Appropriation in the Fine Arts: Fair Use, Fair Dealing and Copyright Law

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Introduction

In the 20th century, comprehensive and far-reaching theoretical shifts occurred in the Fine Arts, with Post-Modernism re-conceptualising the discipline and challenging its formal and philosophical boundaries. Artists sought to disassociate art from the notions of hierarchy and genius intrinsic to 17-19th century art[1] and Modernism,[2] with works characterised by the questioning of the role of the artist through, for example, techniques of appropriation. Moreover, the paradigm of Post-Modernism asserted that art was a space where anything and everything was permissible, for example, where a toilet could be an artwork,[3] and where artists could overtly appropriate images from their environment and from other artists. Through so doing, post-modern artists aimed to overthrow artistic convention and challenge the established capitalist, patriarchal and colonial narratives of Modernism, as well as its emphasis on 'high' and 'low' art. We see such practices in the collages of Dada artists;[4] the Pop art appropriations of Andy Warhol and Robert Rauschenberg;[5] in the work of Neo-pop artists such as Jeff Koons, Keith Haring, Kennny Scharf and Rodney Allan Greenblat;[6] and in Richard Prince's 2008 'Canal Zone' series.[7] In New Zealand this approach is evidenced in the work of Michael Parekowhai who, in appropriating imagery from New Zealand modernist painters Colin McCahon (Fig. 1 and 2) and Gordon Walters (Fig. 3 and 4), has engaged heavily with post-modern strategies.[8]

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[1] Throughout the 17th – 19th centuries, art maintained a hierarchy of genres and focussed on narrowly defined conceptions of beauty, with artists "using [a] perfect, seamless technique to execute very well-established subject-matter." Megan Gambino "Ask an Expert: What is the Difference between Modern and Post-Modern Art?" Smithsonian.com <http://www.smithsonianmag.com/arts-culture/ask-an-expert-what-is-the-difference-between-modern-and-postmodern-art-87883230/?no-ist>

[2] A movement starting around 1860 in response to the art of the 17th-19th centuries, Modernism incorporated "personal expression… [putting] emphasis on the value of being original and doing something innovative." Above

[3] As in the case of Marcel Duchamp's famous *Fountain*, 1917

[4] Such as Hannah Hoch, Raoul Hausmann and John Heartfield

[5] "Pop artists like Robert Rauschenberg, Claes Oldenburg, Andy Warhol, Tom Wesselman, and Roy Lichtenstein reproduced, juxtaposed, or repeated mundane, everyday images from popular culture—both absorbing and acting as a mirror for the ideas, interactions, needs, desires, and cultural elements of the times." "Pop Art" Museum of Modern Art Learning <http://www.moma.org/learn/moma_learning/themes/pop-art/appropriation>

[6] Who "appropriated commercial images from comics and media along with collage and an effluvia of found materials" Margot Lovejoy *Digital Currents: Art in the Electronic Age* (3rd ed Routledge, New York: 2004) at 76

[7] Which engendered the litigation in *Cariou v Prince* 714 F 3d 694 (2d Cir 2013)

[8] Joanna McFarlane "Kiss the Baby Goodbye: Appropriation in New Zealand Art" ARTH2061 The Post-Modern Sublime Presentation Paper, Australian National University, May 2013)

Fig. 1: Colin McCahon, *I Am*, 1954

Fig. 2: Michael Parekowhai, *The Indefinite Article*, 1990

Fig. 3: Gordon Walters, *Kahukura*, 1968

Fig. 4: Michael Parekowhai, *Kiss the Baby Goodbye*, 1994

Appropriation such as this is important, as it enables artists and the viewing public to critique individual artists, art movements and particular artworks through appropriating and transforming their imagery. Such appropriation can also verge on the political, as we see in politically oriented remixes, such as the Stephen Harper remix, Jack Layton remix, and Michael Ignatieff remix, [9] as well as various remixes created during the 2008 United States election.[10] As evidenced in these examples, "transformative works often involve authorial creativity and social critique… values at the core of freedom of expression."[11]

That copyright could then limit this, that it could say an artist's work is their *property*, seems anathema to these trends and to the fundamental value of freedom of expression which is made manifest in the Fine Arts. On the other hand, copyright is not strictly in opposition to creativity and expression. In the United States this system of private property was actually established amid beliefs that it would facilitate freedom of expression through providing incentives to create.[12]

Similarly, art is not an area entirely distinct from economics. In some cases artists can make millions of dollars from pieces which are based on overt appropriation and parodies are often created as a result of purely commercial motivations.[13] The most extreme example of this can be seen in Jeff Koons, whose work has been described as "the archetype of money-driven art production".[14] Employing 128 people,[15] Koons' studio is more akin to a factory than the traditional artist's studio. Thus, art is not solely a vehicle for criticality, but can also be oriented around commercial interests. This reality suggests that art should not be deemed wholly distinct from copyright and that *some* line should be drawn as to when appropriation will and will not be legitimate. This line is found in fair use and fair dealing.

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[9] Graham Reynolds "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Irwin Law, Toronto, 2010) at 399-400

[10] "High-profile mashups during the 2008 elections included hip-hop star will.i.am's "Yes We Can" video (a remix of Obama's New Hampshire primary concession speech in February 2008), the eponymous Obama Girl's "Crush on Obama" video, satirist Paul Shanklin's "Barack the Magic Negro" song (a remix of an *Los Angeles Times* column and the song "Puff the Magic Dragon") and Comedy Central's late night host Stephen Colbert's "John McCain's Green Screen Challenge" (a mashup contest centering around a speech given by Republican presidential candidate John McCain). Each of these mashups in turn encouraged or stimulated other users to create their own video mashups, such as the numerous user-generated videos on BarelyPolitical.com that remix video footage of Obama Girl, or users who submitted their own mashup creations into Colbert's remix challenge." Richard L. Edwards and Chuck Tryon, "Political video mashups as allegories of citizen empowerment" (2009) 14 First Monday 10, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2617/2305#p4>

[11] David Fewer "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 Fac.L.Rev., U.Toronto175 at 201

[12] "Thus, private property and liberty were viewed as complementary and not opposing forces." William Patry, *The Fair Use Privilege in Copyright Law* (2nd ed, BNA Books, Washington D.C., 1985, 1995), at 575

[13] "... as opposed to being done purely for the purposes of criticism." Susy Frankel, *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 354

[14] "Staff Picks: Beard-Burdened and Beer-Branded" (5 September 2014) The Paris Review <http://www.theparisreview.org/blog/2014/09/05/staff-picks-beard-burdened-and-beer-branded/>

[15] Sixty-four employees in painting and forty-four in sculpture, Jed Perl "The Cult of Jeff Koons" (25 September 2014) The New York Review of Books <http://www.nybooks.com/articles/archives/2014/sep/25/cult-jeff-koons/?insrc=hpss>

Fair use (in the United States) and fair dealing (in the United Kingdom, Australia, Canada and New Zealand) are legal exceptions to copyright. The exceptions permit the use of copyrighted work for purposes such as criticism and review, research and private study, news reporting, and in some cases parody, satire and education – criticism, parody and satire being especially relevant to art works utilising appropriation. Fair use in the United States also applies the criterion of transformative use - which allows for the use of elements of a copyrighted work when the secondary work is sufficiently different from its antecedent to be classed a new work. In this way fair use and fair dealing recognise that a) in some circumstances a secondary work has modified a copyrighted original so significantly that it can be considered an entirely new, non-infringing work, and/or b) the secondary work should be permitted as it fulfils the important social uses of criticism, parody or satire.

In recognising these uses, the exceptions are also a valuable starting point for analysing our system of copyright generally, as they have inherently to do with its fundamental purpose of maximising creativity and knowledge. Copyright achieves this in two ways – firstly, through facilitating economic incentives for artists to create through establishing a monopoly on the use of their works. Secondly, through allowing for new creative works to be spawned through restraining this monopoly via limited copyright durations and fair use and fair dealing. Copyrighted is oriented around a balancing of these two practices and conceptualised as a legal dynamic that, through this balance, "must work for the public good". [16]

However, it has been argued that throughout the last century copyright has increasingly focussed on copyright holders, rather than users. This can be seen in the extension of copyright durations, the strengthening of enforcement measures and the emergence of a 'permission' culture where permission via license is required to use any copyrighted work and where anxiety and caution characterise the use of copyrighted work generally. All of this has been said to have disrupted the copyright balance, resulting in fewer works being available for appropriation, and thus less creative works and criticism from which we as a society benefit. Fair use and fair dealing can serve to bolster this space and facilitate a more flexible system of copyright, as they recognise and condone certain creative acts which serve the purposes of criticism, parody or satire. Simultaneously, their application also recognises that the Fine Arts shouldn't be removed from the sphere of copyright entirely as it also helps to facilitate their production.[17]

Chapter one will examine the tensions between copyright law and the arts in greater depth, as well as the expansion of copyright generally, which fair use and fair dealing play an important role in both questioning and curtailing. Chapter two will outline the strategies of fair use and fair dealing, with particular reference to transformative use as a valuable mechanism for conceptualising artistic practice. Given the lack of cases in the fair dealing jurisdictions, much attention will be paid to the American cases as

[16] Susan Ballard and Pamela McKinley, "Art at Risk: Copyright, Fair Dealings and Art in the Digital Age" (Otago Polytechnic, Dunedin, 2011) at 17

[17] "Without such protection, artists would lack the ability to control the reproduction and public display of their work and, by extension, to justly benefit from their original creative work." *Friedman v Guetta* US Dist LEXIS 66532 (CD Cal 2011) at 19-20

examples of how the visual arts have been, and could be treated under copyright, especially regarding transformative use.

Alternatively, the fair dealing jurisdictions could consider broadening the scope of 'criticism' and expanding the categories to which fair dealing applies – particularly in New Zealand which is lagging behind its counterparts in the United Kingdom, Australia and Canada in having no provision for parody or satire. This is especially pertinent given that New Zealand will soon be reviewing its copyright legislation.[18] Chapter three will examine the potential of these options while again recognising that analyses and developments in fair use and fair dealing provide a basis for critiquing copyright generally and recognising that, at its heart, copyright is not an exclusive property right but an intangible 'bundle of rights' which involves the regulation of expression.

[18] Cabinet Paper "Delayed Review of the Copyright Act 1994" (15 July 2013)

Chapter 1: Art and Copyright

A. The Tension between Art and Law in Copyright

An integral aspect of what makes a work capable of copyright is found in the distinction made between an idea and its expression. As stated in *Rogers v Koons*: [19]

> We recognise that ideas, concepts and the like found in the common domain are the inheritance of everyone. What is protected is the original or unique way that an author expresses those ideas, concepts, principles or processes.

An example to demonstrate this can be found in the case of *Leibovitz v Paramount*[20] where the photographer's image of a pregnant and naked Demi Moore was imitated (Fig.5), but replaced with the head of the actor Leslie Nielsen (Fig. 6). The 'idea' inherent in Leibovitz's work is that of photographing a naked, pregnant woman in the classical 'Venus Pudica' pose. Leibowitz does not have a monopoly on this idea. However, her expression of this idea in her choice of lighting, background, angle and choice of camera is capable of copyright protection.

The idea/expression dichotomy in this way acts as a justification for the particular way in which copyright limits freedom of expression, as ideas are still able to be accessed and used in creative works – it is only their expression which is curtailed. We see this approach in the United States,[21] Australia,[22] the United Kingdom,[23] New Zealand[24] and Canada.[25]

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[19] *Rogers v Koons* 960 F 2d 301 (2nd Cir 1992) at 308

[20] *Leibovitz v Paramount Pictures Corp.* 137 F 3d 109 (2nd Cir NY 1998)

[21] For example, in cases such as *Sid & Mary Krofft Television v. McDonald's* 562 F 2d 1157 (1977) at 1170, *Schnapper v Foley* 471 F Supp 426 (1979) at 428, *Eldred v Reno* 239 F 3d 372 (2001) at 376 and finally in the Supreme Court case of *Harper & Row, Publrs. v Nation Enters.* 471 US 539 (1985) at 556: "The Second Circuit noted, correctly, that copyright's idea/expression dichotomy 'strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression" as cited in Robert Burrell and Allison Coleman *Copyright Exceptions: the digital impact* (Cambridge University Press, Cambridge, 2005) at 20, n 12

[22] As in *Skybase Nominees v Fortuity* (1996) 36 IPR 529 at 531: "the fact that another work deals with the same ideas or discusses the same fact also raised in the work in respect of which copyright is said to subsist will not, of itself, constitute an infringement. Were it otherwise the copyright laws would be an impediment to free speech, rather than an encouragement of original expression". At 21, n13

[23] As in *Ashdown v Telegraph Group Ltd* [2001] 4 All ER 666 at [12]

[24] "The statutory monopoly is not granted in respect of information itself. It does not prevent the taking and reuse of knowledge itself. Copyright protects not ideas but the form in which they are expressed. Ideas can be appropriated so long as they are not expressed simply by copying the words of the author." *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91 at 19

[25] As in *Ce G nrale des Etablissements Michelin -Michelin & C" v. CAWCanad* (1996) 71 CPR (3d) 348 (FCTD) at [112] where the court found defendants had "a multitude of other means for expressing their views."

