartlawblog.blogspot.com/2010/01/reversed.html (accessed August 12, 2014). See also Sérgio Muñoz Sarmiento's blog *Clancco* posting "Büchel Wins Appeal, Major Victory for Artists," http://clancco.com/wp/2010/01/buchel-wins-appeal-major-victory-for-artists/ (accessed August 12, 2014). See also scholar Alison Friedberg, "Work in Progress: Reconciling VARA, Unfinished Works, and the Moral Rights of Artists," *Tulane Journal of Technology and Intellectual Property* 13 (2010): 217-233.

115. "A survey of prominent art institutions that do installations found that many, including the Institute of Contemporary Art in Boston, Walker Art Center in Minneapolis, and Yale University Art Gallery, require some signed deal before proceeding, while others, notably the Mattress Factory in Pittsburgh and Museum of Contemporary Art in San Diego, operate without written agreements." Geoff Edgers, "Dismantled," *The Boston Globe*, October 21, 2007, http://www.boston.com/ae/theater_arts/articles/2007/10/21/dismantled/?page=full (accessed August 12, 2014). Despite the outcome of *Training Ground*, Mass MoCA's Director Joe Thompson insists that legal agreements should not forge relationships with artists. "[The case is] not going to affect the way that Mass MoCA approaches its artists. I don't believe 100-page contracts that try to foresee every contingency are a helpful way to start a project…If you start developing production contracts, you risk losing what has made the other 120 works of art we've made here successful. You risk losing the magic that makes this possible." Jacquelyn Lewis, "Joe Thompson on a Future Without Büchel," *Blouin ArtInfo*, October 18, 2007, http://www.artinfo.com/print/node/268697 (accessed August 12, 2014).

116. *Mass MoCA v. Büchel* (2010)

117. As scholar K.E. Gover notes, "While so much of contemporary art positions itself as rejecting the ideology of artistic autonomy and freedom associated with modernism, these disputes [such as *Büchel*] reveal our lack of a consistent theory of artistic production despite decades of artistic and theoretical gestures aimed at revising it…While it is a commonplace in academic and art world settings to denounce the "myth" of the artistic genius or to disparage the image of the "Romantic" artist, the real myth is the belief that these ideals no longer apply to contemporary art." K.E. Gover, "Christoph Büchel v. Mass MoCA: A Tilted Arc for the Twenty-First Century," *The Journal of Aesthetic Education* 46 no. 1 (Spring, 2012): 46-58.

118. See Anton Vidokle, "Art Without Artists?", *e-flux Journal* 16 (May 2010), http://www.e-flux.com/journal/art-without-artists/ (accessed August 12, 2014). See also "Curator as Producer: Michelle White and Nato Thompson," http://turbulence.org/blog/2008/09/05/curator-as-producer-michelle-white-nato-thompson/ (accessed August 12, 2014).

119. The New York based arts organization Creative Time is the model here. Incidentally, Nato Thompson, the curator at the heart of the Büchel dispute, is Creative Time's current Chief Curator. See http://creativetime.org (accessed August 12, 2014).

120. Vidokle, "Art Without Artists?".

121. Ibid.

122. Going forward my use of Malik's theses on contemporary art will stem from his lecture, held at New York's Artist Space on May 31, 2013, "On the Necessity of Art's Exit from Contemporary

Art: A History of Negations," http://artistsspace.org/programs/a-history-of-negations (accessed August 12, 2014).

123. Peter Bürger, "Avant-Garde and Neo-Avant-Garde: An Attempt to Answer Certain Critics of *Theory of the Avant-Garde*," *New Literary History* 41 (2010): 706.

124. See Thierry de Duve, *Kant after Duchamp* (Cambridge, MA: MIT Press, 1996); Peter Bürger, T*heory of the Avant-Garde* (Minneapolis: University of Minnesota Press, 1984). Neither De Duve nor Bürger employ the term "anrcho-realism," but both follow a similar historical and theoretical trajectory. Bürger would likely describe postwar anarcho-realism as the neo-avant-garde.

125. Quoted in Claire Bishop, *Artificial Hells: Participatory Art and the Politics of Spectatorship* (London, New York: Verso, 2012), 1.

126. Malik, "On the Necessity of Art's Exit from Contemporary Art."

127. Ibid.

128. See Jean-François Lyotard, "Answering the Question: What is Postmodernism?", *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984), 71-82.

129. Ibid., 79.

130. Ibid., 81.

131. In her provocative essay "Against Moral Rights," legal scholar Amy Adler argues that art should not be afforded special considerations, but rather treated as any other type of property given to modification, distortion or destruction by their owners. Amy Adler, "Against Moral Rights," *California Law Review* 91, no. 1 (February, 2009): 263-300.

Chapter Five

1. Figure 1 is photograph of a promotional stand in a Boston mall I took in the fall of 2011. The advertisement is for MAC cosmetics, which features the images of Pictures Generation artist Cindy Sherman. Technically speaking, Sherman is not an appropriation artist inasmuch as in her wide body of work, she has always used original photography (of herself). Yet Sherman's practice is appropriation-related; it comments on the tropes of female representation in American pop culture by repeating stereotypes. She is without a doubt an archetype of postmodernist art. Firmly established in the art-historical canon, Sherman achieved success in the early 1980s in much the same that Sherrie Levine and Richard Prince did—via the art theory and criticism at the time. Like much postmodern appropriation art, it's difficult to discern whether her collaboration with MAC is critical of or complicit with the commodification of female beauty. I think it is the latter more than the former.

