# INSTA-APPROPRIATION: FINDING BOUNDARIES FOR THE SECOND CIRCUIT'S FAIR USE DOCTRINE AFTER *CAMPBELL*

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*Copyright law's current fair use landscape is riddled with unclear standards and old considerations forced upon new media. This is especially problematic in the context of digital appropriation of art from online social media platforms—an issue highlighted by Richard Prince's exhibit "New Portraits," in which he appropriated strangers' Instagram photos for his own profit. Unless this situation is remedied, digital content creators will effectively lose their statutory copyright protections. Thus, when considering digital appropriation cases, courts should require a transformation of content rather than purpose, should elevate the weight of the fourth statutory factor, and should reinstate the "comment upon" standard for works of parody and satire. Other scholars have proposed changes to the fair use doctrine, but none adequately protect first-order digital content creators. As such, this Note proposes a reinterpretation of the fair use factors in light of digital appropriation and social media.*

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## INTRODUCTION

Imagine getting a text that reads, "I just saw your portrait at Gagosian Gallery!" As a young artist, this is your long-awaited dream. But you then find out that your photograph, which you took and posted to your personal Instagram account, is being sold for thousands of dollars—and you will not receive a dime. This was the scenario for several unsuspecting Instagram users when appropriation artist Richard Prince took their Instagram photos, commented on them, and then printed them on canvas to display and sell.[1]

Prince did this without permission and without crediting the original posters.[2] As *The Guardian* writes, "Prince's New Portraits series comprises

1. Hannah J. Parkinson, *Instagram, an Artist and the $100,000 Selfies—Appropriation in the Digital Age*, GUARDIAN (July 18, 2015), http://www.theguardian.com/technology/2015/jul/18/instagram-artist-richard-prince-selfies [https://perma.cc/27SA-Z652].

2. *Id.* Though there were several different categories of Instagram users from whom Prince copied, this Note focuses on the young artists. "Apart from the smattering of celebrities, many of Prince's subjects are aspiring or career-beginning models, actors, artists, students, in their teens and early-20s, working at clothing stores . . . or bars, while finding their feet." *Id.* In addition to appropriating posts from aspiring artists, Prince also appropriated posts containing the work of renowned photographer Donald Graham, who brought a copyright infringement suit against Prince. *See* Eileen Kinsella, *Outraged Photographer Sues Gagosian Gallery and Richard Prince for Copyright Infringement*, ARTNET NEWS (Jan. 4, 2016), https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498 [https://perma.cc/4XFS-SYLH].

entirely of the Instagram photos of others. The only element of alteration comes in the form of bizarre, esoteric, lewd, emoji-annotated comments made beneath the pictures by Prince."[3] In an age where young artists flock to social media platforms to display their work, society and the law should not sanction this type of blatant appropriation.

Appropriation artists[4] such as Jeff Koons and Richard Prince have long pushed the boundaries of copyright's theory of fair use, and Prince's most recent exhibit, entitled "New Portraits," pushes these limits even further. Now, an artist named Donald Graham has sued Prince in federal court,[5] and the Southern District of New York and potentially the Second Circuit will have to consider whether the appropriation art doctrine established in *Cariou v. Prince*,[6] another case involving Prince's work, will withstand the new considerations brought on by the ease of digital appropriation. Whether Prince's most recent appropriation style is deemed "fair" will have a profound impact on how fine art interacts with social media and Internet postings in the fair use context.[7] If the Southern District of New York or the Second Circuit does find fair use, it will have overarching implications for the exclusive rights that copyright owners hold in their works. A primary inquiry of this Note will be whether current copyright standards of fair use and transformation promulgated by the Second Circuit are sufficient for the digital age. This Note also will undergo an analysis of

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3. Parkinson, *supra* note 1 (writing comments such as: "  " under a picture of partially exposed breasts; "Enjoyed the ride today, lets do it again. Richard." under a picture of a woman looking back seductively at the camera in a car; and "Jez to be dare ID quite I'm you nut schmoo fwend  " under an image of a undressed woman).

4. Appropriation art is defined as "[t]he practice or technique of reworking the images or styles contained in earlier works of art, esp[ecially] (in later use) in order to provoke critical re-evaluation of well-known pieces by presenting them in new contexts, or to challenge notions of individual creativity or authenticity in art." Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 220 (2007) (quoting *Appropriation Art*, OXFORD ENGLISH DICTIONARY ONLINE (Oct. 2001), http://www.oed.com/view/Entry/9877?redirectedFrom=appropriation#eid [https://perma.cc/SD7X-GENG]).

5. *See* Kinsella, *supra* note 2.

6. 714 F.3d 694 (2d Cir. 2013).

7. Fair use is a defense to a claim of copyright infringement. This judge-made doctrine was codified in the Copyright Act of 1976 § 107. This section reads:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2012).

how a fair use determination of Prince's "New Portraits" likely would fare under both the current copyright regime and under proposals for reform.

The Second Circuit has taken a leading role in fair use, art law, and novel legal issues brought on by the digital age. It also has taken a leading role in cases that touch on all of these subjects. However, it has yet to hear a case that combined art appropriation and fair use issues with digital and social media concerns. How the Southern District and the Second Circuit rule on this issue will have a profound effect on the development of copyright law in the digital age.

Part I reviews the elements and doctrines of copyright law that are relevant to digital media and appropriation art. It explains that digital works posted to the Internet and on social media platforms most likely receive basic copyright protections—that is, they meet the basic requirements of creativity, fixation, and expression. This part also considers the evolving doctrine of fair use, from a judge-created common law exception, to a codified defense against infringement, to the current expansive doctrine. Then, this part will evaluate the impact of the Second Circuit's holdings on the doctrine of fair use, tracing the changing application of appropriation art from *Rogers v. Koons*[8] to *Cariou.*

Part II considers a number of proposals to clarify and fix the current copyright regime. Next, this part considers how Prince's exhibit "New Portraits" likely would fare under the new considerations put forth in each proposal. It then concludes that none of the considered proposals adequately address the impact of copyright and fair use considerations on first-order digital content creators, who often are young artists using social media platforms as a way to display and exhibit their work.

Finally, Part III suggests alternative interpretations of the four statutory factors of fair use that would protect this subset of artists. This part argues that (1) courts should require transformation of content; (2) the fourth factor, the effect on the potential market, should be given more weight; and (3) the "comment upon" standard should be reinstated for parody and satirical uses.

## I. THE PRIMARY ELEMENTS OF COPYRIGHT PROTECTION

The threshold of creativity required to receive copyright privileges is extremely low and copyright protection applies broadly. However, in considering social media users' and first-order[9] digital content creators' rights, it first should be established whether their works meet the requirements of originality and fixation needed for copyright protection.[10]

8. 960 F.2d 301 (2d Cir. 1992).

9. A first-order creator is the original creator of a work. Second-order creators use the original work as the foundation for their own work. The extent to which second-order creation is permissible is currently a major tension in copyright law—a tension that this Note aims to address.

10. This poses a major issue in the context of the copyrightability of social media postings. While there is no word limit for protection, the 140-character limit for "tweets" on the Twitter platform might make most of the postings too short to meet the basic level of

### A. Meeting the Threshold of Originality

Only "original works of authorship" can receive copyright protection under § 102(a) of the 2012 Copyright Act.[11] Interestingly, nowhere in the copyright statute or in the Constitution is "originality" defined; yet it is central to the copyright regime. As such, interpretation of this concept has developed over time.[12]

Courts are hesitant to explicitly define the contours of the requisite creativity and originality required for copyright protection. This reluctance forms the basis of the "nondiscrimination principal," first articulated in *Bleistein v. Donaldson Lithographing Co.*[13] Because deciding the creativity of a work would necessarily turn on a subjective opinion regarding the value of such work, courts consistently have applied the creativity and originality standard liberally.[14] Many social media posts indeed would meet this threshold requirement of originality; the more creative the post, the stronger the copyright protection is likely to be.[15]

### B. Fixation in the Digital Age

To receive copyright protection, a creative work must be fixed in a tangible medium of expression.[16] Digital content clearly is "fixed" when it exists for "more than a transitory period" of time.[17] Thus, all social media postings most likely would meet this requirement.

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creativity needed for copyright laws to apply. *See* Adam S. Nelson, Note, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 710 (2012). For social media platforms like Instagram, some photos would qualify for protection while others may not. *Id.*

11. 17 U.S.C § 102(a).

12. It was once argued, for example, that photographs did not have the requisite creativity to qualify for copyright protections because they were simply "capturing reality." *See* Burrow-Giles Lithographing Co. v. Sarony, 111 U.S. 53, 57–58 (1884) (holding that photographs could be considered "writings" and photographers were "authors" for purposes of the statute).