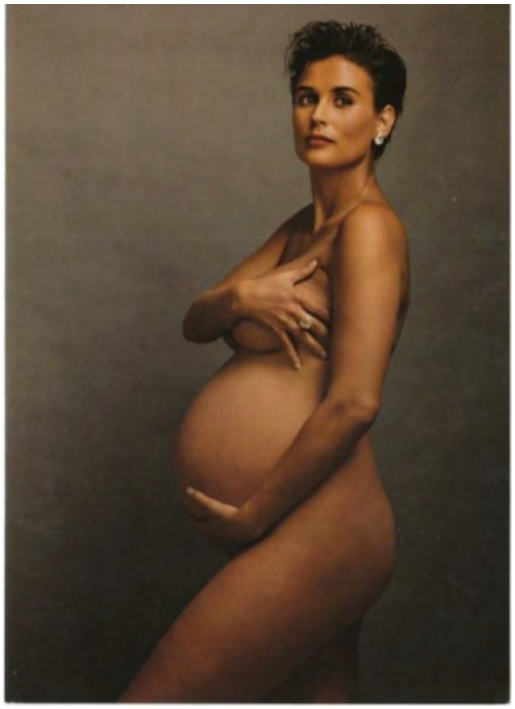

Fig. 5: Annie Leibovitz, *Demi Moore*, 1991

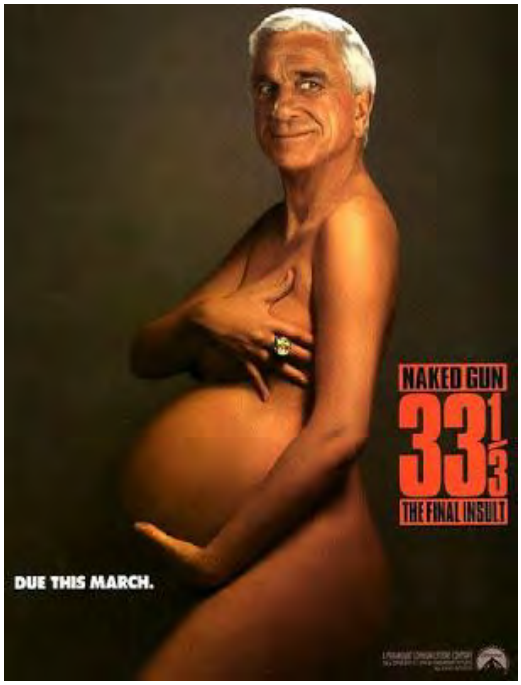

Fig. 6: Promotional poster for *Naked Gun 33 1/3: The Final Insult*, 1993

However, the work of appropriation artists is dependent on the overt use of another artist's expression. Post-Modern artistic practices in this way challenge central tenets of copyright, such as the idea/expression dichotomy, as well as 'originality'. While copyright generally aims to obviate the convoluted question of artistic merit, defining artistic works as such "irrespective of artistic quality",[26] works still need to be 'original'.[27] But what if the artist's very intention is for the two works to be similar, so as to question the concept of originality itself?

Post-Modernism, for example, is "[a]ggressively and self-consciously derivative in its ideology."[28] Be it Ready-mades,[29] Found Objects, Object Art, or Collage, post-modern artists have appropriated visual elements from their environment prolifically. Fundamental to these practices is a questioning of the ideas of originality and authorship. Examples include simulationist photographers such as Sherrie Levine[30] and Richard Prince[31] (who re-photograph photographs), and simulationist painters such as Mike Bidlo[32] who re-paint original works. Through producing such works these artists aim to problematize the distinction between copy and original, and the market value that is attached to an original and to art generally.[33]

Collage, a technique used by many of the artists mentioned here and fundamental to movements such as Dada and Pop Art, is characterised by the appropriation of other images into a new work. This process of appropriation re-contextualises the original imagery, and in the process changes its meaning or emphasis. Through this process artists may comment on the work of other artists or use "images fundamental to a culture… to make a point about that culture".[34] So too, it is not only the final product which constitutes the work in such examples but the act of appropriation itself:[35]

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[26] In New Zealand, for example, an artistic work is defined as "a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality" per Copyright Act 1994 (NZ), s 2. The same is true of the United Kingdom per Copyright, Designs and Patents Act 1988 (UK) and Australia per s 4(1)(a) and Australia Copyright Act 1968 (Aus), Part II

[27] 'Copyright in Original Works' Copyright Act 1994 (NZ), s 14; 'Works in which Copyright May Subsist' Copyright Act RSC C 1985 C-42, s 5; 'Nature of Copyright in Original Works' Australia Copyright Act 1968 (Aus), s 31; 'Copyright and Copyright Works' Copyright, Designs and Patents Act 1988 (UK), s 1; 17 USC §102

[28] Lynne A. Greenberg "The Art of Appropriation: Puppies, Piracy and Post-Modernism" (1992) 11 Cardozo Arts & Ent.L.J. 1, at 1

[29] "A commonplace artefact (such as a comb or bicycle rack) selected and shown as a work of art", Ballard and McKinley, above n 16, at 45

[30] Levine's most famous work is likely her appropriation in 'After Walker Evans' where she re-photographed Evans' photographs from his series 'First and Last'. AfterSherrieLevine.com <http://www.aftersherrielevine.com/>

[31] For example, "Prince's 'Spiritual America' is an appropriation of Garry Gross's lascivious photo of a nude, ten-year-old Brooke Shields." Richard Biles "Richard Prince: 'Spiritual America' (1983)" 21 October 2011 freq.uenci.es <http://freq.uenci.es/2011/10/21/richard-prince-spiritual-america-1983/>

[32] Who "has created an entire exhibition of Bidlo Picassos including *Guernica*, the Gertrude Stein portrait, and *Les Demoiselles d'Avignon.*" Lovejoy, above n6, at 74

[33] These artists "challenge concepts such as authenticity of the original, the primacy of the creative act… the mastery or genius of the artist… [and] the market system." At 74

[34] Karen Lowe "Shushing the New Aesthetic Vocabulary: Appropriation Art under the Canadian Copyright Regime" (2008) 17 Dalhousie J. Legal Stud. 99 at 101

[35] Ballard and McKinley, above n 16, at 37

> The selection, arrangement and juxtaposition of collage is the art [as it produces] a novel arrangement of the information… [Part of the purpose and process of art] lies in the very process of rescuing the fragment.

These practices are *fundamental* to contemporary art, which "depends upon direct appropriation as an instrument of critical expression."[36] Post-modern artists aim to challenge powerful, entrenched, often highly unfair norms, and the most effective way for them to do this is to utilise the imagery of established systems. For example, in Barbara Kruger appropriates commercial imagery in her feminist collages with the aim of problematizing capitalism as well as the male-dominated voice in both Modernism and society generally (see Fig. 7 and Fig. 8).[37] Such critiques are important and necessary and it is simply impossible to communicate them in the same way if artists are not allowed to use appropriation techniques. At its very core appropriation art also questions the notion of authorship and the market system in relation to artworks. This is of course problematic when we consider that copyright is ultimately a system of property ownership.

Fair use and fair dealing provide a means through which to navigate these varying concerns in allowing the use of "expression itself for limited purposes."[38] We see this, for example, in the explicit recognition of appropriation art practices in fair use's transformative use and in the inclusion of parody and satire provisions in fair use and some of the fair dealing jurisdictions.

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[36] David Lange and Jennifer Lange-Anderson, "Copyright, Fair Use and Transformative Critical Appropriation", <http://law.duke.edu/pd/papers/langeand.pdf> at 132

[37] Kruger places text over appropriated commercial images in a "deconstruction of Modernism… aimed at destroying a certain order of representation; the domination of the 'original which up to now has largely been male-identified." Lovejoy, above n6, at 74

[38] *Eldred v Ashcroft* 537 US 186 (2003)

Fig. 7: Barbara Kruger, *Untitled*, 1989

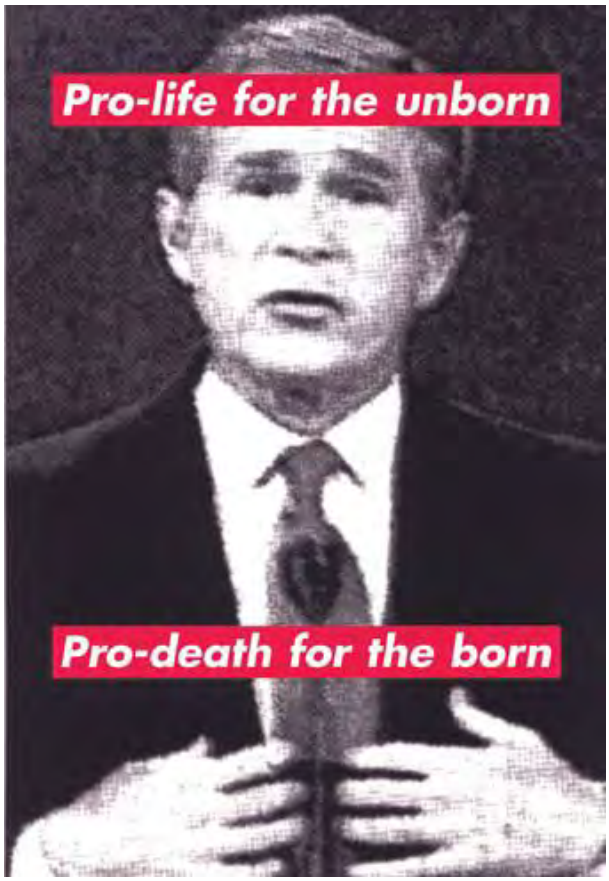

Fig. 8: Barbara Kruger, *Untitled*, 2000

B. The Expansion of Copyright

A number of commentators assert that we are experiencing an unprecedented expansion of copyright protection and a correlative shrinking of the public domain.[39] These developments are attributed to the rise of neo-liberalism throughout the Western world in the late 1900s. Neo-liberalism favours limited government, free markets and private property and it is argued that this emphasis on private property in particular has had an enormous impact on copyright, with creative works increasingly being associated with exclusive possession ad infinitum. The quintessential example of this is Disney. Many of the Disney stories were inspired by the Grimm Brothers fairy tales, which had entered into the public domain. Given the expansion of copyright and in particular the lengthening of copyright durations, "no one can do to the Disney Corporation what Disney did to the Brothers Grimm."[40]

Commentators have articulated this as a 'second enclosure movement'[41] or "the enclosure of the intangible commons of the mind".[42] These developments have broadened the scope of copyright enormously, where it originally applied only to literary texts:[43]

> … the great American novel, a report prepared as a duty of employment, a shopping list, or a loanshark's note on a debtor's door saying "Pay me by Friday or I'll break your goddamn arms" are all protected by copyright.

Thus, the use of completely mundane, quotidian objects could amount to copyright infringement. This can only contribute to uncertainty in regards to copyright generally and hesitancy in using any kind of copyrighted work, no matter how banal. The examples used above also go far beyond the original scope of copyright which was initially intended to protect works of creative import in order to incentivize their production. A shopping list, for example, has little to do with creativity, nor requires the author to be incentivized to produce it - in the act of creation they are not influenced by any profit making potential of their 'work'. Thus, the inclusion of such 'works' in copyright is ostensibly incongruent with its fundamental purposes, serving only to evidence its excessive expansion.

We can also see this in the extension of copyright durations. In the United States, copyright has extended from 14-28 years to 70-120 years.[44] As a result of the

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[39] The 'public domain' can be defined as "body of communal knowledge and creativity that anyone can use whether for commercial or non-commercial purposes". Ballard and McKinley, above n 16, at 27

[40] Lawrence Lessig, "The Creative Commons" (2003) 55 Fla.L.Rev 763 at 764

[41] The first enclosure movement originated in England, occurring periodically from the late 15th century to the 19th century according to James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 LCP 33, at 34, fn 2

[42] At 37

[43] Pierre N. Leval, "Toward a Fair Use Standard" 103 (1990) Harv. L. Rev. 1105 at 1116-1117

[44] 70 years after the death of the author for works created after 1978, per Copyright Act 17 USC § 302(a) and "95 years from the year of its first publication or… 120 years from the year of its creation, whichever expires first … [for] anonymous works, pseudonymous work, or a work made for hire" per Copyright Act 17 USC § 302(c). For works created before 1978, "but not theretofore in the public domain or copyrighted, [copyright] subsists from January 1, 1978, and endures for the term provided by § 302. In no case, however, shall the term of copyright in such a work expire before December 31,

Australia-United States Free Trade Agreement,[45] Australia has increased its copyright duration from 50 to 70 years. In the United Kingdom copyright extends for 50-70 years after the death of the author.[46] In New Zealand, the Trans-Pacific Partnership trade agreement could lead to a United States model which would extend copyright from the life of the author plus 50 years to 70-120 years.[47] In Canada copyright duration is currently at 50 years after the death of the author for all works.[48] In terms of policy, such lengthening is problematic: [49]

> It surely cannot be based on the principle of encouraging artistic creativity by increasing the size of the carrot. No one is going to be more inclined to write computer programs or speeches, compose music or design buildings because 50, 60 or 70 years after his death a distant relative whom he has never met might still be getting royalties.

The impact for creators is that it is simply more difficult for them to use original source material in their works – either they have to wait for the copyright duration to end or pay a licensing fee.

This results in a significant loss in creative and critical works. One example can be seen in Alice Randall's 'The Wind Gone Done' – a re-work of Margaret Mitchell's 'Gone with the Wind', told from the slaves' perspectives in the Southern United States. This work was bound up in copyright disputes after its publication in 2001 and unable to be released. Even though the copyright had ostensibly come to an end for 'Gone with the Wind', further legislative extensions of copyright duration enabled Mitchell's estate to continue to defend the work against any adaptation. It attempted to do this via an injunction in *Suntrust v Houghton Mifflin*.[50] The case eventually settled and the book was released and became a bestseller. This example demonstrates the loss of creative works that we can suffer as a result of expanding copyright. If a creator cannot access and re-work previous artistic works, a slew of critical commentary may be suppressed as a result. This is especially crucial for marginalized groups who, in utilising the original work of more powerful players, can construct impactful critiques of both them and society generally, as in the case of *Wind Gone Done*.[51]

2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047" per Copyright Act 17 USC § 303(a).