2. As scholar Lambert Zuidervaart points out, "There are many different applications of the concept of autonomy. Göran Hermerén distinguishes no fewer than twelve theses about the autonomy of art." Lambert Zuidervaart, "The Social Significance of Autonomous Art: Adorno and Bürger," *The Journal of Aesthetics and Art Criticism* 48, no. 1 (Winter, 1990): 61-77.

3. See, generally, Theodor W. Adorno, *Aesthetic Theory* (Minneapolis: University of Minnesota Press, 1997).

4. As Peter Bürger laments in describing the seeming impotence of a critical avant-garde project, "It is the status of their products, not the consciousness artists have of their activity, that defines the social effect of works." Peter Bürger, *Theory of the Avant-Garde*, (Minneapolis: University of

Minnesota Press, 1984), 58. Bürger's polemic is not leveled at the particularity of appropriation art, but at the whole of "neo-avant-garde" artistic practice, as the question of whether avant-gardist art is even possible any longer looms on a postmodern horizon.

5. Ibid., 57.

6. John C. Welchman, *Art After Appropriation: Essays on Art in the 1990s* (Amsterdam: G+B Arts International, 2001), 19.

7. Luc Boltanski and Eve Chiapello, *The New Spirit of Capitalism* (London; New York: Verso, 2005), 38. It should be noted that Boltanski's and Chiapello's extensive research is specifically French in context, focusing on conditions in the aftermath of Paris, May 1968. However, the authors surmise (and I believe) that much of their analysis can translate to other geographical, social and cultural settings.

8. Ibid.

9. Ibid.

10. This is certainly not true of all postmodern art, and it might be more accurate to state that any common thread of criticality between modernist and postmodernist art should be traced through their respective advocates, especially in the case of the latter. As I mentioned in the first chapter, critics and theorists such Craig Owens, Douglas Crimp and Hal Foster, among others, heralded "poststructuralist" postmodernist art as favorable to its "neoconservative" strain, which for those authors did not adequately analyze, but rather uncritically celebrated, an aesthetics of ahistorical heterogeneity and pastiche through a return to figuration, narrative, harmony, etc.

11. Lucy Soutter, "The Collapsed Archive: Idris Khan," in David Evans, ed., *Appropriation* (London; Cambridge, Mass.: Whitechapel; MIT Press, 2009), 166. While I cannot account for all of appropriation art in the 1990s, certain American artists do come to mind when theorizing what I would consider more "subjectivist" approaches to appropriation: Christian Marclay, Paul Pfeiffer, Jason Salavon and Tom Friedman are just some examples of artists who employ appropriation towards new formalisms in contemporary art.

12. Douglas Crimp's 1983 essay *Appropriating Appropriaton*, originally written for the exhibition *Image Scavengers: Photography* at the Institute of Contemporary Art, University of Pennsylvania is reprinted in Douglas Crimp, *On the Museum's Ruins* (Cambridge: MIT Press, 1993), 127-137. On the Pictures generation being the last movement in contemporary art, see Douglas Eklund and Metropolitan Museum of Art, *The Pictures Generation, 1974-1984* (New York; New Haven: Metropolitan Museum of Art; Distributed by Yale University Press, 2009), 17.

13. Chantal Mouffe, "Artistic Activism and Agonistic Spaces," *Art and Research* 1, no. 2 (Summer 2007), http://www.artandresearch.org.uk/v1n2/mouffe.html (accessed August 19, 2014).

14. As John Welchman writes, "By the 1990s, singular, or programmatic appropriation, focusing on the relatively unassisted citation of an individual image or object, was largely a thing of the past, and the language of postmodern appropriation, complete with critical assumptions, had passed into something like a general currency." Welchman, *Art After Appropriation*, 18.

15. Further articulating Soutter's statement above, Welchman writes, "Art after appropriation, then, takes over the gestures of taking, but assumes that the selected presentational facts and self-evident appearances are now remaindered outside of any political or critical predisposition, or effect. Objects and their spreads are supposedly made or found, installed and viewed outside the shell of any theoretical dependence—or even, at the extreme of this tendency, beyond reference itself." Welchman, *Art After Appropriation*, 29. I'd additionally like to point out that my statement concerning accommodation here runs counter to the Copyleft narrative often espoused by scholars

such as Lawrence Lessig, who have, in the last ten years, argued that current copyright doctrine is seriously hampering the cultural output potential of a democratic society. While I agree with some aspects of his claims, from an everyday, "on the ground" standpoint, the facts tell a different story. Across the spectrum of cultural production, and certainly in the art world, there is more appropriation than ever, despite the perception that copyright law is choking creativity.

