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APPROPRIATE TESTING AND RESOLUTION: HOW TO DETERMINE WHETHER APPROPRIATION ART IS TRANSFORMATIVE "FAIR USE" OR MERELY AN UNAUTHORIZED DERIVATIVE?

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I. INTRODUCTION

"Art . . . is the desire of a man to express himself, to record the reactions of his personality to the world he lives in."[1] But what if this original expression was taken away from the artist for all the wrong reasons? What if the work was wrongfully sold for money or portrayed as an appropriation artist's own work? Art cannot be taken away from its creator unless there is fair use of that product. At the same time, appropriation art creates new works of art by utilizing common images found in society, thereby aiming to change the way we think about these images.[2] Does appropriation art deprive the original artists and creators of their copyrighted material? This Article will examine the fair use of appropriation

1. AMY LOWELL, TENDENCIES IN MODERN AMERICAN POETRY 7 (1917).

2. William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2000).

art and discuss whether an appropriation artist has infringed upon an artist's original work when it comes to creating "new" appropriation art. After all, "art is either plagiarism or revolution,"[3] and appropriation art might or might not be "making something out of nothing and selling it."[4] Courts need to determine whether the fair-use defense is suitable for this specific type of art through the application of existing boundaries and tests.

This Article addresses the copyright concerns in appropriation art today and concludes that copyright law should be amended to address the complex issues found in this area of the law. Part II provides a background on appropriation art and the different facets of copyright law, including the doctrine of fair use. Part III analyzes whether appropriation art can even be considered "fair use" under the current exceptions of copyright infringement. Part IV discusses various legal tests to determine whether appropriation art that utilizes copyrighted material can exercise the doctrine of fair use against alleged copyright infringement. It also proposes a change to copyright legislation in order to offer more guidance for appropriation art legal issues with regard to the doctrine of fair use and potential copyright infringement. This Article concludes by looking back at copyright infringement versus the doctrine of fair use with regard to appropriation art and how the adoption of the proposed legislation will be more in line with the goals and fairness sought for copyright law.

II. BACKGROUND

A. *Appropriation Art*

To examine the doctrine of fair use with regard to appropriation art, one must understand what each of the relevant terms means. The term "appropriation art" essentially involves the taking of an image garnered from a "real object or even an existing work of art" and using the borrowed elements to form a new piece of art.[5] "Appropriation art borrows images from popular culture,

3. PETER ARCHER, THE QUOTABLE INTELLECTUAL 10 (2010).

4. *Frank Zappa Quotes*, QUOTES.NET, http://www.quotes.net/quote/19338 (last visited Nov. 7, 2011).

5. William F. Patry, *Appropriation Art and Copies*, PATRY COPYRIGHT BLOG (Oct. 20, 2005, 10:22 AM), http://williampatry.blogspot.com/2005/10/appropriation-art-and-copies.html.

advertising, the mass media, other artists[,] and elsewhere" and forges them into a new work.[6] Appropriation art has commonly been described "as getting the hand out of art and putting the brain in."[7] Some appropriation art does not incorporate items subject to copyright protection; however, the appropriation artist risks infringing upon an owner's right if that work is copyrighted.[8] Appropriation art embraces the maxim touted by modernist artists who question the nature or meaning of art by blurring the lines of originality, creation, and authenticity.[9]

B. *Original Work, Copying, and Copyright Infringement*

In order to obtain a copyright for a work, that work must be original.[10] To qualify as original, a work must be "independently created" and have only "some minimal degree of creativity."[11] Though an artist's portrayal may closely resemble another's work, it retains its originality as long as the similarity is fortuitous and not the result of intentional copying.[12] However, "[c]opyright law protects an author's [or artist's] expression; facts and ideas within a work are not protected."[13]

To establish copyright infringement, a party must show that he had valid ownership of a copyright for the original work and that the "constituent elements of the work that are original" were copied by another party.[14] Thus, to prove infringement, a plaintiff

6. William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2000).

7. *Id.* (internal quotation marks omitted).

8. *Id.*

9. William F. Patry, *Appropriation Art and Copies*, PATRY COPYRIGHT BLOG (Oct. 20, 2005, 10:22 AM), http://williampatry.blogspot.com/2005/10/appropriation-art-and-copies.html.

10. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (noting that the constitutional protections afforded to copyrighted works "presuppose a degree of originality").

11. Mid Am. Title Co. v. Kirk, 59 F.3d 719, 721 (7th Cir. 1995) (quoting *Feist Publ'ns*, 499 U.S. at 345) (internal quotation marks omitted).

12. *Feist Publ'ns*, 499 U.S. at 346.

13. Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990).

14. *Feist Publ'ns*, 499 U.S. at 361; *see* S. Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801, 810 (11th Cir. 1985) ("To prevail on a claim of copyright infringement, a plaintiff must establish ownership of a valid copyright in the work and copying by the defendant." (citing Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 684 F.2d 821, 824 (11th Cir. 1982); Miller v. Universal City Studios, Inc., 650 F.2d 1365 (11th Cir. 1981))).

with a valid copyright must demonstrate that "(1) the defendant has actually copied the plaintiff's work; *and* (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectable elements of plaintiff's."[15]

A claim for copyright infringement cannot survive unless a copying has occurred.[16] A work is considered copied when an accused had access to protected material, and the work in question is substantially similar to the ideas protected under copyright law.[17] No artist may combat accusations of plagiarism by demonstrating how much of the work he has not pirated.[18] Where a substantial similarity exists between different works, small changes made by the copying party are unavailing.[19]

A violation of any of the copyright owner's exclusive rights constitutes infringement.[20] These exclusive rights include the right to reproduce the work, the right to prepare derivative works, the right to distribute copies of the work to the public, and the right to display the work publicly.[21] A derivative work is one that is "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."[22]

The United States Code provides that the use or reproduction of a copyrighted work is "not an infringement of copyright" if it is used "by reproduction in copies or phonorecords or by any other

15. Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp., 25 F.3d 119, 122–23 (2d Cir. 1994) (citing Laurenyssens v. Idea Grp., Inc., 964 F.2d 131, 140 (2d Cir. 1985)), *abrogated by* Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010).

16. *See* Mazer v. Stein, 347 U.S. 201, 217–18 (1954) ("[P]rotection is given only to the expression of the idea—not the idea itself." (citing F.W. Woolworth Co. v. Contemporary Arts, Inc., 193 F.2d 162 (1st Cir. 1951); Ansehl v. Puritan Pharm. Co., 61 F.2d 131 (8th Cir. 1932); Fulmer v. United States, 103 F. Supp. 1021 (Ct. Cl. 1952); Muller v. Triborough Bridge Auth., 43 F. Supp. 298 (S.D.N.Y. 1942))).

17. Gentieu v. Tony Stone Images/Chi., Inc., 255 F. Supp. 2d 838, 847 (N.D. Ill. 2003) (citing Susan Wakeen Doll Co. v. Ashton-Drake Galleries, 272 F.3d 441, 450 (7th Cir. 2001)).

18. Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992); *accord* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) (establishing that a plagiarist cannot defend himself by pointing out that only a portion of the work was pirated).

19. *Rogers*, 960 F.2d at 308.

20. 17 U.S.C. § 501(a) (2006).

21. *Id.* § 106(1)–(3), (5).

22. *Id.* § 101.

means specified by [§ 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[23]

The immediate question then becomes whether appropriation art is copyright infringement. This is where the fair-use defense can help counter allegations of copyright infringement based on the creation of appropriation art.

1. Copyright Protection

The United States Constitution has recognized copyright protection since its inception.[24] The Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[25] The purpose of copyright law is "to secure 'the general benefits derived by the public from the labors of authors[,]'" and to motivate authors and inventors by giving them a reward.[26] The

23. *Id.* § 107; *accord* Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 522 (7th Cir. 2002) (recognizing the statutorily-created exceptions regarding fair use of copyrighted material).

24. U.S. CONST. art. I, § 8, cl. 8; *accord* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1270 (1992) ("The United States Constitution provides for copyright protection.").

25. U.S. CONST. art. I, § 8, cl. 8; *see also* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1270 (1992) (quoting the relevant constitutional authority); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 216 (2005) (stating the protections granted to copyrighted works and noting that any state law conflicting with the constitutional protections is invalid).

26. N.Y. Times Co. v. Tasini, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2000 ed.)); *accord* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (noting that copyright protections are intended to motivate creative minds to produce great works); Mazer v. Stein, 347 U.S. 201, 219 (1954) (discussing how the Copyright Clause encourages individuals by rewarding them through economic personal gain, which then advances the public welfare); Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003) (stating that the Copyright Act's purpose is to promote creativity, which will in turn benefit the artist and the public); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991) (holding that "sweat of the brow" from one's labor does not provide copyright protection); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 521 (2006) (discussing how Congress passed the Copyright Amendment to promote creativity and reward artists for their labor by granting them copyright ownership); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1270 (1992) (recognizing that the primary benefit of an owner obtaining his copyright is for

Copyright Act of 1790 was the first federal copyright act instituted in the United States.[27] Currently, the Copyright Act of 1976 is the most recent enactment by Congress.[28] The Act gives legal protection to the authors of original works that are "fixed in any tangible medium of expression."[29] Furthermore, the Copyright Act preempts state law, therefore, any conflicting state law is considered invalid.[30]

2. Copyright Infringement

To prove copyright infringement, the owners must show (1) ownership, (2) unauthorized copying, and (3) unlawful appropriation.[31] Ownership is the first element that copyright

economic reasons because artists are granted a limited monopoly for their work, which leads to artists continuing their creativity to create a public good); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 215 (2005) (examining the two main purposes of copyright law—to encourage people to create art for society and to protect the artist's work from theft).

27. Act of May 31, 1790, ch. 15, 1 Stat. 124.

28. Copyright Act of 1976, Pub L. No. 96-517, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1332 (2006 & Supp. III 2009)); *accord* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1271 (1992) (acknowledging the Copyright Act as the controlling law regarding copyright protection).

29. 17 U.S.C. § 102(a) (2006); *see also* 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:82 (2008) (discussing the most important aspects of the Copyright Act, such as the limited timeframe a copyright exists, the fair-use privilege, and a Copyright Royalty Tribunal). Congress enacted the first copyright act in 1790, which granted merely fourteen years of protection to authors of maps, charts, and books. 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:82 (2008). Congress passed the next copyright act in 1909. *Id.* § 1.45.

30. *See* 17 U.S.C. § 301(a) (2006) ("[N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State."); *accord* John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 216 (2005) ("[A]ny conflicting state law is invalid."); 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:82 (2008) (discussing how preemption of state law is one of the most important aspects of the Copyright Act).

