The Copycat Dilemma: Appropriation Art and Legal Ethics

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TABLE OF CONTENTS

INTRODUCTION

This Note argues that the existing copyright law framework, coupled with the erosion of the fair use defense as shaped by statutes and judicial interpretations, threatens to obfuscate the well-defined delineations of professional responsibility as set forth in the *Model Rules of Professional Responsibility* for attorneys and their clients and the *Code of Conduct for United States Judges*. First, this Note sets forth the basic legal framework of copyright law and the fair use defense, including both the relevant statutory background and quintessential Supreme Court precedent. Subsequently, this Note delves into the pervasive tradition of copying and appropriation that has been central to artistic practice across historical periods, highlighting notable instances in the realms of visual art, literature, and beyond. In the third section, this Note synthesizes the intersection of

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copyright law with contemporary art, offering an in-depth examination of three recent high-profile copyright infringement litigations, including the landmark 2023 Supreme Court ruling concerning Andy Warhol. Finally, this Note critically assesses the implications of evolving fair use jurisprudence on the ethical contours of legal practice, scrutinizing how these shifts threaten to blur the clear lines of professional responsibility as envisioned by governing legal ethics standards.

I. LEGAL BACKGROUND

A. COPYRIGHT LAW

The United States Constitution vests Congress with the authority to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] This provision, from which an entire body of copyright law has derived, reflects a balance of competing interests. On the one side, the Copyright Clause seeks to encourage creative endeavors by offering authors and inventors a limited monopoly over their works. In other words, it is "intended to motivate the creative activity of authors and inventors by the provision of a special reward."[2] This reward is embodied in exclusive rights and protection for the creator, without which creators ostensibly would not retain sufficient incentive to sustain and advance further creative and intellectual efforts. At the same time, the constitutional framework reflects a utilitarian philosophy, prioritizing the eventual integration of these creations into the public domain. By limiting the duration of exclusive rights, the Clause facilitates the dissemination of intellectual achievements, fostering the progress of science and the arts for broad societal benefit.[3] This structure is "designed [] to stimulate activity and progress in the arts for the intellectual enrichment of the public."[4] This dual-purpose approach underscores the enduring principle that copyright is both a tool for individual reward and a mechanism by which to promote the broader public interest.

The constitutional framework was codified in the Copyright Act of 1976, which provides the statutory foundation for modern copyright law. The Act affords "copyright protection [to] . . . original works of authorship fixed in any tangible medium of expression."[5] Protection extends over a broad spectrum of creations; including literary, musical, dramatic, pictorial or graphic works, as well as motion pictures, sound recordings, and more.[6] In doing so, the Act effectuates the balance prescribed by the Framers by delineating the scope of exclusive rights conferred upon creators

1. U.S. CONST. art. I, § 8, cl. 8.
2. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).
3. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
4. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 94–95 (2014) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990)).
5. 17 U.S.C. § 102(a).
6. *Id.*

while concurrently imposing limitations to safeguard the broader public interest.[7] Among the bundle of exclusive rights granted to copyright holders are the rights to reproduce the work, create derivative works, distribute copies to the public, and engage in various other forms of control over the use of the copyrighted material.[8] Supplanting these privileges are the specific limitations set forth by the Act, such as the fixed duration of copyright protection,[9] exclusion of ideas and facts from protection,[10] and the specific boundaries of the rights granted to copyright holders.[11]

B. FAIR USE DEFENSE

Fair use is a legal principle that allows for limited use of copyrighted materials for specified purposes. Copyright protection is remarkably expansive, making the fair use doctrine a critical safeguard against granting undue monopoly power to copyright holders.[12] To qualify for copyright protection, a work must meet only a low threshold of originality and creativity.[13] In fact, the Court has previously articulated that "the requisite level of creativity is extremely low; even a slight amount will suffice."[14] As a result, the vast majority of works that exhibit even a minimal "creative spark" beyond mere factual compilations are removed from the public domain. The fair use doctrine acts as a vital check on this broad scope of protection, ensuring balance in the system, and thus forms the central defense against copyright infringement claims.[15]

The doctrine was first distilled by Justice Joseph Story in *Folsom v. Marsh*.[16] In *Folsom*, the court addressed whether the defendant's use of pages from the plaintiff's biography of George Washington constituted copyright infringement.[17] To resolve the dispute, Justice Story "look[ed] to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[18] These features were subsequently codified in

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7. *See generally* The Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*

8. 17 U.S.C. § 106; *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546–47 (1985).

9. *Id.* §§ 302-305; *see also* The Sonny Bono Copyright Term Extension Act, Pub. L. 105–298, 112 Stat. 2827 (1998) (extending the length of copyright protection by 20 years to consist of the life of the author plus 70 years following the author's death); Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (affirming the constitutionality of the Copyright Term Extension Act of 1998).

10. 17 U.S.C. § 102(b); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 344–45 (1991) (citing *Harper & Row Publishers, Inc.*, 471 U.S. at 556) ("The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.'").

11. 17 U.S.C. §§ 107-122.

12. *See, e.g.*, Stewart v. Abend, 495 U.S. 207, 236 (1990) ("The [fair use] doctrine is an equitable rule of reason, which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.") (internal citations and quotation marks omitted).

13. *See Feist Publ'ns, Inc.* 499 U.S. at 345.

14. *Id.*

15. Priya Kavuru, Note, *Appropriation Makes the Art Grow Fonder: The Fair Use Doctrine and the Future of Contemporary Art*, 76 RUTGERS U. L. REV. 825, 831 (2024).

16. 9 F.Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

17. *Id.* at 345.

18. *Id.* at 348. In formulating the foundational principles of the fair use defense, Justice Story expounded that "a reviewer may fairly cite largely from the original work, if his design be really and truly to use the

Section 107 of the Copyright Act of 1976, which provides a four-factor test to determine whether a particular use is fair:

> (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.[19]

The preamble of the statute enumerates illustrative categories that may presumptively qualify as fair use, including criticism, comment, news reporting, teaching, scholarship, and research.[20] In practice, these delineated purposes are treated as a "plus factor" in the judicial calculus when evaluating fair use claims.[21] Legislative history surrounding the passage of Section 107 evinces congressional intent for the doctrine to remain inherently flexible.[22] Statements from the enacting legislature make clear that the provision was designed solely to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[23] Flexibility, although key for enhanced discretion, is not oft a catalyst for consistency or clarity. Subsequent judicial interpretation has perpetuated a state of doctrinal ambiguity, complicating the contours of fair use jurisprudence.[24]

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court announced that the fourth doctrinal factor—the effect of the use on the potential market for the work—"is undoubtedly the single most important element of fair use."[25] "[W]hen properly applied," the Court explained, the fair use doctrine "is limited to copying by others which does not materially impair the marketability of the work which is copied."[26] Prior to this, the Court had expounded that "every

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passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." *Id.* at 344–45.