16. On remix culture, see Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008); Eduardo Navas, *Remix Theory*, http://remixtheory.net/ (accessed August 22, 2014). On the cultural and economic capital inherent in remix culture, see a succession of documentary films recently released: *Copyright Criminals* (2010); *Steal this Film*, http://www.stealthisfilm.com/Part2/ (accessed August 22, 2014); *RIP: A Remix Manifesto*, http://ripremix.com/ (accessed http://ripremix.com/); *Everything is a Remix*, http://www.everythingisaremix.info/ (accessed August 22, 2014).

17. "In a postmodern world all phenomena and forces are artificial, or, as some might say, part of history. The modern dialectic of inside and outside has been replaced by a play of degrees and intensities,of hybridity and artificiality." Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000), 187-188.

18. On John Heartfield and AIZ, see John Heartfield, David Evans, and Anna Lundgren, *John Heartfield, AIZ: Arbeiter-Illustrierte Zeitung, Volks Illustrierte, 1930-38* (New York: Kent, 1992); on Guy Debord and détournement, see Guy Debord and Ken Knabb, *Society of the Spectacle* (London: Rebel Press, 2000); on Hans Haacke and his Reichstag project *To The Population*, see Sara Ogger, "*DER BEVÖLKERUNG*: The German Parliamentary Debate," *Grey Room* 16, (Summer 2004): 82-115.

19. Primary texts on tactical media include David Garcia and Geert Lovink, "The ABC of Tactical Media," http://www.ljudmila.org/nettime/zkp4/74.htm (accessed August 22, 2014); Critical Art Ensemble, *Digital Resistance: Explorations in Tactical Media* (New York: Autonomedia, 2001) and Geert Lovink, *Dark Fiber: Tracking Critical Internet Culture* (Cambridge, MA: MIT Press, 2002). For a more recent analysis, see Rita Raley, *Tactical Media* (Minneapolis: University of Minnesota Press, 2009) as well as Konrad Becker and Jim Fleming, *Critical Strategies in Art and Media: Perspectives on New Cultural Practices* (New York: Autonomedia, 2010). See also the issue of *Third Text* dedicated to the efficacy of tactical media in the early 21st century; Gene Ray and Gregory Sholette, "Whither Tactical Media?", *Third Text* 22, no. 5 (2008).

20. Garcia and Lovink, "ABC of Tactical Media," http://www.ljudmila.org/nettime/zkp4/74.htm (accessed August 22, 2014).

21. See David McNally, *Another World is Possible: Globalization and Anti-Capitalism* (Winnipeg: Arbeiter Ring Pub., 2006).

22. See "U.S. Chamber Cries Uncle," http://yeslab.org/chambercriesuncle (accessed August 22, 2014).

23. On "stealth" art, see Stephen Wright, "The Future of the Reciprocal Readymade: An Essay on Use-Value and Art-Related Practice," http://www.turbulence.org/blog/archives/000906.html (accessed August 22, 2014).

24. On Michael Lebron's work see Todd S. Purdum, "AT HOME WITH -- Michael Lebron; The Adman as Artist (Or Is It Vice Versa?)," *The New York Times*, January 28, 1993 http://www.nytimes.com/1993/01/28/style/at-home-with-michael-lebron...rtist-or-is-it-vice-versa.html?src=pm&pagewanted=2&pagewanted=print (accessed August 22, 2014). On the Billboard Liberation Front, see http://www.billboardliberation.com (accessed August 22, 2014).

25. On Eva and Franco Mattes' Vienna hoax, see http://0100101110101101.org/nike-ground/ (accessed August 22, 2014). On Superflex's various copy projects, see http://www.superflex.net/

tools/copyshop/search (accessed August 22, 2014); on spoofing UC President Mark Yudof, see Josh Keller, "College Presidents Are Easy Targets for Cybersquatting and Hoaxes," *Chronicle of Higher Education*, March 3, 2010, http://chronicle.com/blogs/wiredcampus/college-presidents-are-easy-targets-for-cybersquattinghoaxes/21572 (accessed August 22, 2014).

26. Boltanski and Chiapello, *The New Spirit of Capitalism*, 38.

27. Ibid.

28. Ibid., 39. Boltanksi and Chiapello point out that the artistic critique and the social critique produce a tension between one another because they are classed-based (the artistic critique of capitalism arising from the sphere of artists and intellectuals often affiliated with the bourgeoisie and its art patronage; the social critique arising predominantly from the working class).

29. As Peter Bürger notes, "That, since Kant's and Schiller's writings, aesthetic theory has been one of the autonomy of art seems to me to speak in favor of a definition of art as an institution in developed bourgeois society that makes the normative aspect central to its reflection." Bürger, *Theory of the Avant-Garde*, 97.

30. Theodor W. Adorno, *Aesthetic Theory* (London, New York: Continuum, 2002), 225-6.

31. "The culture industries mass-produced culture as a commodity, thus imbuing culture itself with the very form of the commodity. But at least the culture industry went to the trouble of making something to be consumed. The vulture industries retreat from making culture to controlling the vector of its distribution and extracting a rent from its use. The rise of the vulture industries is in part a tactical acknowledgment that culture has been partly socialized by digital sharing. But it is in part also a new attack on the common cultural realm." McKenzie Wark, *Telesthesia: Communication, Culture and Class* (Cambridge, UK; Walden, MA: Polity Press, 2012), 208.