[45] Australia-United States Free Trade Agreement (signed 18 May 2004, entered into force 1 January 2005)

[46] 70 years in the case of literary, musical, dramatic or artistic works per Copyright, Designs and Patents Act 1988 (UK), s 12; 70 years for film per Copyright, Designs and Patents Act 1988 (UK), s 13B; 50 years in the case of sound recordings per Copyright, Designs and Patents Act 1988 (UK), s 13A and broadcasts per Copyright, Designs and Patents Act 1988 (UK), s 14

[47] "The TPP and NZ Creatives" (15 August 2012) The Big Idea <http://www.thebigidea.co.nz/news/industry-news/2012/aug/120449-the-tpp-and-nz-creatives>

[48] Copyright Act RSC C 1985 C-42, s6

[49] Hugh Laddie "Copyright: Over-Strength, Over-Regulated, Over-Rated?" (1996) 18 E.I.P.R 253 at 256

[50] *SunTrust Bank v Houghton Mifflin Co*., 268 F 3d 1257 (11th Cir. 2001)

[51] "Transformative use of copyright-protected expression does not just benefit individuals. It also allows marginalised or oppressed groups to achieve autonomy from more empowered cultures by writing themselves into central roles in culturally significant texts." Reynolds, above n 9, at 401

As a result of such long copyright durations we've also developed a 'permission culture'[52] – where permission to use images is conceptualised as a commodity in and of itself. Firstly, it is insufficient to say that artists should simply acquire a license if they wish to appropriate material. Whether an artist could have acquired a license to use the original author's particular expression has never been a relevant consideration in determining fair use[53] or fair dealing. Rather, the doctrines are concerned with the damage to the market of the actual good itself. So too, licenses have become increasingly and prohibitively expensive and obtaining one can be confusing and time-consuming in that creative works often will not come with a copyright notice, even though copyright law does apply to them.[54] Thus, it is difficult for creators to know what they can and cannot use and even when they do know, to find the copyright holder and obtain their permission to use the work. We see this in the case of *Friedman v Guetta*[55] where the appropriating artist came across the photograph on the internet by chance. There was no indication on the image that it was copyrighted and the artist was not aware of its publication by the plaintiff in a book. The fact that there are so many 'orphan works' also serves to exacerbate this[56] – with no identifiable copyright holder, users face uncertainty in that even after an inordinate amount of effort the copyright holder may not be traceable and may still emerge later on. Copyright holders may also be unlikely to grant a license to users who will criticize their work or even the ideas and issues their work represents.

These obstacles are also exacerbated by a strict clearance culture i.e. an industry of cultural gatekeepers, such as insurance or film companies, who will prevent content from being used unless permission has been obtained from the copyright holder.[57] As Lessig states: [58]

> These controls increasingly mean that the ability to take what defines our culture and include it in an expression about our culture is permitted only with a license from the content owner… The freedom to remake and retell our culture thus increasingly depends upon the permission of someone else.

An example of this in New Zealand can be seen in the case of CK Stead, who was required to obtain permission from Janet Frame's estate to be able to quote from her in his memoir. Although Stead believed he was able to publish the work without

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[52] Lawrence Lessig quoted in Stefano Basilco, *Cut: Film as Found Object in Contemporary Video* (Milwaukee Art Museum: Milwaukee, 2004) at 51 as cited in Ballard and McKinley, above n 16, at 17

[53] "As another federal district court noted, 'the fact that a copyright holder has previously secured licenses does not make a given market traditional, reasonable, or likely to be developed'." *Bill Graham Archives, LLC. V Dorling Kindersley Ltd.* 386 F Supp 2d 324 (SD NY 2005) at 332 as cited in *Seltzer v Green Day, Inc* US Dist LEXIS 92393 (C.D. Cal. 2011) at 20

[54] Brad Templeton "10 Big Myths about Copyright Explained" (1994) <http://www.templetons.com/brad/copymyths.html>

[55] Who "often incorporates pre-existing images in the creation of his artwork" *Friedman v Guetta*, above n 17, at 3-4

[56] For example, the "British Library estimates 40 per cent of all print works are orphan work." Andrew Gowers *Gowers Review of Intellectual Property* (HM Treasury, London, 2006) at [4.91]

[57] Factors identified, for example, in Tricia Beckles and Marjorie Heins *Will Fair Use Survive? Free Expression in the Age of Copyright Control* (Brennen Centre for Justice, NY, 2005) at ii, and Giuseppina D'Agnostino "Healing Fair Dealing: A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use" (2008) 53 McGill L.J. 309 at 352

[58] Lessig, above n 39, at 770

permission, he publically apologised to the estate in order to avoid litigation. Stead believed he could use the fair dealing defence for the purposes of criticism or review and that the Trust was simply using copyright as a weapon against his book which they disliked.[59] The Trust challenged this, asserting that the defence "could not be used when commenting on an author or when quoting from unpublished material."[60] Thus creators are aware of the defence, but there is still uncertainty as to whether and how it would be applied.

The uncertainty this dynamic engenders, coupled with a desire to avoid expensive litigation, leads to artists either not using copyrighted material or having to acquire permission to do so – but even then there are problems. Take the National government's use of a riff from Eminem's 'Lose Yourself' song in their latest advertising campaign. The owners of the song have filed proceedings against the National Party, despite the fact that the licensor told National they could use it, the latter had paid the licensing fee and the track had been used in the past.[61] A similar incident occurred in regards to the Coldplay song 'Clocks' in 2008.[62]

Even when not presenting an imminent threat of legal action, copyright is something that artists and institutions have to think about constantly. For example, in the experience of the Dunedin Public Art Gallery copyright is "a fairly large issue with half of our collection being under copyright."[63] The feeling generally is that copyright is "very tricky… [and] there's always a bit of a risk."[64] Although dealing with copyright is "general practice… it is still problematic."[65]

More broadly, such regimes have led to a 'chilling effect', which has been defined as a "culture of anxiety that now exists as right holders aggressively attempt to thwart potential fair uses of works."[66] The exact consequences of this are difficult to measure, as often such attitudes do not result in court cases but in cautious 'behind the scenes' practices such as teachers advising students to avoid appropriation practices,[67] or artists co-operating with copyright holders so as to avoid litigation. This dynamic

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[59] "CK Stead settles dispute with Frame's trust" *The New Zealand Herald* (online ed, Otago, 25 June 2010)
[60] Above
[61] Hamish Rutherford "Eminem sues National over election ad" *Stuff.co.nz* (online ed, New Zealand, 16 September 2014)
[62] "National forced to recall DVD promoting Key" *The New Zealand Herald* (online ed, New Zealand, 3 December 2007)
[63] Interview with Tim Pollock, Commercial Development Manager at the Dunedin Public Art Gallery (the author, 5 September 2014)
[64] Above
[65] Above
[66] D'Agnostino, above n 57, at 352
[67] For example, Sandra Camomile of the United States College Art Association states: "I also teach students in a digital world, and I feel I have a responsibility to give them information on how to protect themselves… I tell them[, i]f they're going to take images from the Internet and use somebody else's work, they have to manipulate the image enough that the artist will not be able to recognize that image as their own. I've heard percentages, like it needs to be changed 75%. I've heard 80%, 90%, 95%. I've looked for information. It seems to be a moving target. So I give them the advice that if the artist can't recognize the work, then you're going to be okay. Otherwise, you could put your company into bankruptcy. You could put yourself into bankruptcy with legal fees. And I tell them that right now copyright and fair use are uncertain. And you don't want to become the test case." Beckles and Heins, above n 57, at 25

equates to a lack of faith in copyright generally. The Gowers Report found that "[c]opyright in the [United Kingdom] presently suffers from a marked lack of public legitimacy. It is perceived to be overly restrictive, with little guilt or sanction associated with infringement."[68] As a result, parties are unsure of asserting their rights under fair use or fair dealing, which also leads to a large number of parties appeasing copyright holders or settling out of court. This includes, for example, a large number of artists using comic images in the 1980s,[69] Pop artists such as Robert Rauschenberg and Andy Warhol (both of whom settled out of court),[70] appropriation artist Jeff Koons,[71] Damien Hirst[72] and painter Joy Garnett[73]. More recently, Shepard Fairey reached a settlement with the Associated Press in regards to his appropriation of their copyrighted photograph of Obama;[74] sculptor Lauren Clay was alleged to have infringed copyright in David Smiths' sculptures in 2013 (the parties settled);[75] and photographer Lois Greenfield issued proceedings against painter Jill Pankey earlier this year for appropriating 33 of her images.[76] Even though most of these cases didn't reach court, they show that copyright prevents artists from producing in the way they want to, impacting on their freedom of expression. In the case of Rauschenberg, for example, this led to the artist completely changing his art practice so as not to have to accommodate copyright concerns.[77]

In light of these developments, fair use and fair dealing take on a heightened importance in maintaining the copyright balance, as they act to moderate its application. One commentator goes so far as to state that "[i]n this moment of expansive copyright, the doctrine of fair use is enjoying a renaissance because it is a

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[68] Gowers, above n 56, at [3.26]

[69] Artists such as Kenny Scharf (who used images from the Jetsons and the Flintstones), Ronnie Cutrone (Woody Woodpecker and Felix the Cat), Keith Haring (Mickey Mouse) and Susan Pitt (Sargent Rock and other Marvel comics) were "[threatened by] the companies that owned the cartoon imagery… In certain cases, notably with Scharf's use of characters from the Jetsons, the artists were forced to stop using the characters or to alter them to the point that they could not be confused with their original sources." John Carlin "Culture Vultures: Artistic Appropriation and Intellectual Property Law" (1988) 13 Colum. VLA J.L. & Arts 103 at 127

[70] At 127-129

[71] Who has been sued four times in *United Feature Syndicate v Koons* 817 F Supp 370 (SD NY 1993), *Rogers v Koons,* above n 19, *Campbell v Koons* US Dist LEXIS 3957 (SD NY 1993), *Blanch v Koons* 467 F 3d 244 (2nd Cir NY 2006)

[72] In 2000 artist appropriated a toy set of the human body, blowing it up in proportion to make a giant sculptural work identical in appearance to the original. The works sold for approximately £1 million. The artist settled through paying an undisclosed sum of money to charity. "Hirst pays up in toy row" (19 May 2000) BBC News <http://news.bbc.co.uk/2/hi/uk_news/754680.stm>

[73] In 2003 Garnet conceded to the demands of artist Susan Meiselas to take her work offline after basing one of her paintings on Meiselas' photograph *Molotov*. Garnet removed the images for fear of her internet service provider removing her website. "Now I believe that the whole thing was just a scare tactic to get me to take the stuff off the Web. And it worked. I called my lawyer and said I was taking my images off the Web site because I didn't want them to go to my Internet provider. I didn't want my Web site pulled. This is what I was really afraid of, because I use that site to send images to galleries, to writers, to critics." Beckles and Heins, above n 57, at 22

[74] This settlement took place in 2010. Irina Tarsis "Fairey and Fair Use" (15 January 2011) Center for Art Law <http://itsartlaw.com/2011/01/15/fairey-fair-use/>

[75] Brian Boucher "David Smith Estate Settles Copyright Tiff" (15 October 2013) Art in America <http://www.artinamericamagazine.com/news-features/news/david-smith-estate-settles-copyright-tiff-/>

[76] Mark.A. Baker "The thin line between Copyright Protection and Fair Use" (22 February 2014) Entertainment Attorney Blog <http://www.entertainmentattorneyblog.com/tag/photography/>

[77] Discussed in Susan Bielstein, *Permissions* (The University of Chicago Press, Chicago, 2006) at 87

last holdout in the law against absolute commodification."[78] Crucially, the exceptions not only protect expression that would otherwise be considered infringement, but also "form part of a wider dispute between those who are in favour of the expansion of copyright and those who would like to see copyright protection curtailed."[79] In particular, they can help us to look beyond established understandings of copyright and analyse the system by examining its fundamental underpinnings. For example, the exceptions highlight the fact that copyright is a limited rather than absolute form of property ownership.

That fair use and fair dealing help us to examine copyright at its most fundamental can be best understood if we conceptualise the provisions as intrinsic to copyright, rather than as exceptions or defences to it. Although some have conflated the concepts with 'fairness' or Equity[80], commentators such as William Patry[81] and Pierre N. Leval[82] aver that they have in fact to do with the copyright balance of providing incentives to create, at the same time as not establishing too extensive a monopoly on copyrighted works – thereby maximising creativity. They do this by recognising the values of criticism, commentary, research and private study, news reporting, parody/satire and (in the case of fair use) transformative use where they outweigh the commercial aspects of the dealing. In this way, fair use and fair dealing simultaneously anchor and are anchored by the copyright balance.

In order to authentically and freely practice, artists need a fair use and fair dealing doctrine which is relaxed and which takes their aesthetic and philosophical characteristics into account. In this way there is room to assert that the exceptions should be broadened. This is especially the case in fair dealing which is currently a much narrower defence than fair use. The time is particularly ripe for discussing such issues in New Zealand as a review of the Copyright Act 1994 will soon be taking place – although only after the Trans-Pacific Partnership Agreement with the United States has been concluded.[83]

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[78] At 79

[79] Burrell and Coleman, above n 21, at 3

[80] "The doctrine is entirely equitable and is so flexible as virtually to defy definition." *Time, Inc. v Bernard Geis Assocs.* 293 F Supp 130 (SDN 1968) at 144

[81] Fair use is a "child of the common law that sought to accommodate a *statutory* scheme, the goal of which was to 'encourage… learned men to compose and write useful books,' by allowing a second author to use, under certain conditions, a portion of a prior author's work". Patry, above n 12, at 5

[82] "A second misleading assumption is that fair use is a creature of equity. From this assumption it would follow that unclean hands and all other equitable considerations are pertinent. Historically this notion is incorrect…. Fair use was a judge-made utilitarian limit on a statutory right. It balances the social benefit of a transformative secondary use against injury to the incentives of authorship." Leval, above n 43, at 1127-1128

[83] "Review of the Copyright Act 1994" (15 July 2013) Ministry of Business, Innovation and Employment <http://www.med.govt.nz/business/intellectual-property/copyright/review-of-the-copyright-act-1994>

Chapter 2: Application of Fair Use and Fair Dealing

Fair dealing is utilised in New Zealand, Canada, Australia and the United Kingdom, while the United States uses the doctrine of fair use. The doctrines are used in cases of potential copyright infringement which involve the alleged interference with a copyright holder's exclusive rights to their work, including the right to copy the work.[84] The doctrines are concerned with a variety of largely similar factors although the only jurisdiction to consider 'transformative use' – the extent to which a secondary work has superseded an antecedent one to create a new work – is the United States in fair use.