19. 17 U.S.C. § 107.

20. 17 U.S.C. § 107.

21. Niki Kuckes, *From Andy Warhol to Barbie: Copyright's Fair Use Doctrine After Andy Warhol Foundation v. Goldsmith*, 29 ROGER WILLIAMS U. L. REV. 177, 191 (2024).

22. *See* E. Kenly Ames, Note, *Beyond Roger v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1489 (1993).

23. *Id.* (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65, 66 (1976)).

24. *See also* Kuckes, *supra* note 21, at 200 ("[T]he doctrine of fair use originated as a judge-made rule, an 'equitable rule of reason' so that the courts could avoid 'rigid application of the copyright statute' when such an application 'would stifle the very creativity which that law is designed to foster.' Given both its history as a common-law doctrine and the loose wording of the statute, judicial interpretations have an appropriate and legitimate role.") (citing Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1196 (2021)).

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

26. *Id.* at 566–67 (citation omitted).

commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[27]

Five years after the Court's opinion in *Harper & Row*, and in light of conflicting and contradictory lower court judgments applying fair use, Judge Pierre Leval authored a seminal article describing the fair use doctrine as a "disorderly basket of exceptions to the rules of copyright," and arguing that it should be grounded instead in his theory of transformative use.[28] According to Leval, the pervasive inconsistencies and doctrinal confusion in fair use jurisprudence stemmed from the subjective and erratic application of the statutory factors, exacerbated by the inherent tension between safeguarding copyright holders' exclusive rights and advancing the public's interest in free expression and access to information.[29] He pointed out the failure of judges, including himself, to explicitly delineate the relative weight of each factor or provide coherent guidance on their interplay, resulting in a fragmented understanding of the doctrine's proper application.[30] Situating the doctrine, Leval argued, should be the question of whether a "secondary use adds value to the original" rather than "merely repackages or republishes" it.[31] Under this transformative formulation, Leval theorized that permissive uses might include "criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it," as well as "parody, symbolism, [and] aesthetic declarations."[32] Judge Leval's theory formed the conceptual foundation of the first factor—the purpose and character of the use.[33]

The transformative use theory reached its doctrinal zenith upon embrace by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, in which rap group 2 Live Crew asserted a fair use defense against an infringement claim over their parody of Roy Orbison's *Oh, Pretty Woman*.[34] The *Campbell* Court expounded that "[t]he central purpose of [the fair use inquiry] is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation,[35] . . . [or] in other words, whether and to what extent the new work is 'transformative.'"[36] Although

27. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

28. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106 (1990).

29. *Id.* at 1105–09.

30. *Id.* ("The court of appeals' disagreement with two of my decisions provoked some rethinking, which revealed that my own decisions had not adhered to a consistent theory, and, more importantly, that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values.").

31. *Id.* at 1109.

32. *Id.*

33. *See* Kavuru, *supra* note 15, at 833.

34. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 573 (1994).

35. *Id.* at 579 (citing *Folsom*, 9 F.Cas. at 348).

36. *Id.* (citing Leval, *supra* note 28, at 1111). Unsurprisingly, in a speech, Leval later described *Campbell* as "a beautifully reasoned opinion," which "brought to an end fair use's odyssey of bad piloting and aimless drift." Pierre N. Leval, Campbell *as Fair Use Blueprint?*, 90 WASH. L. REV. 597, 597, 600 (2015). *See also* Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 112–13 (2d Cir. 1998) ("*Campbell* [] significantly illuminated the proper application of the first fair use factor, the purpose and character of the use. . . . The Court considered this standard appropriately captured by Judge Leval's helpful adjective 'transformative.'") (citation omitted).

clarifying that such transformative use is not an absolute requirement, the Court ultimately instructed that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works," and thus "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weight against a finding of fair use."[37] *Campbell* marked a jurisprudential shift, dismantling entrenched presumptions against fair use in cases involving commercial secondary uses[38] and solidifying the transformative use inquiry as a central axis for lower courts to navigate. Accordingly, the decision was viewed as a departure from the reliance on the fourth factor in the fair use inquiry.[39] In its place, the first factor—purpose and character of the use—became supreme.

This supremacy, however, may be under fire. Commentators have suggested that courts are beginning to regress on the now established primacy of the first factor and the transformative use test.[40] For instance, in *Authors Guild v. Google, Inc.*, Judge Leval himself writing for the Second Circuit both referenced and twice quoted the Supreme Court's decision in *Harper & Row*, where the Court had determined the fourth factor to be "undoubtedly the single most important element of fair use."[41]

Most significantly, the shifting relativity of the preeminence of each individual factor demonstrates the lack of uniform direction in application of the fair use doctrine in the realm of art, and particularly the new era of contemporary art. This gap hinders the ability of the judicial institution to render consistent dispositions on cases presenting arguably similar legal issues, and leaves artists, attorneys, and judges without the requisite tools to administer justice in the manner ordained by the United States Constitution and put forth through the various catalogues of legal ethical directives.[42] In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, discussed *infra*, the Supreme Court declined an opportunity to provide much needed guidance on the definition of "transformative" and arguably muddled what minimal areas of law had been settled in fair use jurisprudence.[43] Between the Court's first and most recent fair use case, 27 years passed.[44] Within that time, courts have fiddled with and proposed inconsistent formulations of the fair use doctrine in

37. 510 U.S. at 573.

38. *See supra* text accompanying notes 25–27.

39. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 926 (1994) ("*Campbell's* discussion of the fourth factor conspicuously omits th[e] phrasing" of it as "the single most important element of fair use," thus . . . "apparently abandoning the idea that any factor enjoys primacy") (citation omitted); *see also Leibovitz*, 137 F.3d at 113 (same).

