



RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark
www.lawrecord.com

Volume 42

2014-2015

“YES, RASTA,” AND THE TENUOUS LINE BETWEEN INFRINGEMENT AND FAIR USE

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I. Introduction

The copyright suit brought by French photographer Patrick Cariou against famous “appropriation artist” Richard Prince has concluded with a denial for certiorari, and a denial of clarity for those of us still uncertain about what makes for an adequate “fair use” defense. Several years into the litigation, and the public has yet to tire of this strange narrative leading to what could have been a significant moment in the history of the “fair use” doctrine. In the art world, “fair use”² is an infamous affirmative defense to a claim of copyright infringement. The defense has been raised with varying degrees of success in cases with similar facts.³ The overwhelming majority of fair use defenses have been raised in California and New York, arguably the cultural and artistic epicenters of the east and west coasts of the United States.⁴

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² 17 U.S.C. § 107 (2006).

³ *See, e.g. Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998); *see also Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

⁴ *See* PROFESSOR BARTON BEEBE’S “AN EMPIRICAL STUDY OF U.S. COPYRIGHT FAIR USE OPINIONS, 1978-2005,” 156 U. PENN. L. REV. 549 (2008) (Finding 57% of opinions about fair use to be written by the Second and Ninth Circuits)

The question of “transformative interpretation,” which nearly disappeared⁵ in favor of language expressly found within the codified section containing the fair use exception,⁶ is now revived by the *Cariou* decisions⁷ and concretely exposed for its suspicious malleability. Here, the district and circuit courts disagree as to the central requirements for a finding of fair use.⁸ This article expresses the position that the fair use doctrine, and its accompanying “transformative” analysis, is an inefficient vehicle by which “[t]o promote the Progress of Science and useful Arts”⁹ and an insufficient means for “mediat[ing] between . . . the property rights [copyright law] establishes in creative works.”¹⁰ Property rights, “must be protected up to a point, and the ability of authors [and] artists . . . to express them [or themselves] by reference to the works of others . . . must [also] be protected up to a point.”¹¹

II. The Narrative

The story began long before Cariou’s complaint ever reached the courts. Cariou’s book of photographs, “Yes, Rasta,” was the product of his six years spent in Jamaica, living, working, and gaining the trust of the individuals who would later also become the subjects of a very different work product created by Richard Prince.¹² Cariou carefully posed each subject in a style meant to resemble “extreme classic . . . portraiture[.]”¹³ Seven thousand copies of his “Yes, Rasta”

and their corresponding district courts); therefore, the artistic-minded public ought to be concerned that the District Court for the Southern District of New York and the Second Circuit opinions on the copyright infringement claim alleged by Cariou against Prince, exhibit fundamental discrepancies, and perhaps individually misguided interpretations in the applicability of the defense.

⁵ See generally *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 742 F.3d 17 (2d Cir. 2014).

⁶ See 17 U.S.C. § 107.

⁷ See *Cariou v. Prince*, 714 F.3d 694, 706 (2nd Cir. 2013).

⁸ See 17 U.S.C. § 107.

⁹ U.S. Const. Art. I § 8, cl. 8.

¹⁰ See *id.*

¹¹ *Blanch v. Koons*, 467 F.3d at 250 (2nd Cir. 2006).

¹² See *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *judgment rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

¹³ 714 F.3d at 699.

compilation were printed by the publisher, powerHouse Books, Inc., resulting in Cariou's entire known profit from the venture totaling just under \$8,000.¹⁴

Richard Prince, an internationally celebrated "appropriation artist" came across "Yes, Rasta" in a bookstore at some point during 2007 or 2008.¹⁵ Prince put on a show on the island of St. Barths around that time.¹⁶ The show, entitled "Canal Zone" consisted of thirty-five photographs, all torn from the pages of "Yes, Rasta," nailed to plywood and "altered" with painted "lozenges" on the subjects' faces and other markings.¹⁷ After purchasing several other copies of "Yes, Rasta," Prince incorporated Cariou's images into a series of new paintings.¹⁸ At the end of 2008, Prince's "Canal Zone" show in New York City was host to numerous celebrity friends and collectors, who purchased his paintings for \$2,000,000 or more per piece.¹⁹ Around the same time, gallery owner, Cristiane Celle declined to proceed with plans for a New York show for Cariou's photographs, which would have included several images from "Yes, Rasta."²⁰ Celle had learned of the Gagosian Gallery's show for Prince's "Canal Zone," and assumed that Cariou had alternatively decided to work with Prince to create the paintings at Gagosian.²¹ Celle maintained an interest in other work by Cariou, but concluded that his Rastafarian photographs were "done already" and were no longer worth pursuing.²²

Cariou initiated a copyright infringement suit on December 30, 2008; responsively, Prince raised a fair use defense, which the court rejected.²³ Cariou prevailed on summary judgment and Prince was ordered to offer up all of the paintings at issue for destruction or other disposition as

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 700.

¹⁷ *Id.* at 700-01.

¹⁸ *Id.* at 701-02.

¹⁹ *Id.* at 703.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 703-04.

²³ *Id.* at 704.

Cariou demanded.²⁴ The crux of the decision was reasoned from the court’s interpretation of case law, suggesting that a new work must somehow comment on a prior work to constitute a “fair use.”²⁵ On appeal, the Second Circuit found that the overall requirement of “fair use” is that the new work must exhibit new meaning or expression.²⁶ Applying this different standard, the court found the majority of the Prince’s works “transformative” as a matter of law, and remanded only five works to be reevaluated on the issue of infringement.^{27,28}

a. The Discrepancies

The statutory factors set forth in the Copyright Act (hereafter “the Act”) are meant to guide on a question of “fair use”:²⁹

“[U]se by reproduction in copies or . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work . . . is a fair use[,] the factors to be considered shall include- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;(2) the nature of the copyrighted work;(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”³⁰

The factors of the test are meant to be read and analyzed together, as where great evidence centers on one factor, it may render other factors less important. Here, the first factor was cited as “the heart of the . . . inquiry” and the appropriate category under which to analyze whether the nature of Prince’s work was “transformative.”³¹ The district court found Prince’s testimony, wherein he stated that he had no interest in Cariou’s original intent, to be highly influential in finding the first factor

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 712.

