ART AFTER *WARHOL*

Xiyin Tang*

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Copyright laws, which generally prohibit copying, and contemporary art, which has increasingly come to rely on copying, is on a collision course—or so the traditional argument goes. This purported clash between the law and creative practice seemed to reach its apex in the Supreme Court's recently-decided Warhol v. Goldsmith, *which held against Warhol's famous brand of unlicensed appropriations. The dissent, as well as much of the commentary published following the decision, warned that the Court's holding will have existential consequences, striking at the very heart of the way that artists today have been raised to make and understand art.*

This Article presents qualitative empirical evidence that calls into question the traditional argument. Through twenty extensive interviews with leading contemporary artists, museum curators, and gallerists, it highlights an art world grappling with the problematic politics and potential inequities in using others' copyrighted works. Artists who engaged in appropriation (incorporating materials from other sources) often sought licenses or informal permissions—not because of any threatened legal consequences, but for ethical or moral reasons. Similarly, when artists took without asking, it was because they believed the purposeful appropriation of an image owned by a more powerful corporate entity was necessary for purposes of critique and commentary. Where artists were unable to use a particular image for legal reasons, they reported simply creating around the problem—in contravention to the traditional narrative of an art world stunted by copyright restrictions. This Article outlines how contemporary artists are working towards an ethics of appropriation almost entirely independently from the legal frameworks long assumed to incentivize or chill artistic innovation—and what that might mean for the law.

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INTRODUCTION

"[T]he use and reuse of existing imagery are part of art's lifeblood—not just in workaday practice or fledgling student efforts, but also in the revolutionary moments of art history." -*Warhol v. Goldsmith* (Kagan, J. dissenting) (citing amici)[1]

"I do kind of believe that it's not okay to just take it….[T]his goes right into morality and people's ethics….[F]or me, I like to respect that we're all trying to become individuals and have our own voice and have our own little spot in the canon of art history, but also just in history, and make a footprint on the world. And so allowing people to do that,[] no matter how small, I think is important because that's part of the reason we find meaning in our existence." -Artist Liz Nielsen[2]

It would be difficult to overstate the effect that the postmodern turn[3]—the critiques of originality and the Romantic author, a celebration of pastiche, repetition, and remix culture—has had on intellectual property law and scholarship. At the turn of the 21st century, as digitization picked up pace and user-generated websites like YouTube and MySpace revolutionized the way that consumers engaged with content, legal scholars theorized that we were on the cusp of a digital revolution. Some scholars called this a shift from "read-only" culture to "read-write" culture;[4] other free speech theorists wrote that First Amendment law itself needed a rethinking, and argued for a new conception of "democratic culture" for the "information society."[5] The law, many scholars theorized, was wholly out of step with our new digital age of copying, remixing,

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[1] Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1308 (2023) (Kagan, J., dissenting) (citing Brief for The Robert Rauschenberg Foundation et al. as Amici Curiae Supporting Petitioners at 27, Andy Warhol Found. For Visual Arts, Inc. v. Goldsmith, No. 21-869 (2022) [hereinafter Art Institutions' Brief]) (internal quotations omitted).

[2] Telephone Interview with Liz Nielsen (Jan. 25, 2023) [hereinafter Nielsen Interview].

[3] For how this Article defines the "postmodern turn" in intellectual property scholarship, see *infra* part I. Other scholars have used the term "postmodern turn," variously, to refer to somewhat similar moves in other areas of the law. *See, e.g.*, Edward Soja, *Afterword*, 48 STAN. L. REV. 1421, 1422 (1996) (describing a "postmodern turn in critical thinking" as one that consists of a "deep epistemological critique of modernist theories [and] practices"); Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements That Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1414 (2000) (describing the "postmodern turn" in critical race theory as "the adoption of anti-essentialism as a primary intellectual stance and dominant cultural norm").

[4] LAWRENCE LESSIG, REMIX 28 (2009).

[5] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

collage, cut-and-paste, and mash ups—with copyright law as the foremost culprit.[6]

Nowhere did this seem more true than in the fine arts,[7] which, according to the critic David Joselit, increasingly "marginalizes the production of [new] content in favor of producing new formats for existing images"—a practice sometimes referred to as "appropriation art."[8] As Professor Sonia Katyal wrote years ago, the "traditional argument goes something like this: because of the expansion of intellectual property, artists and activists have been forced to

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[6] *See, e.g.*, Balkin, *supra* note 5; Lessig, *supra* note 5; Sonya G. Bonneau, *Ex Post Modernism: How the First Amendment Framed Nonrepresentational Art*, 39 COLUM. J.L. & ARTS 195 (2015) (arguing that First Amendment law has grown disconnected from contemporary artistic expression); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORD. L. REV. 347, 367 (2005) (on the "postmodern" copyright user as one who celebrates rote copying, because copying that privileges transformation over rote copying privileges romantic authorship).

[7] Throughout this Article, I use the term "art" to mean those participating in the "art world" as it is conventionally understood. *See, e.g.*, *Boundary Issues: The Art World Under the Sign of Globalism*, ARTFORUM (Nov. 2003), *available at* https://www.artforum.com/print/200309/boundary-issues-the-art-world-under-the-sign-of-globalism-5683 ("In common parlance, the 'art world' signifies a society of individuals and institutions—a social, cultural, and economic world organized around museums, galleries, and the art press and the legions of artists, critics, collectors, curators, and audiences who have truck with such sites."). Likewise, the terms "art" and "artists" are used herein to refer to those who participate in this network (as opposed to a broader definition of "art" that sweeps in other types of cultural goods such as film, music, or books, or other forms such as commercial photography, that do not participate in the broader "art world" as conventionally understood). What those participating in the art world call "art" is similar (though not identical) to what copyright law defines as a "work of visual art" under the Visual Artists Rights Act of 1990. 17 U.S.C. § 101 (defining a "work of visual art" as "a painting, drawing, print, or sculpture" existing in copies of 200 or fewer). *See generally* Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 624 (2016) (on delineations between "art" and "other forms of visual expression"); Stephen Frailey, *Objects of Desire: Photography and the Language of Advertising,* ARTFORUM (Mar. 2023), at 163 ("Commercial photography is perceived as a servile vocational endeavor—its creators part of the workforce—while artists maintain loftier sensibilities and aspirations regarding their photographic pursuits.").

[8] *See* Adler, *supra* note 7, at 572 (citing DAVID JOSELIT, AFTER ART (2013)). Note that, as Professor Adler points out, this definition of "appropriation art" is not entirely accurate, as art historians generally use the term to refer to a particular movement of artists that engaged in wholesale copying of others' works for *critical* purposes. According to Adler, our current era has given way to what I'll call blank appropriation—appropriation without critical intent. *See id.* at 571. Still, the term "appropriation art" is often used more generally to refer to the incorporation of "existing source material—sometimes with little change in outward form—" in a new work. *See* Brief for Barbara Kruger and Robert Storr. as Amici Curiae in support of petitioner at 6, Andy Warhol Found. For Visual Arts, Inc. v. Goldsmith, No. 21-869 (2022) [hereinafter Artists' Brief].

abandon artistic projects for fear of being sued for infringement."[9]

To some, the purported clash between the law and appropriation art seemed to reach its apex in the most closely-watched intellectual property case of the year, *Warhol v. Goldsmith*, which centered on a work created by "master appropriator" Andy Warhol (and later licensed by the now-deceased artist's foundation).[10] In both briefing for the petitioner the Warhol Foundation, and numerous amicus briefing submitted before the Court, the Justices were advised that finding against the Foundation would have existential consequences: as one artists' foundation brief put it, doing so "does not just threaten one famous artist's output with infringement liability—it strikes at the heart of the way artists today have been raised to make and understand art."[11] Warhol, in the telling of leading art law scholar Amy Adler, was emblematic of how art is made today, because he "realized that the most crucial piece of making art had become 'choosing the right source image,'" presaging our current era where "perhaps the greatest artist is not the one who *makes* an image but the one who knows which image to *take*."[12]

But what if the dominant scholarly argument is out of step with how artists today actually operate on the ground? There have been scant empirical studies—qualitative or quantitative—that investigate how contemporary artists actually approach such hotly contested issues as appropriation, licensing, attribution, and permissions.[13] This Article presents novel qualitative data that

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[9] Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U.L. REV. 489, 492 (2006).

[10] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1308 (2023).

[11] *See* Art Institutions' Brief, *supra* note 1, at 27; *see also* Brief of Art Law professors as Amici Curiae in support of Petitioner at 10, Andy Warhol Found. For Visual Arts, Inc. v. Goldsmith, No. 21-869 (2022) [hereinafter Art Scholars' Brief] (noting that "a whole generation of artists working today…will be chilled were [the Second Circuit's] ruling [against Warhol] to stand"); Artists' Brief, *supra* note 8, at 25 (arguing that the Second Circuit's fair use decision "will chill artists' creative expression"); *id* at 3 ("appropriation in art…ha[s] been a cornerstone of art for centuries, and ha[s] become a core component of much contemporary artistic practice, from Manet to Duchamp to Warhol to Barbara Kruger").

[12] Adler, *supra* note 7, at 572.

[13] This is distinct, and different from, qualitative studies that seek to understand what incentivizes creators of all types, from scientists to designers, to create, and how the law may influence these creators' practices on the ground. On the former question, Professor Jessica Silbey pioneered the qualitative empirical method, in *Harvesting Intellectual Property: Inspired Beginnings and 'Work-Makes-Work,' Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091 (2011) and THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 287 (2014) [hereinafter SILBEY, EUREKA MYTH]. Professor Silbey then applied the method to the latter question in AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE

provides a real, on-the-ground picture of how contemporary artists—including those who have exhibited works at some of the most influential museums and galleries in the world—conceive of art's relationship to appropriation.[14] This qualitative evidence, gathered from twenty extensive interviews with visual artists, museum curators, and gallerists, paints a different picture.

