

THE ART OF APPROPRIATION: PUPPIES, PIRACY, AND POST-MODERNISM

LYNNE A. GREENBERG*

INTRODUCTION

The 1980s have seen a proliferation of new forms of experimentation within the visual arts. Of particular interest is the wide-reaching trend which has arisen as a response to post-modernist criticism. This artistic trend, a reaction to the formalist ideals of modernism and to the aesthetics of a media- and image-saturated society, has shattered normative visions of what constitutes art.¹ Aggressively and self-consciously derivative in its ideology, post-modernist art critiques the very attributes that copyright law uses to define art: namely, artistic creativity and originality.²

This Article focuses on the various strands of post-modernist art and the particular challenge to copyright law that each has invoked. Discussions of individual works of art and the artists that best exemplify each trend are used to illustrate and emphasize the limits of copyright law. This Article argues that pictorial, graphic and sculptural works, because of their unique status as material entities, require a different copyright analysis from that applied to other copyrightable subject matter. Consequently, this discussion will concentrate on the visual arts and their own discrete needs, and should not be read as addressing the other subjects of copyright.

© 1992 Lynne A. Greenberg

* An intellectual property attorney practicing in New York. B.A., 1986, Brown University; J.D., 1990, University of Chicago Law School. The author was awarded first prize in the Nathan Burkan Memorial Competition at the University of Chicago Law School for an earlier version of this Article. The author would like to thank Professor William Landes of the University of Chicago Law School for his invaluable encouragement and assistance in the preparation of this Article.

¹ For critical descriptions of post-modernism, see generally Craig Owens, *The Allegorical Impulse: Toward A Theory of Postmodernism*, in *ART AFTER MODERNISM: RETHINKING REPRESENTATION* (Brian Wallis ed., 1984); ANDREAS HUYSEN, *AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM* (1986); Benjamin H. D. Buchloh, *Allegorical Procedures: Appropriation And Montage in Contemporary Art*, in *ARTFORUM*, Sept. 1982, at 43.

² See ROSALIND E. KRAUSS, *THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS* 151-70 (1984) (discussing the meaning of originality); Gerald Marzorati, *Art in the (Re)Making*, *ARTNEWS*, May, 1986, at 90, 91 (describing artist Sherrie Levine's appropriation art as "flatly questioning—no, flatly undermining—those most hallowed principles of art in the modern era: originality, intention, expression"); Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, *OCTOBER*, Spring 1992, at 92, 101-103.

Part I explores the art of the Readymade³ and its threat to the viability of the creativity requirement as a hurdle to achieving copyright protection. Part II examines Neo-Conceptualist art and its call for a reformulation of the originality requirement. This section focuses on the regressive application of the originality requirement in recent cases, which operates to restrict unnecessarily the realm of works protected by copyright. Part III focuses on the medium of photography, its relationship to the originality requirement, and its particular vulnerability to infringement actions. This section places special emphasis on *Rogers v. Koons*,⁴ a recent decision which reads as an indictment of the whole movement of appropriation art.

I. CREATIVITY: A QUESTIONABLE REQUIREMENT FOR COPYRIGHT

The requirement of creativity raises three separate questions concerning copyright in a derivative work: 1) whether such a requirement in fact has any force in the realm of the visual arts; 2) what implications this requirement imposes on derivative works in particular; and 3) whether this requirement should stand as a barrier to copyright protection.

A. Creativity Defined

Authority for the creativity requirement has not derived from a statutory mandate, but rather from a Copyright Office regulation defining the category of pictorial, graphic and sculptural works contained in section 102(a)(5) of the Copyright Act.⁵ "In order to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form."⁶ Professor Nimmer has expounded on this categorization, proposing that works of art must demonstrate some level of independent creativity as "a matter of definition. That is, unless a work evidences some creative authorship, it cannot by definition be regarded as a work of art."⁷

³ See *infra* notes 18-30 and accompanying text.

⁴ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

⁵ 17 U.S.C. § 102(a)(5) (1988).

⁶ 37 C.F.R. § 202.10(a) (1991).

⁷ MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.08(B)(1) (1992) (footnote omitted) [hereinafter NIMMER]. See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 532 (1986) (defining "creativity" as, among other things, the "ability to create" and "create" as, among other things, "to produce (as a work of art or of dramatic interpretation) . . . along new or unconventional lines" and "to make or bring into existence something new (as something of an imaginative or artistic character)").

Of import, then, is the articulation of the requisite level of creativity necessary to classify something, by definition, as a work of art. Professor Nimmer concedes that the standard is of "a most humble and minimal nature."⁸ Indeed, most courts have been reluctant to utilize the requirement of creativity as a potent means of denying copyright, averring the oft-repeated words of Mr. Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*:⁹

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of the public is not to be treated with contempt.¹⁰

In two cases, however, the courts have chosen to utilize this admittedly minimal requirement of creativity as a barrier to copyright protection.¹¹ In *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*,¹² the district court held that plastic flower arrangements did not possess sufficient creativity for copyright purposes, as the arrangements had been copied from natural and cloth flower arrangements. The court professed the view that the "degree of creativity necessary to define objects as works of art is not supplied through innovations which are solely utilitarian or mechanical."¹³

⁸ 1 NIMMER, *supra* note 7, at 2-83. See also *Fiest Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1287 (1991) ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.") (quoting 1 NIMMER, *supra* note 7, § 1.08(c)).

⁹ 188 U.S. 239 (1903).

¹⁰ *Id.* at 251-52.

¹¹ See also *Feist Publications*, 111 S. Ct. 1282 (1991) (denying copyright protection to a telephone directory).

¹² 280 F. Supp. 776 (S.D.N.Y. 1968).

¹³ *Id.* at 781. In *Florabelle Flowers, Inc. v. Joseph Markovits, Inc.*, 296 F. Supp. 304 (S.D.N.Y. 1968), the court refused to grant a preliminary injunction for copyright infringement in part because it doubted that the artificial flower model, *Flower in Flower Pot*, possessed sufficient originality for copyright protection. These cases, when taken

In the second case, *Bailie v. Fisher*,¹⁴ the court upheld a refusal by the Register of Copyrights to issue a copyright for a cardboard star. The court relied upon a standard for "creativity" derived from a Ninth Circuit case, *Rosenthal v. Stein*,¹⁵ which stated that "[a] thing is a work of art if it appears to be within the historical and ordinary conception of the term art."¹⁶ Utilizing this standard, the court found that "[a] cardboard star which stands because of folded flaps does not fall within that conception."¹⁷

B. Creativity and the Art of Found Objects

Nothing has been more effective in stupefying the "creative" act, in making it shine in its pure and inane form, than Duchamp's unexpected exhibition of a wine rack in an art gallery [H]enceforth, without an object . . . [art] will spiral in on itself and in a sense disappear, but not without exercising over us a definite fascination. Art, today, merely practises the magic of disappearance.¹⁸

The lack of a substantial body of precedent utilizing the creativity requirement to deny copyright suggests the requirement's inherent weakness. Yet, the import of the language in *Rosenthal* and *Bailie* does require a cautionary stance vis-à-vis the creativity requirement. In particular, the copyrightability of certain ap-

together, seem to negate the possibility of obtaining copyright protection on both creativity and originality grounds for works presenting flowers, and even other natural organisms, in a purely mimetic light. Certainly, this conclusion is not farfetched given the language of the holdings.

These cases must be reconciled with the work of artists such as Dana Duff, who present organic specimens as works of art. For example, Ms. Duff's wall relief entitled *Guilty*, 1989, exhibits embalmed cut flowers displayed in a commercially produced vase. Michelle Stewart likewise creates assemblages of flowers, and David Nyzio recently exhibited a wall of butterfly wings displayed in an even grid from floor to ceiling. Duff's embalming technique, Stewart's assemblaging tactics, and Mr. Nyzio's recreation through amputation do provide powerful arguments for copyright protection. These artists have transformed and recast the organisms, endowing them with a creative component. The artist Donald Lipski challenges the creativity and originality requirements most fundamentally: he simply displays flowers, leaves, or twigs in chemical vials or under glass.

¹⁴ 258 F.2d 425 (D.C. Cir. 1958).

¹⁵ 205 F.2d 633 (9th Cir. 1953).

¹⁶ *Id.* at 635.

¹⁷ *Bailie*, 258 F.2d at 426. See Gregg Oppenheimer, *Originality Art Reproductions: "Variations" in Search of a Theme*, 26 BULL. COPYRIGHT SOC'Y 1, 8 n.41 (1978) (reading the *Rosenthal* standard not as a minimal standard for all works qualifying for copyright, but as a broadening standard meant to provide protection for the sculptural figures at issue in the case).

¹⁸ JEAN BAUDRILLARD, *Fatal Strategies*, in *SELECTED WRITINGS* 185, 187-88 (Mark Poster ed., 1988).

propriational works is arguably most vulnerable to a showing of inadequate creativity.