31. Tuff 'N' Rumble Mgmt. Inc. v. Profile Records Inc., 42 U.S.P.Q.2d 1398, 1400 (S.D.N.Y. 1997) (citing M.H. Segan Ltd. P'ship v. Hasbro, Inc., 924 F. Supp. 512, 518 (S.D.N.Y 1996)); *accord* Jarvis v. A & M Records, 827 F. Supp. 282, 288 (D.N.J. 1993) (listing the three elements of copyright infringement); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 526–27 (2006) (addressing the elements of copyright infringement); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1272–76 (1992) (noting what a plaintiff must prove to support a claim for infringement); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How*

owners must demonstrate.[32] The initial copyright is granted to the author of the original work.[33]

The second element needed to prove infringement is unauthorized copying.[34] Copying can be illustrated by either

the Sixth Circuit Missed a Beat on Digital Music Sampling, 55 DEPAUL L. REV. 209, 217–19 (2005) (conducting an in-depth discussion of the elements of copyright infringement); *see also Kelly*, 336 F.3d at 817 (stating that the Ninth Circuit requires proof of copyright infringement by a showing that the plaintiff retains ownership of the copyright and that there was copying by the defendant).

32. Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 526 (2006); *accord* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1272 (1992) ("Ownership of the copyright is the first element of infringement that a plaintiff is required to show."); *see also* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 393 (6th Cir. 2004) (announcing that ownership of the copyright was established by the plaintiffs because there was no dispute among the parties), *amended by* 410 F.3d 792 (6th Cir. 2005); *Kelly*, 336 F.3d at 817 (conceding that the plaintiff had a prima facie case of infringement); Williams v. Broadus, 60 U.S.P.Q.2d 1051, 1051 (S.D.N.Y. 2001) (denying a claim for infringement because the plaintiffs had no valid copyright); *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1399 (indicating that 17 U.S.C. § 410(c) provides prima facie evidence of a valid copyright if registration occurs within five years of first publication); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 217–18 (2005) (addressing how copyright registration may constitute prima facie evidence of ownership of a valid copyright).

33. *See* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 526 (2006) (noting that copyrights are granted to the original composers of a work and that derivative works are not protected under the original copyright); *cf.* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1272 (1992) (explaining that "authors of a sound recording often include the performer, engineer, and producer"); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 217 (2005) (recognizing that sound recording copyright owners have limited copyright protections compared to the those who composed the work). *But see Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1399–1400 (explaining that although Roy C. Hammond was listed as the original author of the work, the party failed to produce evidence that established Hammond maintained any copyright interest).

34. *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1400; *accord* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 526 (2006) (listing the elements of copyright infringement); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1273 (1992) (noting that a party must show unauthorized copying to succeed in an infringement claim); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 217 (2005) (recognizing that a party must show "proof of copying" in an infringement claim).

direct or indirect proof.[35] Direct proof is evidenced when a defendant admits to copying the work or through eyewitness testimony that the defendant copied the work.[36] Direct admission is not common in copyright infringement cases; therefore, the plaintiff usually must show indirect proof.[37] Indirect proof of copying is established through circumstantial evidence showing the defendant had access to the plaintiff's work,[38] the work was readily accessible to certain groups of people or the general public,[39] or that there is a sufficient similarity between the two

35. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *Jarvis*, 827 F. Supp. at 289; *accord* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 526 (2006) (stating that a party must either show direct evidence of copying or provide evidence supporting an inference of copying); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1273 (1992) ("Copying can be proven either directly or indirectly." (citing WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 191 (6th ed. 1986))); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 218 (2005) (holding that copying can be proven through admission or by showing that the infringing party had access to the work sufficient to support an inference of copying); *see also Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1401 (denying plaintiff the inference of copying where the party could not show that the defendant had sufficient access to the work).

36. Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 526–27 (2006); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1273 (1992); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 218 (2005); *cf. Kelly*, 336 F.3d at 817 (stating the defendant conceded that the plaintiff established a prima facie case of infringement); *Williams*, 60 U.S.P.Q.2d at 1051 (revealing defendants admitted to using part of the plaintiffs' song); Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (providing an example of how courts have found direct admission of unauthorized copying).

37. John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 218 (2005).

38. *Id.*; *accord* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1273 (1992) (recognizing that access to an author's work could suffice as indirect proof of infringement).

39. *See Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1402 (asserting that indirect proof may be established by showing widespread access to the work); *see also* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976) (noting that under copyright laws, indirect proof of copying could be shown where a widely disseminated song was virtually identical to a song recorded by the infringing party even if the copying was done subconsciously), *aff'd sub nom.* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983).

works.[40] Proving access to the plaintiff's work may involve establishing that the defendant viewed the work or had knowledge of the work.[41] If similarities and evidence of access are apparent when comparing the two works, those factors may be sufficient for the court or jury to conclude that there was copying.[42]

The third and last element of copyright infringement is unlawful appropriation or misappropriation.[43] Misappropriation is shown by establishing substantial similarity between two works.[44] There are several tests used among federal circuit courts to establish substantial similarity, which include, but are not limited to, the average-lay-observer test,[45] the recognizability test,[46] and the fragmented-literal-similarity analysis.[47] Unlawful appropriation

40. *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1401.

41. *See* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) (discussing that a widely disseminated work may support a claim of access) (citing *ABKCO Music*, 722 F.2d at 998); *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1402 ("As proof of access, a plaintiff may show that '(1) the infringed work has been widely disseminated or (2) a particular chain of events exists by which the defendant might have gained access to the work'" (quoting Favia v. Lyons P'ship, No. 94 CIV. 3277 (SS), 1996 WL 194306, at *3 (S.D.N.Y. Apr. 23, 1996))); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 218 (2005) (noting that access to a work may be used as indirect evidence of copying).

42. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1401.

43. Williams v. Broadus, 60 U.S.P.Q.2d 1051, 1053 (S.D.N.Y. 2001); *e.g.*, *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1402 (reiterating that absent a showing of improper appropriation, the plaintiff could not sustain a claim of infringement even if copying were proven).

44. *Williams*, 60 U.S.P.Q.2d at 1053; *Tuff 'N' Rumble Mgmt.* 42 U.S.P.Q.2d at 1402; *accord* Newton v. Diamond, 349 F.3d 591, 594 (9th Cir. 2003) ("For an unauthorized use of a copyrighted work to be actionable, there must be substantial similarity between the plaintiff's and the defendants' works."), *amended by* 388 F.3d 1189 (9th Cir. 2004); *see, e.g.*, *Bright Tunes Music*, 420 F. Supp. at 180–81 (finding that although the defendant did not intend to copy the original work, a substantial similarity existed nonetheless, which supported a finding of infringement).

45. *See Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1402 ("The test for determining whether substantial similarity is present is 'whether an *average lay observer* would recognize the alleged copy as having been appropriated from the copyrighted work.'" (emphasis added) (quoting Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 44, 51 (2d Cir. 1966))).

46. Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1276 (1992). The recognizability test asks whether an author's work is recognizable in any way to the copyrighted work. *Id.*

47. *Id.* at 1275; John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 219 (2005). Fragmented literal similarity denotes the copying of portions of a work rather that the entire work. Mary B. Percifull, Note, *Digital Sampling:*

lies at the heart of proving copyright infringement.[48] To prove unlawful appropriation, the plaintiff must demonstrate that defendant's use of his work was substantial and material.[49] To determine whether there is unlawful use of the plaintiff's work, courts typically utilize the "substantial-similarity" standard.[50] Under this standard, courts will determine whether a lay observer could recognize the plaintiff's original within the defendant's work.[51] If a fact finder determines that the copying is substantial

Creative or Just Plain "Cheez-Oid?", 42 CASE W. RES. L. REV. 1263, 1275 (1992).

48. Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 527 (2006); *see also* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1274 (1992) (recognizing that a plaintiff must show impermissible use through unlawful appropriation to support a copyright infringement claim); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 217 (2005) (listing unlawful appropriation as an essential element in proving infringement).

49. *See Newton*, 388 F.3d at 1192–93 (requiring that copying be substantial in order for a plaintiff to support an infringement action); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1274 (1992) (echoing that unlawful appropriation requires that a copy be substantially and materially similar in its use); *see also Williams*, 60 U.S.P.Q.2d at 1054 (ruling in favor of the defendant where a "reasonable finder of fact" could determine that the copying was not substantial and material); *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1401–02 (holding that although defendant's work was similar to the plaintiff's, the similarity was not so material as to be considered unlawful appropriation).

50. Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1274 (1992); *accord* Funky Films, Inc. v. Time Warner Entm't Co., 462 F.3d 1072, 1076 (9th Cir. 2006) ("Absent evidence of direct copying, 'proof of infringement involves fact-based showings that the defendant had access to the plaintiff's work and that the two works are substantially similar.'" (quoting Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000)) (internal quotation marks omitted)). The substantial-similarity standard looks at the work as a whole and asks whether unlawful appropriation exists, rather than focusing on individual portions. *See* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 527 (2006) (discussing how substantial similarity examines the "'total concept and feel' of the disputed works" (citing Newton v. Diamond, 349 F.3d 591, 594 (9th Cir. 2003); *Williams*, 60 U.S.P.Q.2d at 1054; *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1401; Jarvis v. A & M Records, 827 F. Supp. 282, 289 (D.N.J. 1993))). *But see* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 397–99 (6th Cir. 2004) (determining that use of the substantial-similarity test was not required since the owner of the sound recording had the exclusive right to sample his own recording).

51. *Tuff 'N' Rumble Mgmt.*, 42 U.S.P.Q.2d at 1401; *see Newton*, 388 F.3d at 1193 (concluding that no substantial similarity existed where "the average audience would not recognize the appropriation" (quoting Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986))); *see also Williams*, 60 U.S.P.Q.2d at 1053 (noting that no substantial similarity

and material, the defendant's work may infringe upon another's copyright.[52] If the defendant's work is not found to be substantial and material under the substantial-similarity standard, then the defendant's use is *de minimis*.[53] When copying qualifies as *de minimis*, the copied portion of the original work is considered too small and immaterial for the law to recognize a legal remedy.[54]

exists if an average listener would not recognize similarities between two works (citing Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 139 (2d Cir. 1998))); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 528 (2006) (indicating that the substantial-similarity standard is determined by looking at the work "from the perspective of the average lay audience") (citations omitted); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1274 (1992) ("Substantial similarity has traditionally been determined by using the impressions of the 'lay listener.'" (citing Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946))); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 219 (2005) (referring to the average listener test as the "ordinary observer test").

52. Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 528 (2006); *accord Diamond*, 349 F.3d at 594 (pointing out that legal consequences will not follow unless the work is substantially copied), *amended by* 388 F.3d 1189.

53. Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 528 (2006). The term *de minimis* has been used to exemplify injuries that are not sufficient to allow the law to provide a remedy. *See* Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997) (defining *de minimis* as a "technical violation of a right so trivial that the law will not impose legal consequences"); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 218–19 (2005) (describing *de minimis* as "copying so trivial that it does not gain copyright protection" (citing Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the* De Minimis *Defense?*, 1 J. HIGH TECH. L. 179, 189 (2002))); *see also Newton*, 388 F.3d at 1189 (defining the legal term, *de minimis non curat lex* to mean that "the law does not concern itself with trifles" (citing *Ringgold*, 126 F.3d at 74–75) (internal quotation marks omitted)); Bridgeport Music, Inc. v. Dimension Films LLC, 230 F. Supp. 2d 830, 841 (M.D. Tenn. 2002) (6th Cir. 2004) (recognizing that the *de minimis* copying of a work is allowable), *rev'd on other grounds*, 383 F.3d 390 (6th Cir. 2004).