40. *See, e.g.*, Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 575 n.67 (2016).

41. Authors Guild v. Google, Inc., 804 F.3d 202, 214, 220 (2d Cir. 2015); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

42. *See* Haley A. Palmer, Note, *The "Orange Prince" of Copyright: Warhol's Prince Series & Transformative Fair Use*, 38 NOTRE DAME J.L. ETHICS & PUB. POL'Y 409, 412–13 (2024).

43. *See infra* text accompanying notes 106-141.

44. *Campbell v. Acuff-Rose Music, Inc.*, as discussed, was the Court's foundational fair use decision, published in 1994. The next came in 2021—*Google LLC v. Oracle America, Inc.*, 593 U.S. 1 (2021)— and addressed whether the use of certain software interfaces was a fair use under copyright law.

application to cases involving art.[45] Specifically, the Ninth and Second Circuits have emerged as the most influential in transformative use jurisprudence.[46]

II. CONTEMPORARY ART

Copying or 'appropriation' is a pervasive feature of art history.[47] Throughout each artistic movement, artists have taken inspiration from previous works of art in developing new creations, often to the point of brazen and unabashed copying. All art is in dialogue with what comes before, and this dialogue is critical to the progression of art culture.[48] Writing as *amici* to the Supreme Court in a recent fair use case, a number of museums and art groups including, but not limited to, the Metropolitan Museum of Art, the Art Institute of Chicago, Solomon R. Guggenheim Foundation, Whitney Museum of American Art, documented several prominent examples of appropriation throughout art history.[49] Arguing that the lower court mistakenly discounted as "copying" an established and important tradition of incorporating substantial elements of preexisting works, the museums pointed to numerous quintessential works of art throughout history depicting precisely this feature.[50] To name a few, Giovanni Panini interposed essentially replicas of several famous former works in his 1757 painting *Modern Rome*, including Michelangelo's *Moses*, Bernini's *Constantine, David, Apollo*, and more.[51] In 1856, Jean-August-Dominique Ingres appropriated the unique pose taken from the ancient Roman painting *Herakles Finding His Son Telephas* to liken the figure appearing in his painting to an Olympian goddess.[52] In the late 19th century, Vincent Van Gogh produced a series of paintings in which he transposed prints of the works by Jean Francois Milled, an artist he admired.[53] The famous *Drowning Girl*, produced in 1963 and featured at the Museum of Modern Art, is a painting derived from a print in a romance comic book published by DC

45. *See, e.g.*, text accompanying notes 74-80 (explaining the Second Circuit's flip-flopping on its view of the propriety of one artist's appropriative technique).

46. Palmer, *supra* note 42, at 412; *see also* Part III. (exemplifying four noteworthy Second Circuit decisions).

47. Adler, *supra* note 40, at 572 ("Copying is now so ubiquitous in art that some have complained it has become 'hegemonic.'").

48. *See, e.g.*, Brief for the Art Institute of Chicago et al. as Amici Curiae in Support of Neither Party, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023) (No. 21-869) ("Over the centuries, artists have leveraged, repurposed, and recontextualized preexisting works.") [hereinafter Museum Brief]; Adler, *supra* note 40, at 568 n.29 (citing Affidavit of Kathy Halbreich, Rogers v. Koons, 89 Civ. 6707 (CSH) (1990)) ("the interpretation of existing imagery is essential to all artistic practice. Even to cite examples feels absurd because, once again, virtually every work of art is based upon or inspired by some other work of art."); *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 560 (Kagan, J. dissenting) ("let's be honest, artists don't create all on their own; they cannot do what they do without borrowing from or otherwise making use of the work of others. That is the way artistry of all kinds—visual, musical, literary—happens (as it is the way knowledge and invention generally develop.")).

49. Museum Brief, *supra* note 48, at 10–20.

50. *Id.*

51. *Id.* at 11.

52. *Id.* at 12.

53. *Id.* at 13.

Comics.[54] Also in the 20th century, artist Elaine Sturtevant was gifted a silkscreen from Warhol so she could produce her own version, as she took up the technique of repeating the works of her contemporaries.[55] Famous street artist Banksy's work, *Girl with a Pierced Eardrum*, is a stripped down replication of Vermeer's *Girl with a Pearl Earring*, painted in 1665.[56] The examples are endless. And yet, they prove something that every artist and art historian has understood for centuries: art does not exist in isolation, each is but a single drop in the vast ocean of artistic creation. From this massive body, artists draw inspiration, offer commentary, and channel their creativity.

This feature—the pervasive role of appropriation—is not unique to painting, nor even limited to the more traditional forms of artwork. Recently in dissent, Justice Kagan went through significant pains to make precisely this point.[57] Take not her word for it, she pronounced, but look to that of Justice Story, eloquently articulated in 1845: "in literature, in science and in art, there are, and can be, few, if any, things, which … are strictly new and original throughout."[58] Or, perhaps, Mark Twain: "'the substance, the bulk, the actual and valuable material' of creative works—all are 'consciously and unconsciously drawn from a million outside sources.'"[59]

Exacerbating the role of appropriation in art has been the emergence of a new artistic era, termed the "postmodern movement."[60] Postmodernism is viewed largely as a rebellion against the strict dictates of Modernism, the era which preceded it.[61] With origins in the 1860s, the Modernist movement involved experimentation with new forms and sources to produce what was deemed "good art" or "high art," that which was "pure, self-critical, original, sincere, and serious."[62] Postmodernism attacked these distinctions, rejecting the demand that art be serious, or even have meaning or value at all.[63] Blossoming from the repudiation of novelty and originality was imitation and copying, which became so central to the postmodern philosophy[64] that a broader movement within the era has been dubbed "appropriation art."[65] Because "purposeful erasure of artistic subjectivity, intentionality, and affect," is a

54. *Id.* at 15.

55. *Id.* at 17.

56. *Id.* at 18-19.

57. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 587-92 (Kagan, J. dissenting).

58. *Id.* at 568 (quoting Emerson v. Davies, 8 F.Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845)).

59. *Id.* at 582 (quoting Letter from M. Twain to H. Keller, in 2 Mark Twain's Letters 731 (1917)).

60. *See* Xiyin Tang, *Art After Warhol*, 71 UCLA L. Rev. 870, 883 (2024).