13. 188 U.S. 239 (1903). There, the U.S. Supreme Court famously stated: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Id.* at 251.

14. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (holding that the alphabetization of listings in a telephone directory did not meet the requisite originality standard required to receive copyright protection). There the Court stated that "[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." *Id.* at 345.

15. Postings of generic items such as pictures of food or monuments might not meet the threshold of creativity required for protection. If they do, it is likely to be a "thin" protection. When a work has thin protection, infringement is likely to be found only if the defendant copied all, or substantially all, of the plaintiff's work. *See* CRAIG NARD ET AL., THE LAW OF INTELLECTUAL PROPERTY 494 (4th ed. 2014). However, the Supreme Court has stated that photographs only need a modicum of creative composition to receive protections. *See Burrow-Giles*, 111 U.S. at 57.

16. *See* 17 U.S.C. § 102.

17. Williams Elecs., Inc. v. Artic Int'l Inc., 685 F.2d 870, 874 (3d Cir. 1982). Additionally, "[a] court would likely find social media content to be fixed in tangible form. Therefore, for those works that also meet the originality requirement, this renders at least some user-generated content copyrightable material." Jessica Gutierrez Alm, *"Sharing"*

Because an author's rights exist upon fixation, registration with the government is not required to receive copyright protections.[18] Copyright owners enjoy several exclusive rights, which include the right to make copies of the work and the right to publicly display the work.[19] As American copyright law evolved, defenses to these exclusive copyright protections such as "fair use" were developed and codified.[20]

### *C. Making Fair Use of Copyrighted Works*

The concept of fair use is a judge-made doctrine with early roots in American jurisprudence. One of the earliest fair use cases was *Flosom v. Marsh*,[21] in which the defendant was sued for publishing copies of George Washington's letters.[22] In his famous decision, Justice Joseph Story explained several factors that courts should consider to determine if a secondary use is fair. He stated:

> [T]he question of piracy, often depend[s] upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercise the same common diligence in the selection and arrangement of the materials.[23]

These factors have since been the cornerstone of the fair use defense[24] and are meant to ensure that creativity will not stagnate due to the overrestriction of copyrights.[25] Justice Story's fair use factors were

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*Copyrights: The Copyright Implications of User Content in Social Media*, 35 HAMLINE J. PUB. L. & POL'Y 104, 111 (2014).

18. However, registration does confer additional protections for copyright owners. If seeking damages from copyright infringement, the plaintiff has the right to claim actual damages plus the infringer's profits, or statutory damages. 17 U.S.C. § 504(b)–(c). However, statutory damages are only available for copyrights that are registered with the Copyright Office. *Id.* In theory, authors still would be able to recover actual damages, but these are invariably harder to calculate and give the plaintiff less flexibility in litigation. *See* Engle v. Wild Oats, Inc., 644 F. Supp. 1089, 1091 (S.D.N.Y. 1986).

19. The other exclusive rights include the right to prepare derivative works, the right to distribute copies of the work, and the right to publicly perform the work. 17 U.S.C. § 106.

20. *Id.* § 107. The doctrine of fair use was not part of the original copyright statute, either in its English form or in the Copyright Act of 1790. Early copyright law recognized a "fair abridgement" claim, "by which a defendant could be found not to infringe by having demonstrated his own 'invention, learning, and judgment' in the production of a modified work." NARD ET AL., *supra* note 15, at 697.

21. 9 F. Cas. 342 (C.C.D. Mass. 1841).

22. *Id.* at 345.

23. *Id.* at 344.

24. The emergence of fair use to balance the benefit to the infringer against the harm to the copyright holder was explored in Justice Story's formative opinion in *Flosom*, 9 F. Cas. at 344. In that case, Justice Story articulated a framework for analysis that largely survives in § 107. Fair use entered the law but remained uncodified until the 1976 Act formally included the doctrine. Despite the early articulation of the fair use doctrine, the Supreme Court did not explicitly address fair use until 1984. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) ("the *Betamax* case").

25. 17 U.S.C. § 107 codifies copyright's fair use doctrine and provides that certain uses of copyrighted works are not infringements of the copyright owner's exclusive rights. That a

codified in the Copyright Act of 1976, and courts now consider four nonexhaustive factors: "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work . . . ; and (4) the effect of the use upon the potential market for or value of the copyrighted work."[26]

### 1. The Four Factors of Fair Use

The preamble to the fair use section of the Copyright Act explains that, in general, fair use can be made of copyrighted materials for educational purposes such as, "criticism, comment, news reporting, teaching . . . scholarship, or research."[27] This nonexhaustive list is considered in conjunction with the four enumerated factors. However, nothing in the text or history of the statute suggests how courts should handle any of the factors or how they should balance the results of analyzing each factor separately.[28] In fact, the weight of certain factors has changed over time. Formerly, courts afforded the fourth factor (effect on the potential market for or value of the copyrighted work) the most weight,[29] but the Second Circuit has been influential in focusing on the first factor (the purpose and character of the work) by applying and expanding the "transformativeness" test.[30]

In analyzing the purpose and character of the work, courts consider the transformative nature of the work and ask "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."[31] In *Campbell v. Acuff-*

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use is "fair" is a defense to a charge of infringement, with the burdens of pleading and proving the defense falling on the alleged infringer. *Id.*

26. *Id.*

27. *Id.*

28. *See* NARD ET AL., *supra* note 15, at 710. However:

> [T]he first and fourth factors are overwhelmingly the most important factors in fair use analysis, as measured by their correlation with the outcome of the overall fair use test. With regard to the first factor, . . . Beebe's study reveals that 95% of the opinions that found that factor one disfavored fair use, found no fair use, while 90% of opinions that found that factor one favored fair use, found fair use . . . for the fourth factor . . . the correlation with overall outcome was even higher. Of 141 opinions that found that factor four disfavored fair use, all but one found no fair use . . . a correlation of over 99%. Of 116 opinions that found that factor four favored fair use, all but six found fair use: a correlation of 95%.

Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 723–24 (2011).

29. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985) (stating that the fourth factor, the effect on the market for or value of the work, weighed most heavily against a finding of fair use).

30. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 259 (2d Cir. 2006) (holding that Koons's work sufficiently transformed Blanch's photograph because it incorporated her work into a larger social commentary).

31. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (alteration in original) (citations omitted) (quoting Flosom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)); *accord* Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

*Rose Music, Inc.*,[32] arguably the most important modern fair use case, the U.S. Supreme Court liberalized the traditional fair use standard by adopting Judge Pierre N. Leval's definition of transformation.[33] As Professor Pamela Samuelson stated, the most notable contributions of the *Campbell* decision have been "the Court's emphasis on the 'transformative' nature of a defendant's use as weighing in favor of fair use, and . . . its expansive definition of what constitutes a 'transformative' use."[34]

The Court in *Campbell* based its transformation test on Judge Leval's article "Toward a Fair Use Standard."[35] In this highly instrumental article, Judge Leval argued that the key determination in a fair use decision should be whether, and to what extent, the challenged use is transformative.[36] He explained, "[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."[37] He articulates that if the secondary work "adds value" to the original, then it encompasses the very type of activity that fair use is meant to encourage in society.[38] A court that accepts a use as transformative gives less weight to the possibility of market harm and the amount of the work taken, and the use will most likely be deemed fair.[39] The concept of transformation is of central importance to appropriation art in general and has important ramifications for digital art posted on social media, as digital works are incredibly easy to manipulate and appropriate. The interpretation of this factor is likely the most important for the fate of these works.

The second factor, the nature of the copyrighted work, analyzes the connection of the original work to copyright's goals, such as the promotion of artistic expression.[40] Works that are more factual in nature or employ common images are less likely to receive the same amount of protections as creative, individual works.[41] For social media users, this second factor is relevant in determining the strength of a post's copyright protection. Though most social media content would be deserving of at least minimal copyright protection, the strength of that protection likely would vary depending on the nature of the content.

The amount and substantiality of the portion used, the third fair use factor, must be analyzed in terms of the "quantitative and qualitative aspects of the portion of the copyrighted material taken."[42] However, some courts consider this factor to be neutral, especially when analyzing works such as photographs where anything less than the entirety would be unrecognizable,

32. 510 U.S. 569 (1994).

33. *See id.* At the time of this decision, Judge Pierre N. Leval sat on the bench of the Southern District of New York. He now sits on the Second Circuit Court of Appeals.

34. Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 818 (2015).

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

36. *See id.*

37. *Id.* at 1111.

38. *See id.*

39. *See* Netanel, *supra* note 28, at 723–24.

40. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

41. *See* NARD ET AL., *supra* note 15, at 494.

42. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006).

unlike quotations from books.[43] In a social media context, most links and sharing platforms reproduce the entirety of a work.[44] Thus, in the digital age, or at least regarding social media sharing platforms, this third factor might not be material to a fair use outcome.

The final factor, the effect on the potential market for, or value of, the work, has been heralded as "undoubtedly the single most important element of fair use" (though never dispositive).[45] It considers the market substitution effects of subsequent works on the market for the original. In *Campbell*, however, the Court limited the emphasis on the fourth factor and held that the commercial purpose must be considered in context and should be given less weight when the use is transformative.[46] If a use is sufficiently transformative, the Court explained, there will be a lower likelihood that such use will replace the market for the original.[47] In light of "New Portraits," and in consideration of social media users' rights, this Note argues that in some situations, the market factor should, in fact, weigh heavily in the fair use decision.

### 2. Fair Use in Nondigital Art: The Second Circuit's Leading Approach

The Second Circuit's approach to fair use for appropriation art has changed over the years. In early appropriation art cases, the court guarded artists' exclusive rights. However, post-*Campbell*, the court went in the opposite direction, expanding the definition of what uses are considered fair, effectively minimizing original creators' exclusive rights in their works.

#### *a. Initial Treatment of Fair Use*

The Second Circuit's fair use cases regarding nondigital art were the principal vehicles in creating the modern fair use landscape. Several formative cases in the past few decades have both developed and greatly expanded the traditional conceptions of fair use.[48] Notably, the Second Circuit has been instrumental in expanding fair use by using a liberal "transformation" test post-*Campbell*.[49]

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43. *See id.* ("[C]opying the entirety of a work is sometimes necessary to make a fair use of the image.").

44. For instance, on Twitter, a user can "retweet" the entirety of a posting, and on Pinterest, a user "pins" the entirety of an image. On these platforms the sharing of an entire image or message is the foundation of the community and is an accepted practice when appropriate attribution is given.

45. Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 566 (1985).

46. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

47. *See id.*

48. *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (holding that, in a fair use analysis, a work's transformative nature does not depend on whether it "comments" on the original work, but rather whether it has altered the original work with "new expression, meaning, or message").

49. *See id.*

The Second Circuit initially adopted a protectionist view of copyright owners' exclusive rights in *Rogers v. Koons*.[50] There, appropriation artist Jeff Koons took a postcard with a picture of puppies on it and instructed his assistants to build a sculpture in the likeness of the image.[51] When sued for infringement, Koons asserted a fair use defense, but the district court granted an injunction.[52] On appeal, the Second Circuit upheld the injunction, holding that Koons's copying was so blatant that a trial was not required.[53] In his defense, Koons suggested that the primary purpose of this piece was a social commentary meant to parody society at large.[54] However, the court rejected this contention, holding that to be considered parody, the new work needs to comment upon the underlying work, not be aimed at society at large.[55] In the court's four-factored analysis, the fourth factor was of material importance because Koons stood to gain financially from his appropriation of the postcard image, a consideration that weighed strongly against a finding of fair use.[56]

### *b. Post-*Campbell *Fair Use in the Second Circuit*

Koons continued to appropriate, and in *Blanch v. Koons*,[57] the Second Circuit considered yet another challenge to his work. However, this time the court employed a different theory and application of fair use. Koons created a series of paintings entitled "Easyfun-Ethereal" for Deutsche Bank and the Guggenheim in 2000.[58] In this series, he used a number of images from advertisements, which he combined with his own photographs.[59] One of his pieces incorporated part of a photo by a well-known fashion photographer, Andrea Blanch.[60] She filed suit for copyright infringement, and the district court once again decided on summary judgment.[61] However, this time, the court found that Koons's use was transformative and therefore fair.[62] On appeal, the Second Circuit upheld the lower court's finding of fair use and stressed the transformative nature of the work as material to the fair use analysis.[63]

In *Blanch*, the Second Circuit deemed Koons's work transformative because it was used as a commentary on the aesthetics of mass media.[64]

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50. 960 F.2d 301 (2d Cir. 1992).
51. *See id.* at 305.
52. *See id.* at 306.
53. *See id.*
54. *See id.* at 310.
55. *See id.* at 311.
56. *See id.* at 312.
57. 467 F.3d 244 (2d Cir. 2006).
58. *See id.* at 247.
59. *See id.*
60. *See id.*
61. *See id.* at 249.
62. *See id.*
63. *See id.* at 256.
64. *See id.* at 253. However, in *Campbell*, the court did note that finding of transformativeness was not absolutely necessary for a finding of fair use, nor was transformativeness necessarily the only important fair use factor. *Id.*

The court articulated that when a copyrighted work is used as "raw material" for the creation of a new work with distinct "creative or communicative" intentions, then the use would be considered transformative in a fair use determination.[65] This decision, in light of *Campbell*, arguably mirrored the Supreme Court's adoption of the standard articulated in Judge Leval's article. However, it set a liberal precedent for what the Second Circuit would consider transformative in other appropriation art cases. This is especially relevant in the digital age, where appropriation and manipulation of images is incredibly easy.

This transformation standard was further expanded in the Second Circuit case *Cariou v. Prince*.[66] This decision has been incredibly influential in modern fair use analyses, especially in appropriation art cases.[67] In *Cariou*, the Second Circuit examined whether Richard Prince's "Canal Zone Series" transformed Patrick Cariou's photographs in such a way that made Prince's use fair.[68] Cariou's original photographs were scenic shots of Rastafarians in natural island settings, printed in the book *Yes Rasta*.[69] Prince ripped out book pages and superimposed Cariou's photographs with images and colored "lozenges" layered on top of the original work.[70] Prince juxtaposed the scenic images with images of musical instruments and created dystopian scenery throughout the "Canal Zone Series."

Some of the works were indeed more transformed than others, but most consisted of Prince's use of Cariou's entire photograph with few added elements. The Second Circuit held that whether a work is transformative does not depend on whether it "comments" on the original work but rather whether it has altered the original work with "new expression, meaning, or message."[71] This was an important shift in fair use theory as the "comment upon" requirement was previously an important consideration for determining the nature of derivative works.[72] Additionally, under *Campbell*'s influence, the Second Circuit ignored the negative effect Prince's exhibit had on Cariou's ability to display his own art for monetary gain.[73] The court considered this factor unimportant because of the

65. *See id.* at 251–52.

66. 714 F.3d 694 (2d Cir. 2013).

67. *See* Samuelson, *supra* note 34, at 843.

68. *See Cariou*, 714 F.3d at 698.

69. *See id.* at 699.

70. *See id.* at 701. The "lozenges" were oval-shaped blotches of color used sporadically throughout the pieces of the "Canal Zone Series."

71. *Id.* at 705.

72. *See id.*

73. The district court case went into great detail regarding the effect of Prince's work on Cariou's market. The Gagosian Gallery showed twenty-two of Prince's paintings that featured Cariou's photographs, created and sold an exhibition catalog, and sent invitation cards featuring pictures that included Cariou's work. *See* Cariou v. Prince, 784 F. Supp. 2d 337, 344 (S.D.N.Y. 2011). The gallery ended up selling eight paintings for $10,480,000, of which Prince received 60 percent, or $6,288,000. *Id.* at 350. Additionally, the gallery exchanged seven of the paintings for other art valued at between $6,000,000 and $8,000,000 and made approximately $7,000 in exhibit paraphernalia. *Id.* at 351. This is even more consequential because, at the same time, another gallery in New York was planning on showing Cariou's photographs from *Yes Rasta*. However, once the gallery owner found out

transformative nature of Prince's work. However, the Second Circuit went further than the *Campbell* Court, not only mitigating the importance of the fourth statutory factor, but also lowering the threshold for transformation by not requiring the secondary work to comment upon the original.[74]

## II. THE SPECULATIVE FUTURE OF FAIR USE IN THE DIGITAL AGE

The rapid rise of the Internet and digital media has forced courts to apply dated legal standards to new contexts. In an attempt to remedy the friction between new media and traditional copyright applications, courts have broadened what constitutes fair use. However, in its expansion, the doctrine has become muddied and has ceased to adequately protect original content creators. Additionally, as a result of the shifts in both the art world and intellectual property law, the level of appropriation of copyrighted material by both artists and nonartists has become "so pervasive that traditional copyright enforcement strategies [have] lost much of their utility."[75] As such, the future of fair use in the digital context has been a subject of much debate and has engendered wide and disparate suggestions, observations, and proposals from commentators and professors.

Richard Prince's exhibit "New Portraits" pushes the boundaries of fair use more. This part will analyze the potential outcome of a copyright challenge to Prince's appropriation under the current legal framework, as well as the exhibit's fate under the proposals addressed below.