All the jurisdictions appear to maintain a level of flexibility, treating the exceptions as highly qualitative analyses and fair use/fair dealing as a relatively open concept. Fair use is particularly flexible, being structurally much less specific than its fair dealing counterparts, with the provisions using the terms 'such as' and 'including'. This permits the courts to apply the exception to uses outside of what is specified in the provision, and to consider factors other than the four which it outlines. In comparison, the fair dealing provisions reference specific uses outside of which the courts are not allowed to go. However, fair dealing is not absolute and does allow room for interpretation and adaptation in how the specified uses are analysed. As Lord Denning states in the United Kingdom case of *Hubbard v Vosper,* "It is impossible to define what is 'fair dealing'. It must be a question of degree."[85] In New Zealand Blanchard J has described fair dealing in similar terms as a "reasonable use".[86]

Recognition of the creativity inherent in appropriating works, as well as the valuable functions of criticism, research, parody and so on, are an integral part of both fair use and fair dealing. However, these considerations must always be balanced with the goal of copyright to provide authors with incentives to create through allowing them a limited monopoly on their work.

A. Fair Use

The four part test from 17 United States Code § 107 is as follows:[87]

> … the fair use of a copyrighted work…for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

[84] These exclusive rights also include the right to distribute copies of the work, to communicate works in public, to make an adaptation of a work or, in the case of the United States, to make a derivative based on a work. Copyright Act 17 USC §106; Copyright Act 1994 (NZ), s 16; Copyright Act 1968 (Australia), s 31; Copyright Act RSC C 1985 C-42, s 27; and Copyright, Designs and Patents Act 1988 (UK), Part II

[85] *Hubbard v Vosper* [1972] 2 QB 84 at 94

[86] *Television New Zealand Ltd v Newsmonitor Services Ltd*, above n 24, at 44

[87] Copyright Act 17 USC § 107

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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.

'The purpose and character of the use' under § 107(1) pertains to whether the secondary work is sufficiently transformative to be considered a 'new' work (discussed under 'Transformative Use' see chapter II(C)).

Section 107(2) considers the nature of the copyrighted work - whether it was published or unpublished, creative or factual. Unpublished works tend to negate a fair use finding as such works are considered more deserving of copyright protection, given that authors should have the right to determine the release of their works. Similarly, appropriation of a creative work suggests against fair use, as such creations are what copyright is fundamentally designed to protect, as compared to facts which are more likely to be considered in the public domain.

This interpretation has been contested in cases of artistic works. In *United Feature Syndicate v Koons* artist Jeff Koons argued that his appropriation of the Garfield character Odie (Fig 9.) in his sculpture 'Wild Boy and Puppy' (Fig. 10) was legitimate because "the commercial success of the Garfield characters… and their pervasive presence in our society [have made them]… 'public figures."[88] Koons contended that "these characters have 'a factual existence as such' which entitles them to less protection under the copyright laws."[89] The court rejected this interpretation on the grounds that these characters are creative, not factual in the conventional sense. They considered that to sanction this interpretation would contradict the central copyright tenet of "[fostering] creativity by assuring the creator of an original work that he or she will reap the exclusive benefits generated from the commercial success of the work."[90] However, this assertion fails to recognise that these artists have already benefited from their works – that is *why* the figures they've created have become 'public' in this way. Such an interpretation would also have recognised the function of art in collecting and critiquing visual elements from the environment. Generally speaking, however, use of an original work that is unpublished and/or of a creative nature is less likely to be considered fair under § 107(2). In regards to artistic works, this provision has been somewhat ameliorated by transformative use.

[88] *United Feature Syndicate v Koons*, above n 71, at 380
[89] At 380
[90] At 380

Fig. 9: Jim Davis, “Odie”

Fig. 10: Jeff Koons, *Wild Boy and Puppy*, 1988

Per § 107(3) the 'amount and substantiality' of the content used as compared to the copyrighted work as a whole is also considered, although this factor is less significant in parodies (see chapter III) and since the establishment of transformative use under § 107(1). This is especially so given the reality that "visual images cannot be summarized, paraphrased, described, or… quoted from" in the same way that other creative works can be. Thus, emphasis must instead be placed on determining the purpose and character of the use under § 107(1).[91] Finally, § 107(4) pertains to the effect of the use on the market of the original. There have been very positive developments under this factor since fair use was first applied to artistic works.

The first cases pertaining to works of Fine Art and conceptualising § 107(4) again concern Jeff Koons. The plaintiff's work in *Rogers* was a photograph on a commercial postcard (Fig. 11). In *United Feature Syndicate* it was the Garfield comic book character of Odie. Both cases compared these creations to a sculptural work of Fine Art by Koons (for a comparison with the postcard in *Rogers* see Fig. 12) – the kind of work one would find in an art school, gallery or museum. The focus in these cases was on the harm caused by the secondary work to the author's ability to engage in and profit from derivative works.[92] These are works which are based on the original and which receive profit from their association with it. In the case of Odie, for example, this could include a stuffed animal, a postcard or kitchen utensils featuring the cartoon dog.[93] The problem in both *Rogers* and *United Feature Syndicate* was that neither of the copyright holders operated in the realm of the Fine Arts, and nor were they ever likely to. Especially not in the way Koons did – in *United Feature Syndicate* coupling Odie with a troll doll and a butterfly in a basket, and in *Rogers* exaggerating the affectedness of the sitters and their kitsch quality.

This is not to say that a commercial sculpture of either of these works could not be a derivative but that a *work of Fine Art* cannot be characterised as such, as the two operate in and receive revenue from completely different realms. Thus, it is not only the nature of the secondary work (as a sculpture) but the use to which it could be put (as Fine Art) that should inform whether or not it constitutes a genuine derivative. There is little likelihood that secondary works which are used for such a distinct purpose as Fine Art will unfairly compete with the original or infringe on its profits. This reality should be recognised by the court as otherwise they are essentially providing protection for derivatives that could never happen, making nonsense of the justification of incentivising in copyright whilst also disinhibiting further creativity.

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[91] As averred by Stephen E. Weil "Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood" (2001) 62 Ohio St.L.J. 835 at 840

[92] Or the "harm to the market for derivative works" *Harper & Row, Publrs. v Nation Enters.* 471 US 539 (1985) at 539 as cited in *New Era Publications Int'l ApS v. Carol Pub. Group* 904 F 2d 152 (2nd Cir 1990) at 159 as cited in *United Feature Syndicate v Koons*, above n 71, at 370

[93] As for sale at "Garfield and Odie" Memorabilia Connection <http://www.memorabiliaconnection.com/garfield-and-odie/>

Fig. 11: Art Rogers, *Puppies*, 1980

Fig. 12: Jeff Koons, *String of Puppies*, 1998

This was ameliorated somewhat in the apportioning of profits, where the court found Koons should "have the opportunity to establish those 'elements of profit attributable to factors other than the copyrighted work'."[94] These elements included Koons' fame and his "related ability to command high prices for his work", as well as the "alterations [made to the original] and the creativity behind them."[95] However, the court still issued a turn-over order under § 503(b) [96] for the artist's copy of 'String of Puppies' to be given to Rogers – meaning the original author could either destroy or commercially exploit the secondary work. *Campbell v Koons*, which required "little discussion, for it is substantially identical to *Rogers*"[97] reached a similar conclusion. [98] As such, not only was the artist punished for his appropriation, but the artworks were taken out of circulation entirely. In this way the court effectively passed "judgment on Koons' vehicle of critical, as well as artistic, expression."[99]

In contrast, the court explicitly considers the likelihood of the artist venturing into these derivative markets in *Gaylord v United States*.[100] In this case, the artist's sculpture (Fig. 13) was photographed (Fig. 14) and this image was used by the United States government for a postage stamp (Fig. 15). Coherently enough, the stamp was found to be no substitute for the sculpture itself and to have caused no market harm to it, as it actually caused the sculpture to increase in value.[101] However, the court also found no damage to derivative works. In its analysis it considered the likelihood of the artist engaging in such a market, stating that the artist has "made only limited attempts to commercialize his copyright in [the sculpture]… [and] has never sold photographs, postcards, magnets, or keychains of [the sculpture]."[102]

The same approach was taken in *Mattel v Walking Mt. Productions*[103] and *Cariou v Prince*.[104] Thus, to infringe under § 107(4) "the infringer's target audience and the nature of the infringing content [must be] the same as the original."[105] A case which

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[94] 17 USC § 504(b) as cited in *Rogers v Koons,* above n 19, at 312
[95] At 313
[96] At 312
[97] *Campbell v Koons*, above n 71, at 6
[98] Koons was prevented from continuing to deal in the infringing work and had to deliver all infringing material to the original artist including the sculptures themselves as well as any derivative material featuring the sculptures (such as photographs). At 9
[99] Fewer, above n 11, at 201
[100] *Gaylord v United States* 85 Fed Cl 59 (2008)
[101] At 71
[102] At 70. This was affirmed in the Court of Appeal in *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010) at 1375
[103] It was found that Mattel would be unlikely to produce the photographs that the artist Forsythe did as a derivative of their brand - images of mutilated Barbies being not exactly in keeping with their marketing strategy (see Fig. 38). *Mattel Inc. v Walking Mt. Prods.* 353 F 3d 792 (9th Cir 2003)
[104] The original artist Cariou had a profitable show cancelled due to Prince's use of his works, as the gallery owner did not want to appear to be capitalizing on Prince's work and did not want to exhibit work that had already been shown at the nearby Gagosian Gallery. However, the Court of Appeal found that this did not amount to a usurpation of the market of the original work, as the two artists have very different audiences (Prince's works selling for high sums and showing in the major galleries) and there was no evidence that Prince's appropriation could act as a substitute for Cariou's in the market or affect people purchasing his work. There was also no real likelihood that Cariou would have ever wanted to sell derivatives of his work that looked like the works Prince had produced. *Cariou v Prince*, above n7, at 708-709
[105] At 709

evidences this is that of *Morris v Young*, where the artist's appropriation of a copyrighted photograph of the Sex Pistols (Fig. 15 and Fig. 16) could legitimately be seen as a threat to the market of the original:[106]

> At a minimum… the works could appeal to overlapping audiences of Sex Pistols fans and those who appreciate punk-rock culture… [This is made] even more likely in light of the lack of any transformative purpose or message conveyed by the works; the two works are so strikingly similar to the Subject Photograph that they could easily "supersede" it in the marketplace.

Generally speaking, a transformative work is unlikely to affect the market of the original as it is deemed a new work with a new market.[107] However, this case is one of very similar products, marketed at very similar audiences.

Occasionally the commercial nature of the factor under § 107(1) will still enable the court to consider market considerations against a finding of fair use. This was the case in *Gaylord* where the US government's use was not transformative under § 107(1), the use being for a purely commercial rather than critical purpose.[108] A similar approach was taken in *Friedman*[109] where the appropriating artist exhibited his works in an exhibition, with some of the works being sold. Regarding § 107(4) the court found that the plaintiff's use of the image within an exhibition context "competes directly with defendant's use",[110] without further substantiating exactly how and why this was the case. However, under § 107(1) a number of the defendant's works were regarded as plainly non-transformative, and thus the commercial nature of the images was able to be taken into account.

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[106] *Morris v Young* 925 F Supp 2d 1078 (CD Cal 2013) at 1087

[107] "Green Day presented evidence that its video backdrop did not perform the same "market function" as the original. The original, created six years before Green Day's use, was primarily intended as street art. Green Day's allegedly infringing use, on the other hand, was never placed on merchandise, albums, or promotional material and was used for only one song in the middle of a three hour touring show. In this context, there is no reasonable argument that conduct of the sort engaged in by Green Day is a substitute for the primary market for Seltzer's art." As cited in *Seltzer v Green Day, Inc* 725 F 3d 1170 (9th Cir 2013) at 1179

[108] "The Postal Service acknowledged receiving $ 17 million from the sale of nearly 48 million 37-cent stamps. An estimated $ 5.4 million in stamps were sold to collectors in 2003. The stamp clearly has a commercial purpose." *Gaylord v United States*, above n 102, at 1374

[109] *Friedman v Guetta*, above n 17, at 17

[110] At 19

Fig. 13: Frank Gaylord, *The Column*, 1990

Fig. 14: John Alli, photograph of *The Column*, 1996

Fig. 15: United States Postage Stamp, 2002

Fig. 16: Russell Young, *Sex Pistols in Red*, c.2005

Fig. 17: Dennis Morris, *Sex Pistols at the Marquee Club*, 1977

B. Fair Dealing

Countries such as Australia, Canada, the United Kingdom and New Zealand use 'fair dealing', allowing the use of copyrighted material for specific purposes - research or study,[111] criticism or review,[112] reporting news[113] and, in some cases, parody and satire[114] and education generally.[115]

The Courts tend to engage in a three-step analysis - determining whether a substantial part of the original has been taken,[116] whether the dealing can come under any of the specified purposes, and whether it is 'fair' or 'reasonable'. In determining this latter criterion, the fair dealing jurisdictions consider a variety of factors similar to fair use. These include the impact of the use on the market of the original, the amount and substantiality of the taking, the nature of the copyrighted work, alternatives to the taking and the purpose of the secondary work.[117]

Compared to fair use and even to some extent the other fair dealing jurisdictions, the United Kingdom is very narrow in its application of fair dealing.[118]As a result, the Gower report found that there "is concern that, at present, the [United Kingdom] exceptions, are too narrow and that this is stunting new creators from producing work and generating new value."[119] Thus, following the more recent Hargreaves review, the United Kingdom has announced that it will soon expand the fair dealing exception to include 'parody, caricature and pastiche'.[120]

In contrast, Canada significantly broadened the scope of fair dealing in *CCH Canadian Ltd v Law Society of Upper Canada*.[121] The court held that fair dealing in regards to research must be given a "large and liberal interpretation in order to ensure that 'users' rights' are not unduly constrained."[122] The case also found that fair

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[111] Copyright Act 1968 (Aus), ss 40, 103A; Copyright Act RSC C 1985 C-42, s 29; Copyright, Design and Patents Act 1988(UK), s 29; Copyright Act 1994 (NZ), s 43

[112] Copyright Act 1968 (Aus), ss 41, 103C; Copyright Act RSC C 1985 C-42, s 29; Copyright, Design and Patents Act 1988(UK), s 30; Copyright Act (NZ), s 42

[113] Copyright Act 1968 (Aus), ss 42, 103B; Copyright Act RSC C 1985 C-42, s 29; Copyright, Design and Patents Act 1988(UK), s 30; Copyright Act 1994 (NZ), s 42

[114] Copyright Act 1968 (Aus), ss 41A, 103AA; Copyright Act RSC C 1985 C-42, s 29

[115] Copyright Act RSC C 1985 C-42, s 29

[116] Fair dealing is only applied "if a work would otherwise have been infringed; that is, if a substantial part of a work at hand has been taken." Frankel, above n 13, at 348

[117] Canada considers "the purpose of the dealing, the nature of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work." *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [60]. These factors are also applied under Copyright Act (NZ), s 43 ' research and private study', although practically the same considerations will be applied to s 42 'criticism, review and news reporting', as has occurred in previous case law such as *Television New Zealand Ltd v Newsmonitor Services Ltd*, above n 24. The same is true of fair dealing in Australia.