32. Raley, *Tactical Media*, 3.

33. Michel de Certeau, *The Practice of Everyday Life* (Berkeley: University of California Press, 1984). Reference to de Certeau and the implementation of his theories is peppered throughout tactical media literature. Two texts that depart from de Certeau and may also serve as theoretical bookends to tactical media are: Garcia and Lovink, "ABC of Tactical Media," and Critical Art Ensemble, "Tactical Media at Dusk?", *Third Text* 22, no. 5 (2008): 535-548.

34. On secondary production, see ibid., xiii.

35. On poaching as subversive consumption, see ibid., 31. Although the concepts of agency and hegemonic transformation found within the British Cultural Studies tradition are not explicitly adopted in tactical media's first theoretical articulations, there is nonetheless a similarity between tactical media's use of de Certeau's "practice of everyday life" and the way academics such as Richard Hoggart, Raymond Williams and Stuart Hall examined the resistant, "on the ground" use of media texts in various British subcultures. As scholar Graeme Turner notes, "One can see the similarity between de Certeau's approach and that taken by, say, [Dick] Hebdige in *Subculture: The Meaning of Style* (1979). In both cases, a process of *bricolage* makes over cultural forms and practices in order to produce moments of resistance." Graeme Turner, *British Cultural Studies: An Introduction* (New York, London: Routledge, 2003), 183.

36. Tom McDonough, *"The Beautiful Language of My Century": Reinventing the Language of Contestation in Postwar France, 1945-1968* (Cambridge: MIT Press, 2007), 193.

37. Ibid., 194.

38. Guy Debord and Gil J. Wolman, "A User's Guide to Détournement," in Ken Knabb, ed., *Situationist International Anthology* (Berkeley: Bureau of Public Secrets, 2006), 18.

39. Ibid., 20-21.

40. On the dynamism of capitalism and its subsumption of revolutionary rhetoric and practice under French managerial procedure, see generally Boltanksi and Chiapello, *The New Spirit of Capitalism*; on the effects of May '68 on French intellectual thought and its rethinking social transformation, see generally Peter Starr, *Logics of Failed Revolt: French Theory After May '68* (Stanford: Stanford University Press, 1995); Julian Bourg, *From Revolution to Ethics: May 1968 and Contemporary French Thought* (Montreal: McGill-Queen's University Press, 2007).

41. On the neoconservative call for an end of history, see Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

42. Geert Lovink, *Dark Fiber: Tracking Critical Internet Culture* (Cambridge: MIT Press, 2002), 260.

43. de Certeau, *The Practice of Everyday Life*, 35-36.

44. Ibid., xix.

45. Hakim Bey, *T.A.Z.: The Temporary Autonomous Zone: Ontological Anarchy, Peotic Terrorism* (New York, Autonomedia 2003), http://hermetic.com/bey/taz_cont.html (accessed August 27, 2014). Here, again, the link back to de Certeau can be traced insofar as his notion of the tactic, and the micro-gesture, is interpreted in the name of autonomy against an overarching "post-political" and technocratic order. The importance of autonomy as a concept has played in Tactical Media's theoretical development is evidenced most obviously in the use of the word "autonomy" itself in the naming of various artists groups and texts affiliated with the movement. *T.A.Z.: The Temporary Autonomous Zone*, a celebrated book within the discourse of Tactical Media, was itself published by the organization most often associated with Tactical Media's agenda, Autonomedia; see http://www.autonomedia.org/ (accessed August 26, 2014). See also the New York group Institute for Applied Autonomy http://www.appliedautonomy.com/ (accessed August 26, 2014).

46. Boltanski and Chiapello, *The New Spirit of Capitalism*, 37.

47. Peter Bürger, *Theory of the Avant-Garde*, 35-94. My earlier claim that the abundance of appropriation in contemporary art is evidence of the accommodation of the artistic critique is not unlike Bürger's conclusion that the historical avant-garde ultimately solidified, rather than abolished, the institution of art, which has since deprived neo-avant-gardism of the social aims set forth by the generation preceding it. Except now this solidification has extended even into the realm of legal dictate; art (including its neo-avant-garde variants such as the Pictures generation) has become such as autonomous activity that it can (again with some exceptions) openly violate intellectual property law with impunity.

48. Bürger's theory of the avant-garde is far from satisfactory. Its major deficiency, as scholars such as Benjamin Buchloh and Hal Foster have noted, is its reduction of a diverse range of theory and practice within modernism to the social question, as if all avant-gardism aspired to the same ideal. This criticism is similar to that leveled against Boltanksi and Chiapello, in that they reduce the historical particularities and nuances of capitalist resistance to the binary categories artistic and social critique.

49. Benjamin Buchloh, "Theorizing the Avant-Garde," *Art in America*, Volume 72, No. 10, November 1984, 21. Buchloh's criticism of Bürger's analysis of avant-gardism and neo-avant-gardism is well established. See also, for example, Benjamin Buchloh, "The Primary Colors for the Second Time: A Paradigm Repetition of the Neo-Avant-Garde," *October* 37, (Summer, 1986): 41-52.