### *A. The Status Quo: The Second Circuit's Application*

As one of the most influential circuits in this area of law, the Second Circuit's holdings reflect the leading application of the fair use and transformation tests as they stand in modern copyright jurisprudence.[76] Several recent Second Circuit cases have considered the fair use and transformation standards in digital contexts.[77] In general, these cases fashioned liberal tests to determine whether a derivative work is considered a fair use and whether a subsequent work is sufficiently transformed for its use to be considered fair.

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about the Gagosian show, she cancelled Cariou's show because it had been "done already." *Id.* at 344. At his show, Cariou had planned on selling copies of his books and prints of his photographs ranging from $3,000 to $20,000. *Id.*

74. Samuelson, *supra* note 34, at 830.

75. Richard H. Chused, *The Legal Culture of Appropriation Art: The Future of Copyright in the Remix Age*, 17 TUL. J. TECH. & INTELL. PROP. 163, 166 (2014).

76. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 568 (2008); Netanel, *supra* note 28, at 721 ("First, Beebe found that, as measured by case citations, fair use opinions from courts of the Second and Ninth Circuits exerted an overwhelming influence on fair use opinions outside those Circuits, even more than we might expect.").

77. *See, e.g.*, Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013) *aff'd*, 804 F.3d 202 (2d Cir. 2015); *see also* Perfect 10, Inc. v. Amazon.com, 508 F.3d 1146 (9th Cir. 2007).

### 1. Recent Digital Cases

In 2012, the Author's Guild sued HathiTrust and several of its public university partners for copyright infringement.[78] HathiTrust created a database of ten million books from digitized copies of research library collections and claimed its database made fair use of the copyrighted books because the full-text search feature allowed users to find books more easily.[79] The Second Circuit agreed and characterized the full-text searchable database as "a quintessentially transformative use."[80] The court claimed that this use was for a different purpose than the authors had in mind when they wrote their books, which weighed in favor of finding the subsequent use fair.[81] As Professor Samuelson noted, "the court viewed the full-text search use as transformative because it considered the HathiTrust database itself as a new work . . . . [T]he court focused the harm analysis as to the transformative use on whether the use supplanted demand for the original, and if not, that factor tipped in favor of fairness."[82] In considering the searchable database a transformative work, the Second Circuit set the stage for other digital appropriation cases.

The most recent fair use decision from the Second Circuit, *Authors Guild v. Google, Inc.*,[83] once again considered the boundaries of fair use. The plaintiffs, who owned copyrights in published books, sued Google for making digital copies of their books for its Google Library Project and Google Books Project.[84] For these features, Google made digital copies of millions of books to create a publicly available search function that allows users to search for particular words or phrases in multiple books at once.[85]

The court ultimately found that "Google's making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information *about* Plaintiffs' books without providing the public with a substantial substitute for . . . the original works or derivatives of them."[86] This case is the most recent in the line of Second Circuit cases to expand the definition of fair use in response to changing Internet functions and considerations.

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78. *See* Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).

79. *See HathiTrust*, 755 F.3d at 97.

80. *Id.*

81. *See id.* The court stated that "the full-text search function does not serve as a substitute for the books that are being searched." *Id.*

82. Samuelson, *supra* note 34, at 836.

83. 804 F.3d 202 (2d Cir. 2015).

84. *See id.* at 207.

85. *See id.* The authors alleged infringement, while Google contended that the use was fair. The district court agreed with the fair use assertion, to which the plaintiffs responded that the use was not "transformative" within the meaning of *Campbell*.

86. *Id.*

2. Status Quo Applied to Prince and Social Media

The Second Circuit has yet to apply its latest fair use standards to the growing field of social media and digital artistic appropriation. When such expansive fair use standards are applied to social media uses, the results may undermine a digital creator's exclusive copyright rights. Recent events have highlighted this issue. In his 2015 exhibit "New Portraits," Richard Prince displayed large canvases on which he printed screenshots of others' Instagram photos.[87] As a matter of transformation, Prince commented on the original Instagram post before taking the image offline, so that his comment was displayed underneath the image along with the other top comments on the photo.[88] He then sold the canvases in New York and London for an average of $100,000 each.[89] Under the current test, his trivial transformation might pass the fair use standard. His use is arguably for a different purpose than what the original posters conceived when posting their photos to Instagram, which has been enough to constitute fair use in other cases.[90]

One of Prince's canvases included a photo taken by world-renowned photographer Donald Graham.[91] Subsequently, Graham sued Prince for copyright infringement.[92] Now, a court will have to apply the Second Circuit's expansive fair use test, designed for traditional art, to the world of digital and appropriation art. As such, a key issue for the court will likely be the difference in transformation of content versus transformation of purpose in the new works.

Many commentators have depicted the difference between content transformation and purpose transformation.[93] Purpose transformation is likely to be deemed fair, as in the recent Second Circuit cases cited above.[94] In the case of "New Portraits," there is arguably a transformation of purpose, if not of content. Content transformation requires an alteration of the image itself. The only added element to the images in "New Portraits" is the comment underneath the photo, which is likely not enough to qualify as sufficient content transformation. However, Prince's use could still be, and likely would be, considered fair use in light of his transformation of purpose and context. Prince took the photos out of the social media context and put them into the gallery setting, while preserving the social media element of the Instagram border. Shifting the audience for the work has been considered transformative and generally weighs in favor of a fair use

87. *See* Parkinson, *supra* note 1.
88. *See id.*
89. *See id.*
90. *See, e.g.*, Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 460 (S.D.N.Y. 2012).
91. *See* Kinsella, *supra* note 2.
92. *See id.*
93. *See* Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869 (2015); *see also* Netanel, *supra* note 28, at 746.
94. *See, e.g.*, *HathiTrust*, 902 F. Supp. 2d at 445.

finding.[95] In *Cariou*, the Second Circuit held that the audience for Cariou's photographs was so different than Prince's audience that his appropriation was unlikely to infringe on the market for the original work.[96] Notably, whether the purpose or audience is truly transformed requires an underlying judicial determination of the purpose of the different works.[97]

"New Portraits" also is unique because it is contrary to the traditional direction of appropriation. Historically, copyrighted information has passed from the professional user to the amateur user.[98] The amateur end user rarely would have the power or opportunity to infringe significantly on the copyright owner's exclusive rights. However, with the rise of the Internet, infringement claims against end users became more common.[99] Then, the phenomenon of peer-to-peer sharing arose, changing the distribution of content from amateur to amateur. Now, with appropriation easier than ever, content can easily go from amateur to professional, as was the case in "New Portraits." However, the professional should not be able to exploit copyright in a manner that extinguishes the rights of these first-order digital content creators, a result the current system seems to sanction.

### *B. Observations and Proposals for Reform*

Many scholars lament the unpredictable nature of the current fair use system. As such, proposals for reform are abundant. Several of the most prominent suggestions include instituting a "fairness test" when considering user-generated content and amending the safe harbor provisions to declare some uses statutorily fair.

In "The Tangled Web of UGC: Making Copyright Sense of User-Generated Content," Daniel Gervais articulates the many ways copyright is struggling with user-generated content.[100] One reason for this struggle is the massive amount of Internet users that are "downloading, altering, mixing, uploading, and/or making available audio, video, and text content on personal web pages, social sites, or using peer-to-peer technology to allow others to access content on their computer."[101] Current copyright doctrine, he argues, is not equipped to meet the changing requirements of the Internet age.[102] Now, individual Internet users have become content providers, a sphere historically reserved for professionals.[103] Because of

95. *See, e.g.*, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

96. *See id.* However, this requires that the court determine the audience of the work. By determining the audience, the court is making a determination regarding the sophistication of the audience and thus potentially the value of the work itself, which may conflict with the nondiscrimination principal.

97. Which might, once again, force judges to make determinations regarding the quality and purpose of a work in potential violation of the nondiscrimination doctrine.

98. Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 846–47 (2009).

99. *See id.* at 847.

100. *See id.* at 841.

101. *Id.* at 845–46.

102. *See id.* at 855.

103. *See id.* at 849.

the changing intellectual property landscape, Gervais suggests that courts should recognize three categories of user-generated content: user-authored content,[104] user-derived content,[105] and user-copied content.[106] He then considers the potential copyright liabilities for each type of content.

Gervais dismisses any liability for user-authored content by stating, "A fair use defense [for posting their work] should not be required, because where no previous copyrighted content is reused, there should be no finding of infringement."[107] This in itself is clear; the original creator of the content is also the poster of the content. However, it is interesting that he does not consider the potential liabilities for people who infringe this user-authored content.