54. *See* Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 528 (2006) (indicating that copied material "too meager" for an average person to notice may be *de minimis*); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1281 (1992) (identifying small, trivial changes as possibly *de minimis*). There is no bright-line rule controlling whether copying is *de minimis*; the determination must be done on a case-by-case basis. Sandoval v. New Line Cinema Corp., 147 F.3d 215,

However, pleading *de minimis* use is only one way to avoid copyright infringement.[55] Another common method used to avoid copyright infringement is the fair-use defense.

C. *Doctrine of Fair Use with Regard to Appropriation Art*

Now that the terms original work, appropriation art, derivative work, copied work, and copyright infringement have been discussed, there are two aspects of the doctrine of fair use that should be examined. The doctrine is a statutorily recognized defense to copyright infringement; it uses a number of factors that are applied to a set of facts to determine whether the copying of a work qualifies as fair use.[56] The initial inquiry regarding a fair-use determination measures the "purpose and character of the use."[57] Courts have recognized two factors that are necessary to measure purpose and character: "(1) the degree to which the challenged use has transformed the original; and (2) the profit or nonprofit character of the use."[58] These factors consider, "in other words, whether and to what extent the challenged work is transformative" and whether the transformed work is used for commercial value.[59]

Therefore, if a piece of appropriation art fulfills the two conditions of the fair-use defense, copyright infringement may not be held against the appropriation artist because the use may qualify as fair.[60] Thus, fair use protects appropriation artists from copyright infringement if they properly use elements of a prior work to create a truly unique work.

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217 (2d Cir. 1998).

55. *See Sandoval*, 147 F.3d at 217 (recognizing that in addition to pleading *de minimis*, a defendant may also establish the fair-use defense).

56. 17 U.S.C. § 107 (2006).

57. *Id.* § 107(1).

58. Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 788 (N.D. Ill. 1998).

59. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1997)). Courts have recognized transformative works are often used for educational or artistic purposes, whereas a work that lacks transformative value often only furthers commercial gain and is likely to be an infringement. *Id.* (quoting *Campbell*, 510 U.S. at 579).

60. *See* Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 540 (S.D.N.Y. 2008) (describing the transformative test as "[m]ost critical"); Jeannine M. Marques, Note, *Fair Use in the 21st Century:* Bill Graham *and* Blanch v. Koons, 22 BERKELEY TECH. L.J. 331, 347 (2007) ("[T]he transformative inquiry dominates the fair[-]use analysis.").

1. Transformative Use

The first aspect to consider in the analysis of fair use centers on whether the new work merely "'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[61] Works that qualify as transformative are more likely to promote and further the original purpose of copyright, whereas works that simply mimic the original often do not qualify as transformative use and more likely to be ruled an infringement.[62] Though transformative value is not essential for fair use, if a work is considered transformative, the other statutory factors may be less significant when determining whether a fair use exists.[63]

The transformative inquiry can be reformed to include: (1) creative works beyond the enumerated examples; (2) expressive purpose beyond mere functional purpose; (3) the sufficiency of minimal aesthetic changes; and (4) less weight accorded to market harm after establishment of transformation.[64] This proposed reformation will be demonstrated later when discussing *Bill Graham Archives v. Dorling Kindersley Ltd.*[65]

2. Commercial Use

The other aspect to consider in determining whether fair use exists is "whether [an artist's use of another's work] is of a commercial nature or is for nonprofit educational purposes."[66] In fair-use analysis, the critical question is "whether the [artist] stands to profit from [the] exploitation" of another's work.[67]

61. *Campbell*, 510 U.S. at 579 (1994) (citations omitted) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841) (No. 4,901)).

62. *Id.*; *Storm Impact,* 13 F. Supp. 2d at 788; *see* U.S. CONST. art. I, § 8, cl. 8 (declaring that the purpose of copyright is "[t]o promote the Progress of Science and useful Arts").

63. *Storm Impact*, 13 F. Supp. 2d at 788 (citing *Campbell*, 510 U.S. at 579).

64. Jeannine M. Marques, Note, *Fair Use in the 21st Century:* Bill Graham *and* Blanch v. Koons, 22 BERKELEY TECH. L.J. 331, 347 (2007).

65. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006); *see infra* Part IV.A.3 (describing the *Bill Graham* case).

66. Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 496 (1984) (quoting 17 U.S.C. § 107(1) (2006) (internal quotation marks omitted)); Davis v. Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001) (quoting 17 U.S.C. § 107(1)) (internal quotation marks omitted).

67. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

In the Copyright Act of 1976,[68] the "purpose and character" fair-use factor asks whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer.[69] Although commercial gain and fair use are not mutually exclusive, a court may ascertain which of these was the artist's primary objective.[70] "Knowing exploitation of a copyrighted work for personal gain militates against a finding of fair use."[71]

Copies made for commercial or profit-making purposes are presumptively unfair.[72] "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain[,] but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[73]

D. *The Fair-Use Breakdown*

This section will conduct a more in-depth examination of the four fair-use doctrine factors. An explanation will be given for each fair-use factor and how that particular part pertains to copyright infringement. The fair-use defense may be used in an action for copyright infringement.[74] One of the first significant copyright infringement cases in the United States was *Folsom v. Marsh*[75] in 1841.[76] In *Folsom*, the court held that a concern of copyright infringement is the "degree [that] the [defendant's] use may prejudice the sale, or diminish the profits, or supersede the

68. 17 U.S.C. § 107.

69. *See generally id.* § 107(1) (factoring whether a work was used in "a commercial nature" or "for nonprofit educational purposes" to determine purpose and character).

70. MCA, Inc. v. Wilson, 677 F.2d 180, 181 (2d Cir. 1981).

71. Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992).

72. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984).

73. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (citing Roy Export Co. Establishment v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980)).

74. 17 U.S.C. §§ 106, 107 (2006); *accord* Kelly v. Arriba Soft Corp., 336 F.3d 811, 817 (9th Cir. 2003) (recognizing that copyright infringement can be rebutted by invoking the fair-use exception).

75. Folsom v. Marsh, 9 F. Cas. 342 (D. Mass. 1841) (No. 4,901).

76. This case dealt with whether the use of letters written by President Washington constituted piracy. *Id.* at 345. Of the 866 pages of the defendant's book, 353 were identical to the plaintiff's book. *Id.* Plaintiff acquired an interest in President Washington's letters, and it was held that the plaintiff owned these letters along with the exclusive copyright and that the defendant infringed upon these rights. *Id.* at 345, 356.

objects, of the [plaintiff's] original work."[75] *Folsom* also held that copyright infringement is determined by "look[ing] to the nature and objects of the selections made, [along with] the quantity and value of the materials used."[77] Later, the *Folsom* holding was codified in § 107 of the Copyright Act of 1976.[78] Today, § 107 is known as the doctrine of fair use.[79] The doctrine provides that the use of an original work "for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research" does not infringe upon a copyright.[80] Determining whether a work qualifies as fair use hinges upon the consideration of four factors.[81] These four factors include:

> (1) [T]he 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 copyright work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[82]

75. *Id.* at 348.

77. *Id.*

78. Copyright Act of 1976, Pub L. No. 96-517, § 107, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 107); *see also* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1278 (1992) (announcing that the common law fair-use defense is codified in the Copyright Act).

79. 17 U.S.C. § 107.

80. *Id.*; *see* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1278 (1992) (discussing how Congress's use of the words "such as" signals that the statute's list is non-exclusive).

81. 17 U.S.C. § 107(1)–(4); *accord* Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?"*, 42 CASE W. RES. L. REV. 1263, 1278 (1992) (listing the factors stated in the statute); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 220 (2005) (providing the statutory factors used in determining fair use). Courts implement these factors by determining whether each subsection is supported negatively or positively by the facts; after weighing each factor, the court makes a determination regarding fair use. *E.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003) (ruling that two factors weighed positively in favor of fair use, one factor was not applicable, and one factor weighed against a holding of fair use and determining that the fair-use defense was applicable).

82. 17 U.S.C. § 107(1)–(4). The four factors have been recognized as "direct[ing] attention to a different facet of the problem" of determining whether fair use exists. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

The fair-use doctrine will only be applied after the court has found copyright infringement.[83] Therefore, the *de minimis* analysis used in an infringement case is separate from the fair-use exception because *de minimis* use is found when two works are not considered substantially similar.[84]

The fair-use doctrine permits parties to use copyrighted material, without the owner's consent, in a reasonable manner for certain purposes.[85] The doctrine is important because it helps to determine whether a copied work is done legally or not through the use of four different factors.[86]

The use of a copyrighted work will not generally be considered reasonable if the work "extensively copies or paraphrases the original or bodily appropriates the research upon which the

83. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (holding that the fair-use defense allows a party to infringe upon another's protected creation if punishing the infringement "would stifle the very creativity [that copyright law] is designed to foster" (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)) (internal quotation marks omitted)); *Kelly*, 336 F.3d at 817 (noting that the doctrine of fair use is a statutory exception to copyright infringement that may be pleaded after a plaintiff establishes a prima facie case of infringement); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 220 (2005) (stating that courts will only implement fair-use analysis after determining that the works are substantially similar); *see also* Fisher v. Dees, 794 F.2d 432, 440 (9th Cir. 1986) (holding that the works were substantially similar but that, as a matter of law, the parodic use of the work constituted fair use); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J., 515, 528 (2006) (opining about instances of parodies in disputes that have brought out the fair-use defense).

84. John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 220 (2005); *see, e.g.*, Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 77 (2d Cir. 1997) (showing that once the *de minimis* threshold has been crossed, the defendant's next possible defense is fair use).

85. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (quoting HORACE G. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)) (recognizing that the fair-use defense traditionally allowed a party the ability to use copyrighted material without the copyright owner's consent in certain situations).

86. *See* 17 U.S.C. § 107 (providing the four factors for determining whether use of a work constitutes fair use); Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417, 432–33 (1984) (stating that copyright owners are not given exclusive control over their work and that parties "may reproduce a copyrighted work for a 'fair use'" without fear of infringement). The doctrine of fair use has always been respected as a legal defense to infringement because it protected actions thought to further the purpose of copyright. *See Campbell*, 510 U.S. at 575 ("From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose.").

original was based."[87] However, under the Copyright Act,[88] fair use prevents copyright owners from restricting distribution of their copyrighted works to the public.[89] To determine whether a use is fair, courts evaluate and apply the aforementioned four statutorily created factors; further, the court will determine whether each factor supports the claim based on the facts at hand.[90] These four factors, however, are not exhaustive in determining fair use.[91]

87. MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981); *accord* Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966) (holding that it would not be reasonable under the fair-use defense for a party to "utilize the fruits of another's labor" without using independent effort); *see also* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757–58 (9th Cir. 1978) (determining that by copying the plaintiff's images in their entirety, defendants took more than was necessary to place firmly in the reader's mind the parodied work and the specific attributes that were to be satirized). The court held that because the amount of the defendants' copying exceeded permissible levels, summary judgment was proper as to the copyright infringement claims. *Id.* at 758.