[118] "Rigidity is the rule. It is as if every tiny exception to the grasp of the copyright monopoly has had to be fought hard for, prized out of the unwilling hand of the legislature and, once conceded, defined precisely and confined within high and immutable walls." Laddie, above n 49, at 258

[119] Gowers, above n 56, at [4.68]

[120] Rights in Performances (Quotation and Parody) Regulations 2014 (UK), reg 5

[121] *CCH Canadian Ltd v Law Society of Upper Canada*, above n 117

[122] At [51]

dealing is not limited to non-commercial or private uses.[123] *CCH* had a distinctly pro-user bent and, despite the fact that it applied specifically to the research provision in fair dealing,[124] it has been affirmed in subsequent cases and had an impact on fair dealing generally.[125] Significantly, *CCH* conceptualised fair dealing not as a narrow exception to copyright but as an "integral part"[126] of the Copyright Act, balancing the rights of copyright holders with the rights of users. It was also stated that using all of a work may be fair in some instances as, for example, "there might be no other way to criticize or review certain types of works such as photographs".[127] This expansion in Canada has been mirrored in legislation, with the Copyright Modernization Act 2012 allowing for the use of fair dealing in parody, satire and education as well as giving protection to non-commercial remixes.[128] Australian fair dealing also allows for parody or satire.

In New Zealand the fair dealing provisions apply quite explicitly to criticism, review and news reporting (under s 42) as well as research and private study (under s 43).
Similar to the United Kingdom, a review of our copyright legislation will be taking place as a result of public demand. This demand is due in part to reviews conducted in the United Kingdom and Australia in recent years, as well as "public perception that New Zealand consumers suffer from a lack of access to copyright content and flexibility to use this content how they wish in the digital environment."[129]

In all these jurisdictions there is a real dearth of cases which explicate how these provisions could play out further, given that fair dealing has never been given the same "centre-stage treatment"[130] as in the United States. This is especially so in regards to the Fine Arts, where there are no cases whatsoever. Given this, the common law of the United States will be of much guidance if a case pertaining to the Fine Arts comes before the fair dealing jurisdictions, especially given that the same fundamental considerations seem to be applicable (purpose of the use, nature of the dealing, effect on the market of the original and so on). The fair dealing jurisdictions could also choose to apply the transformative use strategy of fair use when considering the purpose of the use.

C. Transformative Use in Fair Use

Fair use is akin to a continuum, with overtly commercial and uncritical works suggesting against fair use, and critical, creative and non-commercials works leaning

[123] At [51]
[124] Involving a library allowing photocopies on-request of its materials by members of the Law Society
[125] For example, we see *CCH* affirmed in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2010] FCA 139 and *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [2012] 2 SCR 345
[126] *CCH Canadian Ltd v Law Society of Upper Canada,* above n 117, at [70]
[127] At [56]
[128] Copyright Modernization Act SC 2012 c 20, s29.21
[129] Cabinet Paper, above n 18, at [3]
[130] Frankel, above n 13, at 337

towards it.[131] Thus, copying an artist's work wholesale with either no or minor revisions will almost definitely disallow the fair use defence as there is ostensibly little creativity involved in this. Fair use "is not a cover for the unimaginative"[132] and will not allow an artist to simply tweak aspects of another creator's works and then to benefit from it commercially. One of the main mechanisms the United States has developed to navigate this territory is the concept of transformative use under § 107(4).

The concept originates from the case of *Folsom v March*[133] which applied to takings from a literary work. Although not articulated as transformative use the case considered whether the secondary work creates "an original and new work."[134] This reasoning was taken up much later in *Campbell v Acuff-Rose* which dealt with a rap group's parody of Roy Orbison's 'Pretty Woman' and is applied under §107(1) which examines the purpose and nature of the use. In adopting *Folsom* this case considered whether the secondary work: [135]

> … adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . , in other words, whether and to what extent the new work is 'transformative'.

As such, originality is a significant factor under transformative use - merely changing the content of a work from one form to another, for example, will not suffice.[136] Integral to these analyses is a consideration of the works formal aspects, and how the meaning or "expressive content"[137] of the work is distinct from that of the original.

Notably, transformative use is distinguishable from parody and satire – the work need not comment upon, criticize or parody the original. It need only "alter the original with 'new expression, meaning or message'."[138] In this way transformative use also accounts for the fact that the line between parody and satire is so fine. Parody involves an explicit critique of the original work. In comparison, satire uses original works to conduct a critique of society generally, of which that original work is a manifestation. Thus, works may claim to be parody when they are perhaps more akin to satire, as in the case of *Rogers*. However, as discussed in Chapter III, there was an at least arguable case that Koons' work *was* a parody. Transformative use accounts for the uncertainty inherent in a parody/satire analysis by focussing instead on whether the work is transformative, with satirical works able to come under this head.[139] However, it is also more liberal than satire – the use of an original needn't

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[131] "As we draw further away from the fields of science or pure or fine arts, and enter the fields where business competition exists we find the scope of *fair use* is narrowed but still exists." *Loew's, Inc. v Columbia Broadcasting System, Inc.* 131 F Supp 165 (D Cal 1955) at 175
[132] Patry, above n 12, at 167
[133] *Folsom v March* 9 F Cas 342 (CCD Mass. 1841)
[134] At 347
[135] *Campbell v Acuff-Rose Music* 510 US 569 (1994) at 579
[136] As in *Castle Rock Entertainment v Carol Publ'g Group* 150 F 3d 132 (2d Cir 1998), where a book with trivia questions about the TV show *Seinfeld* was not considered fair use.
[137] *Seltzer v Green Day*, above n 107, at 1177
[138] *Campbell v Acuff-Rose Music*, above n 135, at 579
[139] Satire is not treated "differently from any other transformative use". *Cariou v Prince*, above n 7, at 707

engage in any criticism at all.[140] A work may also amount to transformative use if it serves a purpose other than those outlined in the preamble to § 107(4).[141] The criterion is thus quite expansive.

Campbell also averred that transformative use, although not a pre-requisite for fair use, is central to its application:[142]

> … the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such transformative works thus lie at the heart of the fair use doctrine's guarantee of breathing space.

In this way decisions which reach an unequivocal finding of transformative use almost always also find fair use.[143] Thus, even if not recognising more extreme forms of appropriation, transformative use appears to be giving more weight to the creative process and increasingly allowing artists to utilise antecedent works. Recognition of transformative use also accounts for the reality that transformative works will hardly ever compete with the original.[144]

Conversely, the concept also recognises that it would be unfair if an artist were not be able to dispute appropriation of their work where the secondary artist inordinately profits from the appropriation of a work which they have in no way re-contextualised, re-imaged or commented on it through their use of it. Practically, however, this is rarely the case – almost always appropriating artists will comment on the original or re-contextualise or transform it, to at least some extent. Where the line should be drawn on this is highly ambiguous and problematic, as the case law will show.

Under this principle we see a qualitative interpretation of artworks and a comparative analysis of works. For example, in the case of *Prince*, where appropriation artist Richard Prince utilised photographs taken by Patrick Cariou of Rastafarian culture. The judges in this case compared the aesthetics of the two artists. Cariou's series consisted of black and white, classical portrait and landscape photographs, where Prince's images were colourful, chaotic, cut-and-paste assemblages – fundamentally different from the originals in terms of "composition, presentation, scale, colour palette, and media."[145] We can see this in a comparison of the images in Fig. 18 and

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[140] This would allow, for example, transformative tributes such as Danger Mouse's *Grey Album*, a mashup of Jay-Z's *Black Album* and the Beatles' *White Album* which has been described as a "sincere, sophisticated homage to two acclaimed works and the musical celebrities who created them." Johanna Blakley, "The *Grey Album,* Celebrity Homage and Transformative Appropriation" (paper presented to the Norman Lear Center, University of Southern California, February, 2005) as cited in Reynolds, above n 9, at 406

[141] Criticism, comment, news reporting, teaching, scholarship and research

[142] *Campbell v Acuff-Rose Music*, above n 135, at 579

[143] For example, "[t]he success rate of defendants claiming fair use went from 22.73% between 1995 and 2000, to 40.91% between 2001 and 2005, to 58.33% between 2006 and 2010. In other words there was a close correlation between the ascendancy of the transformativeness analysis and decisions favouring fair use." Neil Weinstock Netanel, *Making Sense of Fair Use,* (2011) 15 Lewis & Clark L. Rev. 715 at 752

[144] For example, "Individuals looking to buy one of the games in the Halo series to play will not, instead, purchase DVDs… set in the Halo world. Someone who wants to read the original Harry Potter books will not be satisfied with one of the myriad Harry Potter fan fiction creations." Reynolds, above n 9, at 409

[145] *Campbell v Acuff-Rose Music*, above n 135, at 706

19. Although elements of the images from *Yes Rasta* have been used in Prince's work (e.g. the style of hair in the second and fourth figures), the two images are clearly distinct, with the former virtually unidentifiable in the latter. All of Prince's paintings are also massive in size, compared to Cariou's photographs included in his book *Yes Rasta*.

In *Prince* the Court of Appeal also conducted a formal analysis regarding the meaning of the work, as opposed to investigating the theory of Post-Modernism or artistic intention. This is perhaps because Prince made no claim to having any kind of intention stating that he doesn't "really have a message."[146] Though the lower court considered the artist's lack of concern for the 'message' or 'intent' in his work to be indicative of a lack of transformative use, the Court of Appeal overruled this, stating:[147]

> The fact that Prince did not provide those sorts of explanations in his deposition… is not dispositive. What is critical is how the work in question appears to the reasonable observer.

This seems coherent given that Prince's lack of intention is ostensibly in keeping with the way in which "contemporary artists often prefer to let the audience debate the multiplicity of meanings that may be attributed to a particular work of art that has recoded an earlier work."[148]

However, under 17 U.S. Code § 107(1) (purpose and character of the use), artistic intention has been relevant in the past.[149] Dissenting judge Wallace J in *Prince*[150] also saw no reason to exclude the artist's intention from an analysis of transformative use. The defendant's lack of coherent intention in the recent case of *Morris*[151] were also considered under § 107(1). Although artistic intention may help to assist in the Court's analysis, it is submitted that the majority in *Prince* were correct in finding that the focus should be on the reasonable observer, as this is consistent with practices in contemporary art. One of the definitive facets of Post-Modernism has been the abandonment of the artist's monopoly on meaning, perhaps epitomised by Roland Barthes' 1967 essay *Death of the Author*, which contested the idea that "the author or artist is the arbiter of a work's meaning."[152] One of the best known examples of this approach is Andy Warhol – an artist notorious for refusing to posit the meaning of his works.

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[146] *Cariou v Prince*, above n 7, at 707
[147] Above
[148] David Tan "The Transformative Use Doctrine and Fair Dealing in Singapore" (2012) 24 *SAcLJ* 832 at [40]
[149] For example in *Blanch v Koons*, above n 71, at 247
[150] *Cariou v Prince*, above n 7, at 713
[151] *Morris v Young,* above n 106
[152] "So far as meaning is concerned… the author "dies" when the work is released to the public" Roland Barthes *The Death of the Author* 1967 as cited in Darren Hudson Hick "Appropriation and Transformation" (2013) 23 Fordham Intell. Prop. Media & Ent. L.J. 1155 at 1157

Fig. 18: Patrick Cariou, images from *Yes Rasta*, 2000

Fig. 19: Richard Prince, *James Brown Disco Ball*, 2008

Fig. 20: Richard Prince, *James Brown Disco Ball* (at the Gagosian Gallery), 2008

The courts should also consider the lineage of appropriation art, for example, through the paradigm of Post-Modernism. Because they refuse to do this, cases of overt appropriation will still not be sanctioned and thus copyright continues to conflict with the philosophy behind appropriation art. We see this in *Prince* where five of the secondary artist's images did not constitute transformative use. The judges acknowledged that there were significant differences between certain artworks, for example in *Graduation* (Fig. 23):[153]

> … [*Graduation*] is tinted blue, and the jungle background is in softer focus than in Cariou's original. Lozenges painted over the subject's eyes and mouth… make the subject appear anonymous, rather than as the strong individual who appears in the original. Along with the enlarged hands and electric guitar that Prince pasted onto his canvas, those alterations create the impression that the subject is not quite human. Cariou's photograph, on the other hand, presents a human being in his natural habitat, looking intently ahead. Where the photograph presents someone comfortably at home in nature, *Graduation* combines divergent elements to create a sense of discomfort.

However, the judges could "not say with certainty at this point" [154] whether *Graduation* did amount to transformative use – as such, it was deemed not to be fair use.[155] This lack of certainty one way or another suggests a lack of clarity in this area of the law as a whole, also evidenced in the fact that there seems to be a very thin line between when a work is and is not transformative. Compare *Tales of Brave Ulysses* which was fair use (see Fig. 22) with *Graduation* (Fig. 23) which was not, or *Back to the Garden* (Fig. 25) which was fair use with *Charlie Company* (Fig. 26) which was not – there does not appear to be a clear demarcation between them.

This could be ameliorated through considering the particular lineage of which the work is a part and how, given this lineage, it does re-contextualise and transform the original. For example, regarding *Prince* one could argue that Prince challenges the inherent colonialism in Cariou's work through his appropriation. Cariou, a white artist, has photographed in classical black and white format the culture of Rastafarianism. These images, as photographs, are authoritative and relate a narrative about the figures as 'natives', close to the earth, uncorrupted. However, in reality we do not know this culture and it is presumptuous for us to gaze upon it in this way, to presume that it is 'innocent'. Prince disrupts the narrative Cariou presents by corrupting these images. Firstly, he includes technological objects – challenging the culture/nature dichotomy that Cariou has implicitly set up. Secondly, he incorporates images of the naked female body, associating the 'native' black man with overt sexuality and animal appetite. But this incorporation is jarring, causing the viewer to question the underlying assumption that Cariou has established of the figures depicted as close to nature and thus more primal than their 'civilized counterparts'. Similarly, the inclusion of specifically white women emphasizes that carnal desire is inherent in all human beings. Questioning the kind of narratives that artists such as Cariou present in their work is a fundamental practice of Post-Modernism, which the courts no-where recognise in their judgments.