The implicated works have been termed Readymades, Found Objects, or Object Art.¹⁹ Disenchanted with the definitional limits of modernism, artists working within this movement appropriate mass-produced commodities associated with the American middle-class, such as vacuum cleaners,²⁰ sneakers,²¹ and basketballs,²² and pedestal them as artistic works.²³ By sanctifying the everyday rather than the transcendent, the works play upon the art object as fetish.²⁴ These artists display merchandise as icons reminiscent of shopping-mall display shelves laden with goods, thereby forcing the viewer to confront and decode the banality of the consumer dream.²⁵ By situating these objects of supply and demand in the elite, nonfunctional realm of the art world, these idioms of our everyday culture blast universal conceptions of what art is supposed to represent. High art—or the iconic “masterpiece”—has been destroyed, replaced by serial images capable of infinite abstraction.²⁶ Jeff Koons in his *New Shop-Vac Wet/Dry*, 1980, renounces even a formal arrangement of objects, as the piece displays merely one single vacuum cleaner on a lit plexiglass stand.²⁷ As Koons explains “I don’t seek to

¹⁹ By 1986, museums throughout the United States had mounted exhibitions which featured examples of these “found objects,” including *Damaged Goods* at the New Museum in New York, *The Brokerage of Desire* at the Otis Art Institute in Los Angeles, *Endgame* at the Institute of Contemporary Art in Boston, and *New Sculpture* at The Renaissance Society at The University of Chicago. For reproductions of many of the quintessential works of this movement, see also Dan Cameron, *NY Art Now: The Saatchi Collection* (1987).

²⁰ Jeff Koons, *New Shop-Vac Wet/Dry*, 1980.

²¹ Haim Steinbach, *Related And Different*, 1985.

²² Haim Steinbach, *Dramatic Yet Neutral*, 1984.

²³ These artists are working out of a long tradition of artists who have appropriated ordinary objects and recycled them into artistic works, beginning notably with Picasso's cubist collages and Duchamp's readymades, in the early twentieth century. Andy Warhol's silkscreens, Jasper Johns's and Robert Rauschenberg's combines, Carl Andre's sculpture made from bricks, and Dan Flavin's sculpture of neon tubing extended this tradition into the 1960s.

²⁴ For discussions of the “fetish” in post-modernist criticism, see ROLAND BARTHES, *MYTHOLOGIES* (1957); JEAN BAUDRILLARD, *SELECTED WRITINGS* (Mark Poster ed., 1988).

²⁵ Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *ILLUMINATIONS* (Hannah Arendt ed. & Harry Zohn trans., Schocken Paperback 1969) (1955); JEAN BAUDRILLARD, *The System of Objects and Consumer Society*, in *SELECTED WRITINGS* 10-56 (Mark Poster ed., 1988); Jean Baudrillard, *The Ecstasy of Communication*, in *THE ANTI-AESTHETIC* 126 (Hal Foster ed. & John Johnston trans., 1983); CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* 71-74 (1978); Frederic Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism*, *NEW LEFT REVIEW*, July-Aug. 1984, at 13.

²⁶ See Lucien Stéphan, *Le Regard-pilote*, in JACQUES KERCHACHE, JEAN-LOUIS PAUDRAT AND LUCIEN STÉPHAN, *L'ART AFRICAÏN* 53 (1988), cited in Daniel Soutif, *Found and Lost: On the Object in Art*, *ARTFORUM*, Oct. 1989, at 155, 158.

²⁷ See I. Michael Danoff, *Jeff Koons*, (1988).

make consumer icons, but to decode why and how consumer objects are glorified."²⁸

These artists likewise strive to erase all authorship from their work, replacing individual signature with the trademarks of mass-produced commodities. In so doing, they radically deny the notion of "creative authorship" as a principle and as a definitional codification for works of art.²⁹ For example, Hans Haake's work, entitled *Simulations*, merely simulates³⁰ another work by Haim Steinbach, which is itself a derivative³¹ work.³⁰

The blurring of the distinction between artistic works and the realm of everyday objects has profound implications for the determination of what constitutes copyrightable subject matter under section 102 of the Copyright Act.³¹ In the appropriation art movement, the creative element virtually disappears as artistic works can no longer be differentiated from the world of everyday objects.

The *Rosenthal* standard is most undermined by these works. By emphasizing that works must be identified with historical and ordinary conceptions of what constitutes art, the standard functions regressively, seeming to negate the possibility of attaining copyright protection for innovative works that break fundamentally with the past. Although the appropriation of found objects has an historical lineage dating back to Marcel Duchamp's displaying of a manufactured urinal on a wall in *Fountain*, 1917,³² the work of contemporary artists differs from that of its predecessors. Duchamp and his successors did not merely exhibit or display readymades; rather they inverted and transformed commercial products, endowing them with a new meaning, for example, as a urinal metamorphosed into a fountain.³³

Contemporary artists, on the other hand, do not strive for

²⁸ Daniela Salvioni, *Interview With McCollum and Koons*, FLASH ART, Dec.-Jan. 1987, at 66-67.

²⁹ For discussions of the death of authorship in post-modernist criticism, see ROLAND BARTHES, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142 (Stephen Heath trans., 1977); MICHEL FOUCAULT, *What is An Author?*, in TEXTUAL STRATEGIES 141 (Josue Harari ed., 1979). See also Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L. J. 1359, 1368-69 (1990) (questioning sincerity and intent as appropriate judicial standards for determining copyright in post-modern works).

³⁰ "Simulation" derives from Baudrillard's term for the object as product or commodity, bearing the attributes of neither the natural nor the real, but rather of the reproductive. JEAN BAUDRILLARD, *SIMULATIONS* (Paul Foss et al. trans., 1983).

³¹ 17 U.S.C. § 102 (1988).

³² ARTHUR C. DANTO, *THE TRANSFIGURATION OF THE COMMONPLACE* 5, 93-94 (1981).

³³ See *id.* This interpretation of Duchamp's work is disputed by art historians. Some perceive his readymades, in which manufactured objects such as urinals, bicycle seats, and snow shovels were displayed with no variation save a witty title, as examples of pure appropriation strategies. Arguably, however, this dadaist "joke" of a urinal being trans-

magical or "creative" transmutations. They simply display the mundane industrial products of our culture in artistic sites such as the museum or gallery. In the most extreme examples of this movement, artists do not even create stands or present a series of objects. They simply display a single commodity, void of any transfiguration or artistic commentary.³⁴

Although these pieces do not conform to our "historical and ordinary conception of the term art,"³⁵ there still exists in the language of *Bleistein*³⁶ a strong argument to find that these works possess adequate creativity. These works have captured the attention of the art world. The pieces are displayed in galleries and museums, are bought by collectors and are critically acknowledged by art historians. The works have "appealed to a public,"³⁷ which, by the language of *Bleistein*, merits their acknowledgment as artistic works under section 102 of the Copyright Act.³⁸

Yet, even this admittedly broad understanding of what constitutes a work of art contains an innately regressive element. Art that challenges and explodes established understandings of what may be termed a work of art will not initially (or potentially ever) gain the recognition of the public. Without such recognition, controversial pieces may not enjoy the protection of copyright status. Only by being subsumed within the commercial art market, and thus losing their controversial status, will the works attain copyright recognition.³⁹ Not only success, but even designation as a work of art is arguably contingent upon commercial viability under the *Bleistein* test.⁴⁰ In this manner, the copyright requirement of creativity serves to suppress the avant-garde.⁴¹

formed on the wall of a museum into a fountain is precisely what distinguishes Duchamp from post-modernist appropriation artists.

³⁴ Examples of this trend include John Armleder's *untitled*, 1987, of a lone battery, and Ange Leccia's *Arrangement CDV*, 1987, of a Mercedes automobile.

³⁵ *Rosenthal v. Stein*, 205 F.2d 633, 635 (9th Cir. 1953).

³⁶ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

³⁷ *Id.* at 252.

³⁸ 17 U.S.C. § 102 (1988).

³⁹ See Adler, *supra* note 29, at 1376-77.

⁴⁰ Consider, for example, what the U.S. Copyright Office might do with the piece by European artist Marcel Broodthaers entitled *Section des Figures: L'Aigle de L'Oligocene au Present*, 1972, an installation which displayed objects relating to the eagle, each labeled: *Ceci n'est pas une oeuvre d'art* ("This is not a work of art").

⁴¹ For a discussion of whether copyright laws serve to maximize economic security for artists, see Robert M. Kunstadt, *Can Copyright Law Effectively Promote Progress in the Visual Arts?*, 23 BULL. COPYRIGHT SOC'Y 233 (1976).

C. *Synthesis*

Given the problematic nature of the creativity requirement, its inherent weakness and potentially regressive application, I propose that it be declared void as a barrier to copyright protection. The benefits of the creativity requirement are few. As a matter of definition, the creative element of a work can be evidenced in the work's physical expression. Because the Copyright Act already accounts for the copyrightability of expression-alone, and not for ideas, the creativity requirement does not offer additional aid to the Copyright Office in determining whether to recognize copyright protection in a given work.

Moreover, the creativity requirement does not provide any useful limitations for which the originality requirement has not accounted. The originality requirement, in its prohibition against utilitarian works and in its emphasis on unique authorship, provides an adequate substitute for the creativity requirement.

Furthermore, the costs of the creativity requirement are great. It affords no workable standard by which to judge a work. Judges, unversed in the latest art historical trends, cannot possibly make adequate determinations as to whether works are endowed with an inherently "creative" component. Given the judicial interpretations to date, it is apparent that judges could misconstrue the requirement and deny copyright protection to controversial or innovative works. The requirement does not operate as an incentive for artists to create, but rather discourages new forms of creation.