88. 17 U.S.C. § 107.

89. *See id.* (providing that fair use of a work does not constitute copyright infringement in certain situations).

90. *See id.* (listing the four factors that courts will use to determine fair use); Davis v. Gap, Inc., 246 F.3d 152, 173–75 (2d Cir. 2001) (reviewing the defendant's claim and applying the four factors to make the determination); *MCA,* 677 F.2d at 182 (recognizing that because a definition of "reasonable and fair" is not provided by statute, courts must weigh the criteria provided and decide whether the fair-use defense is supported); *see also* Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) (applying the four factors to an investigation of copyright infringement involving a book about the Rosenberg trial); Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113, 1123–24 (D. Nev. 1999) (utilizing the four factors to determine whether a computerized precursor image of Las Vegas constituted infringement); Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 787–90 (N.D. Ill. 1998) (noting that the four factors should be weighed against the facts "on a case-by-case basis" (citing *Campbell*, 510 U.S. at 577–78)); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 924 F. Supp. 1559, 1566 (S.D. Cal. 1996) (regarding the four factors as a "careful balancing" test that is "fact intensive"); Horn Abbot Ltd. v. Sarsaparilla Ltd., 601 F. Supp. 360, 368 (N.D. Ill. 1984) (ruling that the impact upon the potential market factor weighed very negatively against defendant's use); Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351, 358 (N.D. Ga. 1979) (stating that certain factors may be "more significant" than others depending on the nature of the claim and the infringed work); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111–25 (1990) (commenting on how the more copyrighted matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification, must favor the secondary user in order to support a fair-use holding).

91. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) ("The factors enumerated in [the Copyright Act] are not meant to be exclusive . . . ."); *accord* 17 U.S.C. § 107 (requiring only that the four factors be included in a fair-use analysis and not incorporating limiting language); *cf.* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1125 (1990) (suggesting that the language of the Copyright Act allows for additional factors to be considered).

1. Purpose and Character

The first factor in the fair-use analysis deals with the "purpose and character of the use" in question.[92] One necessary consideration when analyzing purpose and character considers whether the work has a commercial purpose or a nonprofit motive.[93]

a. Commercial Value

The fair-use doctrine employs the "purpose and character" factor to determine whether the original was copied in an attempt to further the public good or merely to further the private interests of the infringer at the expense of the copyright owner.[94] The Copyright Act directs courts, when weighing the "purpose and character" factor, to focus on whether the work is "of a commercial nature or is for nonprofit educational purposes."[95]

In fair-use analysis, "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain[,] but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[96] While a party's commercial use of a work does not always negate fair use, the party's use of that work for private gain, as opposed to public good, is nonetheless a factor to be considered.[97] Thus, an

92. 17 U.S.C. § 107(1); *accord Campbell*, 510 U.S. at 577 (stating the first factor used to determine fair use).

93. 17 U.S.C. § 107(1); *Campbell*, 510 U.S. at 578; *accord Storm Impact,* 13 F. Supp. 2d at 786 (noting that the "the other element" of the purpose and character factor involves determining whether the infringing party sought to profit from the work being infringed).

94. Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992); *accord MCA,* 677 F.2d at 182 (recognizing that although a finding of commercial interest does not negate the fair-use defense, if a party copies for private rather than public gain there is no fair use).

95. 17 U.S.C. § 107(1); *accord Davis*, 246 F.3d at 174 (restating the requirement specified in the second clause of the "purpose and character" factor). The *Davis* court cautioned, however, that giving too much weight to whether the infringer sought profit was not in line with the Supreme Court's interpretations of the "purpose and character" factor. *Davis*, 246 F.3d at 174.

96. *Harper & Row, Publishers,* 471 U.S. at 562 (1985). *Davis* recognized that courts had given "dispositive weight" to dicta from prior Supreme Court holdings, and as a result, the monetary gain recognized by the infringer was often overstated. *Davis*, 246 F.3d at 167 (citing *Campbell*, 510 U.S. at 584). In fact, the Supreme Court has recognized that "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness." *Campbell*, 510 U.S. at 584.

97. *MCA*, 677 F.2d at 182; *accord Davis*, 246 F.3d at 174–75 (noting that although the majority of allowable uses specified in the Copyright Act are performed for profit,

alleged infringer cannot profit by exploiting another party's protected work without compensating the owner of the copyright for that privilege.[98]

b. Transformative Work

A stronger consideration for determining a work's nature and purpose asks whether the accused's work has transformed the original into something new.[99] A transformative work does not merely imitate the original creation; instead, the work must portray the creation in a different character, or add something new to further the author's purpose all while injecting the first work "with new expression, meaning, or message."[100] Though courts recognize that the transformative test is critical when analyzing fair use, the lack of transformative use does not bar a determination of fair use in all circumstances.[101] Indeed, the goal of copyright is to

commercial purpose is nevertheless a factor that should be considered in fair-use analysis); Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) (determining that although a profit-seeking motive does not always disqualify a party from pleading fair use, whether a work was used "predominantly for commercial exploitation" is relevant to determine whether the defense applies); *see, e.g.*, Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 307–09 (2d Cir. 1966) (stating that information used in a biography of Howard Hughes constituted a fair use as it served a "considerable public interest" and outweighed the commercial nature of the use).

98. *Rogers*, 960 F.2d at 309 (quoting *Harper & Row, Publishers,* 471 U.S. at 562).

99. Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782 (N.D. Ill. 1998) ("[T]he more transformative the new work, the less will be the significance of other factors which may weigh against a finding of fair use." (citing *Campbell*, 510 U.S. at 579); *accord Campbell*, 510 U.S. at 579 (acknowledging that the transformative test "lies at the heart of the fair[-]use doctrine").

100. *Campbell*, 510 U.S. at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)); Blanch v. Koons, 467 F.3d 244, 251–52 (2d Cir. 2006) (affirming there is no infringement where an appropriation of the copyrighted material "adds value to the original" for the betterment of society (quoting Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998)) (internal quotation marks omitted)); *accord Davis*, 246 F.3d at 174 (refusing to recognize transformation where a work was portrayed in the same manner as the original without adding more); *see also* Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 447–51 (2008) (suggesting that the best way to determine whether the new work is transformative would be to examine evidence from the view point of the reader); Matt Williams, *Recent Second Circuit Opinions Indicate that Google's Library Project Is Not Transformative*, 25 CARDOZO ARTS & ENT. L.J. 303, 314 (2007) (discussing the Supreme Court's articulation of the transformative standard).

101. *Campbell*, 510 U.S. at 579 (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984)); *accord* Matt Williams, *Recent Second Circuit Opinions Indicate that Google's Library Project Is Not Transformative*, 25 CARDOZO

promote science and the arts and is generally furthered by the creation of transformative works.[102] To that end, works that merely copy the original are less likely to further the purpose of copyright protection and will likely constitute infringement.[103]

Transformation, therefore, is indicative of fair use.[104] Consequently, the definition of a transformative inquiry can be expanded by "(1) defining transformative purpose beyond . . . examples to include creative works[;] (2) considering a secondary work's expressive purpose not just its functional purpose[;] (3) considering minimal aesthetic changes as sufficient for transformation[;] and (4) deemphasizing any market harm once transformation is found."[105] Basically, transforming a work

ARTS & ENT. L.J. 303, 318–19 (2007) ("[T]he Supreme Court stated that 'transformative use is not absolutely necessary for a finding of fair use'" (quoting *Campbell*, 510 U.S. at 579).

102. *Campbell*, 510 U.S. at 579; *Davis*, 246 F.3d at 167; *see also* Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 451, 466 (2008) (stating that the transformative test was derived from an article authored by Judge Pierre N. Leval, who asked whether a copied work was created in a way that would further the purpose of copyright protection, which is to promote science and the arts).

103. *Campbell*, 510 U.S. at 579 ("[T]he more transformative the new work, the less significance that will be put on the other factors, like commercialism, that may weigh against a finding of fair use.").

104. *See Blanch*, 467 F.3d at 251 (recognizing that transformation lies at "[t]he heart of the fair[-]use inquiry" (quoting *Davis*, 246 F.3d at 174)); Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 540 (S.D.N.Y. 2008) (describing the transformative test as "[m]ost critical"); Jeannine M. Marques, Note, *Fair Use in the 21st Century:* Bill Graham *and* Blanch v. Koons, 22 BERKELEY TECH. L.J. 331, 347 (2007) (noting that "the transformative inquiry dominates the fair[-]use analysis").

105. Jeannine M. Marques, Note, *Fair Use in the 21st Century*: Bill Graham *and* Blanch v. Koons, 22 BERKELEY TECH. L.J. 331, 347 (2007). In *Blanch*, Koons recontextualized the image in dispute, seeking to alter and transform Blanch's photograph in an attempt to force viewers to see the original work and its significance differently. *Blanch*, 467 F.3d at 248. Koons was using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media, rather than for purposes of making money. *See id.* (noting that Koons sought to "further his purpose of commenting on the 'commercial images . . . in our consumer culture'"); *see also* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006) (holding that the defendants' complete reproduction of seven of the plaintiff's graphic images in a biographical book constituted fair use because the images were used "as historical artifacts to document and represent . . . actual occurrence[s]"); Jeannine M. Marques, Note, *Fair Use in the 21st Century:* Bill Graham *and* Blanch v. Koons, 22 BERKELEY TECH. L.J. 331, 332 (2007) (pointing out a consistent problem in the application of the fair[-]use doctrine's balancing test when courts fail to consistently weigh the economic rights of the author against the benefit of secondary use to society as a whole); Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from*

means giving it a different meaning than the original author intended.

2. Nature of Copyrighted Work

The second fair-use factor considers whether the copyrighted work includes a creative element.[106] According to the Copyright Act, courts must examine "the nature of the copyrighted work"[107] while recognizing that some works are "closer to the core of intended copyright protection than others."[108] This means creative works have broad copyright protection as compared to factual works, which garner only limited protection.[109] Indeed, "[a] use is less likely to be deemed fair when the copyrighted work is a creative product."[110] Courts also consider whether the original work is more factual than fictional.[111] Creative and fictional works are given greater protection than factual works.[112]

Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653, 1668–69 (1995) (stating that an artist may not assert a "fair[-]use defense to protect the art work as publicly useful communication and criticism" once the "piece fails to meet the definition of a parody").

106. *See Sony Corp. of Am.*, 464 U.S. at 496–97 (expressing that under the second factor of the fair-use analysis, works that involve creativity or originality are more apt to be protected by copyright law); *Davis*, 246 F.3d at 175 (finding that plaintiff's work fell within the bounds of copyright protection for purposes of the second fair-use factor because the plaintiff's work was an artistic creation).

107. 17 U.S.C. § 107(2) (2006).

