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### No Comment: Will *Cariou v. Prince* Alter Copyright Judges' Taste in Art?

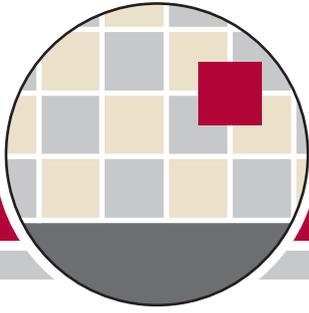
Christine Haight Farley

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## No Comment: Will *Cariou v. Prince* Alter Copyright Judges' Taste in Art?

Christine Haight Farley\*

### INTRODUCTION

Even though copyright law is purportedly designed to promote and protect the arts, oftentimes one can detect an uneasy relationship between copyright law and art. The problems arise when the law attempts to “read” art. Invariably, aesthetic judgments are made and judges cross a line that makes the public uncomfortable.

I have written elsewhere about the extent to which the law makes aesthetic judgments.<sup>1</sup> Though it certainly does, the practice is frowned upon. Justice Oliver Wendell Holmes’s famous 1903 admonishment still describes conventional wisdom today on judging art:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [writings, illustrations, music and other forms of expression] outside of the narrowest and most obvious limits.<sup>2</sup>

It is widely thought that viewing art is a profoundly emotional experience.<sup>3</sup> If this is true, how can we reconcile this with our demand for a dispassionate scrutiny in law?

It is natural for viewers of art to ask the proverbial question, “Is it art?” Who has not done this at least once? Viewers may also inquire about what a work of art might be supposed to

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1. Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005).

2. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (determining whether advertisements could be “art” for purposes of copyright protection).

3. Dorothy Spears, *Heart-Pounding Art, Seen Solo*, N.Y. TIMES, Oct. 26, 2012, available at [http://www.nytimes.com/2012/10/28/arts/artsspecial/arts-emotional-tug-is-best-experienced-alone-a-study-finds.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/10/28/arts/artsspecial/arts-emotional-tug-is-best-experienced-alone-a-study-finds.html?pagewanted=all&_r=0) (describing a scientific study that measured the emotional response of museumgoers).

“mean.” Or we may contemplate what the artist is trying to “say.” These are common questions that museumgoers, for instance, might ask. But generally speaking, we would not want to go on the record with these questions or with the answers we may produce in response to these questions. We would also be uncomfortable with courts addressing these questions. But in art and copyright cases, these very questions may arise.

In *Parks v. LaFace Records*,<sup>4</sup> a case that pitted Rosa Parks’s common law right of publicity against a band’s use of her name as the title of a rap song, the Sixth Circuit Court of Appeals used the phrase “crying artist” not once, but twice.<sup>5</sup> What the court implicitly meant by using this phrase was that one does not get to claim to be an artist and leave it at that. No bald assertions of art will be accepted. If a party’s work is art, it must be proved.

Appropriation art then brings these concerns to the fore. It may provoke curiosity, humor, or even frustration. It may provoke viewers to ask, “Is it art?” And in disputes between appropriation artists and the creators or owners of a work appropriated by them, it may provoke courts to make aesthetic determinations about the works involved under the copyright fair use doctrine.

What is appropriation art? Definitions of appropriation art abound. Generally, these definitions refer to the act of incorporating, with little or no alteration, preexisting images or objects sometimes, but not always, as a means of commenting on the society that has produced such cultural artifacts. How can there possibly be one accepted definition of appropriation art? How can the work of so many disparate artists be so easily summed up? Of course there is no agreement in the art world on a definition of appropriation art.

As a representative illustration, consider the work of Robert Heinecken, a self-proclaimed “para-photographer” who believes his work stands “‘beyond’ traditional ideas associated with photography,” even though he has rarely been behind a camera lens.<sup>6</sup> Heinecken’s work uses images from newspapers, magazines, television, and even pornography. He recontextualizes them through various techniques, including collages and dark room experimentation.<sup>7</sup> In his piece *More Than a Million People Like What Lark Does*, Heinecken simply layers two facing pages from an issue of the magazine *Life*.<sup>8</sup> One page was an advertisement for Lark’s technological advances; the other was the portrait of the “guru” to The Beatles and Mia Farrow. The two combined create the piece below:<sup>9</sup>

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4. *Parks v. LaFace Records*, 329 F.3d 437 (6th Cir. 2003) (stating that it was “not called upon in this case to judge the quality of Defendants’ song, and whether we personally regard it as repulsive trash or a work of genius is immaterial to a determination of the legal issues presented to us.”).