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[153] *Cariou v Prince*, above n 7, at 711
[154] At 711
[155] As the secondary user bears the onus of persuasion - fair use is an affirmative defence and the defendant has the burden of demonstrating it. This is established, for example, in *Campbell v Acuff-Rose Music*, above n 135, at 591

Fig. 21: Patrick Cariou, photograph from *Yes Rasta*, 2000

Fig. 22: Richard Prince, *Tales of Brave Ulysses,* 2008 (fair use)

Fig. 23: Richard Prince, *Graduation*, 2008 (not fair use)

Fig. 24: Patrick Cariou, photograph from *Yes Rasta*, 2000

Fig. 25: Richard Prince, *Back to the Garden,* 2008 (fair use)

Fig. 26: Richard Prince, *Charlie Company*, 2008 (not fair use)

One of the most striking statements regarding the visual arts and law can be seen in a case from 1903: [156]

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [an artistic work], outside of the narrowest and most obvious limits.

Despite the fact that courts do not consider appropriation art within its theoretical and historical contexts, and that the line between transformative and non-transformative works can be very fine, transformative use generally is expansive. The cases reveal that appropriation will only amount to infringement where the original imagery is *overtly* identifiable in the work. We see this in *Prince* as well as the case of *Friedman* where artist Thierry Guetta appropriated Glen Friedman's photograph of the band Run DMC (see Fig. 27) in four of his works. Two works ostensibly involved overt appropriation with little transformation – the banner (see Fig. 28) "which was made by hand-painting a projected altered reproduction [of] the photograph onto canvas" and a stencil which was used to spray-paint the image on three canvases with different backgrounds.[157] However, two of the images did involve at least some degree of transformation – the 'Old Photo' work (see Fig. 29) which combined the image with a scanned old-fashioned photograph of a 19th century couple, and 'Broken Records' (see Fig. 30) where the artist constructed the image through the use of broken vinyl records.[158] However, the judge refused to recognise transformative use in these works to any extent whatsoever.[159] This was largely due to the fact that the figures from the original photograph were immediately recognisable in the appropriating works,[160] with the figures making the same pose, wearing the same clothing and sporting the same facial expressions as in the original.[161]

As discussed earlier, the commercial purposes of the work can also be discussed under § 107(1), especially if the court does not consider the use transformative. The photograph by Friedman is a pop culture image, and Guetta is an artist known for exploiting such images for commercial gain, rather than critical purposes. This much is made clear in the film 'Exit Through the Gift Shop' by the artist Banksy, which documented Guetta's rise to fame. Guetta became successful largely as a result of his association with Banksy, who states "Warhol repeated iconic images until they became meaningless, but there was still something iconic about them. Thierry really makes them meaningless."[162] Similarly, "I don't think Thierry played by the rules in some ways. But then, there aren't supposed to be any rules."[163]

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[156] *Bleistein v Donaldson Lithographing Co*.188 US 239 (1903) at 251
[157] *Friedman v Guetta*, above n 17, at 4
[158] At 3
[159] "Although the statements made by those respective artworks and the mediums by which those respective statements were made differ, the use itself is not so distinct as to render Defendant's use a transformation of Plaintiff's copyright." At 16
[160] "Run-DMC individuals are readily identifiable in each of the four works." At 18
[161] At 18
[162] Banksy "Exit Through the Gift Shop" (10 May 2013) Youtube <https://www.youtube.com/watch?v=K9rnyCyLFtE>
[163] Above

Fig. 27: Glen E. Friedman, Photograph of Run DMC, 1985

Fig. 28: Thierry Guetta, “Banner Work”, 2008

Fig. 29: Thierry Guetta, *Old Photo*, 2008

Fig. 30: Thierry Guetta, *Broken Records*, 2008

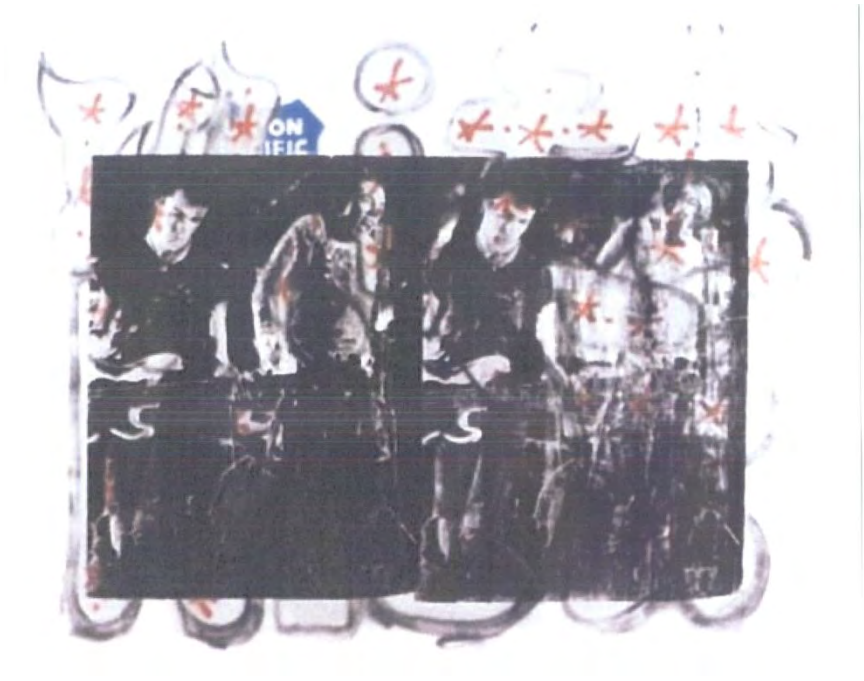

Fig. 31: Russell Young, *White Riot + Sex Pistols*, c.2005

Thus, if there appears to be a patent lack of criticality in works, accompanied by a blatant exploitation of appropriated imagery, fair use is unlikely. Other cases which also demonstrate that overtly identifiable imagery will likely amount to non-transformative use are *Morris* (regarding 'Sex Pistols in Red' and 'Sex Pistols' where again the original subject-matter was too readily identifiable) and *Gaylord*. In the latter case, the Court of Federal Claims found that the work was transformative as it was made aesthetically distinct from the sculpture first by Alli's photograph and then via further editing by the United States government.[164] However, the Court of Appeal disputed this. In their view, the postage stamp represented the clearly identifiable imagery of Gaylord's sculpture and did not reflect any new message or meaning, as "both the stamp and [the sculpture] share a common purpose: to honor veterans of the Korean War."[165] This reality was a reflection of the fact that the United States government were using the postage stamp for a purely commercial purpose as compared to the criticism and commentary usually inherent in the work of artists.[166]

Thus, the second work must not only be formally distinct but must develop some further meaning than the original, with criticality and commentary rather than commerciality being inherent at its core. We see this, for example, in the work 'White Riot + Sex Pistols' (see Fig. 31) which was considered transformative in *Morris*. It was found that the distortion of the image through the inclusion of graffiti and the Union Pacific logo meant that it incorporated "images beyond the band itself and [arranged] them such that the composition may convey a new message, meaning or purpose beyond that of the [original]."[167]

A similar case is that of *Seltzer v Green Day*[168] where the band Green Day appropriated an artist's poster (see Fig. 32) to comprise part of the imagery for a music video (see Fig. 33). Although they used the whole poster, as in *Morris*, it was only one visual element in a much larger piece. The court in this case also considered the distinction in meaning between the original poster and its use in the Green Day

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[164] "Mr. Alli, through his photographic talents, transformed this expression and message, creating a surrealistic environment with snow and subdued lighting where the viewer is left unsure whether he is viewing a photograph of statues or actual human … The viewer experiences a feeling of stepping into the photograph, being in Korea with the soldiers, under the freezing conditions that many veterans experienced…. Mr Alli took hundreds of pictures of "The Column" before he achieved this expression, experimenting with angles, exposures, focal lengths, lighting conditions, as well as the time of year and day… Mr. Alli's efforts resulted in a work that has a new and different character than "The Column" and is thus a transformative work... The Postal Service further altered the expression of Mr. Gaylord's statues by making the color in the "Real Life" photo even grayer, creating a nearly monochromatic image. This adjustment enhanced the surrealistic expression ultimately seen in the Stamp by making it colder. Thus, the Postal Service further transformed the character and expression of "The Column" when creating the Stamp." *Gaylord v United States,* above n 100, at 68-69

[165] *Gaylord v United States*, above n 102, at 1368

[166] "Works that make fair use of copyrighted material often transform the purpose or character of the work by incorporating it into a larger commentary or criticism. For example, in Blanch v. Koons, an artist incorporated a copyrighted photograph of a woman's feet adorned with glittery Gucci sandals into a collage "commenting on the 'commercial images . . . in our consumer culture.'"… Such transformation of a copyrighted work into a larger commentary or criticism fall squarely within the definition of fair use." At 1373, citing *Blanch v Koons*, above n 71, at 248

[167] *Morris v Young,* above n 106, at 1088

[168] *Seltzer v Green Day*, above n 107

video: [169]

> The message and meaning of the original *Scream Icon* is debatable. To us, it appears to be a directionless anguished screaming face… But regardless of the meaning of the original, it clearly says nothing about religion. With the spray-painted cross, in the context of a song about the hypocrisy of religion, surrounded by religious iconography, [Green Day's] video backdrop using *Scream Icon* conveys "new information, new aesthetics, new insights and understandings" that are plainly distinct from those of the original piece.

In this way it appears that courts are trying to apply copyright in only the narrowest of cases and to avoid acting as the arbiters of the value of such works. However, although originality and artistic creativity are not explicitly requirements for fair use and fair dealing, in cases of artistic appropriation they will be integral to them in practice. Thus, in coming to these decisions, judges are determining the 'worth' of such works insomuch as they deem them to be transformative and thus new and original.

One method of managing this, which could allow for greater recognition of the lineage of appropriation art, is putting such issues to a jury. In regards to *Prince* it has been suggested that whether or not the use was transformative should be a triable issue of fact, with Prince's photographs "examined by a jury against this backdrop of prevailing artistic conventions." [170] However, judges simply considering the theoretical context of Post-Modern could serve just as well.

[169] At 1177
[170] Tan, above n 148, at [42]

Fig. 32: Dereck Seltzer, *Scream Icon*, 2003

Fig. 33: Green Day and Roger Staub, backdrop for Green Day's song 'East Jesus Nowhere', 2009-2010

D. Adopting 'Transformative Use' in Fair Dealing

Given that transformative use works so well in recognising the creative process and accounting for the more subtle forms of appropriation, it would make sense to adopt it within the fair dealing context – especially as many of the jurisdictions include a 'purpose' provision similar to § 107(1) in their respective legislation. That Australia considered adopting fair use, and Australia, Canada and (soon) the United Kingdom have extended fair dealing, suggests that these jurisdictions could be open to considering the transformative use approach. Various parties in Australia have already expressed their support for such a provision as they believe it would "encourage cultural production… [and] legitimise current artistic practices",[171] without unduly prejudicing the interests of copyright holders.

The Gowers Report in the United Kingdom supported adoption of this methodology in 2006.[172] Indeed, transformative use was once a part of the relatively liberal approach taken to fair dealing in the United Kingdom before the 1960s. In cases such as *Glyn v Weston Feature*[173] and *Joy Music v Sunday Pictorial Newspapers*,[174] emphasis was placed on the transformative nature of the use and whether the secondary artist had "bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result."[175] This approach was narrowed in the 1960s[176] where it was found that "[t]he sole test is whether the defendant's work has reproduced a substantial part of the plaintiff's copyright work."[177]

The expansion of fair dealing to allow for parody and satire means that, to some extent, appropriation art is already sanctioned e.g. these provisions in Canada would likely allow for the use of parody that was deemed infringement in *Michelin*.[178] Indeed, as the proscribed uses have expanded in Australia and especially Canada, it has become increasingly easy for works to come under fair dealing. The result is that fair dealing has become increasingly similar to fair use, the Court in *CCH* having "created a relatively low threshold for the first step so that the analytical heavy-hitting

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[171] Those in favour of a transformative use exception included Internet Industry Association, *Submission 253*; Pirate Party Australia, *Submission 223*; ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*; NSW Young Lawyers, *Submission 195*; R Wright, *Submission 167*; N Suzor, *Submission 172*; M Rimmer, *Submission 143*; K Bowrey, *Submission 94*" as cited in Australian Law Reform Commission "Copyright and the Digital Economy Discussion Paper" (DP 79, 2013) at fn 34 [10.32]

[172] "At present it would not be possible to create a copyright exception for transformative use (but see the discussion of parody below) as it is not one of the exceptions set out as permitted in the Information Society Directive [Article 5 of Directive 2001/29/EC]. However, the Review recommends that the Government seeks to amend the Directive to permit an exception along such lines to be adopted in the [United Kingdom]." Gowers, above n 56, at [4.88]

[173] *Glyn v Weston Feature Film Company* [1915] 1 Ch 261

[174] *Joy Music v Sunday Pictorial Newspapers (1920) Ltd* [1960] 2QB 60

[175] *Glyn v Weston Feature Film Company,* above n 173, at 268

[176] E.g. in cases *Twentieth Century Fox Film Corp v Anglo-Amalgamated Film Distributors* [1965] 109 SJ 107 and the cases which followed it - *Schweppes Ltd v Wellingtons Ltd, Williamson Music Ltd v Pearson Partnership* [1984] FSR 210 (Ch) and *Williamson Music Ltd v Pearson Partnership Ltd* [1987] FSR 97(Ch)

[177] *Schweppes Ltd v Wellingtons Ltd, Williamson Music Ltd v Pearson Partnership*, above n 176, at 212

[178] *Ce G nrale des Etablissements Michelin -Michelin & C" v. CAWCanad*, above n 25, where the parody of a company's logo by an employment union was deemed copyright infringement.

is done in determining whether the dealing was fair."[179] This is, as opposed to focussing on whether the dealing comes under one of the permitted uses in the first instance. However, as witnessed in the American cases (see Chapter III), sometimes parody will not be sufficient to lead to a finding of fair use and a given dealing may not come under one of the permitted uses. Transformative use should also be recognised as it takes into account the theoretical underpinnings of creativity.