108. *Davis*, 246 F.3d at 175 (quoting *Campbell*, 510 U.S. at 586); *accord* Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 789 (N.D. Ill. 1998) (recognizing that "fair use is more difficult to establish when the work being used is [closer to] the core of intended copyright protection" (citing *Campbell*, 510 U.S. at 586). The "core" of copyright protection seems to be directed toward furthering progress in artistic and creative avenues, which, in turn, allow society to reap the benefits of that progress. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

109. *See Campbell*, 510 U.S. at 586 (allowing for greater copyright protection for works that involve "creative expression" and highlighting case law that distinguishes between creative works and those that merely involve factual compilations); *Davis*, 246 F.3d at 175 (finding that an artistic creation fell close to the copyright's protective purpose).

110. Stewart v. Abend, 495 U.S. 207, 237 (1990) (quoting Abend v. MCA, Inc., 863 F.2d 1465, 1481 (9th Cir. 1988)) (internal quotation marks omitted); *see also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (suggesting that a critical determination regarding fair-use analysis asks whether works seek to "stimulate creativity").

111. *Stewart*, 495 U.S. at 237; *accord* New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp., 904 F.2d 152, 157 (2d Cir. 1990) ("[T]he scope of fair use is greater with respect to factual than non-factual works." (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985))).

112. *Stewart*, 495 U.S. at 237; *accord Campbell*, 510 U.S. at 586 (stating that creative

3. Amount Taken

The third fair-use factor looks at the amount of the appropriated work that is substantially copied from the original.[113] Essentially, this means that the less an original work is copied, the more likely the use will be fair.[114] This can be taken as a quantitative analysis.[115] An impermissible level of copying may occur when the original is copied more than necessary.[116] Nonetheless, fragmentary copying is permissible, as it is more likely to indicate a transformative process (a positive fair-use factor) than wholesale copying, which amounts to copyright infringement.[117]

However, one should not look solely at the quantitative aspect of copying; a qualitative analysis must take place.[118] The qualitative degree of the copying is the degree to which the essence of the original is copied in relation to the whole.[119]

Regardless of whether a court is using quantitative or qualitative

works "fall[] within the core of the copyright's protective purposes," thereby making it more difficult to prove fair use in relation to creative work).

113. 17 U.S.C. § 107(3) (2006).

114. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1122 (1990); *accord Davis*, 246 F.3d at 175 (2d Cir. 2001) (recognizing that works created through fragmentary copying are often more likely to be found transformative than works that copy in entirety).

115. *New Era Publ'ns Int'l, ApS*, 904 F.2d at 158.

116. Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992); Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987); *accord New Era Publ'ns Int'l, ApS*, 904 F.2d at 158 (discussing that courts have found "use was not fair where the quoted material formed a substantial percentage of the copyrighted work" (citing *Salinger*, 811 F.2d at 98)).

117. *Davis*, 246 F.3d at 175; *see also* 17 U.S.C. § 107(3) (requiring the court to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978) (implementing a threshold determination assessing "the substantiality of copying"); Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113, 1124 (D. Nev. 1999) (ruling that the defendant could not establish fair use where defendant "scanned all or most" of the original image); Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440, 447–48 (N.D. Ill. 1991) (holding that the defendant established a fair-use defense because the use was not verbatim, but merely fragmentary).

118. Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc. 166 F.3d 65, 73 (2d Cir. 1999); *accord New Era Publ'ns Int'l, ApS*, 904 F.2d at 158 ("[The third] factor has both a quantitative and a qualitative component . . . .").

119. *See Rogers*, 960 F.2d at 308 (stressing that an the expression of an idea, and not the idea itself, determines the quantity of an original work); *Salinger*, 811 F.2d at 98–99 (expounding upon quantitative analysis by noting that the copied work pirated the "heart of the [work]" (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985)) (internal quotation marks omitted)); *see also New Era Publ'ns Int'l, ApS*, 904 F.2d at 159 (holding that the quotations in the book's text, which amounted to the bulk of the allegedly infringing passages, did not essentially copy the heart of the original works).

analysis, the key issue regarding substantiality revolves around the amount the infringing work "'copied verbatim' from the copyrighted work."[120] Essentially, this third factor examines whether the "heart" of the original work was taken.[121]

4. Effect on Potential Market

The fourth and final mandatory consideration used when conducting a fair-use analysis involves the effect of the secondary work on the potential market for the original.[122] This factor examines the market harm caused by the alleged infringer's copying.[123] One should measure harm by analyzing whether the infringer's work usurps or softens the market demand of the original.[124] While a copied work may not supplant the potential market for the original, suppressing market value may be allowed.[125] Fair use, therefore, is limited to an author's work that

120. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587–88 (1994) (supporting the idea that a work that copies an original verbatim often signifies deficiencies in other fair-use factors and will likely lack transformative value). Even where a work offers some variation to the original author's ideas, the substantiality of copying can override the fair-use support garnered by the variation. *See, e.g.*, *Salinger*, 811 F.2d at 98 (indicating that although the defendant introduced a "degree of creativity" to the copied work, the work "track[ed] the original so closely as to constitute infringement").

121. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 924 F. Supp. 1559, 1567 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997); *see* Jonathan M. Fox, Comment, *The Fair Use Commercial Parody Defense and How to Improve It*, 46 IDEA 619, 627 (2006) (discussing the Supreme Court's expansion of the "amount and substantiality" factor regarding parodies by recognizing that whether a copied work takes the "heart" of an original is not the sole question needed; rather, courts should ask whether the infringing party added something further to the work).

122. 17 U.S.C. § 107(4).

123. *See id.* (stating the court shall consider "the effect of the use upon the potential market for or value of the copyrighted work"); Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782, 789 (N.D. Ill. 1998) (claiming that the fourth fair-use factor specifically examines whether the conduct of copying, if unrestricted and widespread, would adversely affect the copyright owner's potential market (citing *Campbell*, 510 U.S. at 590)).

124. Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440, 448 (N.D. Ill. 1991).

125. *See* Davis v. Gap, Inc., 246 F.3d 152, 175 (2d Cir. 2001) (directing courts to look not to whether market value for an original was merely suppressed by a work, but rather whether the demand was supplanted by the copied work (quoting *Campbell*, 510 U.S. at 591)). Therefore, according to the court in *Davis*, determining whether the fourth factor is met requires a court to "examine the source of the harm." *Id.* The court in *Eveready Battery* recognized the necessity for this determination and went on to state:

does not materially impair the marketability of the copyrighted work.[126]

A concern exists when there is an excessively widespread dissemination of derivative works that will cause potential harm to any work's potential market.[127] Hence, "a balance must sometimes be struck between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied."[128] If the unauthorized use becomes "widespread," then a copyright owner only needs to demonstrate it would prejudice the potential market for his work.[129] Accordingly, "where the use is intended for commercial gain[,] some meaningful likelihood of future harm is presumed."[130] This presumption of harm is in harmony with the doctrine of fair use

> In assessing the economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, 'a parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically . . . .' Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original . . . but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it.

Eveready Battery, 765 F. Supp. at 448 (emphasis in original) (citations omitted) (quoting Fisher v. Dees, 794 F.2d 432, 437–38 (9th Cir. 1986)).

126. *See Campbell*, 510 U.S. at 592 (highlighting the distinction between disparagement of a work's potential market, which may still qualify as fair use, and displacement, which most likely will not be protected under fair use); *Storm Impact,* 13 F. Supp. 2d at 789 (determining that the critical question regarding the fourth factor asks whether the copied work had a "substantially adverse impact" on the market for the original work (citing *Campbell*, 510 U.S. at 590)).

127. *See Campbell*, 510 U.S. at 590 (holding that the defendants' fair-use defense to copyright infringement was impaired because they did not address the potential for their work to harm the market for derivative works that the plaintiffs had an exclusive right to prepare).

128. MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981); *accord* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973) (declaring that courts must sometimes subordinate the copyright holder's right to compensation in order to further the public good), *aff'd by an equally divided court*, 420 U.S. 376 (1975). If a court does not determine that a work was used to further the public good, then a work that diminishes the market for the original work while solely benefitting the fiscal interest of the infringing party will not be protected under fair use. *E.g.*, Publ'ns Int'l, Ltd. v. Bally Mfg. Corp., 215 U.S.P.Q. 861, 862 (N.D. Ill. 1982) (concluding that the publisher stole the cover of the copyright holder's arcade game; because illustrations on the covers of one of the publisher's books were non-educational and were only meant to lure buyers, they infringed the copyright, and the fair-use exception did not apply).

129. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

130. Rogers v. Koons, 960 F.2d 301, 312 (2d Cir. 1992).

and copyright protection's core principles: to ensure original creators are encouraged to continue in their creative ventures and to allow the public to benefit from works that further science and the arts.[131]

III. ANALYSIS

A. *Appropriation Art: Fair Use or Unauthorized Derivative?*

Once a court determines that a work is appropriation art, it constitutes a transformative work, and it is intended for nonprofit use or ancillary commercial gain, the question then becomes, When does appropriation art become a fair use of a copyrighted work through transformation and at what point should a court find copyright infringement through unauthorized derivative use?[132]

Key examples of appropriation art dealing with alleged copyright infringement involve famous appropriation artist Jeff Koons. Two cases in particular address some of the concerns that arise in determining whether appropriation art qualifies as fair use. These two cases dealt with similar facts, yet reached different results regarding infringement.

In the first case, *Rogers v. Koons*,[133] Koons instructed artisans to copy and sculpt Rogers's copyrighted notecard portrayal of a couple and their puppies.[134] Koons tore the copyright notice off

131. *See Sony Corp. of Am.*, 464 U.S. at 449–50 (stating that copyright's purpose is to "create incentives for creative effort" yet recognizing that a use that does not affect the market for the original work does not dampen this incentive; therefore, a work that is intended for commercial gain is presumed harmful because this use would seem to deprive a copyright owner of the fruits of the protection that Congress intended).

132. As discussed above, transformative use typically requires that a work "add[] something new [to a copied work], with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)). A derivative work is defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, collage, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (2006). "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.'" *Id.* "A derivative work thus must either be in one of the forms named or be 'recast, transformed, or adapted.'" Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 520 (7th Cir. 2002) (quoting Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997)).

133. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

134. *Id.* at 305.

the notecard before sending the card to the artisans.[135] The court held the copies were made primarily for Koons's commercial benefit and would damage the market of the copyrighted photograph.[136] The court granted summary judgment against Koons for copyright infringement because the blatant copying of Rogers's photographic work was for Koons's profit rather than for a criticism, parody, or other fair use.[137]

Koons's copying of Rogers's copyrighted photograph was not considered fair use because:

> [C]opying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use.[138]

Therefore, the copying of Rogers's work was not considered fair use because Koons copied the expression of the copyrighted photograph, not the idea of the photograph.[139]

In determining whether the two pieces of art are substantially similar or whether copying has occurred, the focus must be on the similarity of the *expression* of an idea or fact, not on the similarity of the facts, ideas, or concepts themselves.[140] Koons's expression was copied verbatim from the expression that Rogers copyrighted in his photograph.[141] If Koons's art had changed the idea of Rogers's similar piece, then the fair-use defense would have applied.[142] Copyright protection from infringement is afforded only "to the expression of the idea—not the idea itself."[143]

The distinction between idea and expression has led one court to comment that "the 'marketplace of ideas' is not limited by copyright because copyright is limited to protection of

135. *Id.*

136. *Id.* at 312.