5. *Id.*

6. MoMA PRESS: EXHIBITIONS, *Robert Heinecken: Object Matter* (June 10, 2013), available at <http://press.moma.org/2013/06/robert-heinecken>.

7. *Id.*

8. See LIFE, Feb. 9, 1968, at 51–52, available at <http://books.google.com/books?id=K0kEAAAAMBAJ&printsec=frontcover&dq=Life+Magazine+February+9+1968&hl=en&sa=X&ei=UeIRVNyCK4ityASey4LQBg&ved=0CB8Q6AEwAA#v=onepage&q=Life%20Magazine%20February%209%201968&f=false>.

9. Robert Heinecken, *More Than a Million People Like What Lark Does*, available at [20](http://www.metmu-</a></p></div><div data-bbox=)



Works like this are sometimes accused of copyright infringement.<sup>10</sup> Because of their reliance on preexisting works, appropriation artists may have to convince courts that their recontextualization amounts to a fair use under the law.

## I. FAIR USE TRANSFORMED

When faced with copyright fair use claims by appropriation artists, judges often go in search of artistic speech in the works in order to make legal determinations. That is, courts have sought to interpret the message of the original work and the allegedly infringing work to determine if the latter work comments on the former. If the latter work does comment on the former, then it will be held to be a fair use and not a copyright infringement. Commenting is one of the preferred fair use activities. But commenting implies a dialog between the works. Under this view, the first work should involve speech and the second work should involve speech that responds to the first.

For example, although not an appropriation art case, *Leibovitz v. Paramount Pictures Corp.*<sup>11</sup> provides a good illustration of what kind of comment succeeds under fair use law. *Leibovitz* involved Annie Leibovitz's famous photograph of a naked and pregnant Demi Moore, which

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seum.org/collection/the-collection-online/search/266189.

10. Interestingly, a few notable musical artists whose work relies on preexisting copyrighted works, such as Christian Marclay and Girl Talk, have thus far not been accused of copyright infringement. Kenneth Goldsmith, *Copyright Is Over – If You Want It*, BILLBOARD (Jul. 15, 2014 9:05 AM) <http://www.billboard.com/biz/articles/news/legal-and-management/6157548/copyright-is-over-if-you-want-it-guest-post>.

11. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

graced the cover of *Vanity Fair* in August 1991. The defendant copied the photo to advertise the film *Naked Gun 33 1/3: The Final Insult*. In doing so, it superimposed Leslie Nielsen's head on a pregnant woman's naked body in the same pose as Moore. The Court of Appeals for the Second Circuit found that "[b]ecause the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original. The contrast achieves the effect of ridicule . . . ."<sup>12</sup> Moreover, the court implied that "the undue self-importance conveyed by the subject of the Leibovitz photograph" was deserving of ridicule.<sup>13</sup>

Courts searched for comments in defendants' works before the 1994 Supreme Court decision in *Campbell v. Acuff-Rose Music, Inc.*,<sup>14</sup> and they have continued to do so since then. That case involved the rap group 2 Live Crew's version of the Roy Orbison song *Pretty Woman*.

*Campbell* made transformativeness the name of the game in fair use law.<sup>15</sup> The Supreme Court decision in *Campbell* incorporated much of Judge Pierre Leval's commentary on fair use and transformativeness. According to Judge Leval, transformative works should be protected by fair use because their purpose is productive and adds value.<sup>16</sup> Quoting Leval, *Campbell* held that a work is deemed transformative if it does not merely "supersede the objects of the original, [but] instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>17</sup>

The transformative use test has been developed at common law, but the word "transformed" appears just once in the copyright act, in the definition of a derivative work. Section 101 defines a derivative work as a work based on one or more preexisting works in any "form in which a work may be recast, transformed, or adapted."<sup>18</sup> Obviously Judge Leval set out to contrast transformative works with derivative works, but the distinction often lies in the eye of the beholder.<sup>19</sup> For instance, Tony Reese has concluded that "in evaluating transformativeness the courts focus more on the purpose of a defendant's use than on any alteration the

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12. *Id.* at 114.

13. *Id.*

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

15. Donald S. Chisum, Tyler T. Ochoa, Shubha Ghosh & Mary LaFrance, UNDERSTANDING INTELLECTUAL PROPERTY LAW 430 (2d ed. 2011) ("Since the Supreme Court announced the 'transformative use' standard in *Campbell*, it has become the central focus in fair use litigation."). See also Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011) (finding a high correlation between judicial findings of transformativeness and fair use since the Supreme Court adopted the transformative use paradigm in *Campbell*).

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

17. *Campbell*, 510 U.S. at 579 (internal citations omitted) (internal quotation marks omitted).