The dominant narrative has often told a cautionary tale of artistic "self-censorship," with "copyright as a cudgel," forcing artists into licenses for fear of being sued.[15] But while the artists I spoke to often did seek licenses or permissions, they did so *not* for legal reasons, but because it was ethically or morally important for them to do so.[16] Other artists disavowed licenses and engaged in appropriation techniques anyway, but mainly because they believed that the theft of a particular image—usually owned by a more powerful corporate entity—was necessary for purposes of commenting critically upon that image, a set of practices that I'll call critical appropriation. Yet other artists disavowed any interest in appropriation, citing the fraught history behind the art historical movements that used it and the power imbalances between the appropriator and the original author. Indeed, in contrast to critical appropriation, interviewees viewed those who used others' copyrighted works with no intention to critically comment on the materials—the type of uncritical appropriation that the Supreme Court took Warhol to task for[17]—as "lazy" or "careless."[18] Almost uniformly, moreover, the interviewees expressed a belief that we have moved past postmodernism—that the movement's once-transgressive strategies of criticizing originality and authorship while vaunting the copied image has become hackneyed and trite, demanding new forms of artistic innovation.

It might be said, then, that this Article had set out to investigate how artists might create after *Warhol*—that is, how the opinion might reshape artistic practice. But what the findings report on, instead, is how artists are creating after Warhol—how much has changed since the reign of the master appropriator, and how little that has to do with the law.

INTERNET AGE (2022) [hereinafter SILBEY, AGAINST PROGRESS]. *See also* Mark McKenna & Jessica Silbey, *Investigating Design*, 84 PITT. L. REV. (forthcoming 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031989 (on how industrial and graphic designers approach their practice). Outside of Silbey's influential work, some other studies have likewise sought specifically to understand how the law conditions creative production, albeit on narrower grounds, such as the doctrine of fair use specifically. *See* Patricia Aufderheide et al., *The impact of copyright permissions culture on the US visual arts community: The consequences of fear of fair use*, NEW MEDIA & SOCIETY 11 & 14 (2015).

[14] For a list of interview subjects and their biographies, see Appendix A.

[15] Aufderheide et al., *supra* note 13, at 11 & 14 (2015).

[16] *Infra* subsection III.B.1.b.

[17] *See infra* section II.C.

[18] For how copyright's fair use doctrine has demanded (or not demanded) that a work "comment on" the original, see *infra* part II.

To a casual observer, these findings might be surprising. After all, we live in the age of the Internet, a world where copying is nearly costless, and where endless duplication in the name of virality is often times the goal.[19] And the academic literature is rife with anecdotal theories that "copying…is now so ubiquitous in art that some have complained it has become 'hegemonic.'"[20] This framework—emphasizing the ubiquity, normativity, and inevitability of copying, often rote copying—I call intellectual property's postmodern turn.[21]

Yet in recent years, many both within and outside of the academy have begun noting that copying often comes at the expense of those with less power and visibility. Creators all across the online space have increasingly called for more attribution and fair compensation, bringing heightened awareness to the yawning gap between the superstar artists who appropriate and the marginalized creators behind some of the most notoriously-appropriated works.[22] Some scholars, in conversations surrounding how the field of intellectual property might be revitalized by critical legal studies, have pointed out that copyright doctrines like fair use may well open the door for "well-financed artists like Richard Prince to come along and appropriate the work of less well-financed artists," leaving "distributive consequences" in its wake.[23] It seems only fitting, then, that the most closely-watched copyright case of the year would be between a name that has become synonymous with art-as-big-business—Andy Warhol—and a lesser known female photographer.[24] Yet the dominant narrative remained: a loss for Warhol would be a loss for art.[25]

The evidence gathered in this study complicates the straightforward narrative that artists today simply cut and paste with abandon, that all the world's

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[19] *See* Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453, 454 (2022) (on meme culture).

[20] Adler, *supra* note 7, at 572.

[21] *See infra* part I; *see also* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1 (1997) (using the term postmodernism to refer to concepts invoking the "death of the author"); Cohen, *supra* note 6, at 348 (2005) (defining the postmodern copyright user as one "who exercises limited and vaguely oppositional agency in a world in which all meaning is uncertain and all knowledge relative," acknowledging that while "'postmodern' properly understood has "a broader and more specific definition than this formulation suggests…whether right or not, however, 'postmodern' is the adjective that copyright scholars most commonly associate with this user").

[22] *See infra* section II.B.

[23] Sonia K. Katyal et. al., *Panel I: Critical Legal Studies in Intellectual Property and Information Law Scholarship*, 31 CARDOZO ARTS & ENT. L.J. 601, 617 (2013).

[24] The majority opinion in *Warhol* starts with this seeming David-and-Goliath struggle. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1266 (2023).

[25] *See supra* note 11; *see also* Blake Gopnik, *The Supreme Court May Force Us to Rethink 500 Years of Art*, N.Y. TIMES (Mar. 1, 2023), https://www.nytimes.com/2023/03/01/arts/design/appropriation-warhol-renaissance-copyright.html.

a set of raw image material ripe for the taking, that originality is simply a modernist construct that has become irrelevant in our contemporary moment. To the contrary, the complex web of normative, ethical, and value judgments that make up the art world and which I describe in this Article overwhelmingly paint a picture of artists "transforming" others' images "to ask critical questions about" them;[26] of artists deeply attuned to potential imbalances in power, capital, and visibility between the creator of the source material and the appropriator when doing so;[27] and, above all else, of artists striving to make an original contribution in the world—just like those who had first engaged in the postmodernist critique of originality were doing.[28]

While it is, of course, impossible to draw definitive conclusions from a limited qualitative data set, this data is valuable because qualitative data can capture nuances and richness that quantitative data cannot, providing "meaning, rather than measurement, to the phenomena observed."[29] Unlike quantitative research, qualitative research does not seek to answer questions like "how many": *e.g.*, do more artists use appropriation techniques than not? Do the majority of artists support Warhol or Goldsmith? Instead, qualitative research seeks to answer the "whys" and the "hows": of artists who use appropriation, *why* might they do so? And *how* do they use appropriation—are they, for example, indiscriminate as to who they appropriate from? Of the artists who do not use appropriation, why might that be so? Digging into these nuanced answers might provide counterintuitive answers. For example, it might appear, whether as an intuitive matter or even as an empirical one, that the Internet makes appropriation a more dominant form of art than ever before. But my interviews suggest a different conclusion: that the Internet actually makes appropriation less palatable, because it makes instances of unethical or unfair appropriation easier than ever to ferret out and criticize.[30]

This Article consists of four parts. Part I provides a brief overview of what this Article calls intellectual property's postmodern turn, as legal scholars reacted to large-scale shifts in criticism and culture that questioned Romantic authorship, in many cases by turning to the wholesale appropriation of works created by others as a means of questioning authorship and originality.[31] This, however, presents a problem for copyright law, which generally prohibits such

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[26] Telephone Interview with Allana Clarke (Jan. 23, 2023) [hereinafter Clarke Interview]; *see also infra* subsection III.B.1.a.

[27] *Infra* subsection III.B.3.c.

[28] *Id.*

[29] *See* SILBEY, THE EUREKA MYTH, *supra* note 13, at 287 (citing PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 243, 248 (2007)).

[30] *Infra* subsection III.B.3.c.

[31] *See generally* Douglas Crimp, *Appropriating Appropriation*, *in* ON THE MUSEUM'S RUINS, at 126-37 (Cambridge Ma. Press 1993) (outlining artistic practices that fall into the definition of "appropriation" as art historians defined it).

rote copying unless the secondary user can assert a fair use defense. Part II examines several major decisions—involving famous appropriation artists Jeff Koons, Richard Prince, and, most recently, Andy Warhol—that seemed to lay bare the inadequacy of copyright law, and fair use doctrine, to respond to contemporary art production. These cases helped bolster the general, dominant narrative that the law and artistic creation was on a collision course—and that the former greatly chilled the latter.

Part III presents evidence from interviews with twenty working artists, curators, educators, critics, and gallerists in the contemporary art market that calls into question the dominant narrative. This qualitative data paints a more complex and nuanced picture of how artists think about issues like appropriation and permissions in an art world fraught with disparities in status, capital, and power. The artists I spoke to sought permissions or licenses for ethical or moral reasons rather than legal ones. Where they failed to obtain licenses, it was because they believed the purposeful appropriation—the *theft*—of an image, owned by a more powerful corporate entity, was necessary for purposes of commenting on power structures, what they called "punching up."[32] Further still, artists who were unable to use an image for legal reasons simply created around the issue, in contravention to the dominant narrative of an art world deeply stunted and chilled by copyright restrictions.

Part IV considers what this evidence's implications might be for intellectual property. My findings tentatively suggest that artists work largely independently of copyright law and fair use. Indeed, copyright, in both doctrine and theory, has largely marginalized the issues that artists felt most strongly about—fairness, equity, and artistic labor. The challenge, for IP scholars, will be thinking through how a predominantly utilitarian-based legal framework can accommodate these distributive justice goals—if it should at all.