61. *See Postmodernism*, TATE GALLERY, https://www.tate.org.uk/art/art-terms/p/postmodernism [https://perma.cc/DR82-8WCD] (last visited Mar. 20, 2025).

62. Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 Yale L.J. 1359, 1363 (1990); *see also Modernism*, TATE GALLERY, https://www.tate.org.uk/art/art-terms/m/modernism [https://perma.cc/SJL7-2BYC] (last visited Mar. 20, 2025).

63. Adler, *supra* note 62, at 1364.

64. *Id.* at 1366.

65. Tang, *supra* note 60, at 885. In fact, "postmodernists challenge the foundations of modernist theory by questioning whether art can ever be original, whether it can be meaningful, and whether art is really any different or any 'better' than popular culture." Ames, *supra* note 22, at 1478.

defining feature of postmodernism, intentional appropriation of the work of another artist fits comfortably within the prevailing contemporary art era and art history more generally.[66] Within this domain, appropriation retains several meaningful distinctions from pure plagiarism. Copying in the postmodern tradition allows an artist to recontextualize an existing image in mass culture, taking it out of the stream of mass consciousness and placing it in a gallery or museum setting, giving viewers an opportunity to more intentionally consider the values (or lack thereof) embodied in those images.[67] Artists like Andy Warhol and Richard Prince arose from and have become paradigmatic figures of the Postmodern tradition,[68] and yet have not been immune from legal challenge.[69]

III. FAIR USE JURISPRUDENCE

A. JEFF KOONS

Artist Jeff Koons occupies a prominent position within the postmodern art movement, distinguished by his employment of industrial fabrication techniques and appropriation strategies that challenge the dichotomy between high art and popular culture.[70] His oeuvre interrogates themes of consumerism, mass production, and commodification, with emblematic works such as *Balloon Dog* and *Rabbit* securing his status as a leading figure in contemporary art discourse.[71] Koons' innovative yet controversial approach to art has not only positioned him as luminary In the postmodern movement, but also as a central figure in the evolution of copyright jurisprudence.

In the late 20th century, Koons commissioned the creation of a polychromed wood sculpture depicting a man and a woman holding a row of puppies, ostensibly intended as a "critical commentary on conspicuous consumption, greed, and self indulgence."[72] Three of the four copies of the sculpture, entitled "String of Puppies," were exhibited in a New York gallery and sold to collectors for a total of $367,000.[73] But there was just one problem. The structure's facial appearance was deliberately and almost entirely appropriated from a photograph featured on

66. Tang, *supra* note 60, at 883.

67. Ames, *supra* note 22, at 1481–82.

68. Tang, *supra* note 60, at 885.

69. *See infra* text accompanying notes 95-152.

70. *See* Soth Rothkopf, *Jeff Koons: A Retrospective*, WHITNEY MUSEUM OF AM. ART (2014), https://whitney.org/exhibitions/jeff-koons [https://perma.cc/QG6Y-8Z5F] (last visited Dec. 20, 2024).

71. *See* Anthony Haden-Guest, *Art or Commerce?*, VANITY FAIR, https://www.vanityfair.com/news/1991/11/art-or-commerce?srsltid=AfmBOoqetVryTjNEdohpPi0UHAl3iEk6VunPTJWZneV0zbbW3zTYy-MV [https://perma.cc/9Y4Q-C6QJ] (last visited Dec. 20, 2024).

72. *Rogers v. Koons*, 751 F. Supp. 474, 476 (S.D.N.Y. 1990); *see Rogers v. Koons*, 960 F.2d 301, 304–05, 309 (2d Cir. 1992).

73. 960 F.2d at 305. Koons explained that he determined the image on the notecard to be a "workable source," because it was "typical, commonplace, and familiar," and thus "part of the mass culture." *Id.* Before he sent the notecard to his artisans to reproduce it in three-dimensional form, Koons tore off the portion of the card showing Rogers' copyright of the photo. *Id.*

a notecard sold in a tourist shop, taken by the lesser-known artist Art Rogers.[74] Upon discovering the sculpture, Rogers initiated litigation against Koons and the gallery, alleging copyright infringement.[75] The district court rejected Koons' contention that his sculpture constituted fair use under the Copyright Act, holding that the absence of explicit commentary on Rogers' photograph itself nullified Koons' assertion of transformative use.[76] The court further underscored that Koons' unauthorized appropriation usurped Rogers' ability to exploit derivative markets and monetize the reproduction rights of his work through artistic renderings.[77] The Second Circuit gave similar credence to Koons' characterization of his sculpture as a "satirical critique of [] materialistic society," but stressed that, to qualify as 'parody' or 'satire,' and thereby warrant enhanced protection under the fair use doctrine, the appropriated work itself must serve as the target of the parody.[78] The court concluded that this essential criterion was not satisfied in the case at hand.[79]

Not even ten years later, Koons was hauled into court again. This time, however, he fared much better.[80] Koons appropriated portions of a magazine advertisement featuring a model's legs, feet, and Gucci sandals—intended to convey "a sense of sleek elegance, with faintly erotic undertones"—and re-contextualized them to "comment on and celebrate society's appetites and indulgences, as reflected in and encouraged by a ubiquitous barrage of advertising and promotional images of food, entertainment, fashion and beauty."[81] In addition to other revenue, Koons received two million for the entire collection within which the appropriated work, entitled "Niagara," was a part of.[82] The original photographer, by contrast, was paid $750.[83] That photographer, Andrea Blanch, became aware of Niagara after it was displayed at the Guggenheim Museum in New York, and subsequently filed a lawsuit against Koons and the galleries where the artwork was displayed for copyright infringement.[84] Unlike in Koons' prior case, however, both the district court and Second Circuit summarily agreed that this appropriation was clearly transformative and "in no way competitive" with the potential market for the original photograph, as "'Niagara's' market is one the photograph had no chance to capture."[85]

During the prior litigation in *Rogers v. Koons*, Koons repeatedly insisted that he believed the original photograph to be "typical, . . . part of the mass culture—'resting in the collective subconsciousness of people regardless of whether [it] had