137. *Id.* at 307.

138. Ty, Inc. v. Publ'ns Int'l, 292 F.3d 512, 517 (7th Cir. 2002) (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[B][1] (rev. ed. 2000)).

139. *See Rogers*, 960 F.2d at 307 (holding that Koons's copying usurped "the very details of the photograph that embodied plaintiff's original contribution").

140. Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 912 (2d Cir. 1980).

141. *Rogers*, 960 F.2d at 308.

142. *See id.* (recognizing that Koons's incorporation of the original work's essence prevented his fair-use defense).

143. Mazer v. Stein, 347 U.S. 201, 217 (1954).

expression."[144] Koons chose to disregard the copyright by tearing off the notice before having the sculptors create the piece of art.[145] As previously stated, appropriation art creates new works by taking images from various sources found throughout the media, society, and elsewhere.[146] Koons did not transform the already-existing piece of art into a new piece of art but rather just copied the copyrighted work exactly as it was expressed.[147] Because Koons chose not to follow accepted appropriation art principles, he could not use the fair-use defense to protect his art from claims of copyright infringement.[148]

In the other well-known incident involving Koons's art, the court ruled that Koons's re-creation of a copyrighted work qualified as fair use. In *Blanch v. Koons*,[149] the court of appeals affirmed the trial court's determination that Koons's painting, *Niagara*, did not infringe upon Blanch's copyrighted photograph, *Silk Sandals*, because Koons's incorporation of the photograph in a collage painting constituted fair use under the Copyright Act of 1976.[150] Koons intended his appropriation of the photograph to be transformative because the exhibition of the painting could not fairly be described as commercial exploitation and Koons had injected originality into the work.[151] Koons altered the borrowed work "with new expression, meaning, or message."[152] Compared to Blanch's original photograph, Koons completely inverted the legs' orientation, painting them to surreally dangle or float over the other elements of the painting.[153] Koons also changed the coloring and added a heel to one of the feet, which had been

144. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1170 (9th Cir. 1977), *superseded on other grounds by* 17 U.S.C. § 504(b) (2006).

145. *Rogers*, 960 F.2d at 305.

146. William F. Patry, *Appropriation Art and Copies*, PATRY COPYRIGHT BLOG (Oct. 20, 2005, 10:22 AM), http://williampatry.blogspot.com/2005/10/appropriation-art-and-copies.html.

147. *Rogers*, 960 F.2d at 311.

148. *See id.* ("Koons went well beyond the factual subject matter of the photograph to incorporate the very expression of the work created by Rogers.").

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

150. *Id.* at 249.

151. *See id.* at 252–53 (identifying Koons's attempt to use the work to further a different purpose and noting that the work's overall objective was to comment upon consequences of the mass media).

152. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)) (internal quotation marks omitted).

153. *Id.* at 248.

completely obscured in Blanch's photograph.[154]

By recontextualizing the image, Koons had, in fact, altered and transformed it in an attempt to force viewers to see the original work and its significance differently.[155] The doctrine of fair use, therefore, could properly be executed because Koons's use of Blanch's photograph transformed the expression of the art. Koons's purposes for using Blanch's image were sharply different from Blanch's goals in creating the piece of art.[156] Koons's intentions confirm the transformative nature of his use.[157] Koons was "using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media," rather than for purposes of making money.[158]

The test to determine if *Niagara*'s use (Koons's work) of *Silk Sandals* (Blanch's image) was transformative was whether it "merely supersede[d] the objects of the original creation, or instead add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[159] Koons changed the size, colors, details and background of Blanch's piece of art.[160] Koons's art also had an entirely different purpose and meaning compared to Blanch's art.[161] Therefore, the work was considered transformative. The purpose of Blanch's photograph changed from an advertisement to a comment on society when Koons transformed the picture into appropriation art.[162] Because Koons altered the meaning, purpose, and expression of the copyrighted photograph, he was

154. *Id.*

155. *See Campbell*, 510 U.S. at 579 (citations omitted) (requiring that a copied work add or alter some additional element or expression to be found transformative (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841) (No. 4,901))); *Blanch*, 467 F.3d at 248 ("[Koons] considered this typicality to further his purpose of commenting on the 'commercial images . . . in our consumer culture.'").

156. *See Blanch*, 467 F.3d at 248 (noting Blanch's original photograph was used in an ad featured in a magazine and Koons's purpose in copying the image was to "comment[] on the 'commercial images . . . in our consumer culture'").

157. *See id.* at 247, 256 (determining that Koons's intention was to alter social perceptions concerning the mass media).

158. *Id.* at 253.

159. Davis v. Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001) (quoting *Campbell*, 510 U.S. at 579) (internal quotation marks omitted).

160. *Blanch*, 467 F.3d at 253.

161. *Id.*

162. *Id.* at 256.

able to successfully plead the fair-use defense.[163]

The essential purpose of a fair-use test is to require courts to "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree to which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[164] "For a fair-use analysis to be effective, courts must compare the degree of intrusion upon an artist's incentive to produce the original work with the public contribution the appropriationist work makes as criticism or comment."[165] The court gave the proper ruling for a fair-use defense in *Blanch* because Koons did not use the art for commercial revenue and because he also changed the copyrighted photograph to have a new purpose and meaning, even though there was a similarity in the idea.[166] In *Blanch*, Koons followed the standards that allowed him, as an appropriation artist, to successfully plead fair use. The same cannot be said for the circumstances in *Rogers*, where a fair-use defense was not accepted because Rogers's work was not transformed at all by Koons, and Koons's sculptures were created to generate a personal monetary gain.[167]

The more a party adds or changes an item, the more likely the secondary work is transformative because the effect on the plaintiff's market decreases and the secondary work comes closer to copyright's goals of spurring further creativity.[168] Moreover, "[a]lthough such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and

163. *Id.* at 259.

164. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841) (No. 4,901)).

165. Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653, 1677 (1995).

166. *Blanch*, 467 F.3d at 259.

167. Rogers v. Koons, 960 F.2d 301, 308, 310 (2d Cir. 1992).

168. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (stating that copyright protection will be relaxed where rigid application would "stifle the very creativity which that law was designed to foster" (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)) (internal quotation marks omitted)); Meeropol v. Nizer, 560 F.2d 1061, 1069–70 (2d Cir. 1977) (declaring that if the effect on the market of the copyrighted work is minimal, a copying artist's use will receive greater privilege); *accord* Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 (9th Cir.) (considering a work transformative where the author changes aspects of a copyrighted work so as to alter the context or expression of the work), *amended by* 508 F.3d 1146 (9th Cir. 2007).

the arts, is generally furthered by the creation of transformative works."[169] Based on these principles, *Blanch* is just an affirmation of the goal of copyrights and furthers the boundaries of appropriation art.

IV. PROPOSAL

What guidelines can be used to determine whether appropriation art is fair use or copyright infringement? Again, the goal of copyright is to promote and further the creativity of art,[170] but there have to be boundaries and limits to control appropriation artists so that they do not have the free will to copy and take whatever they want.

A. *Tests of Appropriation Art*

There are seven main tests that courts have recognized that can be applied in appropriation art cases to determine whether the use of the copyrighted work by the artist was transformative and for commercial gain. These tests help determine whether there is fair use for the appropriation art. The tests are: (1) the fragmented-literal-similarity test; (2) the abstractions test; (3) the patterns test; (4) the extrinsic–intrinsic test; (5) the total-concept-and-feel test; (6) the transformative-value test; and (7) the ordinary-observer test. Application of any of these tests would likely not change the result in either *Rogers* or *Blanch*.

1. Fragmented-Literal-Similarity Test

The fragmented-literal-similarity test for potential copyright infringement assists the court in determining "whether the similarity relates to matter that constitutes a substantial portion of [the] plaintiff's work[—]not whether such material constitutes a substantial portion of [the] defendant's work."[171] In *Rogers*, the appropriation art related exactly to Rogers's copyrighted photograph, so a court applying the fragmented-literal-similarity test would lean in favor of Rogers because Koons's work related to

169. *Campbell*, 510 U.S. at 579 (citations omitted).

170. *Id.* at 577 (citing *Stewart*, 495 U.S. at 236).

171. Arjun Gupta, Comment, *"I'll be your Mirror"—Contemporary Art and the Role of Style in Copyright Infringement Analysis*, 31 U. DAYTON L. REV. 45, 51 (2005) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(A)(2) (2004) (internal quotation marks omitted)).

a substantial portion, if not all, of Rogers's work.[172] However, in *Blanch* there was little similarity between the portions taken from each of the copyrighted works.[173] Therefore, a court applying the fragmented-literal-similarity test would rule in favor of the appropriation artist if that artist indeed used the appropriated work to create something new. If a court applied the fragmented-literal-similarity test to *Rogers* and *Blanch*, the outcome would not be any different than was ruled.

2. Abstraction Test

The abstraction test, developed by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*,[174] allows the court to compare the similarities between two works as a "series of abstractions" of increasing generality to determine whether there is copyright infringement.[175] In *Steinberg v. Columbia Pictures Industries, Inc.*,[176] the Second Circuit applied the abstraction test and concluded that the defendant's movie poster was infringing because it was substantially similar to the plaintiff's magazine cover illustration.[177] Comparing the two works, the court stated that "one can see the striking stylistic relationship between the posters, and since style is one ingredient of 'expression,' this relationship is significant."[178] The similarities between Steinberg's cover and the infringing poster included both style and subject matter, in that both works depicted cities and the surrounding earth through a "parochial" point of view.[179]

In *Rogers*, through the use of the abstraction test, the court would have determined that there was copyright infringement, just as it ruled, because the similarities between the two works would render the copyrighted photograph and appropriation art the same

172. *See Rogers*, 960 F.2d at 307 (agreeing with the trial court that Koons's copying of the "original elements of creative expression" was blatant).

173. *See* Blanch v. Koons, 467 F.3d 244, 247–48 (2d Cir. 2006) (comparing the two works and recognizing that Koons's work was intended as a commentary on consumer culture while Blanch's photograph was used for an advertisement in a magazine).

174. Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).

175. *Id.* at 121; JAY DRATLER, JR., INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY § 5.01(2)(c) (1995).

176. Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987).

177. *Id.* at 715.

178. *Id.* at 712.