II. THE REQUIREMENT OF ORIGINALITY

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.⁴²

Unlike the creativity requirement, which concerns the work of art itself, the originality requirement concerns the artist's contribution to the work. It is the primary measure in determining whether a work merits copyright protection. This section will focus on 1) the formulation of the current judicial standard of originality for derivative works, 2) appropriation art as a threat to the

⁴² Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

originality standard, and 3) a proposal which reformulates the originality requirement in order to accommodate recent art trends.

A. *Originality: Problems in Formulation*

The originality requirement stems from section 101 of the Copyright Act, which defines a derivative work as one "based upon one or more preexisting works . . . [in] any other form in which a work may be recast, transformed, or adapted."⁴³ For a derivative work to achieve copyright protection it must constitute, independent of the original work from which it is derived, an "original work of authorship."⁴⁴

As Professor Nimmer articulates in his treatise:

[A] work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work. It is saved from being an infringing work only because the borrowed or copied material was taken with the consent of the copyright owner of the prior work, or because the prior work has entered the public domain.⁴⁵

Copyright protection of a derivative work, however, "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work."⁴⁶ While using "originality" in its definition of a derivative work, the Copyright Act does not specify the amount a copyright seeker must add to a preexisting work in order to meet the originality requirement. The courts thus have been left to grapple with and define the requisite standard for originality.

In *Alfred Bell & Co. v. Catalda Fine Arts*,⁴⁷ the Second Circuit set forth the generally accepted standard of originality for a derivative work as requiring a "distinguishable variation,"⁴⁸ or "something more than a 'merely trivial' variation,"⁴⁹ of the public domain work. Mechanical copies of public domain work do not merit protection. The court found the originality require-

⁴³ 17 U.S.C. § 101 (1988).

⁴⁴ *Id.*

⁴⁵ 1 NIMMER, *supra* note 7, § 3.01, at 3-3 to 3-4 (footnotes omitted).

⁴⁶ 17 U.S.C. § 103(b) (1988).

⁴⁷ 191 F.2d 99 (2d Cir. 1951).

⁴⁸ *Id.* at 102 (citing *Gerlach-Berklow Co. v. Morris & Bendien*, 23 F.2d 159 (2d Cir. 1927)).

⁴⁹ *Id.* at 103 (citing *Chamberlain v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945)).

ment met in *Alfred Bell*,⁵⁰ where the plaintiff had created mezzotint engravings of public domain paintings. The court held that the mezzotint process itself constituted originality and deemed the engravings distinguishable versions of the original works.

In *Alva Studios v. Winninger*,⁵¹ the court found the originality requirement satisfied in a scaled-down, three-dimensional reproduction of Rodin's *Hand of God*. The replica reproduced every detail of the original and functioned as an exact copy of Rodin's sculpture, save that the replica had been reduced in size. The court emphasized in its formulation of the originality requirement that the author must create a work "by his own skill, labor and judgment without directly copying or evasively imitating the work of another."⁵² The court held this burden met as the exactitude of the replica (coupled with a difference in the treatment of the base) indicated its originality.⁵³

This holding, however, may not have enough precedential value to overcome Justice Story's statement: "In truth, every author . . . has a copyright in the plan, arrangement and combination of his materials."⁵⁴ A change in size alone does not necessarily alter either the plan, arrangement, or combination of materials.

The holding is further weakened by the dicta in *L. Batlin & Son, Inc. v. Snyder*.⁵⁵ In *Batlin* the Second Circuit toughened the originality standard, requiring that reproductions of public domain works of art display "substantial" variation from the underlying work.⁵⁶ The court, in articulating this standard, provided a rationale for ignoring trivial distinctions. "To extend copyright-

⁵⁰ *Id.* at 104-05.

⁵¹ 177 F. Supp. 265 (S.D.N.Y. 1959).

⁵² *Id.* at 267.

⁵³ *Id.* But see *Letter Edged in Black Press v. Public Bldg. Comm'n of Chicago*, 320 F. Supp. 1303, 1310 (N.D. Ill. 1970) (holding monumental sculpture not entitled to copyright as it constituted a mere copy, lacking in originality, of maquette already in public domain).

⁵⁴ *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

⁵⁵ 536 F.2d 486 (2d Cir. 1976). For a contrary argument in favor of granting copyright protection to reproductions in different media, see Oppenheimer, *supra* note 17, at 22-24. See also *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 280 F.2d 800 (2d Cir. 1960) (holding sketch made from Byzantine motif copied and printed upon textiles met originality requirement); *Millworth Converting Corp. v. Slifka*, 276 F.2d 443 (2d Cir. 1960) (finding embroidery design transferred to two-dimensional surface met originality requirement); *Doran v. Sunset House Distrib. Corp.*, 197 F. Supp. 940, 944 (S.D. Cal. 1961) (holding that Santa Claus figure possessed sufficient originality because it was the first production of this traditional character in three-dimensional form and plastic medium); but see *College Watercolor Group v. William H. Newbauer, Inc.*, 178 U.S.P.Q. 418, 423 (Pa. Ct. C.P., Montgomery Co., 1973) (holding conversion from slide to watercolor did not constitute sufficient originality).

⁵⁶ *Batlin*, 536 F.2d at 490.

ability to minuscule variations would simply put a weapon for harassment in the hands of mischievous copiers intent on appropriating and monopolizing public domain work."⁵⁷ The court likewise stated that this standard could not be met by the transmutation of public domain works into different media. In examining the plastic mold version of the public domain Uncle Sam coin bank, the court determined that, although it was not meticulously copied from the original metal Uncle Sam bank, the variations in the sculpture did not rise to the level of substantial deviation. The variations identified by the court included a difference in size and material from the original, as well as differences in a number of minute details relating to texture, shape, and ornamentation.

In distinguishing the holding in *Alva Studios* which recognized a variation in size as adequate to support a finding of originality, the court in *Batlin* articulated an alternative criterion for meeting the originality standard: in some instances, "sheer artistic skill and effort can act as a substitute for the requirement of substantial variation."⁵⁸ The court, in holding that the plastic mold sculpture in question did not meet this threshold either, emphasized the fact that it took appellant only a day and a half to produce the sculpture in question, unlike the month of labor required in *Millworth Converting Corp. v. Slifka*.⁵⁹ "A considerably higher degree of skill is required, true artistic skill."⁶⁰

A subsequent case following the originality requirement as articulated in *Batlin* concerned the copyrightability of replicas in different media—not of works of art in the public domain, but of commercial characters protected by copyright. In *Durham Industries, Inc. v. Tomy Corp.*,⁶¹ the Second Circuit affirmed the *Batlin* principle that reproductions made in different media from the underlying work do not alone merit copyright protection. The court ruled that defendant's plastic toys depicting the Disney characters Mickey Mouse, Donald Duck, and Pluto did not dis-

⁵⁷ *Id.* at 492.

⁵⁸ *Id.* at 491.

⁵⁹ 276 F.2d 443 (2d Cir. 1960).

⁶⁰ *Batlin*, 536 F.2d at 491. It should be noted that in attempting to reconcile its decision with that of *Alva Studios*, the *Batlin* court appeared to be initiating an impermissible inquiry into artistic quality and skill. "No matter how poor artistically the 'author's' addition, it is enough if it be his own." *Alfred Bell Co. v. Catalda Fine Arts*, 191 F.2d 99, 103 (2d Cir. 1951). The court likewise emphasized that a Rodin reproduction evidenced greater creativity than the underlying work—the Uncle Sam bank—at issue in the case. Note that Andy Warhol's *Brillo Box*, 1964, a sculptural rendering of the Brillo pads carton, would be suspect under this line of reasoning.

⁶¹ 630 F.2d 905 (2d Cir. 1980).

play the requisite level of originality, as they did not demonstrate independent creation or distinguishable variation from the underlying work.⁶²

The court reasoned that if it "recognize[d] Tomy's derivative copyrights in its figures, those who . . . have obtained from Disney the right to copy Disney's own characters would, as a practical matter, have to make substantial changes to these characters in order to avoid infringing Tomy's rights."⁶³ At the least, these legitimate licensees would "be vulnerable to harassment,"⁶⁴ as they would have to prove that they based their work on Disney's characters and not on the work of the unauthorized copier (Tomy).⁶⁵

A more recent case which has further extended the holdings of *Batlin* and *Durham* presents the greatest threat to the copyrightability of derivative works. In *Gracen v. Bradford Exchange*,⁶⁶ the Seventh Circuit directed its attention to the potential harassment of future derivative artists. In so doing, the court reformulated the originality requirement to emphasize not aesthetic or artistic concerns, but rather a legal concern for preventing "overlapping claims."⁶⁷ "[T]he purpose of the term [originality] in copyright law is not to guide aesthetic judgments but to assure a sufficiently gross difference between the underlying and the derivative work to avoid entangling subsequent artists depicting the underlying work in copyright problems."⁶⁸ "Gross difference" or "substantial variation" has replaced "distinguishable variation" as the relevant test in the Seventh Circuit for analyzing the copyrightability of derivative works.

Thus, under the guise of the substantial variation test, the court disallowed copyright protection for a painting which realistically depicted Dorothy as played by Judy Garland in the movie *The Wizard of Oz*.⁶⁹ The court reasoned that the painting did not exhibit the requisite difference from the movie stills of Dorothy to substantiate a finding of originality. The court emphasized

⁶² *Id.* at 910.

⁶³ *Id.* at 911.