74. *Id.*
75. *Id.*
76. 751 F. Supp. at 479.
77. *Id.* at 480.
78. 960 F.2d at 310.
79. *Id.*
80. *See generally Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).
81. *Blanch v. Koons*, 396 F. Supp. 2d 476, 479 (S.D.N.Y. 2005).
82. 467 F.3d at 248–49.
83. *Id.*
84. *Id.* at 249.
85. 396 F. Supp. 2d at 480–82; 467 F.3d at 251–58.

actually ever been seen by such people,'" and thus its incorporation into his sculpture achieved the purpose of "comment[ing] critically both on the incorporated object and the political and economic system that created it."[86] Koons employed an identical strategy ten years later with respect to Niagara. There, he explained that the original photograph was "a fact in the world, something that everyone experiences constantly," and "typical of a certain style of mass communication," and thus Koons' use of that image was as "fodder for his commentary on the social and aesthetic consequences of mass media."[87] In both instances, Koons demonstrated an unwavering fidelity to the "artistic tradition of commenting upon the commonplace."[88] However, the Second Circuit's application of the fair use doctrine diverged sharply between the two. In *Rogers*, this rationale fell short of establishing fair use,[89] while in *Blanch*, it prevailed.[90] The *Blanch* court exhibited marked hesitancy in rendering judgments on artistic intent, instead affording significant deference to Koons' articulation of his creative objectives.[91] "Whether or not Koons could have created "Niagara" without reference to [the original photograph]," the court observed, "we have been given no reason to question his statement that the use of an existing image advanced his artistic purposes."[92]

In reflecting on (or rather, *searching for*) meaningful changes between Koons' first and second confrontations with the Circuit Court, one potential explanation emerges. Having gone through one round of litigation, Koons might have learned important lessons about navigating the legal process. In other words, he learned how to testify and build his case in a method that appeased the courts.[93] Rather than rely on affidavits of art experts or transparent recitations of his purpose in creating the art, Koons was likely directed to provide a clear statement of intent that would suffice for the Second Circuit's emphasis on the transformative test.[94] In this way, the judicial institution subverted the artist's ability to create and speak meaningfully about his work, implicating his lawyers and the judges in that effort.[95]

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86. 960 F.2d at 305, 309.

87. 467 F.3d at 255, 253.

88. 960 F.2d at 310.

89. *Id.*

90. 467 F.3d at 255.

91. *Id.* ("Although it seems clear enough to us that Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography, we need not depend on our own poorly honed artistic sensibilities.").

92. *Id.*

93. *See* Adler, *supra* note 40, at 582 ("In the years leading up to Blanch, the Second Circuit had said that question of transformative use boiled down to this: did the secondary work use the first to impart 'new insights and understandings?' And lo and behold, look at what Koons said about his purpose and meaning during his deposition: 'I want the viewer to think about . . . these images and . . . gain new insight' into them.").

94. *See Blanch*, 467 F.3d at 253; *see also* Adler, *supra* note 40, at 582–83.

95. For instance, one commentator reported that Koons adapted his art style, taking on collaging, as a direct response to his legal losses in the 1990's in the hope that it would offer him some protection from legal liability. *See* Adler, supra note 40, at 582 ("Appropriation receded from the central place it had occupied in his work; fair use law had affected his artistic choices, just as it has for so many other artists.").

B. RICHARD PRINCE

Richard Prince is a renowned figure in contemporary art whose practice interrogates foundational concepts of authorship, originality, and cultural production.[96] Often regarded as the "father of Appropriation Art," his work employs strategies of appropriation to disrupt conventional frameworks of artistic creation and critical interpretation.[97] Prince's engagement with mediated imagery positions him as a key provocateur in debates surrounding the intersection of aesthetic practice, legal structures, and ethical norms in the production of cultural meaning. Unfortunately, by the time he encountered the courtroom, Prince had not yet learned to navigate the complex legal landscape of fair use jurisprudence in the same way as Jeff Koons. In navigating his own copyright infringement challenges, Prince failed to explicitly articulate his transformative intent in a way that the Second Circuit could find acceptable.[98]

In 2011, Prince came under intense legal scrutiny for his appropriation of several photos taken by Patrick Cariou, a professional photographer.[99] Cariou had dedicated six years to documenting Rastafarian communities in Jamaica, producing a meticulously composed series of portraits and cultural depictions intended to be "classical photography [and] portraiture" ultimately published in his book, *Yes Rasta*.[100] Prince appropriated at least 35 of Cariou's images, subjecting some (but not all) to extensive reconfiguration through cropping, overpainting, enlargement, and collage.[101] Whereas *Yes Rasta* achieved modest commercial visibility, Prince's collection was prominently exhibited at the Gagosian Gallery in New York, where it garnered significant critical acclaim and commercial success.[102] Cariou learned of Prince's collection from a New York gallery owner who had expressed interest in featuring his photographs, and subsequently commenced litigation against Prince for copyright infringement and the Gagosian Gallery for contributory infringement.[103]

Prince mounted a fair use defense, arguing that appropriation art should qualify as fair use *per se*.[104] Throughout the litigation, Prince insisted that his intent with this and other appropriative practices was not to engage with the meaning of the

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96. *See* Kavuru, supra note 15, at 835.

97. *Richard Prince*, ARTNET, https://www.artnet.com/artists/richard-prince/biography [https://perma.cc/M23N-C748] (last visited December 19, 2024); *see* Amy Adler, Fair Use and the Future of Art, 91 N.Y.U. L. REV. 559, 570.

98. Although the Second Circuit in *Blanch* found Koons' statement of transformative intent to guide their outcome, they expounded in footnote that neither an artist's "clear conception of [] reasons" nor "ability to articulate those reasons" are "a *sine qua non* for a finding of fair use." 467 F.3d at 255 n.5.

99. Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013), *cert. denied*, 571 U.S. 1018 (2013).

100. *Id.*

101. *Id.* at 699–700.

102. *See id.*

103. *Id.* at 704.