179. *Id.* at 713–14.

series of abstractions.[180] In *Blanch*, comparing the similarities, or lack thereof, between the appropriation art and the copyrighted photograph would produce an outcome of no copyright infringement according to the definition of the abstraction test because the two works have different expressions and style.[181]

3. Patterns Test

The patterns test allows the court to examine the pattern of the work, "the sequence of events[,] and the development of the interplay of the characters" to establish whether there is copyright infringement.[182] In *Bill Graham Archives*, the Second Circuit held that the defendants' complete reproduction of seven of the plaintiff's graphic images in a biographical book constituted fair use.[183] Bill Graham Archives (BGA) owned the copyright in seven graphic images depicting the famous rock band, the Grateful Dead.[184] Dorling Kindersley (DK) published *Grateful Dead: The Illustrated Trip*, a 480-page book that chronicled the history of the famous rock band, which included seven BGA images.[185] DK significantly reduced the image size, surrounded each image with explanatory text, and placed the images on a Grateful Dead timeline as a graphic representation of these historic moments.[186] The court held that DK's use of all seven images was transformative because these works are examples of fair use such as criticism and comment.[187]

Courts using the patterns test would have most likely found copyright infringement in *Rogers* because the character of each of the works was developed exactly the same since the appropriation art was an unauthorized derivative of the copyrighted photo-

180. *See* Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992) ("Koons went well beyond the factual subject matter of the photograph to incorporate the very expression of the work created by Rogers.").

181. *See* Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006) (finding that Koons's work was transformative because it altered the original work's colors, size, background, and expression).

182. Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 513–14 (1945).

183. *Id.* at 615.

184. *Id.* at 607.

185. *Id.*

186. *Id.* at 609–11.

187. *Id.* at 615.

graph.[188] In *Blanch*, however, application of the patterns test by the court would show that patterns of the original copyrighted work and the appropriation art had different development to their respective works. The legs, feet, heels, and coloring in Koons's appropriation art were different in character when compared to Blanch's copyrighted photograph.[189] Therefore, no copyright infringement could be found under the patterns test.

4. Extrinsic–Intrinsic Test

A court using the extrinsic–intrinsic test examines the similarity of general ideas and specific expressions between two works to conclude whether there is copyright infringement.[190] The first step in this examination is the extrinsic test, which compares the general ideas of the two works through "specific criteria which can be listed and analyzed."[191] The second step in the evaluation utilizes the intrinsic test, which considers the "similarity between the forms of expression" and relies on the "response of the ordinary reasonable person."[192]

In *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*,[193] the court held that the defendant's painting, *The Cardinal*, did not infringe the plaintiff's copyright in an earlier work, also by the defendant, entitled *Cardinals on Apple Blossom*.[194] The court found that the later painting of cardinals did not infringe upon the earlier work, holding that "while the ideas are similar, the expressions are not," and that the differences between the works are "sufficient to establish a diversity of expression rather than only an echo."[195]

Applying this test to *Rogers* would likely yield the same result. In the first part of the test, the court would probably rule that the two works are extrinsically the same because of the similarity

188. *See* Rogers v. Koons, 960 F.2d 301, 311 (2d Cir. 1992) ("[T]he essence of Rogers's photograph was copied nearly *in toto* . . . .").

189. *See* Blanch v. Koons, 467 F.3d 244, 248 (2d Cir. 2006) (noting the changes in Koons's appropriation art that distinguished it from Blanch's original image).

190. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977), *superseded on other grounds by* 17 U.S.C. § 504(b) (2006).

191. *Id.*

192. *Id.*

193. Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62 (3d Cir. 1978).

194. *Id.* at 63–64.

195. *Id.* at 67.

between the subject matter and setting.[196] An ordinary, reasonable person would likely see these works as intrinsically the same because of the degree to which Koons copied Rogers's photograph.[197] Likewise, *Blanch* would be unaffected by use of the extrinsic–intrinsic test. The two works were not extrinsically similar because the subject matter, setting, materials, and type of artworks were all different.[198] Koons's work is also intrinsically dissimilar to Blanch's because a reasonable person would likely find these pieces to be different.[199]

5. Total-Concept-and-Feel Test

Using the total-concept-and-feel test, a court describes the similarity between the copyrighted work and the alleged infringing material.[200] "The total 'concept and feel' of a work considers the idea of the work and its formal elements as a whole."[201] However, "[t]he inclusion of concepts in determinations of substantial similarity" can create issues for courts because it compares ideas that are not recognized under copyright law.[202]

A German court held that George Pusenkoff's painting, which incorporated "the outline of a nude from a Helmut Newton

196. *See* Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992) (describing how Koons's work copied Rogers's in terms of setting and subject matter). However, the type of artwork and materials used were different because Koons created a sculpture from Rogers's photograph. *Id.*

197. *See id.* at 311 ("[T]he essence of Rogers'[s] photograph was copied nearly *in toto* . . . .").

198. *See* Blanch v. Koons, 467 F.3d 244, 247–48 (2d Cir. 2006) (stating that Koons created his painting by adding several images to Blanch's photograph, changing the setting, and using only a portion of the photograph).

199. *Cf. id.* at 257–58 (holding that Koons's use of the photograph was reasonable in part because Koons did not use a substantial amount of the photograph).

200. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 (9th Cir. 1977) (determining that the copied work "captured the total concept and feel" of the original after viewing and comparing samples of both works (quoting Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970))), *superseded on other grounds by* 17 U.S.C. § 504(b) (2006).

201. Arjun Gupta, Comment, *"I'll Be Your Mirror"—Contemporary Art and the Role of Style in Copyright Infringement Analysis*, 31 U. DAYTON L. REV. 45, 52 (2005) (footnote omitted); *accord Sid & Marty Krofft Television Prods.,* 562 F.2d at 1167 (using the total-concept-and-feel test to render judgment regarding the defendant's work (quoting *Roth Greeting Cards*, 429 F.2d at 1110)).

202. Arjun Gupta, Comment, *"I'll Be Your Mirror"—Contemporary Art and the Role of Style in Copyright Infringement Analysis*, 31 U. DAYTON L. REV. 45, 52 (2005) (footnote omitted).

photograph, a distinctive bright blue background from an Yves Klein monochromatic painting, and a small yellow square from the late Russian artist Casimir Malevich," was a free adaptation rather than copying and, therefore, did not constitute copyright infringement.[203] Pusenkoff's work was considered "a productive or transformative use that did not substitute for the original photograph."[204] Pusenkoff's work, under transformative use, was meant to be a new idea or expression; it was achieved by combining parts from different arts and using different elements to create something totally new.[205] Hence, his taking constituted fair use.

In *Rogers*, Koons infringed on Rogers's copyrighted photograph without fair use because he did not create a new concept with the creation of his sculpture, but rather just imitated the copyrighted photograph of Rogers.[206] However, in *Blanch*, Koons changed the positioning, size, and coloring of Blanch's copyrighted photograph; therefore, a court applying the total-concept-and-feel test would most likely determine that Koons's use was considered to be fair.[207]

6. Transformative-Value Test

A court applying the transformative-value test would only consider the quantitative or visible alterations to the image that "may reasonably be perceived."[208] This test, first conceived by Judge Pierre N. Leval[209] and established in *Campbell v. Acuff-Rose*,[210] assists a court in determining "whether the new

203. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 267 (2003).

204. *Id.*

205. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (identifying that transformative works "add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message." (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841) (No. 4,901))).

206. *See* Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (agreeing with the trial court that Koons's copying was "so blatantly apparent as not to require a trial").

207. *See* Blanch v. Koons, 467 F.3d 244, 248 (2d Cir. 2006) (illustrating the differences between Koons's work and Blanch's work).

208. *See Campbell*, 510 U.S. at 582–83 (comparing the two works and finding that the copied work "reasonably could be perceived" as altering the original for another purpose).

209. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

210. *See Campbell*, 510 U.S. at 579 (1994) ("[T]he more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding

work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[211] This test embraces the aesthetic principle that a secondary user may legitimately use imitation to communicate new meaning about its target without the effect of superseding it—a dynamic central to appropriationism.[212]

Accordingly, in the area of appropriation art, if a court finds that an allegorical work reveals little or no physical alteration of the copyrighted image and adds no explicit criticism of the original composition, the work's commercial aspects bear increased significance in a fair-use determination.[213] As a result there would likely be a finding of unfair use on the basis of the presumed harm to an original work's actual or potential markets.[214]

In *Nunez v. Caribbean International News Corp.*,[215] the court held that a fair use existed when the defendant transformed a photograph from a promotional modeling purpose into a depiction of an important news story.[216] Thus, the function of the secondary work, which was to inform, was transformatively different from the function of the original work, which served to illustrate the model's talent.[217]

Koons's work in *Rogers* "merely 'supersede[s] the objects of the original creation'" in the photograph.[218] Koons did not alter or transform Rogers's copyrighted photograph,[219] so under the

of fair use.").

211. *See id.* (citations omitted) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841) (No. 4,901)).

212. *See Blanch*, 467 F.3d at 251–52 (recognizing that a copied work may add something to the original that furthers the creative endeavors sought through copyright law and prevents the copied work from infringing upon an existing copyright).

213. *See Campbell*, 510 U.S. at 579 (stating that a finding of transformative use shields the infringing party somewhat against the other factors that determine fair use, including whether a work is used for commercial gain).

214. *See id.* at 591 (indicating that a presumption of market harm may exist where a work is merely duplicated for the commercial gain of the party and contrasting that with a work that goes beyond mere copying, which might not require a presumption of market harm).

215. Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000).

216. *Id.* at 23.

217. *Id.*

218. *Campbell*, 510 U.S. at 579.

219. *See* Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (describing Koons's work as "blatant[]" copying).

application of the transformative-value test, a court would render the same outcome and not rule in favor of fair use.

The same cannot be said when a court applies the transformative-value test in *Blanch*. A court using the test would give a ruling in favor of the fair-use defense because Koons "add[ed] something new, with a further purpose or different character, altering the first [piece of art] with new expression, meaning, or message."[220] Koons followed the true meaning of appropriation art[221] by altering the legs, feet, heels, and coloring of the original copyrighted work to make his new transformed piece of art.[222]

Also, in *Leibovitz v. Paramount Pictures Corp.*,[223] the plaintiff's subject was pregnant, nude, and in profile.[224] The defendant's advertisement was of a nude, pregnant woman, similarly "posed so that her posture and hands precisely matched those of the [plaintiff's model]."[225] The court granted the defendant's motion for summary judgment, holding that the factors used in determining fair use under the Copyright Act of 1976[226] favored the defendant because the advertisement commented on the plaintiff's photograph by contrasting the serious expression in the plaintiff's photograph with a smirking face.[227] The plaintiff was not harmed by the defendant's use because the defendant did not affect the plaintiff's potential markets.[228] The defendant's advertisement constituted fair use under the Copyright Act as a parody because the defendant's advertisement commented on the seriousness of the plaintiff photographer's work.[229]

220. *Campbell*, 510 U.S. at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)); *see* Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006) (finding that Blanch changed various aspects of the original work and used his work to convey an "entirely different purpose and meaning").

221. *See* William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 1 (2000) ("Appropriation art borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art.").

222. *Blanch*, 467 F.3d at 248.

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

224. *Id.* at 111.

225. *Id.*

226. 17 U.S.C. § 107 (2006).

227. *Leibovitz*, 137 F.3d at 114.

228. *Id.* at 116–17.

229. *Id.* at 116.