⁶⁴ *Id.*

⁶⁵ For a full discussion of the case and the impropriety of the originality test as set forth in *Durham*, see Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209, 242-43 (1982). Goldstein argues that the evidentiary problems and possibilities of harassment do not present as great a risk as the court assumed, representing only the generally accepted costs inherent in the originality requirement.

⁶⁶ 698 F.2d 300 (7th Cir. 1983).

⁶⁷ *Id.* at 304.

⁶⁸ *Id.* at 305.

⁶⁹ *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939), cited in *Gracen*, 698 F.2d at 301.

that if Gracen had painted Dorothy from life, she would have been entitled to a copyright. This tougher standard for derivative works operates, as the court freely admits, to deny copyright status to an entire art movement, Super Realism, which appropriates color photographs and replicates them exactly. The court made a final troubling announcement concerning the copyrightability of photographs: "We do not consider a picture created by superimposing one copyrighted photographic image on another to be 'original.'"⁷⁰

A synthesis of these seemingly inconsistent holdings leads to the formulation of protected and unprotected categories of originality. Substantial variations, rather than merely trivial ones, will alone suffice to meet the originality requirement for derivative works taken from the public domain. In the Seventh Circuit, only gross differences from underlying works which still retain copyright status will merit copyright protection. Reproductions in different media, while protected under *Alfred Bell*,⁷¹ do not possess adequate originality in the Second Circuit, as *Batlin*⁷² and *Durham*⁷³ hold. Differences in size, as in *Alva Studios*,⁷⁴ possess adequate originality; the *Batlin* court has, however, reformulated this category to require a showing of exactitude rising to the level of artistic skill.

B. Originality and Neo-Conceptualist Art

[My work is] about progress in art . . . It's about extending the boundaries of what's accepted as art. It's my own original contribution.⁷⁵

Judicial application of the originality requirement has led to inconsistent holdings. Taken together, these holding serve to define the limits of acceptable appropriation by artists utilizing the images of forebearers. The rationale for these limitations stems from the perceived need to protect the integrity of art works from "mischievous copiers."

Neo-Conceptualist, Simulationist, or Appropriation art, which has gained notoriety in the art world since the 1980s, ex-

⁷⁰ *Gracen*, 698 F.2d at 305.

⁷¹ 191 F.2d 99 (2d Cir. 1951).

⁷² 536 F.2d 486 (2d Cir. 1976). For decisions holding in favor of granting copyright protection to reproductions in different media, see *supra* note 55.

⁷³ 630 F.2d 905 (2d Cir. 1980).

⁷⁴ 177 F. Supp. 265 (S.D.N.Y. 1959).

⁷⁵ Douglas C. McGill, *Art People*, N.Y. TIMES, Jan. 15, 1988, at C25 (quoting Mike Bidlo).

poses some of the problems that arise in attempting to apply these limitations.⁷⁶ The works themselves also function as direct attacks on the primacy of originality as a definitional tool in defining works of art, on the integrity of the masterpiece, and on the line between mischievous copying and artistic breakthrough.⁷⁷ Duchamp, in *L.H.O.O.Q.*, 1917, appropriated a reproduction of Leonardo da Vinci's *Mona Lisa* and penciled in a moustache over her lip. Surely, this work may be characterized as "mischievous," but it hardly could be denied copyright protection on the grounds of originality in its copying of the original work.⁷⁸ The work of the Neo-Conceptualists, on the other hand, while regarded as embodying similar playful elements, is far more mischievous in its fundamental challenge to the originality requirement.

Artists working within the Neo-Conceptualist tradition create works by lifting images from artistic works of the past and creating replicas of these images. They reuse these motifs in varying degrees, sometimes by appropriating a part of an image, other times by creating works virtually indistinguishable from the originals.⁷⁹ Such wholesale simulations of masterpieces raise serious questions about ownership and the mythic sanctity of the original work.⁸⁰ By confiscating the ideas, images, and even styles of the masters, the Neo-Conceptualist artists radically defy the modernist ethic of individual authorship, the authenticity of expression, and artistic uniqueness as a primary goal of the avant-garde.⁸¹

The work of Sherrie Levine tests the boundaries of the origi-

⁷⁶ For reproductions of many of the pivotal works of this trend, see ELIZABETH FERRER, *THE ART OF APPROPRIATION* (1985) (cataloging an exhibition at the Alternative Museum).

⁷⁷ See generally Buchloh, *supra* note 1; JEAN LIPMAN AND RICHARD MARSHALL, *ART ABOUT ART* (1978) (cataloging an exhibition at the Whitney Museum of American Art).

⁷⁸ See Patricia Krieg, Note, *Copyright, Free Speech and The Visual Arts*, 93 YALE L. J. 1565, 1584 (1984) ("Although he added but two black lines to an art print, Duchamp clearly conveyed original, conceptual expression through his work.").

⁷⁹ It should be emphasized that art commenting upon art and reusing artistic imagery has a lineage dating back to Manet's *Olympia*, which was derived from Giorgione's *Sleeping Venus*. See John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM. J.L. & ARTS 103, 108 (1988). Artists working within this movement today include Sherrie Levine, Mike Bidlo, and Jeff Koons. Another artist who since the 1960s has utilized appropriation strategies is Elaine Sturtevant, although she is not associated purely with the Neo-Conceptualist tradition. She has replicated works in the public domain by abstract expressionist and minimalist masters, including Jasper Johns and Frank Stella, and she has also staged performance pieces that imitate those of Joseph Beuys and Marcel Duchamp.

⁸⁰ Clara Hemphill, *He's Not A Forger, He's An 'Appropriator'*, N.Y. NEWSDAY, Manhattan ed., Jan. 22, 1988, at 31 (discussing Mike Bidlo).

⁸¹ See generally KRAUSS, *supra* note 2; Marzorati, *supra* note 2.

nality requirement most fundamentally, particularly in her repainted oils and watercolors of modern masters. She has reproduced works in the public domain by Piet Mondrian, Jean Miro, Henri Matisse, and Ilya Chasnik, among others, by replicating the images, forms, and lines of the originals. Likewise, she simulates the mannerist styles of these masters, mechanically executing their perceived gestural spontaneity.⁸² This emphasis on technical simulation undercuts the celebrated originality and uniqueness of these masters' processes. Her work has political and feminist ramifications as well, as she chooses to simulate male artists, many of whose styles have been associated with a male aesthetic. The images, on superficial examination, are identical, although some of her works change the medium from oil to watercolor, producing a different surface effect. Her works also change the size of the masters, sometimes reproducing them in miniature.

Traditional copyright doctrine may well view Levine's work as having overstepped the boundary between derivative innovation and mischievous copying.⁸³ Her works do not substantially deviate from the underlying works which she simulates, although they are certainly distinguishable. She has changed the size of these works, which under *Alva Studios*⁸⁴ would qualify for a finding of adequate originality. Yet, the plan, combination, and arrangement of objects have not been transformed, harkening back to the problem of recognizing change in size alone as meriting copyright protection.⁸⁵

Because change in medium alone has not been uniformly recognized by the courts as a ground for copyright protection, the change from oil to watercolors used in some of Levine's works technically would not alone qualify them for copyright protection. Thus, application of these judicially created categories to Levine's work underscores the arbitrariness and inconsistency of these holdings. For example, if medium changes represented the only identifiable variations in Levine's derivative work, her watercolors would be entitled to copyright protection while her oils would not. Such line-drawing does not seem tenable. Exactitude may well provide the strongest ground for a finding of adequate originality in her work. A high level of exactitude exists in

⁸² See generally Buchloh, *supra* note 1.

⁸³ For a discussion of Levine's vulnerability to claims of copyright infringement, see Carlin, *supra* note 79, at 136-38.

⁸⁴ 177 F. Supp. 265 (S.D.N.Y. 1959).

⁸⁵ See *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845).

her work, indicating artistic skill as recognized under *Batlin*.⁸⁶

C. *Towards a Reformulation of the Originality Requirement*

Artists like Sherrie Levine, who paint within the Neo-Conceptualist tradition, pose the most radical threat to the copyright law's originality requirement to date. Mindful of this threat, and of the conceptual weaknesses in the current judicial formulation of the originality requirement, this section will present a reformulation. This proposal attempts to reconcile the opposing needs of adequately protecting the work of past artists and of adequately encouraging the creation of derivative works by future artists.

As the Copyright Act's authority stems from the Constitutional mandate "[t]o promote the Progress of Science and useful Arts,"⁸⁷ the Act must be broadly construed so as not to impede, but rather to encourage, artistic creation. For derivative works in particular, the Copyright Act recognizes only that which is new and has been added to an underlying work. In this manner, the Act creates the incentive for artists to create unique and original works of authorship. This requirement also acts as a check on would-be infringers who could otherwise reap the benefits of another's original contribution to the arts.⁸⁸

Given the Copyright Act's incentive structure, the originality requirement does not warrant the tough "substantial deviation" standard now applied by the courts. Under the previously utilized "distinguishable variation" test, derivative works by artists such as Bidlo and Levine would not face potential copyright problems. Their own signatures on the pieces, the works' qualitative differences, and changes in size and medium would all provide the necessary deviations from the underlying works to merit copyright protection.