50. It goes without saying that it would be far beyond the scope of this text to provide a summary of neo-avant-gardism over the last sixty years. For asee Benjamin Buchloh, *Neo-Avantgarde and Culture Industry: Essays on European and American Art from 1955 to 1975* (Cambridge, Mass.: MIT Press, 2000).

51. On the cultural dimension of late capitalism, see Frederic Jameson, *Postmodernism, Or, the Cultural Logic of Late Capitalism (*Durham: Duke University Press, 1991).

52. On "everyone being an artist," see Claudia Mesch and Viola Maria Michely, *Joseph Beuys: The Reader* (Cambridge, MA: MIT Press, 2007); on the rise of the creative class, see Richard Florida, T*he Rise of the Creative Class: And how it's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books, 2004). One recent example of the blatant commodification of "the artistic life," and the use of intellectual property in the capture of desire and creativity through branding, is the clothing company American Eagle Outfitters' 2009/10 advertising campaign, "Love the Artist," which it used to promote its latest fashion trends in blue jeans (the "Artist Jean"). See http://www.ae.com/women-artist-jeans/web/s-cat/20112 (accessed August 27, 2014).

53. I am "appropriating" the phrase "thinking with Bürger against Bürger" from Chantal Mouffe and, in her development of a theory of radical democracy, her "thinking with Schmitt against Schmitt," in reference to political theorist Carl Schmitt. See Chantal Mouffe, *On The Political* (London; New York: Routledge, 2005), 14.

54. Jochen Schulte-Sasse, in Bürger, *Theory of the Avant-Garde*, xiii.

55. Complicating matters still further is the continued intermingling of "Art," popular culture, and DIY culture. Take, for example, the Guggenheim Museum's 2010 exhibit *YouTube Play. A Biennial of Creative Video,* which showcased the "best" Youtube videos made by "amateurs" who —in a slightly earlier moment would have been labeled "consumers"—no doubt have been influenced by MTV music videos, Hollywood spectacle, etc. See http://www.guggenheim.org/new-york/interact/participate/youtube-play (accessed August 27, 2014). "Curating" the hybridization of cultural production and its dissemination across class lines raises many questions regarding especially the responsibility art institutions have in, on the one hand, staying relevant in an abundance of entertainment choices, and on the other, fostering critical conversations pertaining to the socioeconomic forces that condition such hybridization.

56. On the political and potentially revolutionary shift made possible by technological transformations in media production and circulation, see Walter Benjamin, "The Work of Art in the Age of Its Technological Reproducibility," in Howard Eiland and Michael W. Jennings, eds., *Walter Benjamin: Selected Writings, Volume 3: 1935-1938* (Cambridge, MA: Belknap Press of Harvard University Press, 2006).

57. Critical Art Ensemble, "Tactical Media at Dusk?", 545.

58. Boltanski and Chiapello state, "We believe that…we are currently witnessing a period of revival of [the social critique]. Of the two forms of critique…the *artistic critique,* which elaborates demands for liberation and authenticity, and the *social critique,* which denounces poverty and exploitation - it is the latter that is showing a new lease of life, however hesitant and modest it may currently be." Boltanski and Chiapello, *The New Spirit of Capitalism*, 346.

59. My following treatment of the Chamber of Commerce's case against the Yes Men is not the only example of tactical media practices that have run up against the law. See also the Federal Bureau of Investigation's accusing artist Steven Kurtz and Critical Art Ensemble of "bioterrorism," http://www.caedefensefund.org/ (accessed August 27, 2014). See also the police investigation involving artist Ricardo Dominguez's Transborder Immigrant Tool as well as the "virtual sit-in" he organized to protest University of California President Mark Yudof: "Electronic Civil

Disobedience and Collective Interruption Online," http://iprh.wordpress.com/2014/09/17/electronic-civil-disobedience-and-collective-interruption-online/ (accessed November 19, 2014).

60. See http://theyesmen.org/faq (accessed September 12, 2014). As the they describe on their Hijinks page, "The Yes Men agree their way into the fortified compounds of commerce, ask questions, and then smuggle out the stories of their hijinks to provide a public glimpse at the behind-the-scenes world of business. In other words, the Yes Men are team players…but they play for the opposing team." Although the actual number of Yes Men isn't known, the group's two primary public faces are Jacques Servin, who goes by the fictitious name Andy Bichlbaum, and Igor Vamos, otherwise known as Mike Bonanno.

61. Ibid. See also Andy Bichlbaum, Mike Bonanno, and Bob Spunkmeyer, *The Yes Men: The True Story of the End of the World Trade Organization* (New York: Disinformation, 2004). See also Carrie Lambert-Beatty, "Make-Believe: Parafiction and Plausibility," *October* 129, (Summer, 2009): 51-84.

62. For a list of the Yes Men's identity corrections, see generally http://theyesmen.org/hijinks (accessed September 12, 2014).

63. See http://theyesmen.org/hijinks/salzburg (accessed September 12, 2014). See also Barnaby J. Feder, "The Long and Winding Cyberhoax: Political Theater on the Web," *The New York Times*, January 7, 2001, http://www.nytimes.com/2001/01/07/weekinreview/word-for-word-tweaking-wto-long-winding-cyberhoax-political-theater-web.html?scp=1&sq=The%20Long%20and%20Winding%20Cyberhoax&st=cse (accessed September 12, 2014).