7. Ordinary-Observer Test

To determine whether and to what extent a work was copied, a court may choose to implement the ordinary-observer test.[230] The inquiry asks whether an ordinary observer would see and recognize the amount copied or appropriated from the original work.[231] More simply put, this test asks whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."[232] "Thus, [an] allegation that a trial judge uneducated in art is not an appropriate decisionmaker misses the mark; the decision-maker, whether it be a judge or a jury, need not have any special skills other than to be a reasonable and average lay person."[233]

In *Rogers*, an average person would have recognized that the sculptures Koons created were copied exactly from a note card that had Rogers's copyrighted photograph on it.[234] Therefore, a court's use of the ordinary observer test in *Rogers* would most likely have rendered the same ruling and held that Koons was not entitled to the fair-use defense[235] The court would detect that the two works had no disparities and that their aesthetic appeals were essentially the same.[236]

However, in *Blanch*, the ordinary-observer test would have allowed a court to determine that a fair-use defense was necessary because an average observer would have recognized the difference between the original copyright work and the appropriation art.[237] Again, Koons changed the legs, feet, heels and coloring from

230. *E.g.*, Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022–23 (2d Cir. 1966) (observing that the trial court correctly implemented the ordinary-observer test).

231. *Id.* at 1022.

232. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

233. Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992).

234. *See id.* at 307 ("We agree that no reasonable juror could find that copying did not occur in this case.").

235. *See Ideal Toy Corp.*, 360 F.2d at 1022–23 (discussing the ordinary-observer test and its use in determining whether substantial similarity is present in alleged copyright infringement cases).

236. *See Rogers*, 960 F.2d at 311 ("Koons went well beyond the factual subject matter of the photograph to incorporate the very expression of the work created by Rogers. We find that no reasonable jury could conclude that Koons did not exceed a permissible level of copying under the fair[-]use doctrine.").

237. *See* Blanch v. Koons 467 F.3d 244, 252 (2d Cir. 2006) (stating that Koons's purpose in creating his work was "sharply different" than Blanch's objectives when creating the original work).

Blanch's photograph to create his appeal.[238] Any ordinary observer would most likely have detected the disparities between the two works. Accordingly, applying the ordinary-observer test can greatly assist a court in determining whether fair use exists.

B. *Solution*

This Article suggests a different approach to balance the interests of both the copyright owners and appropriation artists. The best initiative is to draft legislation creating a new section under the Copyright Act that focuses specifically on appropriation art. The proposed statute should state the following:

> Upon the alleged copyright infringer being unable to prove that the appropriation art is proper "fair use" of a copyrighted item via one of the seven tests—(1) fragmented-literal-similarity test; (2) abstractions test; (3) patterns test; (4) extrinsic–intrinsic test; (5) total-concept-and-feel test; (6) transformative-value test; or the (7) ordinary-observer test—a holding of copyright infringement and damages must be resolved by the court. After a determination of copyright infringement by the court, or agreement of copyright infringement by the parties, analysis under 17 U.S.C. § 107 may not be applied in regards to suits involving appropriation art or copying of artistic images. Instead, the copyright owner of the original work and the appropriation artist of the original work will share profits of the appropriation artist's new work based upon a formula. That formula is that one-third of the sales profits from the new work multiplied by the percentage of the original work used in the new work must be paid to the copyright owner of the original work.

For example, if one-fourth of the copyright owner's original work (e.g., one item from a row of four items) were included in the appropriation artist's new work, then the copyright owner of the original work is entitled to one-fourth multiplied by one-third of the appropriation artist's profits from that art (e.g., single sale of piece, exhibition profits). Additionally, if the appropriation artist uses ten single different items from ten different original pieces of work, (e.g., ten different copyrighted images), then each of the ten copyright owners of the ten different original pieces of work is entitled to one-tenth multiplied by one-third of the appropriation

238. *Id.* at 248.

artist's profits from that art (e.g., single sale of piece, exhibition profits).

This proposed statute is radical, yet necessary. This new legislation eliminates the fair-use exception from being used as a defense for appropriation art and provides clear-cut guidance to the artistic community and art industry. Federal courts have yet to create firm ground for appropriation art litigation and, in fact, have issued polar-opposite rulings in these cases.[239] The law needs to be uniform, and it is apparent that the courts have been unwilling to provide this uniformity.

Moreover, this proposed statute promotes the purposes of copyright law. The proposed statute allows appropriation artists to create new works that may be disseminated to the public.[240] By

239. *See supra* Part II.A (contrasting the outcomes of *Rogers* and *Blanch*).

240. *See* N.Y. Times Co. v. Tasini, 533 U.S. 483, 519 (2001) (Stevens, J., dissenting) ("[T]he primary purpose of copyright is not to reward the author, but is rather to secure the general benefits derived by the public from the labors of authors." (internal quotation marks omitted) (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (rev. ed. 2000)); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[Copyright] is intended to motivate the creative activity of authors and inventers by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); Mazer v. Stein, 347 U.S. 201, 219 (1954) (discussing how the Copyright Clause encourages individuals by rewarding them through economic personal gain, which then advances the public welfare); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991) (holding that "sweat of the brow" from one's labor does not provide copyright protection); Lucille M. Ponte, *The Emperor Has No Clothes: How Digital Sampling Infringement Cases Are Exposing Weaknesses in Traditional Copyright Law and the Need for Statutory Reform*, 43 AM. BUS. L.J. 515, 521 (2006) ("In fashioning copyright laws, Congress has sought to promote creativity by rewarding artists with ownership and control over their works for specific time periods and allowing them to receive revenues through licensing fees or royalty payments."); Bryan Bergman, Comment, *Into the Grey: The Unclear Laws of Digital Sampling*, 27 HASTINGS COMM. & ENT. L.J. 619, 643 (2005) ("The Copyright Act looks to balance the competing interests of ensuring progress of science and the arts through widespread public dissemination of ideas and expressions while ensuring that authors will have exclusive economic rights in their works as incentive to create the expressions that ensure this progress."); Mary B. Percifull, Note, *Digital Sampling: Creative or Just Plain "Cheez-Oid?*," 42 CASE W. RES. L. REV. 1263, 1270 (1992) (discussing how the primary benefits of a copyright owner obtaining a copyright are for economic reasons because artists are granted a limited monopoly for their work, which leads to artists continuing their creativity to create a good that benefits the public); John Schietinger, Note and Comment, Bridgeport Music, Inc. v. Dimension Films*: How the Sixth Circuit Missed a Beat on Digital Music Sampling*, 55 DEPAUL L. REV. 209, 215 (2005) ("Copyright law has two major purposes: (1) to encourage people to devote themselves to intellectual and artistic creation for the betterment of society and (2) to protect the authors of copyrightable works from the theft of the fruits of their labor." (internal quotation marks omitted) (citing Michael L. Baroni, Comment, *A Pirate's*

allowing these works into the public, others may benefit and draw inspiration from these new works.[241]

C. *Counterarguments*

In some regards, it can be argued that this proposal goes against one of the purposes of the Copyright Act by taking away some of the exclusive rights granted to the original author.[242] The original author would no longer be able to deny others from using his copyrighted work, but after the appropriation artist turns a profit from his work, the copyright owner also begins collecting its portion of the profits.[243] This proposal would no longer hinder appropriation artists from using a copyrighted work because they do not have to fear a flat denial from the copyright owner. Furthermore, appropriation artists would only have to pay the copyright owner once their work returned a profit. If the appropriation artists never return a profit, then it is unlikely that their works are well known among the public or other artists. This would calm the fear among copyright owners that the marketplace would be saturated with samples of the copyright owner's work.

However, another potential argument against the proposed statute is that it may be considered arbitrary and unfair for the copyright owners. Nevertheless, the proposed statute furthers the purposes of copyright law for appropriation artists by giving them an incentive to create new works. For artists who use copyrighted work for their appropriation art, such as Jeff Koons, a large portion of profits must be set aside for them to have any incentive

Palette: The Dilemmas of Digital Sound, Sampling and a Proposed Compulsory License Solution, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 75 (1993); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[E][2] (1987))).

241. *See* U.S. CONST. art. I, § 8, cl. 8 (declaring that the purpose of copyright is to "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

242. *See* Bryan Bergman, Comment, *Into the Grey: The Unclear Laws of Digital Sampling*, 27 HASTINGS COMM. & ENT. L.J. 619, 644 (2005) ("[M]any feel that artists should still compensate those prior musicians that created the work, as it would otherwise be theft." (citing Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use*, 3 UCLA ENT. L. REV. 271, 289 (1996))).

243. *See id.* at 645 ("[A]n artist may agree to buy out the copyright owner for a flat fee, negotiate an agreement whereby the copyright owner receives a royalty off of each record sold, or enter a co-publishing deal where the owner of the sampled composition retains an interest in the work . . . ." (citing Jeffrey H. Brown, Comment, "*They Don't Make Music the Way They Used To": The Legal Implications of Sampling in Contemporary Music*, 1992 WISC. L. REV. 1941, 1956 (1992))).

to create new works. Without this large portion of profits, artists who use copyrighted work in their art would be almost entirely pushed out of the appropriation art industry.

V. CONCLUSION

Although appropriation art copyright infringement cases must be handled on a case-by-case basis, what can be gathered from these tests are teachings or principles to apply to each case as it appears. These seven different tests have worked in the past to help solve appropriation art cases that involved potential copyright infringement and, thus, provide guidance for future cases involving alleged copyright infringement for appropriation art.

Copyright law looks to balance the interests of copyright owners' economic incentives and the creation of new ideas by other authors. Cases like *Rogers* and *Blanch* show how courts have struggled to come to grips with the appropriation art problem. This judicial confusion has led the art industry to enter the market with a degree of caution for appropriation art. Moreover, the Copyright Act was created before appropriation art surfaced.

What courts can now gather from appropriation art and the allegation of copyright infringement is that works need to be creative, original, and transformative. This appropriation art needs to also serve a beneficial purpose for society rather than for an individual commercial gain. Without this, appropriation artists are infringing upon the very art that they are trying to create.

"Copyright law's ultimate purpose is to foster new creative works."[244] In fact, the Supreme Court stated that fair use should not be susceptible to bright-line rules, but instead, should be interpreted according to a case-by-case analysis.[245] These seven tests simply serve as tools or recommendations to help solve the legal problems that occur between appropriation art and copyright infringement. In no way are these tests the only methods to solve these specific types of cases, but they are guidelines to help determine the proper ruling and apply the correct law.

To better balance the needs of appropriation artists and

244. Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653, 1691 (1995).

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

copyright owners, Congress must step in and create guidance for artists to follow. The statute proposed by this Article fosters guidelines for everyone. Artists need unlimited access to copyrighted material in order to build and create new works. As the proposed statute illustrates, it would only come into effect if the appropriation artists are successful (in a monetary sense). The proposed statute would not take away from the copyright owner if the new work was not a success due to the fact that it would not be widely known to the public. The existing market has been perfected over a number of years. The schemes of the art industry have sufficed thus far, but to continue this positive trend, Congress must give further guidance in order for appropriation art to gain traction. To continue moving the art industry in the right direction, new statutes must be enacted that embrace appropriation art by artists.

This Article has not attempted to analyze or refute such an argument due to the inherently fact-based determinations that a proper fair-use analysis requires. However, the argument should give courts pause—pause to think.