Recent headlines touting multibillion sales in the art market, stunts like Beeple's $69 million NFT,[33] and collaborations between artists and luxury fashion houses have led many to lament the increasingly blurred lines between art and commerce, between the art market and the stock market, between art as aesthetics and art as pure capital asset.[34] And it is true that our age of the "artist as brand"[35] means a superstar artist like Richard Prince can simply take any "old photo"[36] by some lesser known artist, put his name on it, and 10x the returns,

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[32] *See* subsection III.B.1.a *infra.*

[33] Scott Reyburn, *JPG File Sells for $69 Million, as 'NFT Mania' Gathers Pace*, N.Y. TIMES (Mar. 11, 2021), https://www.nytimes.com/2021/03/11/arts/design/nft-auction-christies-beeple.html.

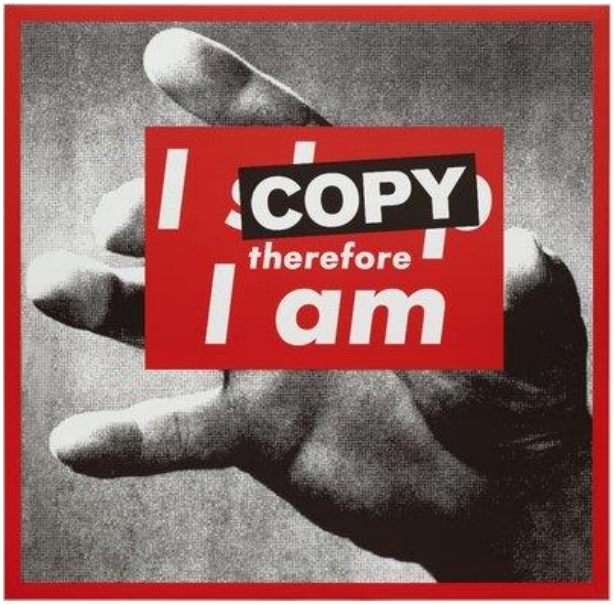
[34] *See* Harmon Siegel, *Quondam Theory*, ARTFORUM, Feb. 2023, at 25.

[35] *See* Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE L.J. 218 (2012).

[36] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, No. 21-869, 2023 U.S. LEXIS 2061, at *81 (May 18, 2023) (Kagan, J., dissenting).

as the tech world value-speak goes. But to understand the game is not to acquiesce to its values. Contemporary artists today understand this fundamental inequity about the art world more than ever. And rather than shrug their shoulders, they are imagining what a fairer world looks like. In the pages that follow, I outline how artists are working towards what I call an ethics of appropriation.

I. INTELLECTUAL PROPERTY'S POSTMODERN TURN



Superflex, *I Copy Therefore I Am* (2011)[37]

Perhaps no field of law has been as influenced by postmodernist thought as that of intellectual property scholarship. And, no wonder. If copyright law fundamentally posits that to copy is to infringe, how are we to handle an entire cultural shift that celebrates pastiche and copying, and that refuses to acknowledge that one "sine qua non" of copyright—originality?[38] Throughout the 90s and 2000s, intellectual property law scholars wrestled with this seemingly intractable divide between the artistic practice and the law that seemed not to foster, but rather to inhibit, it.[39] This Part briefly provides an overview of the postmodern shift in theory and in art historical practice—and how scholars advocated for a new framework to accommodate such practices, reshaping the

[37] This image appears in Adler, *supra* note 7, at 561. I use it here because the image nicely sums up what I term in this Article the "postmodern turn."

[38] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 111 S. Ct. 1282, 1287, 113 L. Ed. 2d 358 (1991).

[39] *See infra* part II.

field of copyright, First Amendment, and art law scholarship in the process.

Of course, it is difficult, if not outright impossible, to attempt to do justice to a concept as broad—and as contested—as "postmodernism" in a brief overview. But to understand what this Article terms the "postmodern turn," it is helpful, at least, to provide a rough conception of the developments in criticism and culture that legal scholars were reacting to.

A. The 1960s – 1980s: The Postmodern Shift

"The last few years have been marked by an inverted millenarianism, in which premonitions of the future, catastrophic or redemptive, have been replaced by senses of this or that (the end of ideology, art, or social class….): taken together, all of these perhaps what is increasingly called *postmodernism*," the critical theorist Fredric Jameson wrote in his canonical 1984 essay *Postmodernism, or The Cultural Logic of Late Capitalism.*[40] Jameson, along with other critical theorists and philosophers writing at the time like Richard Rorty, Jean Baudrillard, and Jean-Francois Lyotard, at once embodied and documented a new "incredulity" toward modernism's belief in overarching truths, grand narratives, and history's progression toward general betterment.[41] Calling this new moment postmodernism, these philosophers called for a break from the almost hundred-year-old modernist project.[42] To some critic-philosophers like Jameson, this break could be most obviously seen by looking to artistic movements that took shape in the 1960s, 70s, and 80s—Andy Warhol and pop art, the music of John Cage and Philip Glass, the writings of William Burroughs, Thomas Pynchon, and Ishmael Reed, architecture as epitomized in Robert Venturi's breakaway from the high modernist styles of Le Corbusier and Mies van der Rohe.[43] Out of these new artistic styles, the postmodernists gleaned some totalizing truths in a new overarching framework distrustful of totalizing truths or overarching frameworks: a fondness for pastiche over parody,[44] the integration of aesthetic production with commodity production,[45] and the disappearance of artistic subjectivity, intentionality, and affect.[46]

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[40] Fredric Jameson, *Postmodernism, or The Cultural Logic of Late Capitalism*, *in* FREDRIC JAMESON, POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM 1, 1 (1992).

[41] JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE xxiv (1979).

[42] *See* Jameson, *supra* note 40, at 1; *see also* LYOTARD, *supra* note 41 at xxiii-xxv; JEAN BAUDRILLARD, SIMULACRA AND SIMULATION (1981) (on the simulacrum as a copy without an original); RICHARD RORTY, THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD (1967) (on postmodernism as a mere semantic turn, but that the framework—of society as simulation, of truth as societal narrative—has always existed).

[43] Jameson, *supra* note 40, at 1-2.

[44] *See id.* at 17.

[45] *See id.* at 4.

[46] *See id.* at 11.

Postmodernists were explicitly reacting to what they perceived to be Romantic—and high modernist—posturing about creation *ex nihilo* that had come before.[47] As the art historian Rosalind Krauss put it in her seminal work *The Originality of the Avant-Garde*, "avant-garde originality is conceived as a literal origin, a beginning from ground zero, a birth."[48] Yet rather than envision some form of progressing beyond that false Romantic sensibility of creation *de novo*, postmodernists wanted its total opposite. As Jurgen Habermas put it, "Should we try to hold on to the *intentions* of the Enlightenment, feeble as they may be, or should we declare the entire project of modernity a lost cause?"[49]

The postmodernists chose the latter. To challenge the "fiction of the creating subject," Romantic art had instead to "give[] way to the frank confiscation, quotation, excerptation, accumulation and repetition of already existing images"—to the rote copy.[50] Technological changes—most obviously, the invention of photography—made emphasis on the obvious "copy," the rote "copy," a world of "reproductions without originals," the perfect site for challenging "[n]otions of originality, authenticity and presence."[51] It is as if, to fully complete the necessary "schism" from the Romantic Enlightenment ideal, the postmodern subject could no longer create at all—only take from what already existed.[52]

Thus, if the painter Jackson Pollock embodied high modernism—the lone, Romantic artist flinging paint at a canvas searching for his version of the Truth, art as grand, totalizing narrative—then Andy Warhol, the subject of this year's Supreme Court case, was the perfect front man for the new aesthetic.[53] Jameson hailed Warhol as a premier example of the new postmodernist art, noting that his works—centering around bottles of Coke or Campbell's soup cans—"explicitly foreground the commodity fetishism of a transition to late capital," stripping artworks of feelings or emotions in favor of random objects

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[47] Due to space constraints, I have chosen not to engage in a full overview of the modern, Enlightenment era that preceded postmodernism. I detail that history in another work, *That Old Thing, Copyright…: Reconciling the Postmodern Paradox in the New Digital Age*, 39 AIPLA Q.J. 71, 74-77 (2011).

[48] Rosalind E. Krauss, *The Originality of the Avant-Garde*, *in* THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 151, 157 (1985).

[49] Jurgen Habermas, *Modernity, an Incomplete Project, in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 1, 5 (Hal Foster ed., 7th ed. 1991) (1983).

[50] Crimp, *On the Museum's Ruins*, *in* THE ANTI-AESTHETIC, *supra* note 49, at 49, 61 (internal citation omitted).

[51] *Id.*

[52] Krauss, *supra* note 48, at 170.