In regards to visual works, the Copyright Council of New Zealand offers guidelines as to how much a secondary artist can appropriate, stating: [180]

> Where an artist does not own copyright in an artistic work… they may still copy the work in making another artistic work, without infringing copyright, as long as the main design of the earlier work is not repeated or imitated. However, the artist is not permitted to commercialise the work.

These guidelines suggest that any appropriation art for commercial purposes is disallowed, which is highly restrictive in light of the appropriation cases in the United States litigation. One recent case highlighting this is that of Wanganui artist Mark Rayner's 'Black Widow' (see Fig. 35). This work was based on a photograph of Helen Milner in court during her trial for the murder of Phil Nisbet (see Fig. 34). The artwork was entered in the Wallace Art Awards and came 49 of 524 works but is now potentially the subject of copyright infringement and could even be destroyed as a result. [181] Some parties considered this "a clear-cut case of copyright infringement."[182] Such sentiments were echoed by the New Zealand Herald which asserted that artists using its photographs must "ask for permission and consult on what they intended to use the work for."[183]

However, other parties disagreed, asserting the work was a legitimate "reinterpretation, and that is what art and artists do. If every artist was sued for re-interpretation, artists by the score would be found to be in breach of copyright." [184] Interestingly, the artist also noted the transformative nature of the work, averring that:[185]

> … the work was not trying to be an outright copy of a photograph but a reinterpretation of a well-circulated media image. "[I]t has been changed to such a degree that it makes it a completely new artwork in its own right. The original source material has been manipulated, colour-changed and cropped and then reinterpreted as a large latch-hook rug.

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[179] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, above n 125, at [27]
[180] "Information Sheet Visual Artists and Copyright" (May 2007) Copyright Council of New Zealand <http://www.copyright.org.nz/viewInfosheet.php?sheet=341> at 3
[181] Kurt Bayer "Image of killer queried by lawyer" *The Otago Daily Times* (Auckland, 13 September 2014)
[182] Above, quoting Intellectual Property litigation expert Kim McLeod
[183] New Zealand Herald Editor-in-Chief Tim Murphy as quoted in Kurt Bayer and Anne-Marie MacDonald "Portrait Sparks Legal Wrangle" *Wanganui Chronicle* (online ed, Auckland, 17 September 2010)
[184] Above, quoting Bill Milbank, owner of WHMilbank Gallery and former director of the Sargeant Gallery
[185] Bayer, above n 181

Similarly divergent impressions were had in the case of artist Peter Vink reproducing in paint (see Fig. 37) a copyrighted photograph of artist Richard Spranger (see Fig. 36). One commentator asserted: [186]

> It [does] not matter what form the art took or how they were copied. If the paintings were identical or substantially similar to the photographs, Vink would be in breach of copyright if he didn't have permission from the original artist to reproduce it.

Although Spranger believed copyright infringement did occur, he did not pursue an action "because of cost and [the fact that] at that time there didn't seem to be too many instances of copyright infringements being prosecuted successfully."[187] Conversely, other commentators believed that "Painting from photographs is acceptable practice - as soon as you paint from a photo [it] is your own interpretation therefore [there is] no copyright infringement."[188] These conflicting views suggest there is much uncertainty within New Zealand regarding visual works and copyright.

Although there are no cases in the fair dealing jurisdictions to suggest that a conflict between appropriation art and copyright exists, a broadening of the defence through incorporating transformative use would still be beneficial to artists in that it would diminish the chilling effect and uncertainty regarding copyright generally. To cite one more example, Lowe considers the Canadian artist Thorneycroft whose series *Foul Play*: [189]

> … depicted well-known children's cartoon characters being hung and massacred… Her objective was to comment on the hypocritical way in which society views violence - that violence is largely acceptable in child's play. After a warning from a lawyer who sat on the gallery board of directors, Thorneycroft decided to substitute copyrighted characters with generic toys, while altering other characters so they were no longer recognizable. This had a compromising effect on her intended commentary because the viewer could not properly associate with the reference.

Philosophically, transformative use also goes to the heart of the creative process and has been shown in the United States to permit artistic works that previously would have been deemed to be infringing. The United States could act as a guide for the fair dealing jurisdictions in future cases, especially if they chose to adopt transformative use when analysing the purpose of the dealing. As Frankel states:[190]

> [Fair use is] of both salutary and practical importance in New Zealand. It is salutary because it emphasizes that the rights of copyright owners to prevent or charge for the reproduction of their work ought sometimes to be tempered to reflect the policy underlying the granting of the right. As there is a dearth of Commonwealth case law on the various fair dealing provisions, United States cases will often be a useful starting point

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[186] Carmen Vietri, copyright expert from Copyright Licensing Ltd as quoted in Elizabeth Binning "Artist accused of copying photos" *The New Zealand Herald* (online ed, Auckland, 25 May 2005)
[187] Email from Peter Vink to the author regarding the artist Peter Vink's appropriation of Spranger's work (24 September 2014)
[188] Binning, above n 186
[189] Lowe, above n 34, at 111-112
[190] Frankel, above n 13, at 338

Fig. 34: Martin Hunter of the New Zealand Herald, photograph of Helen Milner, 2013

Fig. 35: Mark Rayner, *Black Widow*, 2014

Fig. 36: Richard Spranger, *Pohutukawa Flowers*, 2005

Fig. 37: Peter Vink, *Pohutukawa*, c.2005

Chapter 3: Criticism, Parody and Satire

A. Criticism and Commentary

From a rights perspective, uses pertaining to criticism and commentary are justified in that they facilitate freedom of expression. The Canadian Supreme Court in *RJR Macdonald* stated that the principles on which the constitutional right of freedom of expression rest are "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process".[191] These principles are also inherent in the practice of creating artistic works and we should recognise and endorse the critical functions they entail. One way of doing this would be to broaden the scope of criticism in fair dealing to include that which is inherent in any artistic work, thus allowing the use of appropriation in visual artworks under fair dealing.

Traditionally, criticism and commentary under fair use and fair dealing have been seen as applying to the use of excerpts of copyrighted material for the purpose of reviews.[192] However, commentators such as Lange and Lange-Anderson argue for the broadening of this defence to include wider forms of criticism and commentary: [193]

> … reinterpretation of that doctrine would secure a place in copyright for any criticism in which appropriation and transformation play a necessary role with [criticism] to be understood in the broadest sense of that term – the sense of the term that includes any observation on any matter of general interest or concern, whether the observation is explicit or implicit, direct or indirect, published or unpublished, and whether or not aimed at the antecedent work or elsewhere.

Analogous to parody, there is a distinction to be made here between a particular critique of an individual copyrighted work (as in parody), and then a broader critique of society generally of which that copyrighted work is a part (as in satire). Again there is a fine line between the two, although the latter has already been recognised to some extent, for example in the United Kingdom case of *Fraser-Woodland*[194] where it was found that: [195]

> … 'criticism or review' was an expression of wide and indefinite scope and to be interpreted liberally… Reliance was made on *Pro Sieben*[196]… where the United Kingdom Court of Appeal held that criticism could extend to the ideas in the work and its social or moral implications. This meant that the defence could apply even though the criticism embraced a general media practice of which the copyright work was simply an illustration.

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[191] *RJR Macdonald, Inc. v. Canada (Attorney General),* [1995] 3 SCR 199 at [72]
[192] "… book reviews and biographies [being] among the earliest categories of fair use." Patry, above n 12, at 477
[193] Lange and Lange-Anderson, above n 36, at 131, 144
[194] *Fraser Woodland Ltd v BBC* [2005] EMLR 22
[195] Paul Sumpter, *Intellectual Property Law: Principles in Practice* (2nd ed, CCH, Auckland, 2013), at 116-117
[196] *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605 (CA)

Another case which blurs the lines is that of *Hubbard*,[197] where substantial extracts had been taken from books about Scientology authored by the founder of the religion. In this case it arguably was not a pure matter of how much was necessary in order to conduct an adequate critique, but at the very least there was a "suspicion that the nature of the work criticised may have played a part in the generosity of the extracts, which were held to be fair dealing."[198] Thus, criticism and review under fair dealing are not necessarily as narrow and confined as they appear at first blush, and have the potential to be broadened further so as to allow for the kind of criticism that occurs within appropriating art works. Such an approach, along with the introduction of a parody and satire provision in New Zealand, would facilitate creativity and freedom of expression. As Burrell and Coleman state: [199]

> … exceptions that allow for the reinterpretation and creative reuse of earlier works play an important part in safeguarding freedom of expression… [particularly when the defendant is] reusing a work creatively in order to make a political statement.

Whether criticism under fair dealing could encompass such use remains open; in particular, we are yet to see how broadly criticism will be approached since *CCH*. However, characterisation in *CCH* of the fair dealing provisions as a 'user right', rather than as defences to copyright infringement, seems to suggest criticism will be interpreted broadly in the future. For example, we see this liberal approach play out in *Allen*[200] where a freelance photographer sued a newspaper publisher for reproducing a magazine cover containing one of his photographs. The court found fair dealing would apply in this case, as the newspaper used the image for legitimate reporting purposes (comparing the aesthetic of an electoral candidate and the way she chose to represent herself between this and later magazine covers) and did not seek to unfairly compete with the original artist's work.[201] This suggests a distinct possibility that an appropriating artist's work would come under fair dealing for the purposes of criticism, satire or parody if genuinely used for these purposes and without the intention of usurping the original artist's market.

Although *CHH* takes a more liberal approach than New Zealand at present, it has been said to be "broadly reconcilable with the limited existing New Zealand case law".[202] The *Newsmonitor* case, for example, applied similar factors and also found that 'research' could be conducted by a commercial entity, and considered that fair dealing is "simply a reasonable use".[203] The vocabulary of users' rights established in *CCH* could also act as recognition of the rights of subsequent artists, functioning as a "useful rhetorical device with which to counter the overblown claims that are made for the sanctity of intellectual property rights."[204] This approach is also a more gradual development that could be adopted if courts were reluctant to apply transformative use. As the Canadian common law has "gradually evolved to support a more flexible

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[197] *Hubbard v Vosper,* above n 85, at 94
[198] Sumpter, above n 195, at 115
[199] Burrell and Coleman, above n 21, at 41
[200] *Allen v. Toronto Star Newspapers Ltd.* (1997) 36 OR (3d) 201 (Div. Court)
[201] D'Agnostino, above n 57, at 331
[202] Anna Kingsbury "Finding the Copyright Balance: originality, authorisation and fair dealing in Canadian and New Zealand Law" 4 (2005) New Zealand Intellectual Property Journal, 68 at 73
[203] *Television New Zealand Ltd v Newsmonitor Services Ltd,* above n 24, at 44
[204] Burrell and Coleman, above n 21, at 280

approach"[205] there would be less uncertainty in utilising it in New Zealand, especially as the fair dealing approach in Canada is "grounded… [in] detailed guidance provided by the Court."[206] In this way, the Canadian approach could be a starting point for countries who are interested in increased flexibility in copyright, but who also want to maintain legal certainty.

B. Parody and Satire

The categories to which fair dealing applies should also be expanded to include parody and satire. These uses can be considered a subset of criticism generally, as criticality is inherent to them both. Parody is the art of critiquing an original work through imitating that work. The artist uses aspects of the original in order to create a new work which must explicitly comment on the original. This is comparable to satire which involves a critique of or comment on society more generally – of which that original work is a part. In other words:[207]

> Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's… imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.

Parody acts as a form of criticism or comment,[208] "[providing] social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[209] Certain fair dealing provisions explicitly allow for the use of an original work in a parody or satire, for example in Australia, Canada and (soon) the United Kingdom.[210] In order to recognise artistic appropriation practices, New Zealand should open up the available categories to which fair dealing can apply to include these uses.

1. Parody and Satire in Fair Use

Fair use allows the use of works for the purposes of parody, even in cases where commercial value is to be gained[211] or even when this profit motive, as opposed to any creative purpose, is the sole motive for parodying the antecedent work.[212] In ascertaining the 'purpose and character of the use' under § 107(1), courts look at

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[205] Michael Geist "Fairness Found: How Canada quietly shifted from fair dealing to fair use" in Michael Geist *The Copyright Pentalogy* (University of Ottawa Press, Ottawa, 2013) at 180-181
[206] At 180-181
[207] *Campbell v Acuff-Rose Music*, above n 135, at 580
[208] As recognised in cases such as *Fisher* v *Dees* 794 F 2d 432 (CA9 1986) ("When Sonny Sniffs Glue," a parody of "When Sunny Gets Blue," is fair use); *Elsmere Music, Inc v National Broadcasting Co.* 623 F 2d 252 (CA2 1980) ("I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," is fair use) and confirmed in the Supreme Court in *Campbell v Acuff-Rose Music*, above n 135
[209] *Campbell v Acuff-Rose Music*, above n 135, at 579
[210] Copyright Act 1968 (Aus), ss 41A, 103AA; Copyright Act RSC C 1985 C-42, s29; The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (UK), reg 5
[211] Recognised in common law cases such as *Campbell v Acuff-Rose Music*, above n 135
[212] As in *Eveready Battery Co. v Adolph Coors Co* 765 F Supp 440 (NDI11 1991) which involved a parody of the Eveready Battery 'Energizer Bunny' commercials for the purposes of a beer commercial.

transformative use - "whether the new work merely supersedes the original work, or instead adds something new with a further purpose or of a different character".[213]

For example, when the artist Tom Forsythe created his 'Food Chain Barbie' photography series (see Fig. 38) depicting mutilated Barbie dolls being cooked as various dishes, Mattel were unable to succeed in copyright action against him on this ground. Barbie is a well-known symbol of American beauty, associated with glamour, wealth, and materialism generally (as evidenced by the various props and outfits that accompany the dolls). The court found that Forsythe: [214]

> … [turned] this image on its head… by displaying carefully positioned, nude and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations…. In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts. It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie's influence on gender roles and the position of women in society.