64. The Chamber's official web domain is http://uschamber.com/ (accessed September 12, 2014). The Yes Men's prank site, http://www.chamber-of-commerce.us/, has since been taken down. Copies of the counterfeit pages in question, as well as the fake press release, were introduced as evidence into the case. See the document "Defendants' Motion To Dismiss plaintiff's First Amended Complaint," http://www.eff.org/files/filenode/yesmen/YesMenMTDwithExA.pdf (accessed September 12, 2014).

65. Hingo Sembra is just one of the many aliases Andy Bichlbaum has employed in the execution of the Yes Men's interventions. The unusual-sounding names tend to have a coded meaning; in the case of Hingo Sembra, "Hingo" may reference "the bane of everything in the universe…associated with the fall of civilization," while "Sembra" could be taken as the Italian verb *to appear, to seem*. On the etymology of Hingo see http://www.urbandictionary.com/define.php?term=hingo (accessed September 12, 2014).

66. Video of the entire event is available, of course, on YouTube: http://www.youtube.com/watch?v=7QHKcrAfjFw&playnext_from=TL&videos=TVjX2eOE-_U (accessed September 12, 2014).

67. See http://www.youtube.com/watch?v=2HYJZYYT_Oc (accessed September 12, 2014).

68. Ibid.

69. In the aftermath of the event, several news channels continued to report on the Yes Men's ability to "punk" the Chamber. See, for example, Mother Jones reporter Kate Sheppard's first-hand account of the press conference on MSNBC's *The Rachel Maddow Show*: http://motherjones.com/mojo/2009/10/watch-video-yes-men-make-rachel-maddow-show (accessed September 12, 2014).

70. See "Re: Infringement of U.S. Chamber of Commerce's Intellectual Property Rights," http://www.eff.org/files/filenode/yesmen/chamber-dmca-notice.pdf (accessed September 12, 2014).

71. See "Re: DMCA takedown notice for www.chamber-of-commerce.us," http://www.eff.org/files/filenode/yesmen/yesmenletter.pdf (accessed September 12, 2014).

72. The U.S. Chamber of Commerce also sued various people associated with a Maryland-based activist group known as the "Action Factory," who, along with the Yes Men, helped organize the prank against the Chamber. For my purposes here the use of the name "Yes Men" refers to all defendants involved. All court documents available to the public can be found on the web site for the Electronic Frontier Foundation, the civil liberties organization defending the Yes Men. See http://www.eff.org/cases/chamber-commerce-v-servin (accessed September 12, 2014).

73. See "Plaintiff's Opposition to Defendant's Motion to Dismiss First Amended Complaint," http://www.eff.org/files/filenode/yesmen/chamber-opposition-brief_0.pdf (accessed September 12, 2014).

74. See "Complaint," http://www.eff.org/files/filenode/yesmen/chambercomplaint.pdf (accessed September 12, 2014).

75. Following the Chamber's suit, the Yes Men released a peer-to-peer (P2P) version of its latest film on bit torrent sites across the internet, which contained new footage of the Chamber prank. The action was done in response to the Chamber's demand to stop the further circulation of the original version of the film. See http://torrentfreak.com/yes-men-use-bittorrent-to-avoid-censorship-100723/ (accessed September 12, 2014).

76. Edward S. Rogers, "The Lanham Act and the Social Function of Trade-Marks," *Law and Contemporary Problems*, 14, no. 2 (Spring, 1949), 183.

77. Ibid., 180.

78. See Jane C. Ginsburg, Jessica Litman and Mary L. Kevlin, *Trademark and Unfair Competition Law: Cases and Materials* (New York: Foundation Press, 2007). On the ways in which trademarks make consumer "research" easier, see Mark A. Lemley, "The Modern Lanham Act and the Death of Common Sense," *The Yale Law Journal* 108, no. 7 (May, 1999): 1690.

79. As U.S. Supreme Court Justice Felix Frankfurter remarked in 1942, "The protection of trade-marks is the law's recognition of the psychological function of symbols." Rogers, "The Lanham Act and the Social Function of Trade-Marks," 181. Frankfurter's statement anticipates the shift in the American economy following World War II from needs-based and utilitarian to desire-based and symbolic, a shift I will be discussing in the next paragraph.

80. See "Plaintiff's Opposition to Defendant's Motion to Dismiss First Amended Complaint," http://www.eff.org/files/filenode/yesmen/chamber-opposition-brief_0.pdf (accessed September 12, 2014). Original emphasis.

81. Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998), 56. On trademark law in relation to a shifting U.S. economy, see also Lemley, "The Modern Lanham Act and the Death of Common Sense." On a socio-economic condition based on sign value, see generally Jean Baudrillard, and Mark Poster, *Jean Baudrillard: Selected Writings* (Stanford: Stanford University Press, 2001).