Gervais suggests that user-derived content poses the largest problem under the current fair use regime.[108] He states that

> the fair use analysis applied to online derived content must include an adequate fairness test. A distinction must be made between use value gained by the user and lost exchange value by the right holder. The proper test is one of commercial exploitation . . . is the derivation parasitic or simply free-riding?[109]

He further suggests that most user-derived content is free riding and not parasitic, and thus, a court should consider this under the first and fourth statutory factors.[110] This "fairness test" is meant to apply to amateur end users who Gervais suggests should only be liable for commercial exploitation of the copyrighted works.[111] Interestingly, this test could be applied in the inverse—holding professional users liable when they exploit digital material from the amateur user for profit. Under the current copyright regime, the fourth factor, the effect on the market, is not as important as it once was. However, heightening this consideration for digital content is likely the fairest application of fair use standards to both everyday end users and professionals.

Gervais argues that the production of user-copied content will be fair use if the user's act of providing access to it is fair.[112] Gervais suggests that the current transformation analysis should apply to user-copied content, and he argues for a clear distinction between transformation in expression and transformation of dissemination, the latter weighing against a finding of fair use.[113]

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104. Content authored by the lay Internet, or "amateur" user. *See id.* at 858.
105. Content that the lay Internet user did not originally create but has used or has engaged with it in some way. *See id.*
106. Content copied by the lay Internet user. This category would include sites like Tumblr and Pinterest that rely on the copying of entire posts. *See id.* at 859.
107. *Id.* at 865.
108. *See id.*
109. *Id.* at 867.
110. *See id.* at 867–68.
111. *See id.*
112. *See id.* at 861.
113. *See id.* at 863.

When the case of Prince's "New Portraits" is considered under this regime, one must first make the leap that Gervais's considerations can be applied in the inverse—that is, they can be applied to the professional appropriation artist and that they also can apply when digital content is taken *offline* and put in the traditional gallery setting. Once that is assumed, the work then would be categorized. The original Instagram posts, if they are indeed original to the poster, are obviously user-authored content.

Categorizing Prince's use of the work is more difficult. Even though user-generated content is usually online, this analysis might still apply to Prince's use because his actual art was a "screen shot" of an Instagram picture. If he then had posted that image online, it would be considered user-derived or user-copied content within Gervais's framework. This Note's analysis goes one step further and applies these categories even though the end result was displayed offline in a gallery, rather than staying purely digital. The determination between user-derived content and user-copied content most likely would turn on whether one considers Prince's added comments underneath the Instagram photo sufficiently transformative. A finding of transformation likely would lift Prince's work from the user-copied category into the user-derived category. As such, both categories will be considered.

If Prince's work is considered user-derived content,[114] then Gervais's system requires that the "adequate fairness test" apply. In this analysis, a court would consider the commercialization of the secondary work. In Gervais's words, the primary inquiry should be, "is the derivation parasitic or simply free-riding?"[115] Because this is a test of commerciality, a court would take into account that Prince sold his works for large sums of money. Thus, under this category, the nature of his exhibit most likely would fall into the parasitic category, weighing against a finding of fair use.

If one does not consider the comments under the original Instagram posts to be transformative, then Prince's work would fall into the user-copied category. In this analysis, Gervais states that there will be a fair use defense if "the user's act of providing access to [the work] is fair."[116] Here, the images were not part of a public-domain-type archive, but rather were taken from the private accounts of everyday Instagram users. For user-copied content, Gervais suggests that the current transformation analysis should apply.

Gervais argues that there should be a clear distinction between transformation in expression and transformation of dissemination.[117] If one puts forth that Prince's work is user-copied content and that the level of transformation is too minimal to be considered a fair use, Prince's work would be more accurately categorized as "transformation of dissemination" rather than of expression. He simply changed the forum of the original

114. In this scenario, Prince would be the "user" of the content derived from the original Instagram posters.

115. *Gervais*, *supra* note 98, at 867.

116. *Id.* at 862.

117. *Id.*

Instagram images, a transformation that Gervais argues is not enough to save a derivative work from an infringement claim. Thus, under this system, whether Prince's work is considered user-copied or user-derived, his use would likely not be considered fair. However, this analysis does require Gervais's categories to apply to the professional end user who takes the content offline and into the traditional art world, a situation left undiscussed in his proposal.

### *C. Proposing Fundamental Change to the Copyright System*

Several professors and commentators see the current fair use system as so fundamentally flawed that it needs to be reconceptualized in its entirety. The primary contention is that ascertaining the scope of fair use ex ante is so uncertain that the doctrine is not functioning effectively for either party. One plan looks to restructure payment incentives, and many others look to restructure the system either within the Copyright Office or through the use of new administrative procedures.

#### 1. A Tax-Based Royalty Pooling System

Professor Richard Chused argues that because of a shift in both intellectual property law and art culture in the last century, "the level of reuse and remixing of protected material, both by artists and nonartists . . . became so pervasive that traditional copyright enforcement strategies lost much of their utility."[118] To remedy this, Chused argues that copyright law must be reconstructed in its entirety to protect copyright owners without the need for litigation. He suggests that instead of regulating digital appropriation, artists should be able to opt into a different system of payment—one that keeps traditional payment incentives without fighting copying and appropriation.[119]

He puts forth a system that taxes electronic and other digital equipment and pools the funds for redistribution.[120] Artists, whose works are online, with or without their consent, will have the option to forgo traditional judicial remedies and join an artist group that redistributes the pooled funds based on usage.[121] While he does address the ramifications for appropriation artists, the results under this system would be less than ideal for first-order digital content creators. He states:

> The result for art appropriators and other remixers would be both useful and interesting. Their payment for the digital equipment they use would include a "tax"—in essence a fee allowing them to access and use

118. Chused, *supra* note 75, at 166.
119. *See id.* at 167.
120. *See id.* at 192.
121. Organizations seeking to obtain and distribute part of any royalty pool should be required to apply to the Copyright Office for approval to participate in the system. "Each participating royalty pooling organization should be given the freedom to develop its own monitoring methods and royalty allocation procedures." *See id.* at 199. Authors and copyright owners, in turn, would then be free to select which organization to join.

> copyrighted material after they have been digitized and placed online outside the control of copyright owners. Once they pay these fees, nothing would need to be done. Much like a recording arts making a cover, they could do as they wished with online digital materials subject only to moral right limitations or other non-copyright based control systems.[122]

He goes further, arguing that fair use would be "frictionless" under this system because any potential fair user would have paid their tax and thus have nearly unrestricted access to the work.[123] Any difficulty with this system, he posits, only arises with respect to copyrighted items not embedded in the royalty pooling system.[124] However, this is the very group of people and artists this Note addresses, those least likely to be part of any formalized system, yet whose works still deserve copyright protections.

Under Chused's system, an artist like Prince would be able to make fair use of any content that is digitized and put outside the control of the copyright owners. However, Chused does not consider this system's impact on first-order digital content creators whose first "publication" is digital. His analysis arguably works for traditional artists who have digitized physical pieces they have created. But once again, the amateur or young artists working outside this system would be left unprotected.

In the case of "New Portraits," the original Instagram users most likely would not have been registered in any royalty-pooling scheme. Thus, Chused falls back on traditional copyright doctrine to cover those who opt out of the pooling system.[125] Once again, this puts Prince's use under the current judicial analysis that does not protect the subset of artists from whom he appropriated.

### 2. A Fair Use Board

In an administrative-based reform, Michael Carroll suggests that Congress amend the Copyright Act to create a "Fair Use Board" within the Copyright Office with the power to declare whether the use of a certain copyrighted material is fair.[126] A declaration from the Fair Use Board would act similarly to a private letter ruling from the IRS or a no-action letter for the SEC. That is, a favorable opinion from the Fair Use Board would immunize the petitioner from copyright liability for the proposed use, subject to judicial review.[127]

Among others, Carroll believes that current copyright law is unable to supply copyright owners with the necessary means to enforce their rights while ensuring sufficient freedom to end users.[128] With this proposal,

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122. *See id.* at 201.
123. *See id.* at 212–13.
124. *See id.* at 212.
125. *See id.*
126. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007).
127. *See id.* at 1087.
128. *See id.* at 1122.