In this way Forsythe's works parodied everything that Barbie represents – he recognised the doll's associations (which the court called "ripe for social comment")[215] and these were integral to the meaning in his works.

Conversely, Jeff Koons' appropriation of Art Rogers' photograph 'Puppies' (see Fig. 11) in his sculpture 'String of Puppies' (see Fig. 12) was not considered a sufficient parody as it did not explicitly comment on or critique the original. When placed side by side, Koons' work seems to parody the original – a cheesy, kitsch photo made into an even cheesier sculpture through the use of colour, the insertion of daises and the blank stares of the figures. This is especially so in the context of the exhibition in which the work would feature, entitled 'Banality'. We can compare this to the facts in *Campbell* where 2 Live Crew's parody of Roy Orbison's 'Pretty Woman' "derisively demonstrates how bland and banal the Orbison song seems to them… [as] an anti-establishment rap group."[216] However, the court considered *Rogers* more of a satire of society generally than a parody. Some commentators considered this case "chilling"[217] in light of the nature of appropriation art.

In contrast parody could understandably not be found in *Steinberg*[218] where the producers of the movie 'Moscow' used an illustration by Saul Steinberg (see Fig. 39) in a promotional poster for the film (see Fig. 40). Although such a use could potentially now come under transformative use, it was clearly not parody as the secondary work in no way engaged in a meaningful critique or comment on the original illustration – it "merely borrowed numerous elements from Steinberg to create an appealing advertisement to promote an unrelated commercial product, the movie."[219] This case is also an illustration of the way in which transformative use has

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[213] *Brownmark Films v Comedy Partners* 682 F 3d 687 (7th Cir 2012) at [693] citing *Campbell v Acuff-Rose Music*, above n 135, at 576
[214] *Mattel Inc. v Walking Mt. Prods*, above n 103, at 802
[215] At 802
[216] *Campbell v Acuff-Rose Music*, above n 153, at 582
[217] Bielstein, above n 77, at 84
[218] *Steinberg v Columbia Pictures Industries, Inc*. 663 F Supp 706 (DNY 1987)
[219] At 715

changed analyses under fair use. Although the poster clearly does not parody the original, there would now be at least an argument for it being a transformative use, with the two using the same style but the former having changed much of the original and included additional elements to create new meaning in the work. This new meaning was described as the "Muscovite protagonist's confusion in a new city"[220] as compared to the original which was "a humorous view of geography through the eyes of a New York city resident."[221]

Although parody may still be explicitly considered under fair use, transformative use under § 107(1) is a part of the analysis of parody and has also come to prevail in cases where the use of original material can be conceptualised more as satire or simply appropriation for creative purposes. For example, in *Blanch v Koons.* This case was the fourth one brought against Koons in regards to appropriation, involving the use of a fashion photograph taken for Gucci (see Fig. 41) in work by Koons (see Fig. 42). The court considered Koons' use in this way:[222]

> By juxtaposing women's legs against a backdrop of food and landscape, [Koons] says, he intended to 'comment on the ways in which some of our most basic appetites -- for food, play, and sex -- are mediated by popular images.

Thus, the use of Blanch's photograph as an image from the mass-media was an essential aspect of the work. Such purposes were distinct from those of Blanch, who sought simply to eroticize the feet in the photograph. The court in this case found that the use was transformative, as the two artists' objectives were so different in their use of the image.[223]

Generally, however, it will still be easier to find fair use in cases of explicit parody as opposed to satire. Such works by their very nature tend to utilise creative works - usually a finding against fair use under § 107(2). Similarly, regarding § 107(3) 'the amount and substantiality of the use', parodies are often allowed to use a larger percentage of the original as compared to other uses "because [they] must ensure that the original is fully recognizable."[224] This is ameliorated in fair use by the recognition that the quantity of the work taken is a lesser factor in comparison to § 107(4) – whether the secondary work can be considered "a substitute for the original".[225] In future cases, fair dealing could take the same approach. Generally, however, analyses under both parody and satire are necessarily qualitative affairs and will experience issues with ambiguity like any of the other uses under fair use and fair dealing.

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[220] At 712
[221] "Summaries of Fair Use Cases" Stanford University Libraries <http://fairuse.stanford.edu/overview/fair-use/cases/#parody_cases>
[222] *Blanch v Koons*, above n 71, at 247
[223] The "sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals' [confirmed] the transformative nature of the use." At 247
[224] Kim J Landsman "Does Cariou v Prince Represent the Apogee or Burn-Out of Transformative Use in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach" (2014) 24 Fordham Intell. Prop. Media & Ent. L. J. 321 at 362
[225] *Brownmark Films v Comedy Partners*, above n 213, at 693

Fig. 38: Tom Forsythe, *Fondue for Three*, 1997

Fig. 39: Saul Steinberg, *View of the World from 9th Avenue*, 1976

Fig. 40: Promotional poster for the film 'Moscow on the Hudson', 1984

Fig. 41: Andrea Blanch, *Silk Sandals by Gucci*, 2000

Fig. 42: Jeff Koons, *Niagara*, 2000

2. Parody and Satire in Fair Dealing

Both Canada and Australia have instituted a parody and satire exception.[226] The United Kingdom will also be instituting a fair dealing exception for 'parody, caricature and pastiche'[227] following the 2011 Hargreaves[228] and Gowers[229] reports - but not for satire.

Although there are no cases as of yet where we can see how these provisions would play out in the two jurisdictions, their inclusion would likely allow for uses that were previously deemed infringement. Take the Canadian case of *Michelin* where a trade union parodied the logo of its employer – showing the Michelin cartoon logo crushing a worker underfoot. The case justified its finding of infringement on the basis of the idea/expression dichotomy and on the desire to protect private property. Regarding this latter point, the court refused to acknowledge the intangible nature of copyright and to treat it differently from other types of private property, despite the fact that the property in copyright is not a 'thing' but expression itself. Such findings undoubtedly hinder democratic speech - as the United Kingdom government has recognised in expanding its fair dealing, parodying a company's logo, slogan or brand is one of the most effective ways to "highlight questionable business practice."[230] However, the expansion of fair dealing to include parody likely means that such practices would now be allowed. Similarly, none of these jurisdictions define parody and satire, thus the United States case law will likely be helpful on both accounts in navigating these provisions into the future.

The inclusion of satire alongside parody in Australia and Canada also recognises that the line between the two is very fine. For example, in *Campbell*, the artists argued that their work was a parody of Roy Orbison's song 'Pretty Woman', as their version "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones [to show] how bland and banal the Orbison song [is]".[231] However, it is at least arguable that the secondary work engaged in a broader criticism, specifically of "American values in a song that presented the reality of street life in urban America".[232] The same can be said of *Rogers v Koons* where it was again at least feasible that Koons' work could have been considered a parody, although the court considered it satire.

Prior to the inception of transformative use, the United States courts found that the appropriated work "must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."[233] However, the use of an original in a secondary work can also be integral in making it effective satire. It is this very

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[226] Via the Copyright Modernization Act SC 2012 c 20 and Copyright Amendment Act 2006 (Aus), respectively
[227] Rights in Performances (Quotation and Parody) Regulations 2014 (UK), reg 5
[228] "Implementing the Hargreaves Review" United Kingdom Intellectual Property Office <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/types/hargreaves.htm >
[229] Gowers, above n 56, at [4.90]
[230] (29 July 2014) GPBD HL 1556
[231] *Campbell v Acuff-Rose Music*, above n 135, at 573
[232] Frankel, above n 13, at 355
[233] *Rogers v Koons,* above n 19, at 310

'conjuring up of the original' which enables a work to comment effectively on society generally. We see this logic play out in *Blanch v Koons*, with Koons' work 'Niagara' which the courts found "may be better characterized… as satire – its message appears to target the genre of which 'Silk Sandals' is typical, rather than the individual photograph itself."[234] Australia and Canada account for this reality in including satire in their exceptions; however the United Kingdom and New Zealand do not.

In New Zealand we have the standard fair dealing provisions in our Copyright Act: however, we have yet to include a provision relating to parody or satire, even though public support for such a provision has been as high as 87%.[235] Such a provision is supported by the Creative Freedom Foundation in New Zealand[236] and there are cases where it could have been applied in the past, had the plaintiffs not dropped the case so as to avoid any more negative publicity. The first example of this is in the Telecon parody of 2006, where a video on youtube was released parodying a Telecon commercial. The commercial had an added voice-over, making the children in the commercial seem like they were voicing their disgust over the CEO of Telecom's remarks that they use "confusion as their chief marketing strategy".[237] Secondly, in 2009, Should-A.com created a poster using imagery from the Election Office in New Zealand to parody the referendum question released that year, regarding smacking.[238] Of course, both parties could simply have represented their concerns and criticism via other means e.g. the written word. However, in the case of Should-A.com, for example, this visual appropriation of "the official referendum graphics made for a more successful and effective artwork that empowered the public to comment on the referendum in a clear and easy to understand manner."[239] Regarding parody and satire in fair dealing, New Zealand is an exception when compared to all the other countries considered here.

Alternatively, there is the potential for New Zealand and the United Kingdom to bring parody under the general fair dealing for purposes of 'criticism, review and reporting'. Sumpter asserts that "[t]here is no reason in principle why, if the tests under s42 are satisfied, a work of parody could not qualify for the defence."[240] However, such application would undoubtedly be very narrow, as in the Australian case of *Network Ten v. Channel Nine*[241] where it was found that the parody had to involve a *de minimis* taking. So too, it would likely only apply to parodies that are critical of the original, and not to satire generally.

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[234] *Blanch v Koons*, above n 71, at 247
[235] Louisa Hearn, "The Downfall of Hitler's YouTube parody," *Stuff* (online ed, accessed 10 August 2011). As cited in Bronwyn Holloway-Smith "Illegal Art: Considering our Culture of Copying" (2012) 15 Junctures 19, at 22
[236] "Parody and Satire" Creative Freedom NZ <http://creativefreedom.org.nz/goals/parody-and-satire/>
[237] Holloway-Smith, above n 235, at 19
[238] At 20-21
[239] At 20
[240] Sumpter, above n 195, at 120
[241] *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] 108 FCR 235 at 288-289

Conclusion

The Fine Arts are a crucial source of creativity and criticality in our society. Their scope and direction has changed dramatically over the last century, in such a way that their attentions have been focussed back on 'original' artists. This has necessitated the overt appropriation of original works in a questioning of established colonial, patriarchal and capitalist frameworks, as well as concepts such as 'originality' and the market value attached to art generally. This has naturally led to a clash with copyright, a system ostensibly concerned with property ownership which has traditionally justified its prohibition on the use of expression via the idea/expression dichotomy.

The fair dealing and fair use provisions help us to navigate the interaction between these two fields, particularly as they pertain to values fundamental to both, such as creativity and freedom of expression. They also recognise and reinforce the fact that copyright is not concerned with exclusive possession but is rather a limited monopoly on works so as to incentivize their production. This is especially important in an increasingly expansive system of copyright characterised by extended copyright durations, the increased application of copyright and an associated, often highly vexing and convoluted 'permission culture' – all of which have contributed to a lessening of confidence in appropriating imagery and faith in copyright generally.

Both doctrines face difficulties when it comes to navigating the terrain of art, particularly in cases of overt appropriation. As evidenced by the fair use cases, as long as visual art works are considered within the paradigm of copyright there will remain a tension between the two – especially given that copyright law fails to consider the specific lineage of appropriation art. Nonetheless, the United States courts have become much more liberal in their application of the doctrine, adopting 'transformative use' (which explicitly recognises the nature of the creative process and the work artists do), as well as recognising in their application of §107(4) that an impact on the market of the copyright holder will rarely manifest itself in cases a) of transformative use, and b) where an artist operating in the Fine Arts appropriates an image from popular culture, as the two operate in completely different markets. It could also be helpful to recognise that famous creative images may have a 'public' or 'factual' element when considering the nature of the copyrighted work under §107(2). So too, the courts should continue not to prioritise the intention of the artist (as in *Prince*) and should also consider examining works and their meanings via the lens of Post-Modernism. If the courts are considering not only change in form but the change in *meaning* of secondary works, such considerations seem highly applicable to their analyses.

However, overall the courts seem to be applying copyright to the Fine Arts in only the most obvious or borderline of cases – where imagery is overtly identifiable and the artist is appropriating it for highly commercial purposes. This case law and its application of the fair use factors – which are very similar to those under fair dealing – may serve to be very helpful if the fair dealing jurisdictions encounter cases pertaining to artistic works in the future.

Despite the fact that there is little to no common law in the various fair dealing jurisdictions pertaining to artistic works, expansive copyright laws do impact on

artistic practice. Thus, liberal fair dealing provisions which recognise transformative use, a broad reading of criticism, and uses such as parody and satire should be adopted, as this would send a signal to artists and copyright holders that at least some degree of appropriation is legitimate in artistic works. Fair dealing has already widened over the last decade in expanding the uses to which fair dealing can apply and the manner in which it is conceptualised, particularly in Canada with its emphasis on users' rights and liberal interpretation of the doctrine. This already suggests a shift away from or at least a reconsideration of an entrenched system of copyright. New Zealand, however, is the exception to this development and yet it is clear such provisions are necessary given the reality that the application of the fair dealing provisions to artistic works are characterised by uncertainty in this country. In particular New Zealand should also adopt both parody and satire, as this would obviate the problems associated in distinguishing between them and allow for a greater variety of critiques in artistic works, as opposed to only allowing criticism in the very narrow circumstances of parody.

Were New Zealand to follow the lead of countries such as Canada, Australia and the United Kingdom, fair dealing would better contribute to artists feeling able to create, uninhibited by copyright restrictions. This would not only help to facilitate a culture of creativity and critical thinking, but a more meaningful copyright balance.

In a society which values criticality, creativity, freedom of speech, the pursuit of knowledge and education generally, fair dealing has the potential to play a crucial role in maximising the public good. Although New Zealand will only be examining the Copyright Act after the Trans-Pacific Partnership Agreement, an analysis of the fair dealing provisions should be conducted and a widening of the defence implemented, especially in light of what will likely be more expansive copyright measures instituted via these international negotiations.

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