82. In trademark law, "fair use" primarily refers to the use of trademarks for reasons of comparative advertising. For example, auto manufacturer X may want to tout their newest truck model as superior to auto manufacturer Y's, and so including Y's logo within X's truck's advertising campaign makes a more direct connection with consumers because they are probably familiar with Y's brand, and can thus make a "mental judgement" of the two brands side by side. Going forward, my reference to the term "fair use" will be in the sense meant by its relation to the First Amendment. On the First Amendment, see http://www.law.cornell.edu/anncon/html/amdt1afrag1_user.html (accessed September 12, 2014).

83. Quoted from the case *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 151 (Tex. 2004), in "Defendants' Motion To Dismiss plaintiff's First Amended Complaint," http://www.eff.org/files/filenode/yesmen/YesMenMTDwithExA.pdf (accessed September 12, 2014).

84. Oxford English Dictionary, http://www.oed.com/view/Entry/138059?rskey=zOg0Xq&result=2&isAdvanced=false# (accessed September 12, 2014).

85. Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (Urbana and Chicago: University of Illinois Press, 2000), 54.

86. On parody, satire, target and weapon, see Hutcheon, *A Theory of Parody*, 52. For a critique of parody as weapon and target from an economic perspective, see Richard A. Posner, "When is Parody Fair Use?", *The Journal of Legal Studies* 21, no. 1 (January, 1992), 67-78.

87. On the difference between intramural parody and extramural satire, see Hutcheon, *A Theory of Parody,* 43. For a critique of parody as weapon and target from an economic perspective, see Richard A. Posner, "When is Parody Fair Use?", *The Journal of Legal Studies*, Vol. 21 No. 1, (Jan. 1992), 67-78.

88. Ibid., 47. The relation between parody and satire is complex; a deeper analysis of the two genres lies outside the scope of this study. Suffice to say here that satire itself can use parody to target a specific text in the service of criticism of conditions outside of the text. Hutcheon provides the example of Andy Warhol's 1963 silkscreen on canvas *Thirty Are Better Than One*, in which the artist appropriates the Mona Lisa, repeating it thirty times. The target in the work is da Vinci's *Mona Lisa*, which Warhol diminishes from unique Renaissance masterpiece to cheap knockoff through multiplying its form in haphazard fashion. But the parody can be further interpreted as a weapon in the criticism of a modern consumer culture that values quantity over quality, and reduces even auratic art into banal commodity.

89. Ibid., 24.

90. In this sense the Yes Men's appropriation of the Chamber's marks are similar, in terms of formal strategy, with early Pictures generation work, though very different in intent.

91. See "Plaintiff's Opposition to Defendant's Motion to Dismiss First Amended Complaint," http://www.eff.org/files/filenode/yesmen/chamber-opposition-brief_0.pdf (accessed September 13, 2014).

92. Lambert-Beatty, "Make-Believe."

93. Given the various "Occupy" movements in the second half of 2011, I should be clear that I do not mean to suggest that conventional protests and other mass demonstrations are not effective forms any longer. However, as another group of media tacticians, Critical Art Ensemble, point out: "… recent turn of events [have] produced an [electronic civil disobedience] model that…emphasizes simulated action over direct action…Certainly, carefully written and directed letter(s)/e-mail messages could have an implosive effect (although it's doubtful that a full collapse would ensue); however, the lessons learned from these classic cases of simulationist tactics have to be understood and applied. First and most obvious, this form of resistance would be covert." Critical Art Ensemble, *Digital Resistance*, 13-22. Interestingly, two weeks after the Yes Men's prank, the Chamber issued a press release in support of the Senators Kerry's and Graham's framework for climate change legislation, and have since repeatedly proclaimed its endorsement of any legislation that increases job and improves the economy while combatting climate change. See http://www.uschamber.com/press/releases/2009/november/us-chamber-calls-senate-take-bipartisan-bottom-approach-climate-change (accessed September 13, 2014).

94. U.S. Code Title 15, Chapter 22, Subchapter III, Section 1114, http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00001114----000-.html (accessed September 13, 2014). My emphasis.

95. For an analysis of *Polaroid Corp. v. Polarad Elects. Corp.*, see Ginsburg, Litman and Kevlin, *Trademark and Unfair Competition Law*, 332. Other Circuit courts have their own tests based on cases argued before them, but they all more or less follow the standards set forth in the Second Circuit's Polaroid case.

96. Ibid., 332. In the first factor, the "strength" of a trademark is essentially how well it is known by the public. The fourth factor pertains to whether or not, in the case of two similar trademarks selling very different products (e.g., milk and batteries), the likelihood that in the future the plaintiff will sell products in the defendant's range of goods (i.e., the plaintiff will start selling batteries), whereby there would be increased confusion because the two companies would be selling the same type of product using similar trademarks.

97. See "Reply in Support of Defendant's Motion to Dismiss Plaintiff's First Amended Complaint," http://www.eff.org/files/filenode/yesmen/yesmen-mtd-reply.pdf (accessed September 13, 2014). Original emphasis.

98. J. L. Austin, *How to do Things with Words* (Cambridge, MA: Harvard University Press, 1975), 14.

99. Lambert-Beatty, "Make-Believe: Parafiction and Plausibility," 61.

100. Ibid., 64-5.

101. Austin, *How to do Things with Words*, 16.

102. See "Obama Sworn in Again After Error in the Oath at Inauguration," *Bloomberg* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8PEkkW.8rx0 (accessed September 18, 2014).