²⁸ The case was settled as to the remaining works on March 18, 2014. <http://www.theartnewspaper.com/articles/Prince-versus-Cariou-copyright-case-settled/32076>

²⁹ See 17 U.S.C § 107.

³⁰ *Id.*

³¹ 714 F.3d at 705.

for Cariou.³² The majority in the Second Circuit found no merit in looking at the intention of the original artist, yet noted that Prince and Cariou had distinctly different visions, regardless of whether Prince considered that difference when creating his paintings.³³ Judge Wallace's dissent in the Second Circuit decision argued that the factual basis and procedural stage for this case was too different to apply *Brownmark*, on which the majority relied heavily on the proposition that transformative purpose of a work can be seen from viewing the works alone.³⁴ Wallace's dissent, similar to the district court's majority, identified Prince's intent as relevant to the "purpose and character of the use,"³⁵ despite acknowledging that such after-the-fact testimony would encourage artists to fabricate their intent to be a commentary on the original work in order to get a more favorable finding.³⁶

The district and circuit courts disagreed on various standards of inquiry throughout their analysis. With respect to the third factor of the test, the district court focused on the "amount" of work taken, whereas "substantiality" was the key of the Second Circuit's inquiry.³⁷ The Second Circuit rejected one of the district court's conclusions which found for Cariou based on a conclusion that Prince took a "substantially greater [amount] than necessary."³⁸ Instead, the circuit court considered the "quality and importance" of what was taken from the original work. "At least enough of the original" is required for the transformative message to be identified, according to the Second Circuit.³⁹ Here, the courts weighed different considerations of the third factor more heavily and came to different results.⁴⁰ "Amount" and "substantiality" are both listed in this factor of the test,

³² See Prince Dep. 45:25-46:2, 338:5-6, 360:18-20, Oct. 6, 2009.

³³ 714 F.3d at 706-07.

³⁴ *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012).

³⁵ 17 U.S.C. § 107.

³⁶ *Brownmark Films*, 682 F.3d at 687.

³⁷ See 17 U.S.C. § 107; See also *Cariou*, 714 F.3d at 710.

³⁸ See 17 U.S.C. § 107; See also *Cariou*, 714 F.3d at 710.

³⁹ See *Cariou*, 714 F.3d at 710.

⁴⁰ See 17 U.S.C. § 107.

yet the Second Circuit was “not clear as to how the district court could arrive at such a conclusion[.]”⁴¹

When reversing the decision by the district court, the Second Circuit noted that the minor changes made by Prince to five of the paintings were best left to the district court for a determination of fair use.⁴² The dissent questioned why the district court was in a better position to make such a determination on five, but not all thirty-five “Canal Zone” paintings.⁴³

The district and circuit courts also disagreed on the fourth factor of the test, which considers the impact of the successive work on the original artist’s potential market.⁴⁴ The Second Circuit’s “concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.”⁴⁵ The district court considered both the potential and actual markets for Cariou’s work to be impeded by Prince’s work. The district court found that Cariou had a right to his potential market, regardless of whether he aggressively pursued it at the time of the alleged infringement or not.⁴⁶ The district court also found that the harm was actual, as Celle testified that Prince’s use of the photos affected her decision not to continue planning a show with Cariou, at which prints taken from “Yes, Rasta” photographs would have been available for sale between \$3,000 to \$20,000.⁴⁷ Oppositely, the circuit court found this factor for the defendant Prince.⁴⁸ The Second Circuit ignored Celle’s testimony that she wished not to show work that was “done already,” and instead explained only that Celle’s assumption that Cariou had chosen to work with Prince was not so much a usurpation

⁴¹ See Cariou, 714 F.3d at 710.

⁴² *Id.* at 711.

⁴³ *Id.* at 712.

⁴⁴ *Id.* at 711.

⁴⁵ *Id.* at 708 (*quoting* Blanch, 467 F.3d at 258)(emphasis added).

⁴⁶ *Id.* at 711.

⁴⁷ See Cariou, 784 F. Supp. 2d at 344.

⁴⁸ Cariou, 714 F.3d at 708-9.

of Cariou's market as a mistake by Celle with respect to Cariou's intention.⁴⁹ Moreover, the circuit court was influenced by Cariou's lack of initiative in exploiting his own or any art market,⁵⁰ as well as the conclusion that because Prince sold his works at a much higher price point to celebrities, his work appealed to a different type of collector than did Cariou's photographs.⁵¹

b. Unanswered Questions

By weighing each of the factors of the "fair use" test according to specific facts, and focusing analysis on different words in the plain language of the statute, the fair use "test" became no more than a flexible framework, amenable to any predetermined conclusion by the courts. While the statute's preamble itself describes an exception from liability for infringement for purposes of "commentary,"⁵² the relevant case law proposes an expansive view of "fair use" which includes not only commentary, but also use of prior works for an entirely new purpose. Whereas the district court described "transformativeness" as the relevant inquiry under the first factor of the test, "transformativeness" has also been tied into fair use analysis as the goal of 17 U.S.C. § 107 in totality, rather than a question encompassed by any one factor.⁵³ The district court was incorrect in requiring that fair use only be applicable for commentary purposes as described in the preamble of section 107; however, no presumption of fair use should exist beyond those limited circumstances.⁵⁴

The Second Circuit is "not clear" why the amount of work taken was essential to the district court's third factor analysis of fair use. This is peculiar indeed as the "amount" used is part of the

⁴⁹ See *id.* at 704; see also *id.* at 709.

⁵⁰ See Associated Press, 2013 WL 1153979 at 20 (finding fair use more likely "when the use is transformative or takes place in a market that the copyright holder is unlikely to develop").

⁵¹ Cariou, 714 F.3d. at 709.

⁵² 17 U.S.C. § 107.

⁵³ See Thomas M. Gilbert Architects, P.C. v. Accent Builders and Developers, LC, 629 F. Supp. 2d 526 (E.D. Va. 2008).