Carroll aims to overcome fair use uncertainty by reducing the costs of obtaining a fair use determination ex ante. Specifically, he states:

> Congress should extend the advisory opinion function available in other bodies of federal law to copyright law by amending the Copyright Act to create a Fair Use Board in the U.S. Copyright Office. Fair use judges would have the authority and the obligation to consider petitions for a fair use ruling on a contemplated or actual use of a copyrighted work.[129]

Carroll describes the Fair Use Board as an equivalent to the recently created Copyright Royalty Board.[130] As is the case with copyright royalty judges, the Librarian of Congress would appoint members of the Fair Use Board.[131] Under this system, a copyright owner would receive notification of the submitted petition for fair use and would have the option to participate in the proceeding.[132]

Any determination by the Fair Use Board would be subject to administrative review by the Register of Copyrights.[133] Additionally, any decision out of this process would be subject to judicial review in any federal circuit court of appeals.[134] Carroll makes clear that the power to make generally binding interpretations of the law would remain with the federal courts, and the Fair Use Board would be required to apply judicial fair use precedent to the extent possible.[135] This proposal, while providing a new structural system, does not attempt to address the underlying problem—the fact that the current framework of copyright and fair use itself provides an insufficient model to address modern fair use inquiries. Simply providing an alternative forum will not ameliorate the issue of muddy standards that is currently present in the fair use doctrine.

Additionally, Carroll's proposal first requires that an artist or would-be user decide to bring a case before the Fair Use Board. Put bluntly—this system requires that an artist care, or worry, about his potentially inappropriate use. Artists like Prince, who have had success in court based on their fair use defenses, are unlikely to take the time, effort, and costs to get an ex ante judgment regarding use of another's work. For "New Portraits," Prince did not ask for permission to use the Instagram posts. This, combined with other instances of his blatant appropriation, make it seem unlikely that artists like Prince would come to the Fair Use Board for judgment.

Fellow fair use reformer Professor Jason Mazzone questions Carroll's approach because it provides certainty only to the individual user.[136]

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129. *See id.* at 1123.

130. "The Copyright Royalty Board is the institutional entity in the Library of Congress that will house the Copyright Royalty Judges, appointed pursuant to 17 U.S.C. § 801(a), and their staff." THE FEDERAL REGISTER, https://www.federalregister.gov/agencies/copyright-royalty-board (last visited Sept. 6, 2016) [https://perma.cc/9ZWE-QLE2].

131. *See* Carroll, *supra* note 126, at 1124.

132. *See id.* at 1190.

133. *See id.* at 1123.

134. *See id.*

135. *See id.* at 1128.

136. Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 431 (2009).

Because the decisions would be made on a case-by-case basis, there is certainty only with respect to the particular use that is on review.[137] This fails to give other users any indication that their use is fair, and "certainty on a large scale is therefore impossible."[138] Because the Fair Use Board would not have the authority to create clear guidelines or rules, and it is obligated to apply precedent, this proposal would not solve the current system's failure to adequately address digital media and modern forms of appropriation. Carroll's proposal does not address the uncertainty of the current doctrine and thus likely would not handle the rights of first-order digital content creators any differently than the current regime.

### 3. A Fair Use Arbitration System

David Nimmer suggests an arbitration system to resolve any disputes of fair use. Under this system, the Register of Copyrights would identify a list of qualified arbiters, and users who are unable to negotiate license agreements would be permitted to institute an arbitration proceeding.[139] Professor Nimmer describes the process as an "expedited, voluntary, inexpensive, non-binding procedure to obtain an impartial indication as to fair use that would be a valuable adjunct to our copyright laws, offering guidance to prospective plaintiffs and defendants alike."[140]

The proposal contemplates that regardless of the fair use rulings at arbitration, any subsequent review in a court of proper jurisdiction will proceed ab initio. And in fact, "the court shall not be obligated to accord any weight to the ruling of the Fair Use Arbiter(s)."[141] If the usage is deemed not fair, that ruling is admissible in the context of determining the defendant/petitioner's willfulness.[142] Additionally, if the Fair Use Arbiters rule in favor of fair use, then the available remedies would be limited to actual damages and profits.[143]

However, this system is flawed in its assumption that parties would first attempt a licensing agreement. As stated above, this likely should not be assumed for modern appropriation artists like Prince. Similarly, the everyday copyright user would probably not have the sophistication to attempt a licensing agreement. In considering "New Portraits" under this system, because Prince did not attempt to negotiate with the original artists, and because most of the Instagram users did not know their work was appropriated, it is likely that if litigation ensued it would proceed straight to

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137. *See id.* at 432.

138. *Id.* at 433 (arguing instead that "[a]n agency can both tailor rules to particular sectors and harmonize rules across sectors. Among other things, an agency will be able to take account of practices and interests in specific industries, assess the economic impact on copyright owners of allowing particular uses as fair, and hear from creators about their needs and interests.").

139. David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 11 (2006).

140. *Id.*

141. *Id.* at 14.

142. *See id.* at 15.

143. *See id.*

court, which would then apply the current standards. Even if parties were to use the Fair Use Arbitration system, judges would not be obligated to put any weight on the decision, further mitigating any real change to the copyright system under this proposal.

#### 4. A Fair Use Agency

In a complete overhaul of the current fair use system, Jason Mazzone suggests the creation of a fair use administrative agency to regulate permissible uses. He argues that this would be the most comprehensive way for the system to adapt to modern uses and eradicate uncertainty regarding fair use.[144] Mazzone posits that, in most areas of the law where clear directives are needed to guide behavior but where Congress and the courts are unable to supply clarity, our system turns to administrative agencies.[145] The nature of judicial decisions, he argues, fails to provide general guidance about when a proposed use is fair, making future determinations difficult.[146] In each case, the judge is asked to resolve whether (1) a particular copying of (2) a specified amount of (3) a given work for (4) a certain purpose falls within the protections of fair use. This is an incredibly specific consideration that does not provide the general public with a clear understanding of the fair use doctrine.

Mazzone argues that part of this confusion stems from the fact that the provisions of § 107 of the Copyright Act are standards, rather than rules.[147] In a modern administrative state such as ours, agencies can provide important legal directives with much more clarity. This is especially pressing considering that, with the rise of the Internet, intellectual property laws affect a vast number of individuals and entities, and the law is increasingly complex. To remedy this situation he proposes two variations of an administrative agency that could help mitigate the current system's uncertainty: the Office of Fair Use (TOFU) and the Copyright Infringement Review Office (CIRO).[148]

##### *a. Model One: The Office of Fair Use (TOFU)*

Under this model, Congress would do three things: First, Congress would make it unlawful to interfere with fair uses of copyrighted works and subject offenders to civil penalties.[149] This prong would target certain market players who routinely try to restrict fair uses of their copyrighted works.[150] This approach would be similar to federal consumer protection laws, as a federal fair use protection statute would protect the public from

144. *See* Mazzone, *supra* note 136, at 399.
145. *See id.*
146. *See id.* at 401.
147. *See id.*
148. *See id.* at 415–16.
149. *See id.* at 415.
150. *See id.* at 417.

false claims and other practices that limit fair use.[151] Second, Congress would create an agency whose primary role would be to enforce this statute.[152] It would enforce the statute through traditional rulemaking and adjudication and would operate under the Administrative Procedure Act (APA).[153] Third, Congress would specify that fair use law, including the agency regulations, would preempt state laws of contract that would potentially limit fair uses of copyrighted works.[154]

In this scenario, rules would proceed under notice and comment under the APA, allowing for the public and interested parties to take part in reformation of the system.[155] Additionally, as with other administrative adjudications, agency decisions would be reviewable in the U.S. courts of appeals and would receive deference from the courts.[156]

This model of reform would include a huge monetary and social investment by the public. However, in the current government system where administrative offices flourish, an office such as TOFU would likely be the most consistent and fair way to determine rules for an area of law that is constantly changing.

*b. Model Two: The Copyright Infringement Review Office (CIRO)*

In his second agency proposal, Mazzone suggests that Congress give a federal agency similar to TOFU more general responsibility in copyright infringement claims.[157] The agency still would have the power to issue regulations defining fair use, but an agency such as CIRO also would have adjudicative authority under this scheme.[158] Here, a copyright owner alleging infringement would be required to file, prior to going to court, a complaint with the office, which would in turn conduct an investigation into the fair use claim under its current regulations if a fair use defense is asserted.[159] The office would issue a decision in a notice, then the copyright owner could file a suit if he so desired.[160] Further, if CIRO concluded that there was no fair use defense available and therefore the use likely is an infringement, it could attempt a settlement through an office proceeding.[161] Once again, in deciding the copyright infringement action, courts would defer to the agency's decisions as to whether the use at issue was fair.[162]

Other scholars have considered and critiqued the administrative approach. In "Beyond Fair Use," Gideon Parchomovsky and Philip J.