Likewise, the "distinguishable variation" test adequately protects against slavish copying by those interested only in creat-

⁸⁶ 536 F.2d 486 (2d Cir. 1976). Mike Bidlo's Picasso simulations also underscore the definitional problem of the originality requirement, as he neither changes the size nor the media of his repainted Picasso imitations. Rather, he varies only the color, line, and form of the originals, subjecting his works to the amorphous factual question of whether these variations indicate a "substantial variation" from the underlying work (or indeed a "gross difference" for those Picasso works which retain a copyright) sufficient to override an originality challenge.

⁸⁷ U.S. CONST. art. I, § 8, cl. 8. See also *Harper & Row v. Nation Enters.*, 471 U.S. 546 (1984).

⁸⁸ For a full discussion of the underlying economic incentives of copyright law, see William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

ing counterfeit works or imitations.⁸⁹ The test operates to limit the extent of permissible copying by the derivative artist so that the value of the original work does not suffer adverse effects. Such a standard seems consistent with the purposes of the Copyright Act to protect the underlying works by limiting access to them, while also providing an incentive to create derivative, original works.⁹⁰

The "gross" or "substantial" deviation test set forth in *Durham*⁹¹ and *Batlin*,⁹² on the other hand, does not balance these two competing interests in an efficient manner. Rather, the test merely places an unnecessary hurdle in the path of derivative artists, unwarranted by the purposes of the Copyright Act. The only admitted rationale articulated by the judiciary for the more stringent "substantial variation" standard seems misguided as well. The "distinguishable variation" standard adequately deters the threat that derivative artists could harass or be harassed by future derivative artists and accounts for the need to prevent overlapping claims. If a derivative work is indeed distinguishable from the original work, a court would be capable of adjudging whether another derivative work was based on the original and not on the previous derivative work.

The "substantial variation" test, then, does not provide additional protection to artists which the "distinguishable variation" test has not already provided. Its only effect is to limit the availability of copyright protection to future artists, acting as a disincentive for artists to create derivative works. The courts should return to the "distinguishable variation" test as articu-

⁸⁹ Indeed, the works of Neo-Conceptualist artists are theoretically worlds apart from works produced by pure imitators. The Neo-Conceptualist artists acknowledge their own creation by signing their pieces. They are not driven by the desire to pawn off their works for those of the masters. They are driven, rather, by the desire to comment upon and even reject the masterpieces of the past. They also differ from copies by such artists as British-born Susie Ray, commissioned to produce imitations of masterpieces by collectors. Although she is careful to sign each piece with her own signature, she has less political or ideological impetus for her creations. She replicates works of the past for economic, rather than purely political or artistic, reasons. Although Susie Ray may be inspired by a different rationale, evidencing not artistic creativity but pecuniary gain, under the Copyright Act as interpreted by this Article, her works would merit the same protection as those of the Neo-Conceptualist artists. To do otherwise would instill a subjective form of decision-making into the process, whereby a derivative artist would gain copyright protection only upon a showing that she or he has "legitimate" theoretical and artistic motivations for creating a derivative work. See Bruce Weber, *The Art of Emulation*, N.Y. TIMES, May 27, 1990, § 6 (Magazine), at 54.

⁹⁰ See Landes & Posner, *supra* note 88, at 333.

⁹¹ 630 F.2d 905 (2d Cir. 1980).

⁹² 536 F.2d 486 (2d Cir. 1976). For decisions holding in favor of granting copyright protection to reproductions in different media, see *supra* note 55.

lated in *Alfred Bell*⁹³ in order to encourage experimentation and advancement in the realm of the visual arts.

III. PHOTOGRAPHS

Contemporary artists have tested and explored the outer limits of the copyright law most fundamentally in the realm of photography. The expanded use of photo montage and collage, appropriation through rephotography, and the innovative photographic techniques used by photographers and artists have fueled a heated debate over the applicable legal rules in the copyright domain. This section will explore: 1) the current judicial formulation of the originality requirement as applied to photographs; 2) the originality requirement's impact on recent photography movements; and 3) the recent case of *Rogers v. Koons*⁹⁴ which has fundamentally altered the balance accorded to artists utilizing appropriation strategies. More troubling than the threat of being denied copyright protection for their photographs, artists and photographers today now face an increased threat of copyright infringement actions from allegedly impermissible uses of photographs.

A. *Photographs and the Originality Requirement*

The medium of photography has historically occupied a suspect position in the realm of the visual arts. This marginalized position can be understood partly as a reaction to photography's mechanical and technical nature, not easily evidencing the "hand" of the artist, and partly because photographic images are often factual and duplicative, rather than creative and original, in nature. The originality requirement for photographs has grown out of the judicial interpretations of the Copyright Act. In *Burrow-Giles Lithographic Co. v. Sarony*,⁹⁵ the Supreme Court first acknowledged the protection of photographs under the Copyright Clause of the Constitution.⁹⁶ The Supreme Court determined that a photograph of Oscar Wilde possessed sufficient originality for copyright purposes. Originality was evidenced

by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various

⁹³ 191 F.2d 99 (2d Cir. 1951). For a discussion of *Alfred Bell*, see *supra* notes 47-50 and accompanying text.

⁹⁴ 960 F.2d 301 (2d Cir. 1992).

⁹⁵ 111 U.S. 53 (1884).

⁹⁶ U.S. CONST. art. I, § 8, cl. 8.

accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression.⁹⁷

The Supreme Court declined to decide whether the ordinary production of a photograph of a real life object could be the subject of a copyright.⁹⁸

In *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*,⁹⁹ the Second Circuit affirmed Judge Learned Hand's opinion in the district court, which held that photographs of illustrations of jewelers' trademarks could obtain copyright status. The district court had extended the Supreme Court's *Burrow-Giles* holding to include within copyright protection not only posed photographs, but all photographs:

[N]o photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike. . . . [U]nder section 5 (j) photographs are protected, without regard to the degree of "personality" which enters into them. . . . The suggestion that the Constitution might not include all photographs seems to me overstrained.¹⁰⁰

The originality requirement, then, seems to be satisfied by the inherent expression evidenced in any photograph, by virtue of the photographer's own decisions as to lighting, pose, and subject matter. Other courts which have considered the copyrightability of photographs have generally found the requisite level of originality met on similar grounds in the works at issue.¹⁰¹ The copyrightable elements of a photograph include only the photographer's expression of the subject, however, and not the subject matter of the photograph itself.¹⁰²

The Supreme Court's seemingly liberal construction of the

⁹⁷ 111 U.S. at 60.

⁹⁸ *Id.* at 59. In *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), the Supreme Court partially considered this question, granting copyright status to lithographic works. The court emphasized that the subject matter of the pictures—their drawing from life and their representation of visible things, could not affect the status of the pictures. *Id.* at 249.

⁹⁹ 281 F. 83 (2d Cir. 1922).

¹⁰⁰ 274 F. 932, 934-35 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922).

¹⁰¹ See, e.g., *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914) (finding copyrightable elements of a photograph include pose, background, light, and shade); *Kisch v. Ammirati & Puris, Inc.*, 657 F. Supp. 380, 382 (S.D.N.Y. 1987) (finding copyrightable elements of a photograph include the selection of lighting, shading, positioning, and timing); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (upholding copyright in a film of the Kennedy assassination where copyrightable elements included the kind of camera, film, and lens, and the time and place in which the pictures were taken).

¹⁰² *Pagano v. Charles Beseler Co.*, 234 F. 963 (S.D.N.Y. 1916).

originality requirement for photographs, while it expresses prevailing judicial authority in the above-cited line of cases, may not accurately characterize the current state of the law. Professor Nimmer in his treatise has set forth two situations in which a photograph should not evince sufficient originality for purposes of the Copyright Act. He posits that as originality constitutes the basic requirement for the copyright of other pictorial, graphic, and sculptural works, it should thus encompass photographs as well.¹⁰³

The first situation Nimmer describes in which a photograph may be found to lack sufficient originality occurs when:

a photograph of a photograph or other printed matter is made which amounts to nothing more than a slavish copying. If no originality can be claimed in making an additional print from a photographic negative, there should be no finding of greater originality where the same effect is achieved by photographing a print rather than printing a negative.¹⁰⁴

Nimmer describes the second situation as arising when:

[a] photographer in choosing subject matter, camera angle, lighting, etc., copies and attempts to duplicate all of such elements as contained in a prior photograph. . . . Such an act would constitute an infringement of the first photograph, and if the second photograph emerges without distinguishable variation it should be denied protection for lack of originality.¹⁰⁵

B. *Originality and Simulationist Photography*

Instead of taking photographs of trees or nudes, I take photographs of photographs. I choose pictures that manifest the desire that nature and culture provide us with a sense of order and meaning. I appropriate these images to express my own simultaneous longing for the passion of engagement and the sublimity of aloofness.¹⁰⁶

Although the courts have liberally construed the originality requirement for photographic works, requiring a lower threshold of uniqueness than for other pictorial works, the requirement as interpreted by Nimmer still operates as a barrier to the work of

¹⁰³ 1 NIMMER, *supra* note 7, § 2.08(E), at 2-126.2.

¹⁰⁴ 1 *id.* at 2-126.3 to 2-126.4 (footnotes omitted).

¹⁰⁵ 1 *id.* at 2-126.4 to 2-126.5 (footnote omitted).