⁵⁴ See NXIVM Corp. v. Ross Inst., 364 F.3d 471, 477 (2d Cir. 2004); see also Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998).

plain language of the statutory analysis and finds support in case law and legal commentary.⁵⁵ The Second Circuit considers the amount taken from an original work, only with respect to the importance of what was taken. This has been appropriate in the past where the actual use was minimal, but strongly conjured visions of an original.⁵⁶ The proper inquiry appears to be neither wholly the amount taken, nor the importance, but rather a balance of both. Because the rights of the original artist are not subordinate to the secondary artist's right to use, verbatim copying, in large amounts, is prohibited. This balanced consideration of interests even exists for parody, where adequate "conjuring" of an original is essential.⁵⁷ Parodists, specifically, have enjoyed greater leeway on this factor, but this special treatment is inapplicable where no parody is claimed or identified.⁵⁸ Prince's appropriation of Cariou's work included entire photographs or large portions thereof, including entire subjects of photographs in their original poses. While copying of an image in entirety is not infringement per se, such quantity of copying has been limited to extremely narrow circumstances.⁵⁹ The Second Circuit relied greatly on *Campbell v. Acuff-Rose Music, Inc.*,⁶⁰ a clear case of parody which was thus afforded distinct and separate treatment on this factor; yet, even the parodist is not entitled to take as much as he or she wishes, but only as much as is necessary.⁶¹ A parodist is therefore not entitled to take as much as will make for "the best parody." The standard permits parodists to take only as much as required for an effective parody.⁶² If one accepts the Second Circuit's proposition in *Cariou* that fair use may be extended for the purpose of new expression, the secondary use should not exceed in quantity more than is necessary to generate the

⁵⁵ "[T]he larger the volume . . . of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that it will qualify as fair use." Princeton Univ. Press, 99 F.3d at 1389 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1122 (1990)).

⁵⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵⁷ See *Walt Disney Prods v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978).

⁵⁸ See *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

⁵⁹ See *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 449-50 (1984).

⁶⁰ *Campbell*, 510 U.S. at 569.

⁶¹ See *Walt Disney Prods v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978).

⁶² *Id.*

new meaning of the work. This linguistic and theoretical puzzle is the true heart of the problem in *Cariou*: how much of any concrete vision in one artist's creative expression can be *essential* to another's?

The "transformative" question that was posed by the *Cariou* court in relation to factor one of the fair use test is also highly relevant to the test's third factor. *Campbell* explains, "A work is transformative if it does not merely supersede [] the objects of the original creation but instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message";⁶³ however when a copyrighted expression is used as "raw material" it is expected that it "add [] value to the original."⁶⁴ The "added value" spoken of is not economic value, but added value to society. In *Cariou*, the Second Circuit qualifies the "added value" component by describing such value as something "productive [which] employ[s] the quoted matter in a different manner or for a different purpose from the original."⁶⁵ The Court likened Prince's appropriation of Cariou's photographs to the appropriation of Campbell's soup cans and images of Marilyn Monroe by artist, Andy Warhol. This is an imperfect comparison, as the "new message" in Warhol's paintings, which was commentary on consumer culture, appropriated non-art subjects for works of art. In *Rogers*, the appropriation artist, Jeff Koons, could not raise similar support for a fair use finding merely by arguing that his work represented a social commentary on mass production at large. One explanation for why Warhol's works may be presumptively fair, while Koons' work in *Rogers* was not, is that such a finding of fairness may not comfortably ring true where both uses are for "art." In *Rogers*, the original work was taken in its entirety, reincorporated into a greater work, and used for transmitting a message via artistic expression alone. *Rogers* is the appropriate point of comparison for *Cariou*, and yet in that case, "new insights or understandings" of the artist were not

⁶³ *Campbell*, 510 U.S. at 578.

⁶⁴ *Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998).

⁶⁵ *Cariou*, 714 F.3d at 706.

enough to generate a finding of fair use. This article takes the position that where both an original and a derivative work have no functional purpose outside of artistic expression, the use of an original as raw material cannot be different in manner or purpose, as a matter of law.

c. The Omnipresence of Commerciality

The difficulty in using case law for guidance is that the inquiry is unique in every stance and, thus, the weight of various factors may shift with the relevant facts. *Campbell* acknowledged that “[n]o man but a blockhead ever wrote, except for money[.]”⁶⁶ The court does not render the “commercial” factor irrelevant because, as the court thoroughly explained, “commercial nature” is generally considered under the second factor and viewed as one part of a whole.⁶⁷ The “commercial nature” analysis is also well suited to discussions on the fourth factor of the test. In *Cariou*, there is no question that both Cariou and Prince created work of a commercial nature, thus the tension between the district and circuit courts centered not on whether commercial markets existed for both works, but whether their commercial markets overlapped.⁶⁸ The *Cariou* court concluded that Prince’s work did not impede Cariou’s potential market because Prince’s work was attractive to wealthy, celebrity buyers, much unlike the anticipated purchaser of Cariou’s photographs.⁶⁹ There is no testimony from experts or actual purchasers of Prince’s work, nor is there any other basis on which to conclude that collectors of Prince’s high-priced paintings do not, or would not, also collect photographs produced at Cariou’s price points. Moreover, the Second Circuit had decided two decades prior to *Cariou* that the “market” for the original work must be viewed broadly.⁷⁰

⁶⁶ *Campbell*, 510 U.S. at 584-85 (quoting JAMES BOSWELL, LIFE OF SAMUEL JOHNSON 19 (G Hill ed., 1934).

⁶⁷ *Id.* at 256; *see also* *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir.2001) (describing the second fair use factor as “rarely . . . determinative”).

⁶⁸ *See Cariou*, 714 F.3d at 710; *See also Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 847 (C.D. Cal. 2006) (“Whether a use is transformative depends in part on whether it serves the public interest.”) *aff’d in part, rev’d in part and remanded sub nom*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) *amended and superseded on reb’g*, 508 F.3d 1146 (9th Cir. 2007) *and aff’d in part, rev’d in part and remanded sub nom*, 508 F.3d 1146 (9th Cir. 2007).

⁶⁹ *Cariou*, 714 F.3d at 709.

⁷⁰ *See Rogers*, 960 F.2d at 312.