18. 17 U.S.C. § 101 (2012).

19. See, e.g., Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 408 (2005) (suggesting that copyright is better understood in terms of how creative things are produced, who does the producing, and what is produced).

defendant has made to the content of the plaintiff's work."<sup>20</sup> And Matthew Sag has concluded that a "creativity shift" makes fair use more likely.<sup>21</sup> Creative shift is an asymmetry between the works of the plaintiff and the defendant such that one is more creative and the other is more informational.<sup>22</sup> Putting these two insights together, courts seem to favor defendants who have a creative purpose in recasting a pre-existing work.

Parodists often hit this sweet spot, but under the transformative use test, there is now no need for defendants to directly react to the preexisting work, so long as their work otherwise transforms it.<sup>23</sup> As pronounced by the Supreme Court and Judge Leval, the transformative use test opens up the possibilities for defendants' comments: they can now comment directly on the preexisting work or they can direct their comments elsewhere, even to society at large. But because the test puts the onus on the newness of defendant's work, courts continue to search for and compare the speech in the works of the defendant *and* the plaintiff. In order to conclude that defendant's art is new, judges will ascribe a meaning first to the original work and then to defendant's work in order to compare the two.

*Mattel Inc. v. Walking Mountain Productions*,<sup>24</sup> although a parody case,<sup>25</sup> illustrates the contrasting meaning approach taken by courts since *Campbell*. The court first assigned plaintiff's "Barbie" the meaning of "the ideal American woman" and a "symbol of American girlhood" who is "dressed in various outfits, leading glamorous lifestyles and engaged in exciting activities."<sup>26</sup> In contrast, the court's description of defendant Tom Forsythe's photos of Barbie reads as if it could have come from an art gallery catalogue of the photographer's work. Forsythe's work features:

[N]ude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations. His lighting, background, props, and camera angles all serve to create a context for Mattel's copyrighted work that

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20. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 467 (2008).

21. Matthew Sag, *Predicting Fair Use*, 73 OHIO ST L.J. 47, 80 (2012) (recognizing that the number of positive outcomes increase as more favorable factors are added).

22. *Id.* at 84 n.148.

23. See discussion, *infra*, at 28–29. See generally *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), *cert denied* 134 S. Ct. 618 (2013) (finding that appropriation artists' works do not need to comment on the original's artist's work).

24. *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

25. Although Mattel offered into evidence a shopping mall survey that indicated that the general public did not get any parodic meaning from the photos, the court concluded Forsythe's photographs parody Barbie and everything Mattel's doll has come to signify. *Id.* at 802. The court addressed the issue of Forsythe's use of Barbie to make a broader critique on society: "Undoubtedly, one could make similar statements through other means about society, gender roles, sexuality, and perhaps even social class. But Barbie, and all the associations she has acquired through Mattel's impressive marketing success, conveys these messages in a particular way that is ripe for social comment." *Id.*

26. *Id.*

transform Barbie's meaning. Forsythe presents the viewer with a different set of associations and a different context for this plastic figure. In some of Forsythe's photos, Barbie is about to be destroyed or harmed by domestic life in the form of kitchen appliances, yet continues displaying her well known smile, disturbingly oblivious to her predicament. As portrayed in some of Forsythe's photographs, the appliances are substantial and overwhelming, while Barbie looks defenseless. In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts. It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie's influence on gender roles and the position of women in society.<sup>27</sup>

So while Barbie symbolizes "beauty, wealth, and glamour,"<sup>28</sup> Forsythe's photos, in sharp contrast, connote danger, sex, and domestic subordination.

If the transformative use test is constrained by the need to interpret works in this way, it could impose in the law a doctrine that will fossilize our understanding of how art should be appreciated. The transformative use test in and of itself does not impose this constraint. Instead, courts may either impose speech on the art in question, or they may let the art speak for itself.

## II. JEFF KOONS IN COURT

Post-pop artist Jeff Koons has left his stamp not just on the art world, but also on fair use law. Koons has a reputation for controversy and pushing limits. Evidencing his critical success, the Whitney Museum's retrospective of Koons, which opened June 27, 2014, was the biggest show devoted to a single artist that the Whitney has ever done. His commercial success has long been certain. His Balloon Dog (Orange) sold for \$58.4 million, the highest price ever paid for a work by a living artist.<sup>29</sup> Perhaps setting a different kind of record in the art world, he has had to answer in court for his use of copyrighted works in four separate disputes.<sup>30</sup>

Of all of the Koons cases, *Rogers v. Koons*<sup>31</sup> best demonstrates the tensions in applying copyright law to contemporary art. In that case, commercial photographer Art Rogers sued Koons for copying his photograph, *Puppies*, which depicted a seated couple holding numer-

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27. *Id.*

28. *Id.*

29. Ingrid Sischy, *Jeff Koons Is Back!*, VANITY FAIR, July 2014, available at <http://www.vanityfair.com/culture/2014/07/jeff-koons-whitney-retrospective>.