[53] *Cf.* Jameson, *supra* note 40, at 59-61 (on Warhol as an example of a postmodern painter, devoid of affect and "turn[ing] centrally around commodification); 2 HAL FOSTER ET AL., ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM, 1945 TO THE PRESENT, at 411-415 (3d ed. 2004) (on the art critic Clement Greenberg's championing of Jackson Pollock as a true modernist painter).

culled from the detritus of everyday advertising.[54] And in most discussions of Warhol, his prior background as a commercial illustrator for women's shoes inevitably gets mentioned:[55] Warhol, above all else, presaged our current moment of art-market-as-stock-market—and the artist as businessman.[56]

But Warhol was also notorious for something else: copying. As art historian Martha Buskirk documents in her work *The Contingent Object of Contemporary Art*, Warhol "had famously taken copyrighted images from magazines and advertisements, leading to myriad legal problems.[57] But such legal charges clashed with postmodernism, according to Buskirk: as she notes, "[i]n postmodern forms of borrowing based on mechanical reproduction, the obvious copy effects a different kind of critique of originality articulated in the layering of quotation and reference."[58] Art historians Hal Foster et al. trace such methods back further, to the master of the readymade object, Marcel Duchamp, who, they note, was similarly charged with "plagiarism" when he presented a urinal as art almost five decades earlier.[59] The pop artists, then, were simply building on that lineage, while creating something distinctly of the postmodern moment: copying, cropping, and collaging visual signifiers to challenge the ideas of authorship, originality, and creativity.[60]

The artist Richard Prince, a frequent antagonist of copyright law,[61] can also be said to have arisen firmly in the postmodern tradition. Prince in particular has been named as part of a broader movement called, appropriately, "appropriation art."[62] The term "emerged around 1980 to characterize work by artists such as Richard Prince and Sherrie Levine,"[63] who rephotographed ("appropriated"[64]) existing photographic works with "no transformations, no additions."[65] The art historian Douglas Crimp noted that such appropriation practices were "postmodern" because in these "undisguised theft[s] of already existing images," an artist like Levine "lays no claim to conventional notions of artistic creativity."[66] Prince, too, fits into this category, through his "appropriation of advertising images, his thrusting of unaltered pictures into the context of the art gallery, exactly duplicated"—again, with no transformations

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[54] Jameson, *supra* note 40, at 9.
[55] *See id.*
[56] *See* Tang, *supra* note 35.
[57] MARTHA BUSKIRK, THE CONTINGENT OBJECT OF CONTEMPORARY ART 86 (2003)
[58] *Id.* at 3.
[59] FOSTER ET AL., *supra* note 53, at 515.
[60] *See id.* at 445-47; BUSKIRK, *supra* note 57, at 86-87.
[61] *See infra* section II.B.
[62] Sven Lütticken, The Feathers of the Eagle, in 36 NEW LEFT REVIEW (2005).
[63] *Id.*
[64] Crimp, *supra* note 31, at 30.
[65] *Id.*
[66] *Id.*

and no additions.[67]

Six decades later, the influence of the pop art generation continues to loom large in the public imagination. Perhaps it has something to do with how the artists of the 60s, while working well before the age of the Internet, somehow cannily predicted our age of the "infinite scroll"[68]: of endless feeds, of screening and scanning.[69] Indeed, Professor Adler argues that "while art has always relied on copying, the technique has become more prevalent in contemporary culture. Because of shifts in both art and technology, copying itself has now become a central subject of art—as well as a basic tool of how people make it."[70] Adler's evocation of the so-called "hegemon[y]" of copying is fully consistent with how copying is portrayed more broadly in legal scholarship.[71] I call this framework—that focuses on the ubiquity, importance, and hegemony of copying—intellectual property's postmodern turn.

B. Intellectual Property's Postmodern Turn

While this Article focuses on copying in the fine arts, the dominance of intellectual property's postmodern narrative extends far beyond just the visual arts. Instead, one might conceive of the framework's import for intellectual property law in particular to have been shaped by influential scholarship published starting at the turn of the century, as digitization picked up pace and user-generated websites like YouTube and MySpace revolutionized the way that consumers engaged with content. In 2004, Professor Jack Balkin argued that the rise of new digital technologies required a shift in First Amendment thinking, away from a republican concern with protecting democratic process and democratic deliberation,[72] and towards what he termed a "democratic culture," in which "people are free to appropriate elements of culture."[73] Under this model, "freedom of speech is *interactive* and *appropriative*."[74] "Consumers of digital media products are not simply empowered to copy digital content; they are also empowered to alter it, annotate it, combine it, and mix it with other content," he wrote.[75]

In an article published one year later, Professor Julie Cohen termed this

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[67] *Id.* at 34.

[68] Dayna Tortorici, *Infinite scroll: life under Instagram*, THE GUARDIAN (Jan. 31 2020), https://www.theguardian.com/technology/2020/jan/31/infinite-scroll-life-under-instagram.

[69] *See* FOSTER ET AL., *supra* note 53, at 449.

[70] Adler, *supra* note 7, at 353.

[71] *Id.* at 355.

[72] Balkin, *supra* note 5, at 29.

[73] *Id.* at 5.

[74] *Id.* at 4.

[75] *Id.* at 8.

new digital consumer the "postmodern user."[76] Tracking the distrust of overarching truths, master narratives, and the inexorable march towards progress that art historians and critic-philosophers defined as hallmarks of postmodern art production,[77] Professor Cohen defines the postmodern user as one "who exercises limited and vaguely oppositional agency in a world in which all meaning in uncertain and all knowledge relative."[78] The existence of this type of user, Cohen argued, presented a distinct set of normative problems: how are we to debate optimal copyright policy for creative production if the postmodern user "can neither envision herself as an author nor explain how the public domain enriches the creative process in ways relevant to copyright's progress project"?[79] The postmodern user also presented a legal challenge to copyright law: fair use doctrine privileges so-called "transformative uses," emphasizing that the original copyrighted work should be "transformed [in the new work] in the creation of new information, new aesthetics, new insights and understandings."[80] But, as Professor Cohen notes, the postmodern user "rejects the ideal of transformative use, and the linked notion of authorial creation, precisely on the ground that they privilege romanticism."[81]

Thus, throughout the 2000s, what this Article calls the postmodern turn came to frame wider debates about the value of intellectual property. Proponents hewing roughly to the lines of Balkin's "democratic culture" argued that copyright laws must be changed, for new technologies that made it easier for consumers to cut and paste and copy had rendered "the form and reach of copyright law today…radically out of date."[82] Or, as the art historian and critic Sven Lütticken put it: "Contemporary culture is built on appropriation. With digital technology, it has become ever easier for consumers to reuse and manipulate images."[83] Opponents, dubbing the marriage of postmodernist theory with the rise of the Internet a form of "techno-postmodernism," lamented the damage that it wrought upon individual authorship.[84] Professor Jane Ginsburg, for example, noted that "[h]ypertext and the Internet give concrete effect to the theory of the reader as creator"; thus, not only is everyone a creator, but the author figure herself becomes a sort of villain-tyrant, one who "impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction."[85]

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[76] Cohen, *supra* note 5, at 348 (internal quotation marks omitted).
[77] *See supra* section I.A.
[78] *Id.*
[79] *Id.* at 369.
[80] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).
[81] Cohen, *supra* note 5, at 367.
[82] Lessig, *supra* note 4, at 348.
[83] Lütticken, *supra* note 62.
[84] Ginsburg, *supra* note 21, at 8.
[85] *Id.* at 8.

Visual art production, as a subset of this broader conversation surrounding cultural production, both uncannily presaged as it proved exemplar of the postmodern turn. But, as the next Part discusses, a series of art law cases in the 1990s and early 2000s seemed to lay bare the tensions between postmodern theory and the law.

II. POSTMODERNISM CONFRONTS THE COURTS

The law of copyright infringement, at its most basic level, holds that a plaintiff can establish a cause of action for copyright infringement if (1) the plaintiff owns a copyrightable work; and (2) the defendant copied the protected material without authorization.[86] In cases where a plaintiff has established both elements, the artist must resort to the defense of fair use, which "permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes."[87] In evaluating fair use, courts balance four factors: the first asks courts to look at "the purpose and character of the use, including whether such use is of a commercial nature" as well as whether it is transformative[88]; the second evaluates "the nature of the copyrighted work" (such as whether it is more factual or instead more creative in nature); the third looks to "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," and finally, the fourth factor looks to "the effect of the use upon the potential market" for the copyrighted work.[89]

But the new postmodernist art did not find ready acceptance in courts. In this Part, I discuss three major decisions—involving famous appropriation artists Jeff Koons, Richard Prince, and, most recently, Andy Warhol—that seemed to lay bare the inadequacy of copyright law, and fair use doctrine, to respond to contemporary art production.

A. Jeff Koons

The artist Jeff Koons explicitly places himself in a lineage of artists dating back to Duchamp and preceding through Warhol.[90] Like other postmodernists, Koons culled imagery from the detritus of modern life, believing them to be commonplace and familiar.[91] In 1987, while browsing in a "very commercial, tourist-like card shop," he came across a postcard featuring a couple holding a string of puppies.[92] The postcard image had been taken by

[86] *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 306 (2d Cir. 1992).
[87] *Id.*
[88] *See supra* note 80.
[89] 17 U.S.C. § 107.
[90] *Id.* at 304 & 309.
[91] *See supra* note 54 and accompanying text.
[92] *Koons*, 960 F.2d at 305.

the plaintiff, Art Rogers. Koons got to work, tearing off the portion of the postcard that showed Rogers' copyright in the work.[93] He then gave his studio assistants the postcard, and instructed them to copy the image exactly, but in a three-dimensional sculptural piece, as shown below:

(Left: Art Rogers photograph; *Right*: Koons' *String of Puppies*)

As the Second Circuit detailed, he instructed his artists: "the '*work must be just like photo*—features of photo must be captured;' later, '*puppies need detail in fur*. Details—Just Like *Photo!*.'"[94] After plaintiff brought suit, Koons testified that he chose the image because it was "typical, common and familiar…rest[ing] in the collective sub-consciousness of people."[95] But Koons did not state before the court that he intended to comment or criticize the plaintiff's work at all. Instead, he attempted to argue that his appropriation of the plaintiff's photograph was fair because he was "acting within an artistic tradition of commenting upon the commonplace."[96] The court rejected this argument. It first repeated that the definition of parody is to "closely imitate[] the style of another artist and in so doing create[] a new art work that makes ridiculous the style and expression of the original."[97] It then concluded:

> It is the rule in this Circuit that though the satire need not be only of the copied work and may, as appellants urge of 'String of Puppies,' also be a parody of modern society, *the copied work must be, at least in part, an object of the parody*, otherwise there would be no need to conjure up the original work.[98]

The Second Circuit reasoned that this rule was necessary because, "[b]y requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and

[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 310.
[97] *Id.* at 309.
[98] *Id.* at 310.

separate expression, attributable to a different artist."[99] The problem is, of course, that part of postmodernism's critique of modernist tradition is that there remains *no* unique original left to parody. As Fredric Jameson documented, whereas parody in the modernist tradition found some unique original to prod or poke fun at, pastiche—the postmodernists' preferred style—*imitates* the original with no criticality or commentary—"speech in a dead language," as he put it.[100] Pastiche, in other words, refuses to recognize that there is something unique about the original work to even comment or criticize.[101]

Koons fared better in a subsequent infringement case, perhaps having learned from his failures in *Rogers*. Still, the issue of whether a failure to comment on the original work doomed a fair use defense continued to haunt cases involving appropriation art. Indeed, this became the central point of contention in a case involving another appropriation artist, Richard Prince.