104. Cariou v. Prince, 784 F. Supp. 2d 337, 348–49 (S.D.N.Y. 2011), rev'd in part, vacated in part, 714 F.3d 694 (2d Cir. 2013).

original works, nor to convey any explicit message through their recontextualization.[105] Instead, he described his purpose as paying homage to other painters and creating visually compelling artworks.[106] The trial court determined that Prince's appropriation lacked consistent transformative qualities, a finding that weighed heavily against the applicability of the fair use doctrine.[107] Relying on what they assumed to be binding precedent from the Circuit Court, the trial court based this holding on the absence of any discernible commentary or criticism of Cariou's photographs.[108] The Second Circuit, however, rejected this analysis.[109] It instead clarified that copyright law imposes no categorical requirement that a secondary work need comment on the original or its author in order to qualify as transformative.[110] Rather, the key inquiry is whether a new work imbues the original with "new expression, meaning, or message."[111] Critiquing the district court's reliance on Prince's testimony regarding his own intent, the Second Circuit instead undertook an independent evaluation of the transformative nature of Prince's adaptations.[112] The court explained that Prince's failure to articulate a compelling rationale for his practices during deposition was not dispositive.[113] Instead, it emphasized that the perspective of the reasonable observer, not the artist's subjective intent, is determinative in assessing transformative use.[114] Based on this framework, the court found that the majority of Prince's works diverged significantly from Cariou's photographs in character, conveyed new aesthetic dimensions, and achieved creative and communicative outcomes distinct from the originals.[115] After balancing the remaining fair use factors, the Second Circuit concluded that, apart from a few exceptions, Prince's appropriation constituted valid fair use.[116]

This disposition epitomizes the complexities inherent in applying the fair use doctrine to contemporary art and illustrates how judicial interpretations can both clarify and complicative the boundaries of transformative use. By prioritizing the perspective of the reasonable observer over the intent of the artist the Second

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105. *Id.* at 349. ("Prince testified that he doesn't 'really have a message' he attempts to communicate when making art. [] In creating the Paintings, Prince did not intend to comment on any aspects of the original works or on the broader culture.").

106. *Id.*

107. *Id.* at 350.

108. *Id.*

109. 714 F.3d at 706.

110. *Id. But cf. Rogers*, 960 F.2d 301, 310 ("It is the rule in this Circuit that though [] satire need not be only of the copied work and may [] also be 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. . . . We think this is a necessary rule, as . . . [i]f an infringer's claim to a higher or different artistic use—without insuring public awareness of the original work—there would be no practicable boundary to the fair use defense.").

111. 714 F.3d at 706 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

112. *See id.* at 707.

113. *Id.*

114. *Id.*

115. *Id.* at 707–08.

116. *Id.* at 712.

Circuit arguably expanded the scope of fair use, raising questions about predictability and consistency in copyright jurisprudence.[117] The failure of the judicial system to produce a consistent framework for evaluating infringement claims carries implications for the ability of artists and their attorneys to assess the risks accompanying such suits. This malleability in fair use standards underscores broader concerns about the erosion of clear legal frameworks, threatening to obscure the boundaries of ethical responsibility for attorneys advising clients, as well as for judges tasked with adjudicating these disputes under their respective codes of conduct.

C. ANDY WARHOL

Andy Warhol was an American artist known for his pioneering role in the Pop Art movement, blending mass production techniques with fine art to elevate everyday consumer goods and celebrity culture into iconic works of art.[118] He is renowned for turning the ordinary into extraordinary, using silkscreens,[119] bright colors, and repetition to create a vivid, ever-repeating tapestry of modern life.[120] Neither Warhol, however, nor his legacy, has remained immune from the law.

In 1981, photographer Lynn Goldsmith was commissioned to photograph a then "up and coming" musician, Prince Rogers Nelson—more commonly known today as just Prince.[121] Although less well known than Warhol, Goldsmith herself was a professional artist who had dedicated her career from the age of 16 to photography of rock singers, with her earliest clients consisting of Beatles, Led Zeppelin, and more.[122] In 1984, Goldsmith licensed her Prince photograph to Vanity Fair to serve as a reference for an illustration by Warhol.[123] The terms of the license limited the use of the photograph to the singular Vanity Fair issue, and in return, Goldsmith received $400 and a source credit.[124] Warhol's illustration repurposed Goldsmith's photograph into a silkscreen portrait that appeared alongside an article in the November 1984 Vanity Fair issue.[125] Using Goldsmith's photograph, however, Warhol created 13 additional silkscreen prints

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117. Although not discussed in comparable detail in this Note, the Ninth Circuit has also decided a series of cases involving the fair use doctrine. Generally, the Ninth Circuit regards new works to be transformative "as long as new expressive content or message is apparent." Palmer, *supra* note 42, at 414 (citing Seltzer v. GreenDay, Inc., 725 F.3d 1170 (9th Cir. 2013)); *see also* Tresóna Multimedia, LLC v. Burbank High School Vocal Music Ass'n, 953 F.3d 638, 649 (9th Cir. 2020); Dr. Suess Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 453 (9th Cir. 2020).

118. *See Andy Warhol*, MUSEUM OF MOD. ART, https://www.moma.org/artists/6246-andy-warhol [https://perma.cc/CH6C-X98R] (last visited Dec. 18, 2024).

119. *See id.*

120. *What Was Andy Warhol Thinking?*, TATE GALLERY, https://www.tate.org.uk/art/artists/andy-warhol-2121/what-was-andy-warhol-thinking [https://perma.cc/8DJZ-VJ7B] (last visited Apr. 4, 2025).

121. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 516 (2023).

122. *Id.*

123. *Id.* at 517.

124. *Id.*

125. *Id.* at 518.

and two pencil drawings, collectively referred to as the "Prince Series."[126] Goldsmith was not aware of these additional works.[127] After Warhol's death in 1987, the Prince Series was transferred to the Andy Warhol Foundation for the Visual Arts ("AWF"), which retained the copyright and licensed the works for commercial and editorial use.[128] After Prince passed away in 2016, Vanity Fair's parent company Condé Nast sought to issue a special edition magazine to commemorate him.[129] The ensuing magazine devoted to Prince utilized one of the images from the Prince Series, referred to as "Orange Prince."[130] Although Orange Prince "crops, flattens, traces, and colors" her original image, Goldsmith immediately recognized it as her work when she saw the magazine.[131] Upon discovering the unauthorized use, she promptly notified AWF, asserting a copyright infringement.[132] In response, AWF sued Goldsmith in federal district court in New York, seeking a declaratory judgment of noninfringement, or, in the alternative, a finding of fair use.[133] Goldsmith counterclaimed for copyright infringement.[134]