The market for an original has been described as also inherently including the market for any and all derivative works.⁷¹ Market opportunities to license an original work for future derivative uses need not be probable for the original's market to be "affected" by a secondary use, as described in the fourth factor of the fair use test, it need only be plausible.⁷² Where the potential market of a work is indeterminable, or where the overlapping of existing markets is uncertain, this factor cannot serve as strong evidence in favor of either party. In *Cariou's* case, the testimony given by Celle, who declined to show *Cariou's* "Yes, Rasta" photographs after discovering the "Canal Zone" show by Prince, was at least affected by Prince's use, even if other factors contributed to the dissolution of *Cariou* and *Celle's* plans to collaborate.⁷³

But what of *Campbell*? Did that case not also include two works of (musical) "art," in the same medium, where it was determined that one's taste for the original work would not likely be replicated by purchasers of the secondary work?⁷⁴ In this sense, *Campbell* strayed from the well-established precedent, which identifies the fourth factor as the most important consideration in any fair use analysis.⁷⁵ "With certain special exceptions . . . a use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement."⁷⁶ The "market factor" is the most important of the four factors.⁷⁷

In *Sandoval*, the plaintiff's copyright infringement action was for a fleeting appearance of his photographs in the background of the defendants' motion picture, *Seven*.⁷⁸ The *Sandoval* court did not need to address whether the "market factor" was most important, because an effect on the

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Cariou*, 714 F.3d at 709-10.

⁷⁴ *See Campbell*, 510 U.S. at 569 (finding a hip-hop parody with identifiable components from a prior rock and roll song was not found to be an infringement).

⁷⁵ *See Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 414 (S.D.N.Y. 1997) *aff'd*, 147 F.3d 215 (2d Cir. 1998); *see also American Geophysical Union v. Texaco Inc.*, 37 F.3d 881, 889 (1994).

⁷⁶ *Harper & Row Publ'g, Inc. v. Nation Enter.*, 471 U.S. 539, 568 (1985) (*quoting* S. REP. NO. 94-473, at 65 (1975)).

⁷⁷ *See Stewart v. Abend*, 495 U.S. 207, 210 (1990); *see also Rogers*, 960 F.2d at 311.

⁷⁸ *Sandoval*, *supra* note 74.

plaintiff's market by the defendants' use was implausible from the facts as alleged. There, the fleeting nature of the use was central to the court's holding.⁷⁹ Once again, an analysis of another factor of fair use leads back to the amount and substantiality of the use.⁸⁰ In *Campbell*, "transformativeness" was not only directly relevant to a first or fourth factor inquiry, but also to the "amount" analysis in the third factor.⁸¹ The plaintiff in *Sandoval* found disagreement with *Campbell* not because *Campbell* inaccurately weighted other factors more heavily than the supreme fourth factor, but because *Campbell* closely tied the "amount and substantiality" factor to the analysis of fourth factor market effects.⁸² This bold proposition may be inferred from these circumstances and opinions, as it would have been extremely undesirable for the plaintiff's argument in *Sandoval* if the third and fourth factors of the fair use test were considered together, as both would have then cut strongly in favor of the defendant. In *Campbell* the "amount taken" was found to be no more than necessary, and thus eclipsed the fourth factor.⁸³

d. A Contemporary Analogy

An independent argument has been made recently with respect to fourth factor market imposition in the context of a burgeoning art form.⁸⁴ The underlying reasoning for establishing a compulsory royalty scheme for musical composition⁸⁵ in lieu of traditional infringement remedies was addressed and analogized to the circumstances surrounding video game "modders."^{86,87} "Mods,"

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Campbell*, 510 U.S. at 587-88 ("We also agree with the Court of Appeals that whether a substantial portion of the infringing work was copied verbatim from the copyrighted work is a relevant question for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth.").

⁸² *See id.*; *see also Sandoval*, *supra* note 74.

⁸³ *See Campbell*, 510 U.S. 569. It is important to note that defendants in *Campbell* would have been permitted to benefit from the added "leeway" granted to parodies on the third factor. *See supra* p. 8.

⁸⁴ *See John Baldrice, Cover Songs and Donkey Kong: The Rationale Behind Compulsory Licensing of Musical Compositions Can Inform A Fairer Treatment of User-Modified Videogames*, 11 N.C. J. L. & Tech. 103 (2009).

⁸⁵ 17 U.S.C. 115.

⁸⁶ John Baldrice, *Cover Songs and Donkey Kong: The Rationale Behind Compulsory Licensing of Musical Compositions Can Inform A Fairer Treatment of User-Modified Videogames*, 11 N.C. J. L. & Tech. 103, 107 (2009) ("[M]odders are amateur programmers who modify [or "mod"] . . . commercially released videogames, ultimately creating entirely different experiences for the player).

like sound recording covers and pieces of appropriation art, may offer an entirely different experience to the audience than “the underlying copyrighted work.”⁸⁸ Moreover, both modders and fine artists, like cover musicians, feed the talent pools of their respective industries.⁸⁹

Whereas mutually analogous similarities to sound recordings exist for mods and fine art, a fundamental dissimilarity between the two proposed additions to a compulsory royalty regime suggests that fine art may be even better suited for such a licensing scheme than mods. Mods typically “add to or alter the functions of [an] original videogame’s software code . . . [which] already resides on the user’s hard drive. As a result, mods will not operate unless the user has also installed (and therefore presumably purchased) the original videogame”;⁹⁰ therefore, a fairly reliable built-in financial benefit will be delivered to the underlying copyright holder by any purchaser with an interest in the mod. Under ordinary circumstances, when the work of fine artists is appropriated into secondary pieces, the original artist does not receive any built-in financial benefit from the purchase of a secondary work. Even in the most obvious cases of infringement, each secondary work will likely be independently sold, requiring the original copyright holder to potentially proceed through litigation to defend his or her rights against the single or several individual acts or perpetrators of an infringement.

III. Proposal and Variations

a. Traditional Compulsory Royalties

Given the unique challenges of the fourth factor analysis when determining “fair use” of two works made solely for artistic expression, § 107 cannot be determinative on the question of infringement. If the works are found to be substantially similar by an assessment similar to the third

⁸⁷ *See id.* at 130 (concluding that the implementation of a compulsory royalty scheme should be determined by whether such a scheme adequately meets the unique needs for the artistic medium in question).

⁸⁸ *Id.* at 111.

⁸⁹ *See id.* at 107. (“A statutory licensing option would give these digital artists the freedom to produce the kind of new and creative works that the copyright system was intended to promote”).