B. Richard Prince

While much of Prince's most well-known, earlier works consisted of rephotographs of advertising,[102] his appropriations extended into other types of images, as well. In 2008, Prince showed a series titled *Canal Zone* at the blue-chip Gagosian Gallery.[103] *Canal Zone* consisted of 28 images from a book titled *Yes, Rasta* published in 2000.[104] The photographs in *Yes, Rasta* were by a professional photographer named Patrick Cariou, who had "spent time with Rastafarians in Jamaica over the course of some six years, gaining their trust and taking their portraits."[105] Prince's *Canal Zone* "consist[ed] almost entirely of images taken from *Yes, Rasta*, albeit collaged, enlarged, cropped, tinted, and/or over-painted."[106] Cariou, on his end, had been in discussions with a smaller gallery to display photographs from *Yes, Rasta* around the same time.[107] But the show, which would have post-dated Prince's show, was cancelled because the smaller gallery "did not want to exhibit work which had been 'done already' at another gallery."[108]

Cariou then sued for copyright infringement, and much of the district court's opinion focused on Prince's seeming lack of transformative intent. The district court wrote:

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[99] *Id.*

[100] Jameson, *supra* note 40, at 65.

[101] *See id.*

[102] *See* FOSTER ET AL., *supra* note 53, at 587 (discussing Prince's famous rephotographs of Marlboro advertisements and newspaper ads).

[103] *See* Cariou v. Prince, 784 F.Supp.2d 337, 343 (S.D.N.Y. 2011).

[104] *Id.*

[105] *Id.* at 343.

[106] *Id.* at 344.

[107] *See id.* at 344.

[108] *Id.*

> Prince testified that he has no interest in the original meaning of the photographs he uses. Prince testified that he doesn't 'really have a message' he attempts to communicate when making art. In creating the Paintings, Prince did not intend to comment on any aspects of the original works or on the broader culture.[109]

Prince's testimony was true to the very point of appropriation art: refusing to "lay[]…claim[s] to conventional notions of artistic creativity," appropriations with "no combinations, no transformations, no additions, no synthesis."[110] The district court, however, found that this testimony showed that Prince had no transformative intent "within the meaning of Section 107" (the fair use statute).[111] And while "a transformative use is not strictly required for [Prince] to establish the defense of fair use," a work that is transformative "lie[s] at the heart of" the fair use doctrine.[112] Prince lost his fair use defense at the district court.

But on appeal, the Second Circuit took the district court to task for "impos[ing] a requirement that to qualify for a fair use defense, a secondary use must 'comment on…or critically refer back to the original works."[113] Rather than focus on Prince's intent or message, the Second Circuit noted that what was important for purposes of the first fair use factor was the *court's* observation of the artworks—which convinced the court of their transformative nature.[114] "Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works…are hectic and provocative."[115]

But it was, perhaps, the appeals court's analysis of the fourth factor of fair use—which analyzes whether Prince's use of Cariou's work harmed its potential market or value—that became the most notorious. The Second Circuit disagreed with the district court that this factor favored Cariou because his gallerist cancelled a showing of his photographs once she learned of Prince's Gagosian show. "Prince's work appeals to an entirely different sort of collector than Cariou's," the court wrote.[116] Whereas Cariou had only made $8,000 from sales of his book, Prince's "*Canal Zone* artworks have sold for two million or

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[109] *Id.* at 349 (internal citations omitted).

[110] Crimp, *supra* note 31, at 30.

[111] *Cariou*, 784 F.Supp. at 349 ("Prince's own testimony shows that his intent was not transformative within the meaning of Section 107.").

[112] *Id.* at 347.

[113] Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

[114] *Id.*

[115] *Id.*

[116] *Id.* at 709.

more dollars."[117] Further, the court went on, "[t]he invitation list for a dinner that Gagosian hosted in conjunction with" Prince's show "included a number of the wealthy and famous such as the musicians Jay-Z and Beyonce Knowles…professional football player Tom Brady, model Gisele Bundchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour…and actors Robert DeNiro, Angelina Jolie, and Brad Pitt."[118]

This part of the decision (among others) drew backlash. In one published scholarly commentary, Professors Andrew Gilden and Timothy Greene worried that the Second Circuit's decision might "convert the right to rework, comment on, or otherwise engage with creative works into a privilege largely reserved for the rich and famous."[119] And while some scholars, like Professor Adler, were "unapologetically Team Richard Prince,"[120] others, like Gilden, pointed out the Second Circuit's opinion "repeatedly use[d] reasoning infused with racial and gender hierarchies."[121] Professor Sonia Katyal, too, noted the "distributive consequences" of a wealthy artist like Prince harnessing the doctrine of fair use in selling million-dollar artworks.[122] As Professor Anjali Vats noted, cases like the Second Circuit's in *Cariou* or another case finding in favor of Jeff Koons as against a female photographer "highlight how transformativeness disparately benefits white men."[123] Finding in favor of the appropriator in these cases might just be a way of viewing "'anonymous' women's body parts, 'generic' black men, and Jamaican men in their 'natural habitat'" as mere "raw material for fair use and free expression."[124]

Richard Prince, however, seemed emboldened. A year after his win in *Cariou*, Prince resurfaced with a new exhibit of rephotographed images at the Gagosian. Titled "New Portraits," the works consisted of large-scale canvas reproductions of photos that Prince had found on Instagram, with a comment from Prince (using the Instagram handle "richardprince4") underneath the image:

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[117] *Id.* at 609 & 709.

[118] *Id.* at 709.

[119] Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous*?, 80 U. CHI. L. REV. DIALOGUE 88, 89 (2013).

[120] Adler, *supra* note 7, at 561.

[121] Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 357 (2016).

[122] *See* Katyal, *supra* note 23, at 617.

[123] Anjali Vats, *The Racial Politics of Fair Use Fetishism*, 1 LSU J. SOCIAL JUSTICE & POL. 67, 85 (2022).

[124] *Id. See also* Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 277 (2007) ("Many of the most well-known cases of parodic and transformative use involve sexualization and often mockery of women's (or dolls' bodies.").

Graham's *Rastafarian Smoking a Joint* (Fig. 1)

Prince's *Untitled* (Fig. 2)

While Prince had appropriated a number of copyrighted images for his Instagram series, not all of them sued. Donald Graham—who took the photo *Rastafarian Smoking a Joint* (left, above)—did.[125] And just a few days before the Supreme Court issued its decision against Warhol, a district court likewise refused to find for Richard Prince on summary judgment, holding that Prince's copying of Instagram images for his "New Portraits" series was not fair use as a matter of law.[126] In doing so, the court likewise found significant that Prince had no intention to "target" the particular images that he appropriated.[127] The court pointed out that Prince could have used many other images for the same visual impact, citing to the Supreme Court's 1994 decision in *Campbell v. Acuff-Rose*. There, the Court had written:

> For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, *comments on* the author's works. If, on the contrary, the *commentary has no critical bearing* on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, *the claim to fairness in borrowing from another's work diminishes*

[125] Graham v. Prince, No. 15-CV-10160 (SHS), 2023 U.S. Dist. LEXIS 83267, at *73 (S.D.N.Y. May 11, 2023).

[126] *Id.*

[127] *Id.* at *38.

> *accordingly (if it does not vanish)*, and other factors, like the extent of its commerciality, loom larger.[128]

Citing this language, the *Graham* court wrote: "If Prince could have used any number of other photographs to feature in his series, it suggests that his 'commentary has no critical bearing on the substance or style of the original composition.'"[129] Prince, like Warhol, couldn't provide sufficient "justification" for the borrowing, couldn't show why it was necessary to use *this* particular copyrighted work, rather than any other.[130]

It is possible to read this dicta from *Campbell* as trading off commentary and commerciality: the more the secondary work comments on the original work, the less important the secondary work's commercial nature becomes—i.e., whether it is sold for profit. On the other hand, if the secondary work only uses the original without otherwise commenting on it, then courts are free to weigh the work's commerciality—its for-profit nature—against fair use. And indeed, that is just how the Supreme Court interpreted it in this year's *Goldsmith v. Warhol*, discussed below.