Applying the four-factor fair use analysis and binding circuit and Supreme Court precedent, the district court concluded that the Prince Series works were protected by fair use and dismissed Goldsmith's infringement claim.[135] "Looking at the works side-by-side," the court explained, Prince's work "has a different character, a new expression, and employs new aesthetics with creative and communicative results distinct from the original," and thus is transformative as a matter of law.[136] Although the court acknowledged the Prince Series to be commercial in nature, they emphasized the value added by the works to the broader public interest, and ultimately deduced that Warhol's work did not usurp the market or possible derivative markets for Goldsmith's original photograph.[137]

On appeal to the Second Circuit, Goldsmith reasserted her copyright infringement claim.[138] This time, though, she prevailed.[139] In holding that the Prince Series did not constitute fair use as a matter of law, the Second Circuit determined that the district court erred in conducting a "subjective evaluation of the underlying artistic message of the works rather than an objective assessment of their

126. *Id*.
127. *Id*.
128. *Id*. at 519–20.
129. *Id*.
130. *Id*.
131. *Id*. at 522.
132. *Id*.
133. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 322 (S.D.N.Y. 2019).
134. *Id*.
135. *Id*. at 331.
136. *Id*. at 325-26 (quoting Cariou v. Prince, 714 F.3d 694, 707-08 (2d Cir. 2013)). The court explained that "The Prince Series works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure." *Id*. at 326.
137. *Id*. at 325, 330.
138. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 32 (2d Cir., 2021).
139. *Id*. at 54.

purpose and character."[140] In the circuit court's view, the district court erred in their interpretation of the prior binding precedent—*Cariou v. Prince*—as setting forth a bright line rule that any secondary work is necessarily transformative if the secondary work is meaningfully different in terms of character, expression, aesthetics, and beyond.[141] The court accordingly clarified that the fair use inquiry does not revolve around the stated or perceived intent of the artist, nor an impression derived by an art critic,[142] and warned that "the district judge should not assume the role of art critic . . . . because judges are typically unsuited to make aesthetic judgments and because such perceptions are inherently subjective."[143] Instead, the Second Circuit explained, the proper inquiry should be focused on whether a secondary work is of an artistic character or purpose that is fundamentally distinct from the original material.[144] Applying these principles, the Second Circuit concluded that the Prince Series had the same overarching purpose and function as Goldsmith's photograph, and thus failed to be transformative as a matter of law within meaning of the first factor.[145] On the remaining factors, the court held that the nature of Goldsmith's photograph, the amount and substantiality of Warhol's use, and the cognizable harm posed by the Prince Series to Goldsmith's market to license her photograph all weighed in Goldsmith's favor.[146]

AWF sought certiorari at the U.S. Supreme Court, challenging the Second Circuit's ruling.[147] Penning the majority opinion, Justice Sonia Sotomayor affirmed the lower court's determination that the intent behind the Prince Series and Goldsmith's photograph was substantially identical, both works being portraits of the artist Prince designed for publication in magazines as part of a broader cultural commemoration of his life.[148] Echoing the Second Circuit's reasoning, the Court reiterated that judges are not to assume the role of art critics, and that the artist's subjective intent does not govern the analysis of transformative use.[149] The Court underscored that the meaning of a secondary work, as can be reasonably ascertained, should be a key consideration when evaluating whether the secondary use diverges sufficiently from the purpose of the original work.[150] According to the Court, although "[c]opying might [] be[] helpful to convey a new meaning or message . . . . that does not suffice under the first factor."[151] Concluding that Goldsmith's photograph and Warhol's

140. *Id*. at 32.

141. *Id*. at 38. On *Cariou*, the court explained that the "decision has not been immune from criticism," and although the Circuit "remain[s] bound" by it, the court's "review of the decision below [is] persua[sive] [] that some clarification is in order." *Id*.

142. *Id*. at 41.

143. *Id*. at 41-42.

144. *Id*. at 42.

145. *Id*. at 42-43.

146. *Id*. at 45-51.

147. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 525 (2023).

148. *Id*. at 535.

149. *Id*. at 544-45.

150. *Id*.

151. *Id*. at 547.

Prince Series shared essentially the same purpose and the use was commercial in nature, the Court held that Goldsmith was entitled to copyright protection, and AWF's use of her photograph infringed upon that grant.[152] In an uncharacteristic departure from her usual alignment with Justice Sotomayor,[153] Justice Elena Kagan delivered a scathing dissent, excoriating the majority opinion for effectuating a doctrinal recalibration that, in her view, undermined the core principles underpinning copyright law.[154] Justice Kagan contended that the majority's decision egregiously disregarded a wealth of expert testimony elucidating the material distinctions between the original and secondary works, and faulted the opinion for eschewing pragmatic, commonsense reasoning in favor of an overly formalistic approach.[155]

IV. IMPLICATIONS FOR LEGAL ETHICS

The roles of attorneys and judges are clearly prescribed by their respective codes of professional and ethical conduct. Of the most fundamental, Rule 1.2 of the Model Rules of Professional Conduct requires lawyers to "abide by a client's decisions concerning the *objectives* of representation and [] consult with the client as to the *means* by which they are to be pursued."[156] In elaboration, the drafters of the Rules explained that "[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."[157] At the highest level, the Rules require that an attorney provide competent representation to a client, which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[158] Similarly, judges have an affirmative obligation to "be faithful to, and maintain professional competence in, the law."[159] In carrying out these duties, particularly with respect to copyright cases, judges make a number of interpretive choices including whether to require extrinsic evidence, admit experts, whether to rely on judicial intuition or formal analysis, whether to consider aesthetics, and beyond.[160]

The responsibilities of attorneys and judges with respect to copyright infringement cases is plain. Attorneys play a pivotal role in advocating for their client's position, interpreting copyright law, and guiding the case through legal stages. Juggling the diffuse landscape of fair use jurisprudence, attorneys who represent

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152. *Id.* at 550–51.

153. *See* Adam Feldman & Jake S. Truscott, *Supreme Court 2023-2024 Stat Review (Version 1.1)*, EMPIRICALSCOTUS (2024) (reporting that Justices Sotomayor and Kagan were aligned in 97% of opinions in the prior term).

154. *See* 598 U.S. at 559 (Kagan, J., dissenting).