103. Austin, *How to do Things with Words*, 16.

104. Hutcheon, *A Theory of Parody,* 23.

105. See generally Robert G. Bone, "Taking the Confusion out of 'Likelihood of Confusion': Toward a More Sensible Approach to Trademark Infringement," *Northwestern University Law Review* 106, no. 3 (2012): 1307-1378.

106. The Yes Men's fake Chamber "turnaround" announcement includes: "Let's remember Lehman Brothers, a committed, solid member of this Chamber, who in the interest of short-term gain scuttled a century. They ate lamb, but were left without wool when the cold, hard winter set in… this time it won't be only the poor who will find themselves foreclosed on. Sure, they'll be first - in fact, climate change already ravages the developing world…Corporate Social Responsibility just won't cut it anymore, folks - Mother Nature means business, and we do too." See "Defendants' Motion To Dismiss plaintiff's First Amended Complaint," http://www.eff.org/files/filenode/yesmen/YesMenMTDwithExA.pdf (accessed September 18, 2014). In most of the Yes Men's interventions involving their speaking publicly, a flippant, sarcastic tone is used.

107. See note 49.

108. See video documentation of the Yes Men's Chamber steps statement, http://www.youtube.com/watch?v=jew6KiCZ_wQ#t=129 (accessed September 18, 2014).

109. "U.S. Chamber Calls on Senate to Take Bipartisan, Bottom-up Approach on Climate Change,"https://www.uschamber.com/press-release/us-chamber-calls-senate-take-bipartisan-bottom-approach-climate-change (accessed September 18, 2014).

110. "Complaint," http://www.eff.org/files/filenode/yesmen/chambercomplaint.pdf (accessed July 18, 2010).

111. Ibid. Criticism of the Yes Men's strategies have not been exclusive to neoliberal voices. For example, "RustyR1" writes in his Netlfix review of the Yes Men's self-titled 2003 film, "I would…like to know how their fake WTO lectures shed any light on the real evil being done by the WTO to the global community…This movie is a thinly disguised vehicle for these guys to collect donation money to travel the world doing nothing and rid[ing] out their 15 minutes of fame for a horrible hour and a half…After watching the film and reading the reviews it looks to me like the lecture audiences in the film are not the only ones being faked out by The Yes Men." http://www.netflix.com/WiMovie/The_Yes_Men/70000103strackid=4808499adbc23792_0_srl&strkid=1768122723_0_0&trkid=438381 (accessed July 18, 2010).

112. On symbolic capital and its conversion into economic capital, see Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature* (New York: Columbia University Press, 1993).

113. According to the Yes Men, with the realization that *The Yes Men Fix The World* (2009) would be financially unsuccessful came the decision to release the film for free online, rather than spend money trying to secure additional theatrical screenings. For them the important thing was to get their message out. This decision, made after the Chamber filed its lawsuit, no doubt helps the Yes Men demonstrate that they did not use the Chamber intervention solely in order to drive audiences to their film. Mike Bonanno and Andy Bichlbaum, "The Yes Men Fix the World" (panel discussion, Open Video Conference, New York, NY, October 1, 2010).

114. In this sense we may infer that tactical media, now a theory and practice now almost two decades old, has become strategic.

115. On Malcom X's speeches, see Malcolm X and George Breitman, *Malcolm X Speaks: Selected Speeches and Statements* (New York: Grove Weidenfeld, 1990; 1965). On Sartre's use, see Jean-Paul Sartre, *No Exit: And Three Other Plays* (New York: Vintage Books, 1989; 1976), 218. Sartre's text in the English translation reads, "…by using every means at hand to abolish classes."

116. On "stealth" art as well as art's return to use value, see Stephen Wright, "The Future of the Reciprocal Readymade: An Essay on Use-Value and Art-Related Practice," http://www.turbulence.org/blog/archives/000906.html (accessed September 19, 2014).

117. Over the years, the Yes Men have presented their projects in several museums and art exhibition venues. Their latest show, *Outsmarting Capitalism*, is on view at the Museum Het Domein in The Netherlands until November 2014. See http://www.hetdomein.nl/contemporary_art.html (accessed September 19, 2014).

118. Andy Bichlbaum explained the Yes Men's relation to contemporary art during the colloquium "What Is to Be Done (after Graduation)?," held at the School of Museum of Fine Arts, Boston, January 29, 2014.

Conclusion

1. Claire Bishop, "Digital Divide," *Artforum*, http://www.artforum.com/inprint/issue=201207&id=31944 (accessed September 7, 2012). Original emphasis.

2. See the College Art Association, "Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities: An Issues Report," http://www.collegeart.org/pdf/FairUseIssuesReport.pdf (accessed October 18, 2014).

3. Two examples of the art field itself taking on issues of art and law are "The Legal Medium," a forthcoming Yale University symposium, as well as the Art & Law Program, a New York-based residency for artists, curators and writers. See http://www.thelegalmedium.com (accessed October 18, 2014); http://artlawoffice.com/education/art-law-program/ (accessed October 18, 2014).

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