C. Andy Warhol

> "Warhol had found the original photo in a woman's magazine; it had won second prize in a contest for the best snapshot taken by a housewife." –Art Historian Rainer Crone, on Warhol's appropriation of photographer Patricia Caulfield's photograph for his famous *Flowers* series[131]

In 1984, the magazine *Vanity Fair* ran a profile of the musician Prince (not to be confused with Richard Prince).[132] To accompany the profile, the magazine commissioned Andy Warhol to create a print utilizing his famous "silkscreen" technique.[133] The photograph of Prince that underlay that image was taken by a photographer, Lynn Goldsmith, and appropriately licensed from her.[134] When Warhol's illustration ran alongside the profile in the November 1984 issue, an attribution credited Goldsmith as providing the "source photograph" for the Warhol illustration.[135]

Unbeknownst to Goldsmith (and *Vanity Fair*), Warhol had *also* created

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[128] 510 U.S. 569, 580 (1994) (emphasis added).

[129] *Id.* at *38 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994)).

[130] *Id.*

[131] RAINER CRONE, ANDY WARHOL 30 (1970).

[132] Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 34 (2d Cir. 2021), *aff'd sub nom.*, 143 S. Ct. 1258 (2023).

[133] *Id.*

[134] *Id.*

[135] *Id.*

an additional fourteen silkscreen prints and two pencil illustrations based on Goldsmith's photograph, known collectively as the "Prince Series."[136] The Prince Series, like Warhol's other works, were then sold at high sums (in the six figures).[137] When Goldsmith discovered this fact in 2016—because *Vanity Fair* ran a *different* image from the Prince Series in an issue commemorating the death of Prince, this time with no mention at all of Goldsmith's original photograph—she sent the Warhol Foundation a cease and desist letter.[138]

Left: Vanity Fair Cover with Warhol's silkscreen; *Right:* Lynn Goldsmith's original photograph

The Warhol Foundation then brought a suit for declaratory judgment on the issue of noninfringement, or, in the alternative, fair use.[139] While the Warhol Foundation[140] prevailed on fair use at the trial court, the Second Circuit reversed, holding: "We merely insist that, just as artists must pay for their paint, canvas, neon tubes, marble, film, or digital cameras, if they choose to incorporate the existing copyrighted expression of other artists in ways that draw their purpose and character from that work…they must pay for that material as

[136] *Id.*

[137] *See* Adam Liptak, *Warhol's Images of Prince: Social Commentary or Copyright Infringement?*, N.Y. TIMES (Aug. 15, 2022), https://www.nytimes.com/2022/08/15/us/warhol-prince-supreme-court-copyright.html.

[138] *Goldsmith*, 11 F.4th at 35.

[139] *Id.*

[140] Andy Warhol passed away in 1987; hence, the Warhol Foundation, which manages the artist's works, was the plaintiff seeking declaratory judgment.

well."[141] (Notably, Goldsmith had abandoned her claim for injunctive relief, and thus, the court's ruling was limited to royalties. In a footnote, the court stated that "it is highly unlikely that any court would deem" injunctive relief "appropriate in this case."[142])

In a 7-2 ruling, the Supreme Court affirmed the Second Circuit's ruling on a much narrower, more specific ground, holding that the first fair use factor weighed in favor of Goldsmith, but specifically for the licensing transaction that Warhol's foundation entered into with *Vanity Fair*'s parent company, Conde Nast.[143] As the majority opinion put it, in that transaction (and unlike in the 1984 transaction), Warhol's foundation "came away with $10,000. Goldsmith received nothing."[144] Thus, the Court wrote, the Foundation's use was of a commercial nature, which "tends to weigh against a finding of fair use."[145] Nor did Warhol appear to have any intent to comment on or critically target Goldsmith's photograph—in other words, little "justification" for the use.[146] Thus interpreting *Campbell*'s dicta as trading off commerciality with commentary,[147] the Court held that here, both arrows pointed in the same direction: against fair use.[148]

On the one hand, blank, devoid of affect, and glorifying the lowliest of the low with seemingly zero criticality, Warhol, just like Prince, seems to represent the hard case for fair use's transformative standard.[149] On the other hand, the Supreme Court's decision in *Goldsmith* was surprising, precisely because, as the dissent points out, Warhol's works have been cited previously—including by the highest court in the land—as emblematic of protectable artistic expression.[150] In a 2021 fair use case involving computer software, the Supreme Court had stated that an "'artistic painting' might…fall within the scope of fair use even though it precisely replicates a copyrighted 'advertising logo to make a comment about consumerism."[151] The Court was citing the Nimmer on Copyright treatise in that example—and the Nimmer treatise's reference to

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[141] *Goldsmith*, 11 F.4th at 52.

[142] *Id.* at 45 n. 8.

[143] Goldsmith narrowed her request for relief just to the 2016 *Vanity Fair* transaction—and her request for forward-looking relief to "similar" commercial licensing. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1278 n.9 (2023).

[144] *Id.* at 1266.

[145] *Id.* at 1280.

[146] *Id.* at 1281.

[147] *Supra* section II.B.

[148] *Goldsmith*, 143 S. Ct. at 1280.

[149] *See supra* section II.B.

[150] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1299 (2023) (Kagan, J., dissenting).

[151] Google LLC v. Oracle Am., Inc., 209 L. Ed. 2d 311, 141 S. Ct. 1183, 1203 (2021) (citing 4 NIMMER ON COPYRIGHT § 13.05[A][1][b], quoting Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 746 (2011)).

"artistic painting" was to the works of Warhol. Further, the Second Circuit itself, in *Cariou v. Prince*, had used Warhol's works as an example of a "type[] of fair use."[152] Warhol's name appeared as well in a famous 2001 right of publicity case, with the Supreme Court of California referencing the "silkscreens of Andy Warhol" that, "[t]hrough distortion and the careful manipulation of context…was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself."[153] "Such expression," the court reasoned, "may well be entitled to First Amendment protection."[154]

It is important to note here that Warhol, while often portrayed as ruthless in his copying, was, by the late 1980s (the time period in which he made the Prince Series), actually in the practice of seeking out licenses for his source material.[155] As the art historian Martha Buskirk notes, a string of legal troubles led Warhol to "change his methods in his later work, relying more on photographs produced by assistants or going through the process of getting copyright permission," including for a series that predated the Prince Series.[156] At that time, the Warhol Foundation had begun to take out insurance against future copyright claims, a fact, as Buskirk documents, that was "brought to light by a lawsuit between the foundation and the insurance company about paying a claim from a 1996 copyright infringement case."[157]

As Buskirk keenly points out, while Warhol, like other appropriation artists, often justified their takings with the idea that the source material were common objects, so ingrained in our collective consciousness that they were quotidian and banal, "for the original photographers, the familiarity or historic significance of a particular image did not make it anonymous, an authorless image waiting for Warhol to fill the void."[158] Referring, for example, to the photograph on which his famous *Flowers* series was based on, Warhol's dealer Ivan Karp noted that Warhol "was very innocent of doing a disservice to this photographer because this photograph *was not* what you might call a 'remarkable photograph.' It was not an earth-shaking photograph, but Warhol made a

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[152] Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).

[153] Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 408, 21 P.3d 797, 811 (2001).

[154] *Id.*

[155] *See* BUSKIRK, *supra* note 57, at 86 (noting that Warhol had obtained copyright permissions for his 1981 *Myths* series).

[156] *Id.*

[157] *Id.*

[158] *Id.*; *see also* Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992) ("Koons saw certain criteria in the notecard that he thought made it a workable source. He believed it to be typical, commonplace and familiar."); Blanch v. Koons, 467 F.3d 244, 248 (2d Cir. 2006) (Koons believed that certain features in the photograph "represented…a particular type of woman frequently presented in advertising.' He considered this typicality to further his purpose of commenting on the 'commercial images ... in our consumer culture.'").

remarkable series of paintings out of it…they were totally successful, and *we sold them all!*"[159]

Buskirk, however, notes that this dismissive summation of the source imagery was not quite accurate:

> Both [the art dealer Ivan] Karp and [art historian Rainer] Crone defended Warhol's claim over the image by insisting that he was more capable of putting it to interesting use than was the woman who happened, perhaps even accidentally, to click the shutter. But the description of [the photographer of the source material, Patricia] Caulfield as an amateur, which has persisted…in the Warhol literature, has little to do with her actual status. In fact the image was published in the magazine *Modern Photography* as part of an article about color processors…In fact its composition was the result of a succession of highly conscious decisions. Caulfield came across the vase of hibiscus flowers in a restaurant in Barbados, where it was set off by a play of light so striking that she interrupted her lunch, got her camera and tripod, and recorded the subject in multiple photographs. The image published in the magazine was further composed through copying to create the tight arrangement of flowers and foliage that obviously appealed to Warhol.[160]

As for the Flowers image in particular, "asked some years later about the whole business, [the photographer of the original image] Caulfield responded, 'What's irritating is to have someone like an image enough to use it, but then denigrate the original talent.'"[161]

To return to the art historian Rainer Crone's quote that opened this Section: one narrative, perhaps even the dominant one in art history, had been that "Warhol had found" an old "photo in a woman's magazine," which had "won second prize in a contest for the best snapshot taken by a housewife," and transformed it into something significant and worthy.[162] Yet just as the *Goldsmith* majority had noted that the dissent, which would have held that Warhol is entitled to use Goldsmith's works to make historically-significant art, "will not age well,"[163] one wonders, too, whether blithe statements like Crone's, made several decades ago, have aged well. At the very least, it could be time to revisit

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[159] *Ivan Karp*, *in* WARHOL: CONVERSATIONS ABOUT THE ARTIST 217 (Patrick Smith, ed. 1988).