155. *See id.* at 559-66 (explaining, among other things, that the editor of an article presented with the Goldsmith photograph and Warhol portrait as two options would clearly have a preference between the two, and thus the two works are sufficiently materially distinct).

156. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2018) [HEREINAFTER MODEL RULES] (emphasis added).

157. MODEL RULES R. 1.2 cmt. 2.

158. MODEL RULES R. 1.1.

159. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (2019).

160. Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J. LAW & TECH. 469, 470 (2018).

artists must determine objectively whether the artist's work qualifies as fair use and prepare the best evidence and arguments to suggest the work should and does qualify as such under the law. The judge in a copyright infringement suit has the responsibility of reviewing the arguments put forth by the artists on either side, determining through application of the statutory factors and case law whether the artist's work constitutes fair use or copyright infringement. Although this determination often begets both fact-specific and subjective judgments, judges are precluded from straying from the boundaries of the law. Within this framework, the artist must defer both to the technical legal judgment of his attorney with respect to how the artist's ultimate goal for the suit is to be pursued, as well as guidelines, directives, and the ultimate disposition from the judge.[161]

An underlying presumption keeps the fields of art and law conceptually partitioned. Whereas the law is deeply concerned with neutrality and objectivity, art is inherently subjective.[162] It is precisely this subjective nature that renders determinations about art particularly unsuitable for judicial resolution.[163] As early as 1903, Justice Holmes captured this idea:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.[164]

Although not an absolute prohibition, the Holmesian theory cautions those "trained only to the law" against wading into the uneasy and inapposite realm of aesthetic judgments.[165] Taking up this guidance, courts and commentators have generally argued that judges should refrain from engaging in aesthetic judgments.[166] To

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161. *See* MODEL RULES R. 1.2.

162. *See* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 807 (2005).

163. *Id.* at 812 n. 15 (describing a collection of cases supporting this proposition); *see also* Finley v. Nat'l Endowment for the Arts, 100 F.3d 671, 688 (9th Cir. 1996) (Kleinfeld, J., dissenting) ("Philosophers have no way to distinguish art from non-art, or good art from bad art. There is not even a useful vocabulary for most of the distinctions we need to identify 'artistic excellence.'").

164. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903).

165. *Id.*

166. *See* Farley, *supra* note 162, at 811 n.14 (providing a list of sources expressing statements to the effect that the law and aesthetics should remain separate concepts); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 249 (1998) ("the general irrelevance of aesthetics has become a cornerstone of copyright jurisprudence.").

uphold the principles of impartiality, avoid the appearance of bias or prejudice, and ensure the requisite competence and diligence,[167] judges must recognize the limitations of their role and refrain from interpreting the subjective meaning of art. At odds with this proposition, however, is the reality of copyright infringement cases and the fair use jurisprudence. Increasingly, judges disclaim any intent or right to evaluate the quality of art, often citing the above guidance from Judge Holmes,[168] and yet still make such judgments implicitly.[169] That judges are not supposed to be art critics, however, does not mean they always can avoid doing so.[170] And yet, in doing so, this Note argues, judges defy the clear ethical prerogatives laid out by the governing legal codes.

Attorneys engaged in the representation of artists encounter a comparable dilemma, one that is both ethically and legally challenging. While prevailing professional ethical standards mandate that attorneys collaborate with their clients—here, the artists—to define the parameters of their representation, they must simultaneously maneuver through a labyrinthine and often contradictory body of case law and ambiguous statutory provisions. This requires them to reconcile these legal ambiguities with the artists' subjective creative vision and priorities. The challenge becomes even more pronounced in the context of the postmodern movement, where the rejection of fixed meaning—an ideological stance that this Note has examined[171]—compounds the difficulty for attorneys in formulating a persuasive and legally sound argument under the fair use doctrine. The inability to pin down a singular, stable interpretation of the work significantly complicates the task of constructing a compelling case that satisfies the ever-evolving and somewhat nebulous contours of fair use law.

The expanding body of copyright infringement lawsuits pursued against prominent artists—particularly those which have made appropriation their signature—reveals a critical tension between the legal system and the foundational principles of contemporary art. The absence of a coherent and consistent framework for evaluating secondary works undermines fairness and due process. The introduction of subjective tests like the "reasonable observer" standard[172] or implicit demands for artists to provide a definitive statement on the meaning of their

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167. ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 2 (2020).

168. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582–83 (1994) (citing *Bleistein* in support of the proposition that the subjective judgment of parody as good or bad taste is not relevant to the fair use determination); *see also* Farley, *supra* note 162, at 816 n. 36 (describing a number of other cases standing for the same idea).

169. *See* Yen, *supra* note 166, at 249–50 ("[T]he distinction between aesthetic reasoning and legal reasoning is illusory. To be sure, copyright opinions do not openly adopt specific aesthetic perspectives to justify case outcomes. Judges seem quite conscious of the dangers identified with aesthetic reasoning and therefore use legal reasoning to derive their conclusions.").

170. Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 L. & LIT. 20, 29 (2013).

171. *See supra* Part II.

172. *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013); *see also* text accompanying notes 114-15.

works to survive judicial review[173] risks imposing external interpretations on artistic intent and threatens the neutrality of the judiciary.

Various ideas stand out to ameliorate the current failures plaguing the copyright law framework and its application to contemporary art. A comprehensive overhaul of the statutory framework governing the fair use doctrine could be pursued through precise legislative reforms aimed at crystallizing its boundaries, thereby providing more granular guidance for its application in the present legal landscape. An institutional program of continuing legal education for both jurists and attorneys could be implemented, focused on the intersection of evolving copyright jurisprudence and ethical obligations to emphasize the nuanced application of fair use in modern cases and equip legal professionals with the knowledge to mitigate ethical conflicts and ensure consistency in the adjudication of copyright disputes. An amendment to the *Model Rules of Professional Responsibility* and the *Code of Conduct for United States Judges* to explicitly address the intersection of copyright law could establish more clear parameters for ethical conduct in the context of intellectual property disputes. Finally, the development of binding, detailed guidelines for the judicial assessment of fair use, crafted in consultation with intellectual property experts and stakeholders, could provide a standardized framework for evaluating the transformative nature of works in copyright disputes.

173. *See* text accompanying notes 91-95.