⁹⁰ *See id.* at 112-13.

factor currently present in § 107, and meet other criteria for copyright infringement, then courts ought to employ a practical, plausible means for compensating copyright owners without preventing secondary works from being created. The most reasonable solution would be to employ a compulsory royalty scheme⁹¹ similar to that which exists for sound recordings.⁹² Under such a regime, courts would analyze allegations of infringement between “solely artistic expressions” without permitting a defendant to raise a § 107 defense.⁹³

Considering the severe cultural impact of radical departures from current copyright regime in the area of fine art, it is imperative to expound upon variations of a compulsory royalty scheme and highlight the superiority of certain procedural components over others. Compulsory licensing, aside from positively easing the caseloads of our courts, would also avoid potential entanglements of voluntary licensing schemes.⁹⁴ Unlike exclusive licenses,⁹⁵ non-exclusive licenses do not need to be committed to writing and may be implied by circumstances.⁹⁶ While the Second Circuit has commented that “implied” licensing ought to be permitted in only the narrowest circumstances,⁹⁷ the Second Circuit ought to be wary of language so nearly resembling a categorical bar against the freedom to license verbally or impliedly, which would be disfavored in other areas of copyright.⁹⁸

⁹¹ Unlike music compositions, other fine arts would likely require the elimination or alteration of a requirement that the “copy” maintain “the fundamental character” of the original. *See* Elina Lae, *Mashups-A Protected Form of Appropriation Art or A Blatant Copyright Infringement?*, 12 VA. SPORTS ENT. L.J. 31, 61 (2012) (noting the strict requirements governing applicability of compulsory royalties in compositions not be applicable in the context of sound recording mash-ups).

⁹² 17 U.S.C. § 115 (2006).

⁹³ For examples of traditional infringement and misappropriation analysis: *See generally* *Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789 (8th Cir. 2003); *see also* *Stevens Linen Assocs. v. Mastercraft Corp.*, 656 F.2d 11 (2d Cir. 1981); *see also* Goldstein, 6 COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY 870, 874 (To prevail on copyright infringement a plaintiff must prove (1) it owns rights and defendant’s conduct infringes on one or more rights (2) defendant copied Plaintiff’s work (3) at least part of copied material was protected (4) audiences will find the works similar.).

⁹⁴ Elina Lae, *Mashups-A Protected Form of Appropriation Art or A Blatant Copyright Infringement?*, 12 VA. SPORTS & ENT. L.J. 31, 57-58 (2012) (“If obtaining a license would be made an easy and efficient process, where the license would be made an easy and efficient process, where the licensing fees would be fixed by a single administrative body and published to all music licensees, the licensees would not have to speculate whether they are entitled to the fair use defense or not.”).

⁹⁵ 17 U.S.C. § 204 (2006).

⁹⁶ *See* *Psihoyos v. Pearson Edu., Inc.* 855 F. Supp. 2d 103, 119 (S.D.N.Y. 2012).

⁹⁷ *See* *Firesabre Consulting LLC v. Sheehy*, 2013 WL 5420977, at *8 (permitting implied licenses only, “where one party created a work at the other’s request and handed it over, intending that the other copy and distribute it”).

⁹⁸ *See supra* note 83.

The complications of non-compulsory licensing, with its imperfect and potentially unpredictable permissible versus impermissible posturing, would be entirely avoided if licenses were complied with by statute rather than casual agreement.⁹⁹

While compulsory licenses would be beneficial for the public, a solution cannot be employed to benefit the public alone if the costs fall entirely upon the artist and copyright owner.¹⁰⁰ For example, one imperfection when analogizing compulsory royalties in musical composition to the fine arts is that compositions are fungible in a way that fine art is not.¹⁰¹ Price is interchangeable in the music markets, whereas fine art markets are heavily dependent on artists' reputations.¹⁰² For this reason, there may be no economic copy possible for some works;¹⁰³ however, federal copyright law was designed to motivate artistic progress rather than to reward authors.¹⁰⁴ Where an author does not experience cognizable harm from a secondary use of his work, a denial of fair use would defy Congressional intent with regards to copyright law.¹⁰⁵ In *Gaylord*, where the defendant's use increased the value of the plaintiff's work, the court ultimately ruled that the defendant's use was fair.¹⁰⁶ While other factors contributed to the court's ruling, the increased value of the original copyright holder's work weighed strongly in favor of fair use.¹⁰⁷ The same increase in value would likely occur in a great many instances. If a compulsory royalty regime were implemented for artistic

⁹⁹ See Elina Lae, *Mashups-A Protected Form of Appropriation Art or A Blatant Copyright Infringement?*, 12 VA. SPORTS & ENT. L.J. 31, 62 (2012) ("Presumably, a lot of . . . artists would prefer eliminating the risk of litigation that they now face if they proceed under the fair use defense. Instead . . . artists could obtain a license without engaging in negotiations with the original artist for a known, flat fee.").

¹⁰⁰ *Lotus Development Corp. v. Borland Intern., Inc.*, 788 F. Supp. (D. Mass. 1992) (The goals of Congress are fully described, as are the limitations on exclusive rights set forth in § 107 for fair use exceptions. Therefore, takings that extend a little beyond fair use in large works are still not to be tolerated, despite the public's potential benefit.).

¹⁰¹ See Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 234 (1993).

¹⁰² See *id.* at 235.

¹⁰³ *Id.*

¹⁰⁴ See *Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 842 (Fed. Cir. 1992) (celebrating § 107 for its encouragement of creative ventures where rigid application of an exclusive rights regime would otherwise stifle artists).

¹⁰⁵ See Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701 (2010) (detailing analysis of what kinds of harm should be legally cognizable and analyzing whether "potential harm" to an original author's future markets should be cognizable if the likelihood of harm is exceedingly small or speculative).

¹⁰⁶ See *Gaylord v. United States*, 85 Fed. Cl. 59, 70 (Fed. Cl. 2008) *aff'd in part, rev'd in part and remanded*, 595 F.3d 1364 (Fed. Cir. 2010).