¹⁰⁶ Sherrie Levine, unpublished, undated statement, ca. 1980, *quoted in* Buchloh, *supra* note 1, at 52.

simulationist photographers who rephotograph photographs.¹⁰⁷ These photographers, like their counterparts in the realm of painting, fundamentally question the orthodoxy of originality as a vanguard of modernism and as a standard for copyright protection.¹⁰⁸ These photographers achieve their design in two ways, either by rephotographing the works of other photographers or by staging recreations of past photographic images. This section will discuss works in both these categories and explore the copyrightability limitations imposed by Nimmer's articulation of the originality requirement.

The work of Sherrie Levine again provides the most extreme example of the first method of appropriation identified by Nimmer. Levine rephotographs the photographs of masters. For example, she took reproductions of a series of nudes photographed by Edward Weston from a photography book and rephotographed the reproductions in order to create works indistinguishable from the originals. She applied a similar technique for her series, *After Walker Evans*, in which she appropriated photographs taken by Evans of sharecropper families in the 1930s. She made copy prints of these photographs and exhibited them with her signature displayed underneath. Even the minute flaws in the printing of the originals are mimetically replicated in these rephotographs.¹⁰⁹ As her paintings do, Levine's photographs deconstruct the myth of the masterpiece, challenging the notion of inventiveness and originality in an image-saturated culture and the utility of creation as the primary focus of art making. Levine's work falls squarely into the first category formulated by Nimmer, denying copyright status to photographs on the grounds of a lack of originality.

Kenneth Josephson, Michael Bishop, and Fred Parker, in varying degrees, likewise recycle the photographs of past masters.¹¹⁰ Unlike Levine, however, they do not rephotograph

¹⁰⁷ Artists who rephotograph photographs or who use photography in collage form include Sherrie Levine, David Salle, Richard Prince, John Baldissari, Sara Charlesworth, and Victor Burgin. Mike Bidlo has also experimented with photography, or at least with the use of a photographic image. In his 1984 staged recreation of Andy Warhol's studio, or "Factory" as it was commonly called, Bidlo silkscreened Warhol's image of Marilyn Monroe, itself an appropriated photograph. He distributed these silkscreens signed with his name to viewers as the *pièce de résistance* of the event.

¹⁰⁸ For a discussion of the place of photography in post-modernist criticism, see Roland Barthes, *The Photographic Message*, in *IMAGE-MUSIC-TEXT* 15 (1977).

¹⁰⁹ For a full discussion of Levine's technique, see Carlin, *supra* note 79; see also Gay Morris, *When Artists Use Photographs: Is It Fair Use, Legitimate Transformation or Rip-off?*, *ARTNEWS*, Jan. 1981, at 102, 136-37 (discussing other appropriational photographers).

¹¹⁰ The exhibition, *Photographs Beget Photographs*, at the Minneapolis Institute of Arts, displayed the works of many of these photographers in a group show in 1988.

photographs. Instead, they photograph staged recreations of the images of other photographs. Their work bears a similarity to the second category articulated by Nimmer, in which photographs may not be granted copyright status for a lack of originality.¹¹¹

Fred Parker draws copies of photographs onto glass plates⁷ which he then prints photographically. Except for the inclusion of color and the artists' names on the finished works, the works are identical to the originals. Parker's work underscores the regressive nature of Nimmer's second category of inadequate originality, as Parker's photographs do not differ substantially from the underlying photographic works. An argument can be made, however, that the process utilized by Parker achieves substantial differences in quality and overall appearance from the originals, overriding any originality challenge.¹¹²

This example demonstrates the effect that Nimmer's proposed limitations have on the copyrightability of photographs. As artists experiment with the relatively new technology and processes available in the realm of photography, a primary goal of the Copyright Act should be to function as liberally as possible in order to provide an incentive for experimentation. Commenting upon the past, while simultaneously using photography to find new means of expression, accounts for the high degree of appropriation utilized by these photographers in an art historical context. Post-modernist criticism likewise provides a methodology engendering such experimentation.

Arguably, Nimmer's two proposed restrictions do not further advancement in photography. They functionally limit the permissible images available to the photographer. The benefits of these constraints are minimal. Copyright infringement law is better suited to protect the rights of the underlying photographs in those situations in which the similarity between the photographs threatens to undermine the protection afforded by the

¹¹¹ Kenneth Josephson and Michael Bishop in their photographs substitute different objects for those used in the original photographs in order to comment, sometimes satirically, upon their predecessor's work. They do not attempt to reproduce identically the original photographs, but instead capture their essence. For example, Michael Bishop recycled Ansel Adams' photograph, *Moonrise*, by inserting an egg in the place of the moon and titling the work *Egg-rise*. These photographers share a common association with the Duchampian tradition of transformation and transmutation, and arguably do not suffer any threat from the Copyright Act, as their work substantially differs from the originals. See Vivien Raynor, *Photographers Take Aim at the Image from Earlier Works*, N.Y. TIMES, Feb. 21, 1988, § 2, at 22.

¹¹² *Id.*

copyright status of the original work.¹¹³ Nimmer's categories do not diminish this threat, but rather impede the creativity of photographers.

C. Rogers v. Koons: *The Narrowing of the Fair Use Defense*

"It was only a postcard photo and I gave it spirituality, animation and took it to another vocabulary."¹¹⁴

1. Copyright Infringement and the Fair Use Defense

Section 106 of the Copyright Act articulates the five exclusive rights that inure to the copyright owner, i.e., those rights that the owner can protect from unauthorized exploitation by third parties. Two of the rights critical to visual artists are set forth in Sections 106(1) and (2), which grant the copyright owner the exclusive rights to reproduce the copyrighted work and to prepare derivative works based upon the copyrighted work.¹¹⁵

¹¹³ Indeed, copyright infringement law has hitherto accounted for Nimmer's proposed categories in the realm of photography. Three early cases considered virtually the same issues. *Lumiere v. Pathé Exchange, Inc.*, 275 F. 428 (2d Cir. 1921), considered whether drawings based on a copyrighted photograph that were transferred to plates from which colored prints were taken infringed the photograph. The court held that such copying did infringe upon the original photograph, although several differences in detail distinguished the drawings from the original photograph.

In *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914), the Second Circuit held that a posed photograph taken by a photographer who had already sold the copyright to an earlier photograph which utilized the same background, light, shade, and model in a substantially similar pose infringed the first photograph. The court so concluded even though it recognized that "[t]he eye of an artist or a connoisseur will, no doubt, find differences between these two photographs. The backgrounds are not identical, the model in one case is sedate, in the other smiling; moreover the young woman was two years older when the later photograph was taken, and some slight changes in the contours of her figure are discoverable." *Id.* at 931.

In *Falk v. T.P. Howell & Co.*, 37 F. 202 (C.C.S.D.N.Y. 1888), the court held that the stamped reproduction of a substantial portion of a copyrighted photograph on the back of a chair infringed the copyright of the photograph, although the reproduction had been enlarged in size. "Differences which relate merely to size and material are not important." *Id.*

A more recent case which considered this problem is *Kisch v. Ammirati & Puris, Inc.*, 657 F. Supp. 380 (S.D.N.Y. 1987). *Kisch* concerned a photograph used in beverage advertisements which was derived from a pre-existing photograph. In both photographs, the models were seated and were holding musical instruments in the same corner of the same nightclub. Although the lighting, camera angle, and camera position were very similar, different models and instruments were utilized in each photograph. Defendant's motion to dismiss the claim was denied, as the court held that a rational trier of fact could find substantial similarity between the copyrightable elements of the two works. For a reproduction of the subject photographs in this case, see ALAN LATMAN, ET AL., *COPYRIGHT FOR THE NINETIES: CASES AND MATERIALS* 423 (3d ed. 1989).

¹¹⁴ Ronald Sullivan, *Appeals Court Rules Artist Pirated Picture of Puppies*, N.Y. TIMES, April 3, 1992, at B3 (quoting Jeff Koons in a telephone interview regarding his work *String of Puppies*).

¹¹⁵ 17 U.S.C. § 106(1)-(2) (1988).

The 1976 Copyright Act codified a judicially created exception to the grant of exclusive rights. Section 107 provides that the "fair use" of a copyrighted work by a third party does not constitute an infringement of copyright.¹¹⁶ The equitable doctrine of fair use permits the limited use of a copyrighted work—which would otherwise constitute an infringement—for purposes such as "criticism, comment, news reporting, teaching . . . [,] scholarship, or research."¹¹⁷

The fair use exception provides a necessary safe harbor for the appropriation, in certain well-delineated circumstances, of copyrighted material. Congress recognizes through this exception that an absolute grant of exclusive property rights in a work of authorship would actually serve to suppress, rather than to stimulate and encourage, the creation of new works of authorship. For example, the creation of works incorporating copyrighted material, or reviews quoting passages of the underlying work, would not be permissible without the fair use defense.¹¹⁸

In determining whether a given use of a copyrighted work is a fair one for purposes of the exception, the courts balance four factors codified by the Copyright Act. These factors are:

- (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.¹¹⁹

2. *Rogers v. Koons*: Background

Recently, the Second Circuit Court of Appeals was faced with the question of whether a derivative work by the artist Jeff Koons, entitled *String of Puppies*, infringed the copyright in a photograph by Art Rogers entitled *Puppies*. While there is a handful of examples of photographers who have sued artists in the last twenty years, this is the first case which did not settle out of

¹¹⁶ 17 U.S.C. § 107 (1988 & Supp. 1990).