151. *See id.* at 415.
152. *See id.*
153. *See id.*
154. *See id.*
155. *See id.* at 416.
156. *See id.* at 417–18.
157. *See id.* at 419.
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.*
162. *See id.*

Weiser state that "[b]oth Carroll's and Mazzone's proposals raise several concerns."[163] Specifically, Parchomovsky and Weiser are concerned with two costs associated with their proposals: "First, there is the fixed cost of setting up [a] review body—be it a board within the copyright office or an independent administrative organization. Second, there is the cost of the actual review."[164] Parchomovsky and Weiser worry that review requests would overwhelm any administrative body, creating problems much like those that plague the Patent and Trademark Office today.[165]

Parchomovsky and Weiser also critique Mazzone's first agency model, TOFU, stating that the content and basis for drafting the regulations is unclear.[166] They claim that the case law in this area does not provide a clear body of law on which to base any comprehensive regulation.[167] Fundamentally, they argue that the prevailing disagreement as to the meaning and boundaries of fair use does not bode well for Mazzone's proposal.[168] However, Parchomovsky and Weiser seem to ignore that the muddiness of fair use guidelines is what this agency means to correct. While there may not be a clear body of law or judicial agreement, that is potentially a reason *for* the complete overhaul of the copyright system through an administrative agency.

Mazzone's CIRO, in conjunction with the proposed agency in model one, would offer all ranges of end users the form and forum through which to pursue their claims.[169] Additionally, with clear regulations and published rules there would be potentially fewer cases of uncertainty requiring litigation. This system would provide an appropriate forum for all types of copyrightable materials, those seen and unforeseen.

Without the formalized rules and regulations of the proposed agency, it is very difficult to predict how "New Portraits" would fare under the proposed system. As such, this Note forgoes that analysis. However, because the public would be involved in the proposed agency rules, there is less concern that certain interests would go unaddressed or that some parties would be unprotected.[170] In fact, because an agency can tailor rules to specific instances, there could be a rule specifically for appropriation art in the digital context. Though implementing such a proposal would require an extensive overhaul of the current system, it could be the solution fair use needs.

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163. Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 111 (2010).

164. *Id.*

165. *See id.* "In 2008, the average pendency time of patent applications was just over thirty-two months, and the number of applications pending before the patent office was approximately 1,200,000." *Id.*

166. *See id.* at 111–12.

167. *See id.* at 112.

168. *See id.*

169. *See* Mazzone, *supra* note 136, at 419.

170. However, there is always the threat of agency capture, where a special interest group effectively controls an agency.

## III. PROTECTING FIRST-ORDER DIGITAL CONTENT CREATORS: REFORMING THE FOUR-FACTOR ANALYSIS

To protect end users from infringement liability, commentators have failed to address the practical consideration that young artists of all kinds flock to social media to publicly display their art and hopefully gain attention and notoriety. To shield creative end users from excessive copyright infringement liability, the rights of first-order creators of digital content are left out of consideration. Often dismissed as amateurs, Internet content creators are indeed copyright owners who enjoy the benefit of exclusive statutory rights. However, commentators have generally overlooked potential violations of these rights.

As such, this Note proposes an altered interpretation of the first and fourth fair use factors, along with additional considerations that courts should analyze in digital appropriation cases.

### *A. Requiring a Transformation of Content*

In a standard fair use case assuming that (1) the appropriated material is original, fixed, and constitutes expression rather than ideas and (2) a defendant violated an exclusive right, a court examines the four statutory factors of fair use.[171] The first factor has seen the most change in application since the factors were codified in 1976.[172] In analyzing the first factor, the purpose and content of the work, courts have held that when the original work is sufficiently "transformed" its use generally will be fair.[173] However, this Note proposes that instead of permitting transformation of setting, context, and purpose of the work to constitute fair use, the inquiry should focus primarily on transformation of *content*.

A focus on transformation of content will put this first factor back in alignment with the original utilitarian incentives of exclusive copyright protection.[174] A true transformation of the original work should weigh in favor of a finding of fair use. This standard allows appropriation artists to work with copyrighted materials while providing stronger protections for the original creators. This would protect artists like the Instagram users whose work was used in "New Portraits" from having their work taken off

171. *But see* Alm, *supra* note 17, at 108 ("User-generated content, as long as it is created by the individual user, fits the first requirement of 'independent creation.' A user's status updates, comments, and self-made videos and photos are all independent creations when generated by the individual user. However, much of the content on social media websites will not easily satisfy the modicum of creativity component.").

172. *See supra* Part I.A.

173. *See supra* Part I.A.

174. The Copyright Clause of the U.S. Constitution implies that the primary goal of copyright and patent law is utilitarian in nature and aims to benefit society. Additionally,

> copyright and patent laws are generally seen to operate as part of an interdependent mix of incentives and restraints that bestow benefits and impose costs on society and individuals alike. Viewed this way, copyright and patent laws strive to strike a balance between the promotion of creative and technologic expression and the dissemination of and access to its fruits.

NARD ET AL., *supra* note 15, at 13.

the Internet and placed in galleries. This would additionally protect artists such as Patrick Cariou whose work was taken from print media and put into the fine arts setting with little transformation of content.[175]

### *B. Reinstating the "Comment Upon" Standard for Parody and Satirical Uses*

In determining whether satire and parody uses are transformative, courts should reinstate the "comment upon" standard that the Second Circuit has largely eliminated.[176] This standard provides a safeguard both for the would-be critic and the original content creator. A content creator is less likely to license work for the use of satire and parody. But, this standard still allows critics to make fair use of copyrighted works for social commentary. Reinstating the "comment upon" standard would give some control back to the copyright owner while permitting productive social dialogue.

### *C. Elevate the Weight of the Economic Effect for Digital Appropriation*

This Note proposes that courts should give more consideration to the fourth fair use factor. As it stands now, this factor, which considers the effect on the potential market or value of the original work, is not given much weight in the fair use analysis.[177] However, with digital appropriation being incredibly easy, the market factor should once again be a primary consideration in whether a use is fair.

The *Campbell* court mitigated the importance of the market factor partly because the case dealt with a parody use.[178] With parody and satire, there is a lesser chance of the secondary work interfering with the market for the original.[179] This also is likely to be the case where less than the entirety of a work is used, as in *Blanch*.[180] However, where the entirety of the original work is used and there is no underlying social commentary, the effect on the market for the original work should be a material consideration.

Even when this factor is elevated, there is still a potential issue in the judicial determination of what the "market" or "audience" is for each work. By determining the audience, the court is making a determination regarding the sophistication of the audience and thus potentially the value of the work itself. In *Cariou*, for example, the Second Circuit determined that the

175. *Cf.* Cariou v. Prince, 714 F.3d 694, 712 (2d Cir. 2013).

176. The Second Circuit has supported a broader conception of transformation that does not require the presence of comment if the purpose of the new work is "plainly different from the original purpose for which [it was] created." *E.g.*, Bill Graham Archives v. Dorling Kindersly, Ltd., 448 F.3d 605, 609 (2d Cir. 2006).

177. *See supra* Part I.A.

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

179. *See id.*

180. Koons incorporated Blanch's photograph in a collage, where the photograph became part of the overall commentary. Such an inclusion is less likely to interfere with or affect the market for the original photograph. *See* Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

audiences and markets for the two artists were so vastly different that one would have little effect on the other.[181] However, if the audience had been deemed broader, say, "buyers of artistic works," then both Cariou and Prince's audiences would be the same. Allowing the judiciary to make a determination of the audience potentially implicates the nondiscrimination principle.[182] Indeed, "disputes between appropriation artists and the creators or owners of a work appropriated by them . . . may provoke courts to make aesthetic determinations about the works involved under the copyright fair use doctrine."[183] As such, the "market" and "audience" for works should be construed broadly as to avoid an imposition of judicial opinion.

### *D. Additional Considerations*

In addition to the four statutory factors, courts should consider the type of appropriation at issue in each case. They should consider whether the appropriation is from professional to amateur, peer to peer, or whether it is from amateur to professional. In professional-to-amateur situations, a court should apply a test similar to Gervais's fairness test.[184] It should look to whether the purpose is sharing, whether it is free riding, or whether it is more nefarious and "parasitic." A categorization of parasitic use should weigh most heavily against a finding of fair use, while a finding that the use is used merely in sharing or education should weigh in favor of fair use.

In cases of amateur-to-professional use, there should be a higher standard of what constitutes fair use. Otherwise, young artists and content creators can have their work appropriated for the gain of the professional artist. Their original work should be protected, even when it is on a digital platform. Thus, in this category, the market factor should be weighed most heavily. In each category of appropriation, the court should still apply the four amended statutory factors in their determination of fair use.