¹⁰⁷ *Id.*

copies of all artistic works, the original owners would stand to gain financially from the public's desire for the secondary work, less whatever volume of dilution might occur.¹⁰⁸ Under the proposed compulsory royalty scheme, artists displeased with their inability to deny consent for secondary uses ought to be able to strip subsequent users of the benefits of the licensing scheme by proving that their losses due to dilution exceed their increased financial gains from the public's demand for the secondary work.¹⁰⁹ A strict timeframe during which an artist would be able to allege such cognizable financial harm to the original copyrighted would operate to avoid (1) unethical delays in actions to strip compulsory licenses, purposely alleged after the public's demand and willingness to pay for the secondary work has diminished, but also to (2) allow the secondary use enough time to make a profit, potentially greater than the value of any present dilution. Such provisions would promote artists to create works for the value, benefit and enjoyment of the public.¹¹⁰ An original artist who did wish to strip a subsequent user of a license would be signaled to the time period during which the action could be made by mandating a notice requirement for original artists accompanying the grant of compulsory licenses to secondary users for their work.¹¹¹

b. Traditional Infringement

In lieu of a compulsory royalty scheme, courts may consider following traditional infringement principles without permitting § 107 defenses when both works are solely artistic expressions. Presumptions, rather than categorical rules, have been favored in fair use analysis as it exists today.¹¹² For example, the fourth factor of the fair use test has led to debate over whether the use of an

¹⁰⁸ See *Lida, Inc. v. Texollini, Inc.*, 768 F. Supp. 439, 443 (S.D.N.Y. 1991) (questioning whether defendant's secondary use of plaintiff's fabric would dilute the plaintiff's market for protected material).

¹⁰⁹ See 15 U.S.C. § 1125(4) (2006) (determining plaintiff carries burden of proof in an action for trade dress dilution).

¹¹⁰ This does not intend to suggest that § 107 would be inapplicable in all circumstances. It is important to emphasize that compulsory royalties, and available actions to strip users of them, would only be appropriate where both an original and secondary work were solely artistic expressions. This would not limit an author's right to comment on or criticize an original for other purposes, such as scholarship or news.

¹¹¹ Analogize to 17 U.S.C. § 115(b) for example of notice requirement with respect to compulsory licensing for music.

¹¹² See H.R. 4412.

unpublished work can ever be fair.¹¹³ Congress answered that question expressly and affirmatively: “[T]he intent of Congress is that there be no per se rule barring claims of fair use of published works consistent with . . . the 1976 Copyright Act.”¹¹⁴ Courts must determine the affirmative defense of fair use of unpublished works on a case-by-case basis, after considering all the factors set forth in § 107 as well as any other factors a court may find relevant.¹¹⁵ Therefore, Congress demands a balancing test be applied even where the defendant’s actions obliterate a finding in their favor on the important fourth factor analysis.”¹¹⁶

The result of the current fair use test is a time-consuming and expensive process that only serves to delay justice and generate ambiguous conclusions by the courts.¹¹⁷ In *Carion*, the district court relied upon *Brownmark* for the proposition that judges can determine whether a work is “transformative” from a side-by-side¹¹⁸ viewing of the original and secondary works alone;¹¹⁹ however, the dissent questioned the proposition that a judge’s “artistic judgment” from a mere viewing of an original and secondary work is enough to determine whether it is transformative.¹²⁰ The dissent suggested that this proposition, relied upon in *Brownmark*, be limited to its “unusual

¹¹³ See *Int’l News Serv. v. Associated Press*, (describing unpublished news as “quasi property” that cannot be lawfully appropriated until after its initial publication).

¹¹⁴ H.P. Rep. 102-836 (1992); accord *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 540-41, 105 S. Ct. 2218, 2220-21, 85 L. Ed. 2d 588 (1985) (where the unpublished nature of the allegedly infringed material was not determinative, and the court proceeded with an analysis of the fair use factors).

¹¹⁵ *Id.*

¹¹⁶ See H.R. Rep. 102-836, 1-2, 1992 U.S.C.C.A.N. 2553 (“The purpose of [copyright] legislation is thus to direct the courts to give proper weight to all factors; it is not the committee’s intention to direct courts how much weight to give to any factor in a particular case.”).

¹¹⁷ Lorie Graham & Stephen McJohn, *Thirty-Two Short Stories About Intellectual Property*, 3 HASTINGS SCI. & TECH. L.J. 1, 13 (2011) (EXPOUNDING UPON THE MESSY, UNPREDICTABLE LOGIC FOUND IN FAIR USE ANALYSES).

¹¹⁸ Criticism of the *Roger v. Koons* decision, Rogers, 960 F.2d at 305, by one Constitutional Law attorney postulated that the decision may have been different had the judges seen the actual works. The court had only seen a small black-and-white photo of Koons’ sculpture, which is hypothesized not to have brought out the satirical nature of piece. See Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 224-25 (1993).

¹¹⁹ See *id.*

¹²⁰ See *Id.*

procedural posture” in that case, where “fair use” was not pleaded and the proposition arose on a motion to dismiss.¹²¹

In eliminating the opportunity to raise § 107 defenses in the limited circumstances described above, courts may experiment with shifting the burden of initial analysis from the judges to the parties of the litigation. Thus, the plaintiff will maintain certain responsibilities in proving that he or she is a copyright owner of a work that was appropriated by the defendant.¹²² The plaintiff would also prove appropriation by showing the copied material was protected and that audiences would perceive the similarities in works.¹²³ At this time the burden would shift to the defendant to disprove the components of the plaintiff’s claim. If an infringement is found, Congress may wish to consider the benefits of providing plaintiffs with traditional available remedies¹²⁴ by focusing on actual damages, including damages from dilution and the dissolution of the original copyright holder’s ability to license their work at a cost.

c. Adopting influences from both musical copyright and trademark

Perhaps the concept of notice and time-sensitivity could be taken further. Federal trademark law has long made use of public “Registers” to create a waterfall of varying levels of protections and rights to statutory damages. The existence of Principal and Supplemental Register registrations inform “users” of existing trademarks of different potential problems.¹²⁵ A similar system could be adopted in the context of federal copyright for fine arts. Much of the resistance towards compulsory royalty systems is that original artists lose the ability to prevent secondary uses, particularly in cases where their protest is based on artistic integrity rather than financial detriment. An alternative to establishing a mandatory compulsory royalty scheme would be to generate a system

¹²¹ See *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012).

¹²² See Goldstein, *supra* note 92.

¹²³ See *id.*

¹²⁴ See 17 U.S.C. §§ 501-07 (2006).

¹²⁵ 15 U.S.C. §§ 1052, 1091, 1093 (2006).

with built-in options, which would address the moral rights issues while keeping decisions in the hands of artists and users, rather than courts.