¹¹⁷ *Id.*

¹¹⁸ M. Buskirk, *supra* note 2, at 93 ("For if the copyright holders on images . . . are allowed absolute control over the context in which they are reproduced, they will also be granted a form of veto power over criticism by being able to withhold the object of interpretation.").

¹¹⁹ 17 U.S.C. § 107 (1988 & Supp. 1990).

court.¹²⁰ This case stands as a landmark for this reason. The case is also pivotal as it may fairly be read as a death knell to appropriation art.¹²¹ Fair-use cases are relatively fact specific. Furthermore, appropriation artists are still free to make *de minimis* takings of copyrighted work and may still borrow from works already in the public domain. Yet the language of the holding is decidedly hostile to appropriation strategies, and, accordingly, could have far-reaching legal consequences for artists practicing such strategies.

The court rejected Koons's defense that his taking of Rogers's photograph constituted a "fair use," protected by the Copyright Act, and ultimately found that Koons's sculpture infringed the copyright in Rogers's photograph. Although Koons may well have taken "too much" from his source material for purposes of this narrow exception to copyright infringement, the court's language is overbroad in its indictment of, and hostility toward, appropriation. By holding that *all* four fair use factors weighed presumptively in favor of Rogers, the court's holding could be used as powerful precedent in other cases brought against artists working within this movement.¹²²

This section will explore and highlight some of the numerous questions and problems raised by this holding. Some factual background is necessary for a complete understanding of this topic.

Art Rogers, a commercial photographer, was commissioned in 1980 to photograph a couple and their eight German Shepherd puppies. The black-and-white photograph depicts the smiling couple seated outdoors on a park bench holding the puppies in their laps. Rogers subsequently licensed the right to use the photograph on note cards and postcards for mass distribution in 1984.

In 1987, Jeff Koons bought one such postcard in an airport gift shop. This image of Americana, sentimental and endearing, became source material for Koons. He sent the postcard to his fabricators in Italy, instructing them to execute a sculpture from

¹²⁰ For a full discussion of these examples, see generally Morris, *supra* note 109; see also Carlin, *supra* note 79, at 126-38.

¹²¹ See Sullivan, *supra* note 114; Martin Garbus, *Law Courts Make Lousy Art Critics*, N.Y. NEWSDAY, Apr. 22, 1992, at 46; Adrian Dannat, *The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, at 20.

¹²² Indeed, there are two other cases currently pending against Jeff Koons alone. One of these cases was filed by United Features Syndicate complaining about Koons's use of the cartoon character Odie from the *Garfield* comic strip in his sculpture, *Wild-Boy and Puppy*. The other case concerns Koons's use of the Pink Panther character in a sculpture.

its image. In 1988, he exhibited the final work in an edition of three at the "Banality Show" at the Sonnabend Gallery in New York. The work, fabricated from polychrome and wood, is larger than life-size. It depicts a couple with clown faces painted in garish colors with daisies in their hair. They are embracing eight gigantic blue puppies sporting bulbous noses. From a simulationist's perspective, *String of Puppies* is far from an exact replica of the underlying photograph—important differences in medium, size, detail, color, and content are easily apparent.¹²³

Rogers brought suit in the United States District Court for the Southern District of New York against Koons and the Sonnabend Gallery. The complaint alleged copyright infringement and violations of section 43(a) of the Lanham Act, section 349 of the New York General Business Law, and section 17200 of the California Business and Professions Code.

Upon the filing of the complaint, each party cross-moved for summary judgment. The district court granted Rogers's motion for partial summary judgment on the issue of infringement, while denying Koons's motion for summary judgment to dismiss the entire complaint.¹²⁴ Koons and Sonnabend Gallery appealed this decision to the United States Court of Appeals for the Second Circuit. The appellate court affirmed the lower court's holding in a decision remarkable for its hostility toward Koons and to appropriation strategies in post-modernist art in general.

3. The Appellate Court Holding

The court initially held that those portions of Rogers's photograph that had been appropriated by Koons constituted copyrightable expression.¹²⁵ The defendants had vigorously argued that the two works differed significantly, thus undercutting a finding of substantial similarity. The court ignored these differences, holding that Koons had appropriated original expression and that the aesthetic appeal of the two works was identical.¹²⁶

¹²³ These differences, however, were not adequately visible from the black-and-white image of *String of Puppies* that was presented to the court. Apparently, the court never had the opportunity to view the actual sculpture, but instead made its determination of infringement based solely upon a postcard-sized, black-and-white reproduction of the sculpture. See Garbus, *supra* note 121.

¹²⁴ See *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990).

¹²⁵ *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992).

¹²⁶ *Id.* at 311. The court delineated the proper test for determining "substantial similarity" as whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." *Id.* at 307 (citing *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)). See also *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966).

The highly subjective nature of the court's decision is apparent from its analysis of those aspects of the photograph which it deemed were original, copyrightable expression. As the court stated:

It is not therefore the idea of a couple with eight small puppies seated on a bench that is protected, but rather Rogers's *expression* of this idea—as caught in the placement, in the particular light, and in the expressions of the subjects—that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable.¹²⁷

One could argue, however, that it is precisely those aspects of the photograph which the court viewed as “charming” and expressive which Koons meant to distort, even to destroy. Arguably, Koons's purpose in appropriating the photograph was precisely because he saw nothing “original” about this tender scene—he viewed it as a typical, generic example of kitsch. Moreover, not only the placement of the figures, but also the lighting and expression of Koons's sculpture, are radically different from Rogers's underlying photograph.¹²⁸ Koons has changed the medium, scale, colors, expression, overall mood and artistic content of the photograph. Indeed, those aspects of Rogers's piece which the court viewed as “original” are no longer apparent in Koons's sculpture. Gone is the “charming” and cuddly warmth of Rogers's photograph, and in its place is a garish, perhaps horrifying, perhaps hilarious image.

Furthermore, as previously discussed, those aspects of a photograph that are traditionally deemed copyrightable expression, including background, lighting, shading, clarity, and positioning of the camera, film and lens, were simply not copied in Koons's large polychrome sculpture.¹²⁹

The court next examined the work in light of the fair use doctrine. As to the first factor, the purpose and character of the use, the court pronounced that, as a matter of law, the work was predominantly “exploitive”¹³⁰ and commercial in purpose. The court seemed to equate Koons's commercial success and “sub-

(asking “whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work”).

¹²⁷ *Rogers*, 960 F.2d at 308.

¹²⁸ Brief for Defendants-Appellants at 2, 11-12, 28, *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (Nos. 91-7442 & 91-7540) [hereinafter Brief for Defendants-Appellants].

¹²⁹ These qualities are unique to the medium of photography and cannot practically be translated into another medium, particularly into the medium of sculpture. See Brief for Defendants-Appellants, *supra* note 128, at 31.

¹³⁰ *Rogers*, 960 F.2d at 309.

stantial profit"¹³¹ as indicia of Koons's mercenary, unartistic motivations. The fact that Rogers gleaned a mere \$200 for his photograph only added to the court's evident disapproval of Koons's commercial success.¹³²

The Supreme Court has articulated the accepted test for determining whether a given use of a copyrighted work is for a primarily commercial or non-commercial purpose. As the Court stated, "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."¹³³

The Second Circuit seems to have interpreted this test to mean that any time a work is sold, it will not be protected as a fair use. Certainly, the court overstated its point and, in so doing, has left all artists who sell their work vulnerable. Under this holding, the "purpose" of the use will always militate against a finding of fair use in suits brought against derivative artists. It will very rarely be arguable that their purpose in appropriating the images of other artists was for purely eleemosynary reasons.

Also relevant to the first factor of the fair use calculus is the "character" of an alleged infringer's use of the underlying work. The Second Circuit, while recognizing that "comment" and "criticism" of a copyrighted work are protected under the fair use defense, refused to recognize that Koons's sculpture "properly" commented upon or criticized the photograph.¹³⁴ Here, the court may well be viewed as having traversed the line between acting as a legal decision-maker and as a critic of artistic merit.

The defendants argued that *String of Puppies* was valid satire or parody, and thus the work was protected as fair social criticism.¹³⁵ In determining that the work did not constitute a "parody" of Rogers's work as a matter of law, the court defined the

¹³¹ *Id.*

¹³² The court's contempt for Koons's "profit-making" activities is evidenced further in the harshly-worded preamble to the opinion, which states, in relevant part:

The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism.

Id. at 303.

¹³³ *Harper & Row v. Nation Enters.*, 471 U.S. 539, 562 (1985).

¹³⁴ *Rogers*, 960 F.2d at 510-11.