30. See *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Rogers v. Koons*, 960 F. 2d 301 (2d Cir. 1992), cert. denied, 506 U.S. 934 (1992); *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

31. *Rogers*, 960 F. 2d at 301.

ous puppies on their laps. Koons sent the photo, which he found on a greeting card, to an art studio in Italy with instructions to reproduce it in a sculpture that ultimately became *String of Puppies*. The district court ruled that this was copyright infringement—and not fair use—and the Second Circuit affirmed.

Although this case is discussed as a failed parody case,<sup>32</sup> it is not clear that Koons or his lawyers saw it as merely a parody. Instead, their case theory was that there had been an aesthetic transformation, not a transformation of the message. In his certiorari petition to the Supreme Court, Koons framed the question presented as whether an artist who transforms a prior work may be held liable.<sup>33</sup> Koons thus explicitly asked the Court to offer further guidance on the first factor of the fair use test: the purpose and character of defendant's use. The case occurred two years after Judge Leval's influential article on fair use but two years before the Supreme Court's *Campbell* decision.<sup>34</sup>

At trial, Koons's experts testified that the works were radically different aesthetically, but these experts neglected to verbalize what the message in each was. Nevertheless, the court proceeded to analyze the works in the strict manner with which parodies had come to be scrutinized:

Koons argues that his sculpture is a satire or parody of society at large. He insists that 'String of Puppies' is a fair social criticism and asserts to support that proposition that he belongs to the school of American artists who believe the mass production of commodities and media images has caused a deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it.<sup>35</sup>

Koons's sculpture did not succeed as a parody. The court was not able to assign a message to Koons's art that was in reaction to the photo he used.

Two subsequent Southern District of New York cases were similarly decided and relied on the same reasoning. In *United Feature Syndicate, Inc. v. Koons*,<sup>36</sup> the court ruled that Koons's *Wild Boy and Puppy* was an infringement of Odie from the Garfield comic strip. And in *Campbell v. Koons*,<sup>37</sup> the court refused to find that Koons's *Ushering in Banality* was a fair

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32. Darren Hudson Hick, *Appropriation and Transformation*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1155, 1163–64 (2013).

33. Petition for Writ of Certiorari, *Koons v. Rogers*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992) (No. 92-297), 1992 WL 12073534, at \* i.

34. One wonders why the Supreme Court was not motivated to hear *Rogers v. Koons*, which would have given it the same opportunity to incorporate Judge Leval's transformative use test into fair use law.

35. *Rogers*, 960 F. 2d at 309.

36. *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 370 (S.D.N.Y. 1993).

37. *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381, at \*1 (S.D.N.Y. Apr. 1, 1993)

use of Barbara Campbell's photograph *Boys with Pig*.

Many commentators attribute Koons's eventual reversal of fortune thirteen years later in *Blanch v. Koons*<sup>38</sup> to the development in fair use law contributed by *Campbell*.<sup>39</sup> Instead, I submit that it has more to do with his change in legal strategy. In *Blanch*, Koons offered the court an "Art History 101" explanation of his work's meaning—something he was perhaps too arrogant to do in previous cases. In *Rogers*, Koons had first demeaned Rogers's work as mere data—a completely accurate and literal depiction of two real people holding eight puppies. In addition, he had naively asserted that as a massive, vibrant sculpture, his work necessarily transformed the small black and white photograph.

In *Blanch*, he took a different approach. Explaining his use of Andrea Blanch's photograph *Silk Sandals by Gucci* in his painting *Niagara*, Koons makes abundantly clear his artistic intent to offer a new comment:

By juxtaposing women's legs against a backdrop of food and landscape . . . [I intended] to comment on the ways in which some of our most basic appetites—for food, play, and sex—are mediated by popular images. By re-contextualizing these fragments as I do, I tried to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.<sup>40</sup>

So as not to be again criticized for directing his comment too generally at society, Koons offered:

I considered [Blanch's photograph] to be necessary for inclusion in my painting . . . . The photograph is typical of a certain style of mass communication . . . . I thus comment upon the culture and attitudes promoted and embodied in [the magazine]. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am