Currently copyright registration determines not the extent of protection, but the right to a presumption of validity and ability to be granted certain particularized damages. In contrast, registration on the Principal Register as a trademark indicates federal protection of a trademark, whereas the Supplemental Register registration may limit the scope of protection of the proposed trademark to whatever is available under state claims.¹²⁶ One possible approach proposed here is a dual registration system for copyrightable material, which would allow both the scope of protection and the damages or licenses receivable to be alternatively considered. An original artist wishing to register their copyright in a work could be required to make a legally-binding decision to register with either the “Fundamental Register” or the “Compulsory Register.” An artist choosing Fundamental Register registration would be granted all of the rights and privileges currently vesting with federal copyright registration. The registration would meet notice and validity requirements for statutory damages and attorney’s fees. Additionally, such a registration would indicate that the work was furthermore protected as it is currently, including availability for non-licensed derivatives to raise affirmative fair use defenses with gusto. An artist choosing to register with the Compulsory Register would release their right to prohibit secondary uses of an original work; however, all subsequent users would be responsible for paying a compulsory license. Moreover, registration on the Compulsory Register would weigh as the fifth and heaviest factor against fair use. An artist claiming fair use of a work appearing on the Compulsory Register would be subject to a much more stringent analysis, because an unambiguous, statutorily accepted licensing scheme would have been available to the secondary artist. Although room to negotiate rates would remain, the statutory rate could serve as a pre-negotiated rate, which could spare the parties the costs of negotiation. Where

¹²⁶ *See id.*

the parties, original artist and secondary user, together determined that unique calculation or implementation scheme for the user's license would be preferable, deviation from the standard rate would be permitted.

The benefits of a the dual registration system would be to give original and secondary artists the power to “hedge their bets” in their own favor, while also forcing fair license negotiations¹²⁷ by equalizing disparities in negotiation power between the parties. An original artist would be able to prioritize whether the artistic integrity of the work or the financial integrity of the work was of greater importance to them. A Fundamental Register registration could potentially force the destruction of an unauthorized derivative, at the risk of a more lenient judicial scrutiny on claims of fair use. Such uses would be more likely interpreted by courts as sufficiently transformative works, or fair uses, than those taken from the Compulsory Register without compensation. A Compulsory Register registration would automate pecuniary gain in the original artist at the cost of giving secondary users nearly free reign over the manner in which they choose to conjure the original material. Secondary artists would also gain more choice in proceeding with Appropriationist works. The secondary users could choose whether to risk possible destruction of their work by attempting to closely appropriate a Fundamental Register work, or to create greater distance between their work and the original, or to forgo the use altogether and appropriate a work from the Compulsory Register instead. Similarly, a secondary artist who expects his or her work to have wide commercial appeal can decide whether it is worth creating an object of artistic worth, clearly influenced by a prior work from the Compulsory Registry, without submitting for a license, knowing it will be substantially more difficult to prove the use was a transformative non-derivative. The secondary artist can consider whether he or she prefers to pay the compulsory royalty to an originator, or risk

¹²⁷ The practice of negotiating private licenses is not altogether abandoned in musical compositions. Musical artists and songwriters commonly agree to lower licensing rates and settlement awards, although rates remain tied to statutory requirements. See Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 214 (1993).

facing the more stringent fair use test. Under *Cariou* a secondary user may prefer to appropriate a work from the Fundamental Register if he or she believes their work product will have mass appeal, but the original work was suited only for a more discrete niche.¹²⁸

IV. The Unique Impact of Art, Through *Cariou*

The decision in *Cariou* leaves artists with no clear indication of whether use of a protected work of art will result in a finding of infringement or a finding of fair use, if raised in defense. Market interference has been considered the most significant factor of the fair use test in the past; yet, the *Cariou* court inappropriately reasoned that the transformative quality of Prince's work is itself indication that his audience and his market potential were separate and apart from that of *Cariou*. The uncomfortable result for *Cariou* and the artists to follow will be that the mysterious "transformative" finding may compromise an original copyright holder's ability to prove detriment to their market potential. *Cariou* exposes an inherent defect in the conceptualization of damages for fair use. It sets a new standard, nearly expecting an original copyright holder to show actual damages in order to have interference with fourth-factor market potential found in their favor, despite the acknowledgement under traditional infringement theory that proving actual damages is often difficult.¹²⁹

A compulsory licensing scheme in this particular scenario would have bestowed benefits on both the plaintiff and the public. Richard Prince's celebrity, cited in the appellate decision, should never have been a basis for finding Prince to have a unique market from *Cariou*. If this proposition were followed, all celebrity uses of protected artwork would weigh heavily in favor of fair use, simply

¹²⁸ See generally *Cariou*, 714 F.3d 699 (reasoning distinctly different audiences may weigh in favor of a defendant raising a fair use defense).

¹²⁹ See Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 233 (1993) ("Section 504 of the Copyright Act sets forth the remedies available for copyright infringement, which include statutory damages, injunction, and in cases of bad faith, attorney's fees. Statutory damages are provided because it is widely considered difficult to prove actual damages in cases of copyright infringement."); see also 17 U.S.C. § 504 (2006).

because the original artist's collectors would not likely be able to afford the secondary work.¹³⁰ This is particularly alarming with respect to Prince, who knows his work treads near the boundary between fair and infringement.¹³¹ He voluntarily chooses not to license from lesser-known artists,¹³² presumably under the assumption that the law can be avoided.¹³³ Instead, Prince's celebrity, and the exposure received through Cariou's vision, however changed, could be a source of financial gain for Cariou via a compulsory license. If a compulsory royalty scheme had been codified and Prince had complied, Cariou would not have suffered a legally cognizable harm, except if a finding of dissolution had outweighed the Cariou's financial gain in the form of royalties. Most importantly, the public could have benefited from Prince's ability to freely show and sell his entire "Canal Zone" collection without interruption or delay.

Had the court, through any alteration in the weighing of fair use factors, ultimately affirmed the district court's decision, Prince's works would have potentially been destroyed.¹³⁴ The concept of waste¹³⁵ is a foundational principle in property law, which is intimately connected to the fine arts. "Recycled" creativity in the art world is not a new phenomenon.¹³⁶ Existing images have

"moved from the physical incorporation of other works – collage – to reproduction through the technology of mass production The first Appropriationist technology was collage, a natural outgrowth of the fragmented cubist style Although [Pablo] Picasso did his early collages half a century before Appropriationism became a movement [in the art world], he is regularly cited as its primogenitor."¹³⁷

¹²⁹ *Id.*

¹³¹ Prince "thwarted" an attempted lawsuit based upon his work, "Spiritual America No. 1," made using an appropriated photograph of Brook Shields displayed in a fake gallery, by dismantling the entire gallery upon notice of the photographer's intention to bring suit. *See Meeker, supra* note 128.