¹³⁵ Brief for Defendants-Appellants, *supra* note 128, at 16-19. For a full discussion of the defense of parody in the arena of appropriation art, see Carlin, *supra* note 79, at 118-26.

outer reaches of the "parody" defense. The court held that while the allegedly infringing work may operate as "a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."¹³⁶ The court reasoned that if one could avoid copyright infringement merely by claiming artistic purpose, there would be no practicable limit to the defense. As the court stated, "Koons'[s] claim that his infringement of Rogers'[s] work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace . . . cannot be accepted."¹³⁷

In these few words, the court has effectively discredited an entire artistic movement. It is not the proper role of the court to be making pronouncements about what does and does not constitute proper criticism in the realm of the visual arts. By refusing to recognize the critical nature of the work, the court emphasizes its unsuitability to act as an art critic. In order to be deemed "proper" criticism, a work had best be a rather obvious parody of the underlying work—otherwise, the court may miss the critical nature of the work altogether.¹³⁸

Furthermore, by dismissing Koons's work as not a "proper" criticism or commentary, the court is effectively censoring the works of all artists working within the appropriation tradition—even those artists whose appropriation strategies are quantitatively *de minimis*. It is troubling to contemplate just what images the post-modernist artist could legitimately use as source material, when nearly every image she would find of interest (commercial products, media images and works by other artists) is protected intellectual property and therefore off limits.¹³⁹ This overbreadth likewise may serve to chill artistic expression, as artists wary of liability for copyright infringement may choose to steer clear of appropriating copyrightable expression altogether.¹⁴⁰

Surprisingly, however, the court did not address, apart from the "parody" defense, which generally operates as a separate defense to a claim of copyright infringement, whether Koons's purpose in creating the work was primarily for the purposes of education, commentary and criticism. By not addressing the crit-

¹³⁶ *Rogers*, 960 F.2d at 310.

¹³⁷ *Id.*

¹³⁸ *Buskirk*, *supra* note 2, at 104 (citing Brief for Defendants-Appellants, *supra* note 128).

¹³⁹ *Id.* at 105.

¹⁴⁰ *See Krieg*, *supra* note 78, at 1568.

ical purpose of the work, its importance as an example of kitsch and its place in art history and post-modernism, the court neatly sidestepped any real understanding of the work itself. The court also impermissibly limited the scope of the criticism and commentary defense. Neither the Copyright Act nor its legislative history limit an artist to commenting on or criticizing only the underlying copyrighted work. It seems apparent, instead, that criticism and commentary are meant to encompass all forms of criticism and commentary, so as not to restrict freedom of expression impermissibly. By dictating that an artist must be directly criticizing or commenting on the underlying work in order to use a copyrighted work in another work of art, the court has censored the content of permissible artistic speech.

The Second Circuit likewise found that the second fair use factor, the nature of the copyrighted work, weighed against a finding of fair use.¹⁴¹ In determining the nature of the copyrighted work, courts have looked to whether a work is published or unpublished,¹⁴² and whether a work is factual or fictional in nature.¹⁴³ The Second Circuit held that Rogers's photograph was "creative and imaginative,"¹⁴⁴ and thus fictional in nature.

Surprisingly, the court ignored the fact that the photograph had been published, and indeed published widely, as Rogers had licensed the right to reproduce the photographic image. In refusing to give any weight to this fact, the court ignored the economic justifications underlying the fair use defense. The author of an unpublished work is entitled to a presumption of unfairness for an unauthorized taking,¹⁴⁵ in recognition that the author has not yet reaped the benefits of his or her artistic labor. There would be an economic disincentive to create if another could usurp the artist's right to enjoy these benefits, for example, by publishing the work first. Thus, the typical copyright infringement action grows out of the unauthorized commercial exploitation and dissemination of an artistic work by a third party.

Here, the facts are actually the reverse of the typical scenario. Rogers's work has been mass produced and exploited commercially. He has succeeded, however, in enjoining the dissemination of only a very limited edition of a work of fine art.

¹⁴¹ *Rogers*, 960 F.2d at 310.

¹⁴² See *Harper & Row v. Nation Enters.*, 471 U.S. 539, 564 (1985).

¹⁴³ See *New Era Publications Int'l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990).

¹⁴⁴ *Rogers*, 960 F.2d at 310.

¹⁴⁵ See *Salinger v. Random House*, 811 F.2d 90, 97 (2d Cir. 1987) (holding that unpublished works "normally enjoy complete protection").

In this context, the court's holding is troubling, and one must ask whether it is economically beneficial to have an artist prevented from creating a limited-edition, derivative work by one who has already reaped the commercial benefits of the underlying mass-produced work.¹⁴⁶

The court also refused to consider the fact that the photograph was a commissioned work, and that the image itself (couple with eight puppies) had been expressly requested by the Scanlon family. On these facts, the court could easily have found that the realistic representation of the couple and their eight puppies was predominantly "factual" in nature, rather than creative. On both of these grounds, then, the court could have chosen to find that the second fair use factor, the nature of the copyrighted work, weighed in favor of Koons.

The third fair use factor, the amount and substantiality of the taking, was also found by the court to weigh in favor of Rogers.¹⁴⁷ The Second Circuit has stated that this factor has both a "quantitative" and a "qualitative" component.¹⁴⁸ The court ultimately found that Koons had appropriated copyrightable expression, indeed the very "essence of Roger[s]'s photograph was copied nearly *in toto*["]"¹⁴⁹ As the court concluded: "In short, it is not really the parody flag that appellants are sailing under, but rather the flag of piracy."¹⁵⁰

The court overstated its point by arguing that Koons had appropriated the copyrightable elements of the photograph *in toto*. In so doing, this holding may operate as a dangerous precedent for appropriation artists. Koons's work is certainly not as rigorously derivative as Sherrie Levine's rephotographs of photographs, for example. Along the spectrum of appropriation tactics utilized by post-modernist artists, Koons's *String of Puppies* is arguably quite mild. Koons contributed a significant degree of creative and original expression to the sculpture, fundamentally altering the photograph in the process.

Finally, the fourth fair use factor, the effect of the use upon the marketplace for the underlying work, was also found by the court to weigh in favor of Rogers. This factor has been characterized by the Supreme Court as the "single most important" fac-

¹⁴⁶ Buskirk, *supra* note 2, at 104 (citing Brief for the Defendants-Appellants at 36, *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (Nos. 91-7442 & 91-7540)).

¹⁴⁷ *Rogers*, 960 F.2d at 311.

¹⁴⁸ See *New Era Publications Int'l v. Carol Publishing Group*, 904 F.2d 152, 158 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990).

¹⁴⁹ *Rogers*, 960 F.2d at 311.

¹⁵⁰ *Id.*

tor to consider in conducting the fair use analysis.¹⁵¹ In determining whether Koons's sculpture has had an adverse effect on the market for and the value of Rogers's work, the appellate court was mindful that

a balance must be struck between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair. The less adverse impact on the owner, the less public benefit need be shown to sustain non-commercial fair use. It is plain that where a use has no demonstrable impact on a copyright owners' potential market, the use need not be prohibited to protect the artist's incentive to pursue his inventive skills.¹⁵²

While this analysis accurately recites the economic incentives at stake, the court's application of the facts to this methodology is decidedly subjective. The court concludes that again, because Koons's work is primarily commercial in nature, it undercuts not only the demand for the underlying work but also the market for derivative works of Rogers's photograph.¹⁵³

The court seems to have skewed the analysis by focusing once again on the fact that Koons's art is "high-priced." This fact, while relevant to the second fair use factor, is superfluous to the fourth fair use factor, which instead concentrates on whether the Koons's sculpture has "usurp[ed]"¹⁵⁴ or "supplant[ed]"¹⁵⁵ the market for the underlying photograph. It seems farfetched to imagine that Koons's "high-priced" kitsch, sold in the elite world of the art gallery, could even tangentially affect the market for either Rogers's commissioned photographs or Rogers's post-cards, sold predominantly in gift shops.

In summary, while the outcome of the case may be correct under current copyright doctrine which provides only a limited defense to appropriation and which seeks to protect artistic labor, the decision's sharp rhetoric may be viewed as overly broad. Additionally, the effect of the case is to act as a powerful check on appropriation artists. Because the stakes under copyright law for appropriating imagery from a copyrighted work are now so high,¹⁵⁶ it is likely that many artists will steer clear of using such

¹⁵¹ *Harper & Row v. Nation Enters.*, 471 U.S. 539, 566 (1985).

¹⁵² *Rogers*, 960 F.2d at 311-12.

¹⁵³ *Id.*

¹⁵⁴ *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984).

¹⁵⁵ *Weissman v. Freeman*, 868 F.2d 1313, 1326 (2d Cir.), *cert. denied*, 493 U.S. 883 (1989).

¹⁵⁶ The court analyzed the potential damages for which Koons may be liable upon

techniques in their future work. Thus, the holding ultimately acts to chill—rather than to foster—creative expression, the very antithesis of the economic incentives at the heart of copyright law.

CONCLUSION

The art of appropriation, in its borrowing of everyday products and goods from the world of consumerism, and in its borrowing and expanded use of artistic imagery from the past, represents the most radical challenge to the copyright laws to date. Indeed, appropriation art virtually renders the Copyright Act's insistence on creativity and originality obsolete. Arguably, for the Copyright Act to adequately encourage and reward such experimentation, a prudent reformulation of the creativity and originality standards for application in the realm of the visual arts is mandated.

The recent decision of *Rogers v. Koons* simultaneously underscores the precarious position occupied by artists practicing radical appropriation strategies, and accentuates the consequences of so rigorously enforcing the limited monopoly rights granted by copyright law. Because of the volume of quotation and appropriation utilized by some post-modernist artists, it is certain that this most recent judicial pronouncement will not be the last in the ongoing attempt to find a proper balance between protecting the artistic expression of an author, while simultaneously encouraging new forms of artistic creation.

remand, finding Rogers a "good candidate" for statutory damages, given Koons's "wilful and egregious behavior."¹ *Rogers*, 960 F.2d at 313. Statutory damages may run in the thousands of dollars in such circumstances. 17 U.S.C. § 504(c)(2) (1988).