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

39. See Hick, *supra* note 34, at 1167–68 (positing that *Campbell* served as a basis for the framework in *Blanch v. Koons*). See also Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 452–53 (2008) (describing how *Campbell* refocused the fair use inquiry, cautioning against individual judgments on the artistic merit of the challenged work); Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee or Burn-Out of Transformiveness in Fair Use Jurisprudence?: A Plea for a Neo-Traditional Approach*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 321, 337 (2014) (discussing how the analysis in *Blanch* echoed *Campbell*); Donn Zaretsky, *Koons Wins*, ART L. BLOG (Oct. 30, 2006, 11:05 AM), <http://theartlawblog.blogspot.com/2006/10/koons-wins.html> (noting how the standard for determining whether a use is transformative in *Blanch* was taken from the Court's analysis in *Campbell*).

40. *Blanch*, 467 F.3d at 247 (citations omitted) (internal quotation marks omitted) (citing Koons Aff. ¶ 10, June 10, 2005).

referring to.<sup>41</sup>

Koons's explanation of his artistic purpose responded to the court's appetite for imposing meaning. The court was thus able to compare and contrast the two works' assigned meanings. The court found that:

[Koons's] purposes in using Blanch's image are sharply different from Blanch's goals in creating it. *Compare* Koons Aff. at 4 ("I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.") *with* Blanch Dep. at 112–113 ("I wanted to show some sort of erotic sense[;] . . . to get . . . more of a sexuality to the photographs.")<sup>42</sup>

The court incorporated these "sharply different" creative purposes into the *Campbell* test:

Koons is . . . using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media. His stated objective is thus not to repackage Blanch's 'Silk Sandals,' but to employ it 'in the creation of new information, new aesthetics, new insights and understandings.'<sup>43</sup>

The court's ability to understand Koons's comment was what allowed it to appreciate its newness.

It is remarkable that the courts in *Rogers* and *Blanch* reached such different conclusions. These cases had much in common: Koons was represented by the same lawyer throughout,<sup>44</sup> all of the litigation was in the same circuit, and the plaintiffs in *Blanch* and *Rogers* had similar profiles as artists.

The key difference, I submit, is not the decision in *Campbell* in the intervening years, but that the court finally "got" Koons's work.<sup>45</sup> In the *Rogers* decision from the Southern District of New York, Judge Charles Haight's lack of esteem for the artist pervades the opinion. For instance, he remarked how Koons's first career was as a commodities trader and how he hired other artists to make his work. After that, the Second Circuit and subsequent Southern District of New York courts repeated that assessment. In contrast, the Second Circuit's opinion in *Blanch* paints a different portrait of the artist and weaves his testimony into a coherent story

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41. *Blanch*, 467 F.3d at 255 (internal citations omitted).

42. *Id.* at 252.

43. *Id.* at 253.

44. The attorney who represented Jeff Koons in both the *Rogers* and *Blanch* cases was John B. Koegel from The Koegel Group, LLP.

45. Stephen E. Weil, *Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood*, 62 OHIO ST. L.J. 835, 838 (2001) ("That the deadpan and often elusive ironies of post-modernist visual art are also parodies may not be quite so clear. *Rogers v. Koons*, a case in which the court never really got what the artist intended, certainly seems a case in point.").

of how fair use law enables this kind of creativity by granting to artists access to “raw materials” such as Blanch’s photograph.

Koons may not be the only artist who has realized the importance of explaining his art to a court. In addition to copyright, a few artists have had to defend themselves against claims of trademark infringement. In the *Parks v. LaFace Records* case mentioned earlier, the court had to determine whether a rap song by OutKast was artistically related to its title *Rosa Parks*, since the *Rogers v. Grimaldi*<sup>46</sup> decision only allows the use of a trademark in the title of an artistic work when the title is *legitimately* artistically related to the work. But how should a court of law determine artistic relevancy? As with the copyright fair use cases, courts might scrutinize the content of the allegedly infringing work for meaning. In *Parks*, plaintiff supplied the court with a “rap dictionary” and a translation of the lyrics of the song. The court then concluded that the song was not in fact at all about Rosa Parks or the selfless strength she symbolized. Instead, the court determined that the song was about nothing more than boasting on the part of the band. Rather than offer a competing account of their work, OutKast argued that no evaluation of the content of the work was necessary since the song’s hook contains the line, “Everybody move to the back of the bus,” which is repeated ten times. This strategy recalls Koons’s strategy of arguing that a sculpture necessarily transforms a photograph.<sup>47</sup> Both arguments allow courts to take a more distanced view of the works and rely more on form than on content. Both arguments, however, were rejected.