¹³² *Id.*

¹³³ *See id.* at 230 (accommodating the modern artist is futile where artist does not desire to have their work legitimized by law).

¹³⁴ Cariou, 784 F. Supp. 2d at 355.

¹³⁵ Marsha Baumgarner & Michael Hentrel, *What a Waste!: What's a Prudent Lender to Do?* AM. BUS. L.J., available at http://www.wcl.american.edu/blr/documents/Fall08_WhataWaste.pdf.

¹³⁶ *See Meeker, supra* note 128.

¹³⁷ *Id.* at 214.

A previously new technology, known as photography, took over the art world and replaced the importance of collage for the Appropriationists.¹³⁸ The artist, Andy Warhol, popularized these post-Modernism, Appropriationist styles on a mass scale.¹³⁹ “The heir to Warhol’s artistic vision is widely considered to be Richard Prince. He has been called the inventor of Appropriationism, although such a statement would ignore Warhol’s contribution to the practice.”¹⁴⁰

In the continuing post-Modernism period of art, quality and originality are demonized, and the ability of laypersons to create “art” with the assistance of new technologies is celebrated.¹⁴¹ Appropriationists use various techniques that may push against copyright theories in slightly differing ways.¹⁴² Some appropriationism attempts to turn existing commercial art into fine art, others duplicate the “style[s] or exact work of [] well-known artists, and others “re-contextualize” ordinary images by changing positioning and claiming an authorship over these new perspectives.¹⁴³ All of these forms of appropriationism have experienced popularity with the public, making questions of legality increasingly pervasive.

Cariou is revealing of the undesirable waste that may flow under restrictive legislation that reflects an “all or nothing,” fair use or infringement-only binary. The product of Cariou’s years of work and careful interaction with the subjects of his photographs was essentially abandoned for a more popular artist’s framing of Cariou’s narrative. While putting a photograph in a new frame is not transformative as a matter of law,¹⁴⁴ this is exactly what Prince has done. Prince has framed Cariou’s work within a new narrative. “New meaning” ought to still permit a finding of fair use; however, in the context of two pieces of art, the most transformative work could only reach as far as

¹³⁸ *Id.* at 215. Artist Aleksandr Rodchenko, who produced work in the new Soviet Union between 1917 and 1920, believed photography was meaningful not only as artistic expression, but as a medium for socialism.

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 221.

¹⁴¹ *Id.* at 219.

¹⁴² *See id.*

¹⁴³ *Id.*

¹⁴⁴ *See Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997).

“added meaning.” Added meaning, a source of fair use in the past, fails to balance the sensitive interests Congress aims to protect via copyright law.

The need for a process resulting in fairer, less mysterious holdings is greatest in situations like Cariou’s, where the original work is clearly visible beneath the considerable new meaning superimposed over it. The essence of Cariou’s underlying work is still visible, as perhaps some might say of *Femme d’Alger*, the 1963 Roy Lichtenstein adaptation of Picasso’s 1955 work, *Les Femmes d’Algers*.¹⁴⁵ Picasso’s piece predated the 1976 copyright act and was subject to the durational limitations of the 1909 copyright act.¹⁴⁶ The duration of the copyright would have been for 28 years, with a second 28-year term possible if renewed. Picasso’s 1955 work, however, is clearly inspired by the 1834 painting by Eugene Delacroix, *Femmes d’Alger*, 1834.¹⁴⁷ Upon viewing, Lichtenstein’s photo is a descendant of Picasso’s cubist version of the original, which would have been immediately protected when published in 1955. While Lichtenstein’s painting might have been analyzed as an unauthorized derivative of Picasso’s work, it could have been freely adapted from Delacroix, whose *Femmes d’Alger* would have been in the public domain at the time.

This conversation, in and of itself, is an interesting example of the impact of durational limitations on current copyrights, but also of how the independent protection vested in a secondary work can achieve its own protection. Even under current post-1978 copyright duration, Picasso’s *Les Femmes d’Algers* could have been freely made, as Delacroix’s work would have moved into the public domain in 1933.¹⁴⁸ Considering that Picasso is widely considered the forefather of

¹⁴⁵ *Contra* Heather J. Meeker, *The Ineluctable Modality of the Visible: Fair Use and Fine Arts in the Post-Modern Era*, 10 U. MIAMI ENT. & SPORTS L. REV. 195, 225-26 (1993) (confusing *Les Femmes d’Algers* with *Les Demoiselles d’Avignon*, another Picasso piece, and failing to accurately identify creation dates and similarities).

¹⁴⁶ *Id.* at 226.

¹⁴⁷ See *Picasso/Delacroix: The Women of Algiers in their Apartment Exhibition Opens at the Louve*, ARTDAILY.ORG, (Mar. 10, 2014, 9:20 PM), <http://artdaily.com/news/26559/Picasso-Delacroix--Women-of-Algiers-in-Their-Apartment-Exhibition-Opens-at-The-Louvre#.UyMxDqUlhUQ>.

¹⁴⁸ See Notable Names Database, <http://www.nndb.com/people/465/000022399/> (last visited Mar. 10, 2014).

appropriationism in art,¹⁴⁹ a modern discourse about unauthorized derivatives would not have been in the consciousness of Delacroix at the fixation of his famously copied original.

V. Conclusion

With the denial for certiorari in *Carion*, the artistic community must continue to wait for further explanation as to identify what exactly is a “fair use” in appropriation art. The lack of clarity and substantial disagreements on standards and the fact-sensitive fair use factors ought to encourage the tightening of legislative guidance on this issue. The implementation of a compulsory royalty regime is a better-suited system for balancing the interests of the public and copyright holders than the existing method. Furthermore, the procedural posturing of most fair use defense hearings has placed fact-sensitive analysis within the power of judges, rather than juries, the favored fact-finders. Regardless of whether it is substantive or procedural complications that have rendered “fair use” inquiry ineffective in these circumstances, a non-prohibitive system where benefits are shared in addition to profits would be better for all.

¹⁴⁹ *Id.*