Historically, the distinction between amateur and professional was an uncomplicated determination.[185] Primarily, copyrights were given only to professional users, and claims of infringement rarely were brought against the amateur, or private user.[186] Private and amateur uses coincided, as did professional and public uses.[187] Now, amateur uses are increasingly public, making infringement of this content very easy.[188] Because copyright's exclusive rights exist without reference to these traditional distinctions, this both has increased the infringement claims brought against private end

181. Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013).
182. *See supra* Part I.A.
183. Christine Farley, *No Comment: Will* Cariou v. Prince *Alter Copyright Judges' Taste in Art?*, 5 IP THEORY 1, 20 (2015); *see also* Mazzone, *supra* note 136, at 434 ("Although few would admit it (and fewer judges still), determinations of whether a use is fair reflects some degree of judgment about the value of the work.").
184. *See supra* Part II.B.
185. *See supra* Part II.B.
186. *See supra* Part II.B.
187. *See supra* Part II.B.
188. *See supra* Part II.B.

users and has increased the amount of copyrighted material that is available to the general public.[189]

Protecting the amateur artist therefore has not been a necessary discussion in copyright law. But, it is an important modern consideration. If copyright law is primarily utilitarian, which this Note argues it is, then the incentives of this group of artists is of material importance. A professional artist should not be able to monetize the work of the amateur, for doing so could inhibit incentives for amateur artists to make and display their work. Similarly, protecting the amateur would balance the power of dominant players such as Richard Prince, who rarely seek licensing agreements or permission for the works used, with the rights of amateur artists. The equitable interests at stake are clear—amateur artists publish works online that are deserving of copyright and thus legal protection. Creating an analytic framework to uphold this interest will align with utilitarian theories of copyright.

As of yet, no commentator has addressed the unique issue of first-order digital content creators and their rights within intellectual property law. While Gervais's test correctly categorizes digital content users, he ignores the established rights those users have when they post original content.[190] As to the more intensive proposals, the primary flaw with both a Fair Use Board and an Arbitration system is that they provide clarity only to the individual user and for the individual use brought before review.[191] In contrast, amending the interpretation of the current four statutory factors will simply alter the application of current doctrine, giving much more generalized clarity. A royalty pooling system requires voluntary participation and thus is unlikely to gain widespread participation.[192] This, in combination with the difficulty in pooling and distributing the royalties, makes this system unlikely to flourish.[193]

Arguably, the creation of an entirely new administrative agency, empowered not only to determine fair uses ex ante but also with the power to resolve fair use disputes, would be the most comprehensive system of reform. This would address the issue of public knowledge through notice and comment rulemaking and would be better able to address specialized groups and interests particular to fair use. However, the enormous financial and social costs of such an endeavor make it unlikely to be adopted in the near future.

By clarifying that "transformation" requires an actual change in content and not simply purpose and context, the public and appropriation art community are placed on notice that the court primarily will be considering the difference in content between the first and secondary use. Additionally, focusing on the market effect will prevent commercial exploitation of digital work on social media. Added emphasis on this factor is extremely

189. *See supra* Part II.B.
190. *See supra* Part II.B.
191. *See supra* Part II.C.2–3.
192. *See supra* Part II.C.1.
193. *See supra* Part II.C.1.

important in a society where appropriation is incredibly easy. Finally, requiring a work of parody or satire to "comment upon" the underlying use will narrow the field of fair use while still providing social critics with a forum and means to engage with original copyrighted work.

### *E. "New Portraits" Under the Amended Statutory Factors*

When analyzed under the proposed amended interpretations, "New Portraits" would not be considered a fair use of the original copyrighted material. Under this analysis, a court first would need to determine whether the original work is indeed copyrightable. Because the photographs taken for "New Portraits" were artistic, original works, it is very likely they would merit copyright protection. Then, copyright owners likely would claim infringement on their exclusive right to make copies of their work and the exclusive right to publicly display their work. In response to such claims, Prince most likely would raise a fair use defense.

The court would then turn to the four-factor analysis. In considering the first factor and analyzing the transformation of the secondary work, the court would examine what elements of the underlying work were changed. Prince's extremely minimal content transformation in "New Portraits" would weigh heavily against a finding of fair use. In terms of content, Prince added only a single comment under the Instagram photo. Under the proposed interpretation of the first statutory factor, this minor change would not be enough. Additionally, because a court would not consider the transformation of purpose or the transformation of the context of the works, Prince would be relying solely on his one added element in this part of the consideration.

The second factor, the nature and content of the copyrighted work, also would weigh against a finding of fair use. This factor looks to the nature of the original work—here, creative and artistic Instagram pictures. Their publication on social media should not detract from the amount of protection they receive.

The third factor, the amount and substantiality of the portion taken likely would be considered neutral to this analysis. It would be difficult to use a photograph in a secondary work without the whole image. However, it still should be considered that Prince took entireties of works and not merely elements from them.

The fourth factor, the effect on the market, will weigh most heavily against a finding of fair use for this case. Because this factor is elevated in this amended analysis, the fact that Prince monetized others' work for huge financial gain is of central importance. A court also should note that the digital content creators put their work up for free, and if anyone has the right to monetize that work without sufficient transformation, it is the creators.

Finally, this Note's amended analysis also posits that a court should consider the direction of the appropriation in its fair use determination. Because "New Portraits" appropriated material from amateur artists for a professional artist's gain, this weighs strongly against a finding of fair use.

As such, this amended interpretation of the four statutory fair use factors would protect first-order digital content creators, such as the Instagram users in "New Portraits," from professional appropriators like Richard Prince.

### *F. Critiques and Responses*

Several potential critiques arise from this proposed amended interpretation. The two main critiques include: (1) the overruling of precedent and (2) the difficult factual determination between amateur and professional users.

#### 1. Overruling Precedent: Changing What Constitutes a Transformative Use

One potential critique to the new interpretations suggested by this Note is that implementing this system will require overruling current precedent.[194] Primarily, implementation of this Note's proposal, that courts should require a transformation of content rather than a transformation of context, changes the current precedent in both the Second and Ninth Circuits.[195]

However, a limitation that would alleviate this concern is that courts need only apply these considerations to digital appropriation art cases. While there are parallels to other areas of copyright and appropriation art, the ease of digital dissemination and copying is the tension this proposed system aims to address. Still, applying the amended statutory factors to other appropriation art cases would not engender a negative result. For instance, if this proposed interpretation had been applied to the case of *Cariou*, the court would have considered more heavily the monetary gain of Prince at Cariou's expense. While the Second Circuit might still have found that Prince "transformed" the underlying content to a sufficient degree, it would have considered the fact that the art was reproduced on a larger scale or that it was intended for a different audience.[196]

Forcing a more substantial transformation also reflects the utilitarian nature of Copyright Clause: that copyright protection is afforded to encourage and promote the creation of *new* artistic works. Fair use still would have a place but would have a higher bar. Indeed, Professor Gervais notes that before the most recent fair use cases, "transformativeness focused on changes to the work, including a creative recontextualization, but not a mere modification in its mode of dissemination."[197] So in fact, this analysis seems to only be reaffirming the traditional interpretation of this first statutory factor.

194. *See supra* Part II.C.2.
195. *See supra* Part II.C.2.
196. *See supra* Part II.C.2.
197. Gervais, *supra* note 98, at 862.

### 2. The Factual Determination Between Amateur and Professional

While this could be a difficult determination, in most cases it likely would be clear if one user is a professional and another is an amateur. It might be clear based on age, reputation, or career stage. Courts make fact-specific determinations in many contexts, and this determination would not be so different than deciding whether someone is an employee or independent contractor for purposes of tort or corporate law. As with other determinations, a multifactored analysis should be used to draw the line between amateurs and professionals in this context.

Courts should look to the user's education, artistic portfolio, community reputation, history of sales, and age as a set of nonexclusive factors to categorize artists for this analysis. Art education in itself might lend toward a finding of professionalism. However, if an artist was still in school or recently graduated, that would lend itself toward a categorization of amateur. An artistic portfolio would evidence what type of work the artist usually does and in what context. Similarly, the community reputation and history of sales would look to the artist's place and standing in the community and the regard of their peers.

Adding this judicial analysis is yet another decision for a judge to make. However, its relative ease, combined with the implications this Note discussed above, make it worth any additional time spent.

## CONCLUSION

Social media is such a new phenomenon that the law has not been adequately able to address the rights and liabilities for both creators and users of copyrighted works in its context. Should participating on social media mean risking or forfeiting traditional copyright protections? Or can we amend the fair use considerations to allow for productive uses of copyrighted works while also protecting the original content creator? The answer to the latter question is yes. To propose otherwise would be denying an entire generation, which largely posts works digitally, copyright protection that has long been a societal driver of creativity and expression. In amending the weight given to the statutory fair use factors, the rights of first-order digital content creators will be more protected and will continue to encourage contribution to our artistic culture.