In the end, the artist got justice. Unfortunately, the price of this legal success may be Koons’s reputation for subversion. The doctrinal fit in *Blanch* is so cozy that his work feels a bit staid. It does not push boundaries; it does not outrage judges. His work is no longer illegal art, and, if we take him at his word that he has created an entirely new work out of raw materials, it may not even be properly deemed edgy appropriation art. Koons likes to talk about how much his work has been influenced by Marcel Duchamp and the Dadaists. I seriously doubt that Duchamp would claim that his urinal, *Fountain*,<sup>48</sup> was something that he created entirely new from raw materials. The Dadaists questioned conventional thinking about art; they did not seek to explain their art in a way that conformed to convention.

### III. THE *CARIOU v. PRINCE* DECISION

Given this history, the *Cariou v. Prince*<sup>49</sup> case was a revelation. Similar to *Blanch*, appropriation artist Richard Prince was sued for copyright infringement by the artist whose

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46. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (finding that Ginger Rogers’s rights were not infringed by a Fellini film about Italian cabaret stars entitled *Ginger and Fred* because the title was artistically related to the film).

47. See discussion, *supra* Part II., at 25–27 (pointing to Koons argument that his sculpture of the puppies was transformative simply because it was no longer a black and white photograph).

48. Marcel Duchamp, *Fountain* (1917), available at <http://www.tate.org.uk/art/artworks/duchamp-fountain-t07573>.

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

photographs Prince incorporated into his work. Prince is often called an appropriation artist. According to the Second Circuit, “Prince’s work, going back to the mid-1970s, has involved taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in a different context, as his own.”<sup>50</sup>

Prince’s *Canal Zone* series used photographs by Patrick Cariou from his 2000 book, *Yes Rasta*. Prince altered those photographs by, among other things, painting “lozenges” over their subjects’ facial features, enlarging and tinting the photographs, using only portions of some of the images, affixing headshots from *Yes Rasta* onto other appropriated images, and placing them on canvases painted by him. Nevertheless, the district court held that Prince’s work did not constitute fair use of Cariou’s photographs. Citing *Rogers*, a pre-*Campbell* and pre-*Blanch* case, the district court held that defendant’s work must comment on plaintiff’s work in order to be transformative.<sup>51</sup>

The Second Circuit reversed this ruling. It could have simply remanded with instructions to properly apply the transformative use test, rather than the outdated *Rogers* parody test. It did not. Instead, it ruled that twenty-five out of the thirty works at issue were transformative as a matter of law.<sup>52</sup>

*Cariou* went well beyond a reversal of the too narrow requirement that fair reuses comment on the originals. The main significance of the holding is that there is no requirement that a work make any comment at all in order to be transformative.

Unlike Koons in *Blanch*, Prince absolutely refused to offer the court a simple explanation of the meaning of his work. In his deposition, he was asked repeatedly by opposing counsel to define the message in his work. His response was: “I don’t really have a message.”<sup>53</sup> Prince’s deposition testimony indicates that for him, the very question of an artwork’s message was much more nuanced and complicated than it was for his interrogators:

Q. Are you saying that one of the points or one of the messages in the Canal Zone paintings was to evoke Cézanne’s bather paintings?

A. I think if in fact there was a message, it was—there was three people, yes, specifically Cézanne’s bathers because of the composition, Picasso’s hands and feet, and the masks that were on the De Kooning women.<sup>54</sup>

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50. *Id.* at 699.

51. *Cariou v. Prince*, 784 F. Supp. 2d 337, 348–49 (S.D.N.Y. 2011).

52. Given the court’s reasoning, it is peculiar that the court remanded five works that presented close cases. The case recently settled, apparently to Prince’s satisfaction. *See* Stipulation of Voluntary Dismissal, *Cariou v. Prince*, No. 1:08-cv-11327-DAB (S.D.N.Y. Mar. 19, 2014); Brian Boucher, *Landmark Copyright Lawsuit Cariou v. Prince is Settled*, ART IN AMERICA (Mar. 18, 2014), available at <http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled/>.

53. Petition for Writ of Certiorari at App. 76, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) (No. 13-261) 2013 WL 4508637 (quoting from Prince’s deposition).

54. *Id.* at app. 78.

When pressed on the message in a work that merely superimposed lozenges and a guitar over a Cariou photo, Prince offered: “He’s playing the guitar now, it looks like he’s playing the guitar, it looks as if he’s always played the guitar, that’s what my message was.”<sup>55</sup> As a result, the district court and the Second Circuit were hard-pressed to ascribe any meaning to Prince’s work or to contrast his message with Cariou’s.