[160] BUSKIRK, *supra* note 57, at 85.

[161] *Id.* at 86.

[162] CRONE, *supra* note 131, at 30.

[163] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1278 n.9 (2023).

the dominant postmodern narrative. The following Part reports findings from the ground on how contemporary artists approach appropriation in an art world fraught with inequalities in status, power, and capital.

III. TOWARDS AN ETHICS OF APPROPRIATION: EVIDENCE FROM A QUALITATIVE STUDY

This project set out to investigate whether "appropriation"—a term of art defined as "incorporating or appropriating existing source material—sometimes with little change in outward form—"[164] in fact "remains essential to much of contemporary art," as the dominant narrative has long argued.[165] Did working contemporary artists—as noted above, those who have achieved success in the art world—as well as the curators and critics who define such success, in fact "respect[]" these practices?[166] And if artists were in fact incorporating existing source material into their own works, did they do so without permissions or licenses? In other words, were artists just the highbrow version of the digital TikTok native, cutting and pasting source imagery with abandon, with the same lack of critical commentary that the Supreme Court took Warhol to task for?[167] Gleaning some answers to each of these questions seemed critical for answering the all-important one, the one that was debated between the *Goldsmith* majority and the dissent and that will undoubtedly continue to be debated in the aftermath of the opinion*:* would a legal decision that calls into question the validity of appropriation art "chill" artistic expression?[168]

This Part first discusses the methods employed in conducting this study; the latter half of this Part then turns to the findings. These findings reveal an art world grappling with long-overdue questions of inequity, power, and representation, in ways that question the ethics of permissionless appropriation.

A. Methods

This study set out to interview artists participating in the "art world,"

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[164] *See* Artists' Brief, *supra* note 9, at 3-4; Art Institutions' Brief, *supra* note 2, at 3.

[165] *Id.* at 3.

[166] Artists' Brief, *supra* note 9, at 6.

[167] *See supra* section II.C. This Article is limited to an interrogation of appropriation practices among artists, defined herein as institutional fine artists. *See supra* note 7. It takes no position on copying in other communities, including amongst digital TikTok natives. At least some commentators, however, have called for greater use of licensing practices amongst TikTok creators who copy protectable expression from others, citing equity concerns and power imbalances. *See* Comment, Ali Johnson, *Copyrighting Tiktok Dances: Choreography in the Internet Age*, 96 WASH. L. REV. 1225, 1274 (2021).

[168] *Id.* at 4; Art Scholars' Brief, *supra* note 9, at 1; Art Institutions' Brief, *supra* note 2, at 5.

conventionally understood as "a social, cultural, and economic world organized around museums, galleries, and the art press and the legions of artists, critics, collectors, curators, and audiences who have truck with such sites."[169] Notably, this is not only different from previous qualitative studies that have sought to interview all types of creators—musicians, industrial designers, writers, and the like[170]—but it is also different from previous empirical studies that have taken a broader definition of "artist," one arguably at odds with how other art critics and scholars may conceive of it.[171]

This conventional definition and usage of the word "art" pervades much of the amicus briefing filed in support of Warhol before the Supreme Court.[172] This is yet a further reason that this study defined and set out to interview "artists" defined narrowly in this way. That is, Warhol is decidedly an "artist," while the plaintiff-photographer Lynn Goldsmith's work lies closer to the type of "commercial art" that falls outside of this rarefied world. These value judgments came up often in my interviews as well, with statements that distinguished between "taking from another artist" versus taking from other visual material.[173] I attempted to draw interviewees out about their understandings and definitions of "art" versus other visual source material, and, in so doing, drew out normative judgments endemic to the art world and to art.

Further, the art and art law scholarship has suggested that it is *institutional* artists—artists participating in the contemporary art world conventionally understood—for which appropriation has become the dominant mode of production.[174] And indeed, the most high-profile cases involving appropriation

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169 *Supra* note 13.

170 *Id.*

171 For example, in a 2013 study, Professors Patricia Aufderheide et al. interviewed 100 members of the College Art Association, whose members are, per its website, "by vocation or avocation are concerned about and/or committed to the practice of art, teaching, and the research of and about the visual arts and humanities." Aufderheide et al., *supra* note 13, at 6. The College Art Association allows anyone "interested in the mission and purposes of the Association" to become a member; its bylaws do not otherwise attempt to define what "visual art" is. *See* BY-LAWS OF THE COLLEGE ART ASSOCIATION, INC., Feb. 27, 2019, https://www.collegeart.org/about/board-of-directors/by-laws.

172 *See, e.g.*, Kruger Brief, *supra* note 11, at 3 (describing "contemporary artistic practice" as those of Manet, Duchamp, Warhol, and Barbara Kruger—all artists that participate in the art world as described and defined herein); Art Scholars' Brief, *supra* note 11, at 11 ("[I]f fair use does not even protect these familiar works despite volumes and indeed entire careers devoted to explicating their meaning, it is difficult to see how there can be any breathing room for new artists or forms of art."). Note that some other amicus briefs filed in the case argued that the decision would have broader implications for other creative practices. *See* Brief of Amici Curiae Electronic Frontier Foundation and Organization for Transformative Works in Support of Petitioner, Andy Warhol Found. For Visual Arts, Inc. v. Goldsmith, No. 21-869 (2022).

173 *See infra* subsection III.B.1.c.

174 *See supra* note 8 and accompanying text.

art, reviewed in the previous Part, all involved an institutional artist appropriating from a non-institutional one. Thus, one might expect institutional artists to have a more favorable view of appropriation (a conclusion this study calls into question[175]).

1. Participant Population

Per the above, the relevant participant population for this study is, de facto, both rarefied and rare: visual artists who have garnered recognition in museums, galleries, and/or the art press. Given the difficulty of enrolling participants along these specific parameters, the twenty interviewees included in this study do not purport to be (nor could they be) a random or representative sample.[176] Instead, within this set, I set out to create diversity of sample size through ensuring certain variations in the following categories for those artists I interviewed: age, gender, medium (e.g., photography, sculpture, painting, video, drawing, mixed-media and installation projects), and race. Appendix B sets forth the breakdown of artist-participants in each of these categories. In addition to these categories, I wanted to ensure that the sample set included both artists who seemed to explicitly use appropriation techniques—such as visual material that the artist explicitly disclosed as originating from another source, or artist statements that speak to the use of third party materials—as well as artists who, at least from the surface of their work, did not appear to use appropriation techniques at all. With this latter category, my goal was to draw these artists out on what their sources of inspiration were, in digging into the question of in what ways artists may be said to build upon works that came before. Further, some artists were chosen specifically because their work engages with issues pertinent to what this Article calls the postmodern turn—questions of digital reproduction, virality, and Internet culture.

In aiming for some amount of analytic generalizability, in addition to including variations along the critical dimensions identified above, I also interviewed those who could speak more generally to trends they observed across many different artists, artistic practices, and artworks: specifically, curators, educators, art critics, and heads of institutions. Four of the twenty interviewees fell into this category.

2. Participant Enrollment and Consent

Participants were recruited through the "snowball" method, through

[175] *See infra* section III.B.

[176] *See* Silbey & McKenna, *supra* note 13, at 71.

contacts in the network of galleries, museums, and artists that make up the art world.[177] The subsequent approximately hour-long interviews (some with follow-up interviews) took place either by phone or by Zoom. All interviewees agreed to be recorded, and for those interviews to be subsequently transcribed by an outside professional transcription service; interviewees also all agreed to be identified by name in the Article, though some remarks were provided with the caveat that the particular quotation(s), if used, must be used anonymously.[178]

In any qualitative study, the question inevitably arises as to how one is to know whether one has recruited enough interview participants. As Professor Jessica Silbey has noted, "[s]ome social scientists recommend between twenty and fifty, depending on the dimensions of the phenonomena."[179] One way of qualitatively assessing this metric is by assessing whether one has reached "saturation," *i.e.*, the point in the interview process in which the interviewer starts to hear the same thematic responses over and over again.[180] As discussed further in Part III.B, the responses almost uniformly coalesced around similar themes—instances where appropriating from corporate sources or advertising for critical or transformative purposes are acceptable, others, where there are disparities in power dynamics in play where appropriation is not; the need to move beyond the type of appropriative practices engaged in by Warhol because they were no longer relevant or innovative. While the nuances for these answers varied, most clearly with variances in gender, race, and age, these themes saturated almost all the interviews with artists and with curators/critics alike.

However, a few interviewees specifically noted that while they were fairly confident their views were widely shared within the U.S. art world, they surmised that attitudes on appropriation and copying might differ in other societies and foreign art markets—most notably, in China. While this is primarily a study focused on artistic practices in the United States, China was mentioned with enough frequency that I thought it might be interesting to survey an expert in Chinese art, who could, like the other curator/critics interviewed, provide insights as to general trends and practices across many different types of Chinese artists and works. (As discussed in more detail in Part II.B, that interview suggests, on a very preliminary basis, that the Western perception that Chinese

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[177] *See* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1680 (2023).

[178] The project was approved by the Institutional Review Board (IRB) at the University of California, Los Angeles ("UCLA"). Transcriptions were provided by a UCLA-approved vendor, Keystrokes.

[179] Silbey, EUREKA MYTH, *supra* note 13, at 290; *see also* Mario Small, *How Many Cases Do I Need? On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOLOGY 5 (2009). There was yet another, more practical reason I stopped at twenty: the answers I received were so rich that I wound up with too much material for a 25,000 word law review article. Were this to become a book project, I would, undoubtedly, interview more participants.