Moreover, Prince steadfastly refused to conform his art to the particular aesthetic theory of which *Rogers* and *Blanch* are representative:

Q. In superimposing these four images over the landscape from Yes Rasta, right, were you commenting on any aspects of culture?

A. No.

Q. Were you trying to create anything with a new meaning or a new message?

A. No.<sup>56</sup>

Instead, Prince proffered an alternate aesthetic theory:

I know that that’s not the original intent of the image, but I don’t have any—don’t have any really interest in what the original intent is because my—because what I do is I completely try to change it into something that’s completely different.

Q. And just again, what is your intent, what are you changing it into?

A. To make great artworks that I make people feel good.<sup>57</sup>

The following similar exchange demonstrates the plaintiff’s counsel’s interest in eliciting such testimony as to the artist’s objective:

Q. Right. Is there a message?

A. There certainly is a message.

Q. What is the message?

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55. *Id.* at App. 51.

56. *Id.* at App. 95.

57. *Id.* at App. 93.

A. The message is to make great art that makes people feel good. That's my message. Now, I know it might not be someone else's, but I believe that's also the way I've always defined art.<sup>58</sup>

Although a reader might assume that this testimony was elicited by the artist's own counsel to show the artist's worthy intensions, it was not. Plaintiff's counsel, finding this testimony to be in such conflict with the *Rogers/Koons* aesthetic, relied on it to argue that Prince's work was devoid of a transformative message.

This refusal to speak for his artworks would have frustrated the *Rogers* and *Parks* courts, and perhaps many others. But the *Cariou* court held that Prince's testimony on transformativeness was not conclusive since a fair use defendant need not comment on the plaintiff's work or on society, or testify that he is trying to do so.

Instead of searching for an artistic comment, the court focused on the art itself. The critical inquiry is how the works appear to the reasonable observer. The court therefore focused on objective differences between the works and a visibly different aesthetic. Looking at the two works, the court found "drastically different" aesthetic qualities.<sup>59</sup> For example, the court identified differences in the two works with regard to size, color, and materials. In addition, it noted the contrast between the serene, natural beauty in the *Cariou* photographs and the crude, jarring, hectic, and apocalyptic images created by Prince.<sup>60</sup> Thus, the "newness" that Judge Leval has insisted on could be gleaned by the "reasonable observer" without any necessary reference to the artists's intentions.<sup>61</sup>

Henceforth, the provocateurs of the art world will not have to sell out as Koons did in *Blanch*. Judge Haight, in his opinion, described Koons's art as "commenting upon the commonplace." Not only was the judge clearly unimpressed with Koons, he was also dismissive of appropriation art. In contrast, the Second Circuit in *Cariou* accepted one of the central tenets of this art form: that placing common images in new contexts can change the way we think about them. And we do not need the artist to tell us how to think about them.

Essentially, the *Cariou* court emphasized form over content in its application of the transformative use test. Form and content are two distinct vocabularies used to describe art and art's value. Form is the purely visual. Formal qualities of an artwork include its line, color, texture, balance, movement, composition, and light, among other things. Formal analysis is a means for organizing visual information that can be applied to any kind of artwork, from any period in history. The content of a work may be its subject matter, story, information, emotion, humor, or message. The *Cariou* court flipped the common primacy of content analysis over formal analysis.

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58. *Id.* at App. 82–83.

59. *Cariou v. Prince*, 714 F.3d 694, 706–07 (2d Cir. 2013), *cert denied* 134 S. Ct. 618 (2013).

60. *Id.* at 706.

61. *Id.* at 707.

Content is regularly overemphasized because of habit; art audiences tend to interpret an artwork's meaning instinctively without any consciousness, reflection, or critical examination. But content is also privileged because we have become more comfortable with that vocabulary than we are with the vocabulary of form. But in law, fair use and the transformative use test risk solidifying this habit into doctrine.

Lawyers are certainly more verbal than visual. Rebecca Tushnet has written about “the ungovernability of images in copyright” and argues that the law has greater comfort dealing with words than it does with pictures.<sup>62</sup> The law has a tendency to rely on verbal explanations when dealing with the visual. Depositions, oral arguments, briefs, and opinions translate art into words.

The unexamined practice of converting the visual to textual has created a parody trap for visual artists who use preexisting works. Courts automatically subject all visual artists' fair use claims to the parody test. Courts do this because of the inability to conceive of a visual analog to the textual concept of quotation. Quotation is the archetypical fair use.<sup>63</sup> In text, quotation involves dissecting critical amounts of information from its origin and reworking it into new information. Koons and Prince incorporate entire works, and they do so because a portion of the visual work would be incomprehensible, in terms of both form and content. The textual analogy then is not quotation, but parody. And as we have seen, parody requires a content analysis.

Long before any of the cases mentioned herein were decided, Susan Sontag's forceful essay, *Against Interpretation*, critiqued our modern penchant for interpreting art for its content. According to Sontag:

[I]nterpretation amounts to the philistine refusal to leave the work of art alone. Real art has the capacity to make us nervous. By reducing the work of art to its content and then interpreting that, one tames the work of art. Interpretation makes art manageable, conformable.<sup>64</sup>

Sontag argued that this practice necessarily reduces the pleasure of art and art itself: “To interpret is to impoverish, to deplete the world—in order to set up a shadow world of ‘meanings.’ It is to turn the world into this world.”<sup>65</sup>

Sontag denounced interpretation as contrived and disingenuous.<sup>66</sup> The interpretations pronounced in successful fair use cases illustrate and support this critique. In *Campbell*, the Court assigned the following interpretation to the rap song that 2 Live Crew had themselves

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62. Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 687-89 (2012).

63. See LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 52 (2008).

64. Susan Sontag, *Against Interpretation*, in *AGAINST INTERPRETATION AND OTHER ESSAYS* 8 (1966).

65. *Id.* at 7 (emphasis omitted).

66. See *id.* at 12-14.

formerly thought of as a cover:

2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.<sup>67</sup>

Such an interpretation takes some work. Similarly, the ad for the silly movie in *Leibovitz*, the objective of which was to grab attention and be funny, was interpreted by the court as ridiculing the pretensions of Leibovitz's photograph and its claim to direct iconographic lineage to Botticelli's *Birth of Venus* through the use of the "Venus Pudica" pose.<sup>68</sup> These post-hoc explanations of defendants' messages are better tributes to the skill of the lawyers and judges than the artists.

#### CONCLUSION

Cariou's certiorari petition to the Supreme Court framed the question presented in the case as whether fair use:

[R]equires consideration of the secondary user's purpose (*i.e.*, his or her justification for appropriating particular copyrighted materials), and not just of the secondary work's expressive character, as perceived by judges employing their own personal aesthetic sensibilities.<sup>69</sup>

Cariou thus presents the choice of crediting either the artist's stated message or the judge's perception of aesthetic value. The latter choice suggests subjectivity and conjures the "dangerous undertaking" proscribed by Holmes. But as this essay has hopefully illustrated, the first choice also involves a subjective, aesthetic interpretation.

The major significance of *Cariou* for fair use law is that the holding frees courts from the activity of assigning interpretations to works of art in order to determine whether or not they offer a new comment. This practice is borne not from anything required by fair use doctrine, but from a tendency to verbalize meaning rather than describe difference in form. Perhaps the reason that courts have shied away from this approach is that it is outside of their comfort zones. Instead, the *Cariou* approach involved explicitly aesthetic discussions. This is why I am skeptical that this important precedent will have much impact on future disputes involving contemporary art.

The idea that art has a message comes from a particular aesthetic tradition. Finding mean-

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67. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

68. *See Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 111 n.1 (2d Cir. 1998).

69. Petition for Writ of Certiorari, *supra* note 53, at i.

ing in art is itself a hotly contested theoretical terrain. Among many other schools of thought, there are intentionalists, who believe the works means what its creator intended; anti-intentionalists who believe that an artist's intentions are irrelevant; reader-response theorists who believe that the audience of a work is actively involved in meaning production; and formalists, who believe that art should be valued not for its meaning, but for its visual aspects. Given the great range of thought in art theory, courts should be wary of imposing a particular aesthetic tradition on art. Views may change over time. We used to think that the minimal art of the 60s was to be appreciated for its conceptual qualities. Now it is more likely appreciated for its aesthetic beauty. What makes art, art has confounded art historians for centuries. Art is indeterminable. At best, we can conclude that art makes the spectator feel addressed by it and therefore bound in a relation with it.

Reminiscent of statements that Prince made in his deposition, Koons revealed in a recent interview that:

One of the things that I'm most proud of is making work that lets viewers not feel intimidated by art, but feel that they can emotionally participate in it through their senses and their intellect and be fully engaged. And feel that they can get a foothold in it, to push themselves off of, and lift themselves up on.<sup>70</sup>

In his deposition, Prince twice stated that his objective was to make great artworks that made people happy. I believe this activity is precisely what the Framers had in mind when including the intellectual property clause in the Constitution. Society is benefitted by an abundance of art that speaks to people, whether or not that art has a definable intended message.

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70. See Sischy, *supra* note 31.