[180] *See id.* at 190.

artists are somehow more amenable to copying and appropriation more reflects long-held stereotypes of China as a site of rampant counterfeiting and cheap fakes than any basis in actual practice.)

Finally, while the participant population of this study was limited to those who participate in the art world as conventionally defined, as I started to reach saturation among that population, I wondered whether the similarity in responses might be the product of groupthink, among a rarefied group of artists who were all, by and large, participating in the same circuit of institutional museums, gallery spaces, and art discourse. I thus decided to interview a mask maker who had very purposefully described and thought of herself as a fine artist, thinking that any variances might be the jumping off point for further research among "artists" more broadly defined. Surprisingly (or perhaps unsurprisingly[181]), I heard the same thematic responses: copying from others as a learning device rather than end product, the desire to find one's original voice and make one's own place in art history, and a negative view of those who appropriated from others without licenses or permissions. But, I am jumping ahead to the findings. Before I discuss those in full, I will provide a brief overview of the interview protocol and the data analysis.

3. Interview Protocol

The interview guide for artists began by inviting them to explore their own artistic practice, often through my providing a first example of a work that either was explicitly disclosed to have used other source material or else was described as incorporating "found material" or similar words that signaled potential incorporation of third-party source material.[182] In cases where artists were chosen because their works did not seem to use any such appropriation techniques—i.e., abstract works or figurative works—I asked about the development of their artistic practice, what previous artists or works inspired them, and how those prior inspirations made its way into their own works. In the former case of artists who had used appropriation techniques, questions then dived into permissions or licenses; in the latter case, I asked about whether they had ever in the past incorporated someone else's works in theirs, notwithstanding their current style. In addition, interviews—in particular,

[181] "Unsurprising" because the art and art law scholarship has suggested that it is *institutional* artists—artists participating in the contemporary art world conventionally understood—for which appropriation has become the dominant mode of production. *See supra* note 174 and accompanying text.

[182] I reviewed the most prominent works by the artist, as identified in their public-facing social media, in press coverage, or in gallery and museum pages, prior to each interview.

interviews with curators, critics, and art historians—sought to draw out general thoughts on broader art historical movements and our current art historical moment (or where we are headed), including thoughts on the appropriation artworks of those who had come before, like Andy Warhol, Richard Prince, and Jeff Koons.

In all cases, the interview guide served as just that—a rough guide, not a "survey instrument"[183]—a reminder of the list of topics I wanted to cover, while providing me (and the interview participant) the breathing room to explore paths that were interesting that emerged out of the dialogues. As I progressed through the interviews, additional lines of questioning were added and others modified, to accommodate for new themes, or else more helpful ways of getting at a particular issue, all of which emerged during the interview process.

4. Data Collection Analysis

As interviews were conducted, I took notes on recurring themes, wording, or issues. Such notes proved helpful in both refining the interview protocol for subsequent interviews, as well as in creating the initial framework of possible coding categories. As interviews progressed, this initial framework of codes was edited. All interviews were completed by May 2023—before the Supreme Court issued its decision in *Warhol v. Goldsmith*.[184]

Interview transcripts were then read multiple times, first for purposes of coding pursuant to the initial framework of codes by hand, and then again to generate a final set of codes. Coding then proceeded in Dedoose, a web-based platform for analyzing qualitative data.[185] Dedoose allows for the collation of coded text, as well as exporting text excerpts corresponding to each coding label into Excel.[186]

B. Findings

This section proceeds in three parts. The first section focuses on artists who use appropriation techniques in their work—those who use third-party source imagery in their own. Yet rather than simply cutting and pasting with abandon, artists are uniquely attuned to who created the original source imagery and who is doing the appropriating—dynamics that are suffused with questions

[183] Bernstein & Rodríguez, *supra* note 177, at 1684.

[184] That decision was issued on May 18, 2023. 143 S. Ct. 1258 (2023).

[185] Special thanks to my research assistant, Tyler Emeney, who proved invaluable in the coding process.

[186] See Home, Dedoose, https://dedoose.com/.

of power, capital, and empire (what some might call an art world "me too" reckoning[187]). The first subpart of this section shows that artists view appropriation as more permissible when it is a form of what they perceive as "punching up": an individual artist appropriating corporate advertising.

The second section focuses on instances where artists could *not* use a particular third-party source imagery. Whereas prior literature reported "a chilling effect on creativity from copyright confusion,"[188] the artists I interviewed in this study did not report feeling stifled because of inability to use a particular image. Rather, they reported creating either better or simply just different creative works, evidencing the phenomenon that legal scholars have called "creating around."[189]

This section concludes with some data that challenges the dominance of the postmodern turn in artistic practice today. Many of the participants expressed a belief that we had moved beyond postmodernism—and with it, postmodernism's uncritical approach to appropriation, oblivious as it was to the power and capital dynamics of the art world. Finally, whereas postmodernism questioned originality by resorting to its exact opposite (the duplication and re-duplication of preexisting imagery[190]), the artists I spoke with by and large strive for their own original voice or contribution to art history—even as those same artists repeated the postmodernist mantra about originality as a mere Western construct.

1. Artists Who Appropriate

"[I]t's a question of who takes from whom." -Artist Buck Ellison[191]

a. By Whom, From Whom?

Kibum Kim, co-director of Los Angeles-based gallery Commonwealth and Council, notes that artists today are thinking about appropriation "in the larger context of thinking through agency and power dynamics in the art world." "[H]ow artists are thinking through issues like this in the context of copyright and appropriation," he noted, "is just one facet of a larger reckoning that frankly

187 *See infra* subsection III.B.3.c.

188 Aufderheide, *supra* note 13, at 10.

189 *See infra* subsection III.B.2.

190 *See infra* subsection III.B.3.c.

191 Telephone Interview with Buck Ellison (Dec. 29, 2022) [hereinafter Ellison Interview].

hasn't been fully resolved yet." Kim went on: "I feel like what artists today," and "especially the younger artists, are concerned about are our power structures."

One artist, educator, and critic, Ernest Bryant III, recounted an interesting story to illustrate this point about power and capital disparities:

> I traveled once to Cuba, and I ended up setting up an artist studio tour. And it was quite difficult to set it up. And I spoke with some of my Cuban artist colleagues and they told me, well, it's going to be difficult for you to go to people's studios because they know that you're an artist, and also because you're American. And I said, what do you mean? They said, well, because you come from America, like, *you are empire*….[Y]ou have a level of capital because you can come into our studios, and you can view something that we're doing, and if it's interesting, you can take it. Because you have the capital to actually market it to a larger audience.

What Bryant was describing was a problematic taking between two individuals, a Western artist with more resources, social capital, and economic capital taking from an artist with less resources and capital. And while Bryant's point goes to broader types of "taking"—perhaps taking of ideas, taking of style, even cultural appropriation—than the specific appropriation art that this Article is concerned with, this analogy nicely delineates the distinctions that my interviewees drew between appropriating from other artists versus appropriating from what they perceived to be more powerful, better-resourced entities, like corporations.

The artists I spoke with stated that when they appropriate without licenses, they often do so because they see themselves as one individual, speaking truth to power. Danielle Dean, whose works appropriate from third-party advertising, sees her stance on appropriation as "com[ing] down to the corporation versus the individual."[192] Recalling a series of works she made where she "appropriated Nike slogans," she notes: "I don't feel any form of guilt at all because they appropriate from other people." On the other hand, with regard to taking from individuals, she notes: "[W]e shouldn't just appropriate the truly creative things without mind for who originally did it."

Dean's distinction between taking corporate imagery and taking from individuals was echoed by other artists who did not use appropriation techniques. Julia Rooney, a painter, differentiated between Warhol's appropriations of Campbell's soup cans, which was a commentary on "mass media, and advertising," and "not the work of an individual artist," versus Warhol's Prince Series, which was "working off a female photographer who

[192] Telephone Interview with Danielle Dean (Mar. 1, 2022).

many people don't know." Similarly, the painter Deborah Druick distinguishes between Duchamp's canonical appropriations of shovels and urines—"things that were readily available to everybody"[193]—and appropriations done by artists like Richard Prince, who are "appropriating photographs of a contemporary who's working at the same time, trying to make a living." Likewise, the sculptor Allana Clarke noted that appropriation can be problematic when it's a "big name" coming in to "negate someone else's artistic voice, who in a way actually did the work or actually did work beyond just taking." For Clarke, the "abusive and…hierarchical" nature of the taking manifested itself in the appropriator's higher "status." It's as if "everything exists for you to consume, for you to take, for you to put your name on. I think that's incredibly wrong, incredibly unethical."

On the other hand, Clarke, like others I spoke with, noted that appropriation can be valid when it is commenting "directly [on] systems of power and large corporations." This comment aligns with Dean's self-described purpose of her appropriations, which is to comment on "how different forms of media…have an influence on who we become and how our subjects are constructed…[and] how that has a relationship to structures of capitalism."

So, too, for multimedia and film-based artist Suneil Sanzgiri, whose works relate specifically to "colonial history…specifically…in relationship to different archives, colonial archives, and material that was perhaps at one point used as propaganda against" colonialism. "So a lot of what I do is try to work against…the grain of that material," Sanzgiri says. He describes an "ethical stance" that he takes when he appropriates without a license:

> [T]hese people justify the pillage and theft of the land of my ancestors…and they justify it through this footage, through the moving image. Therefore, I have an obligation to sort of steal it back, or at least I have a sort of justifiable ground to…use the material, which they themselves used to justify their exploitation.

For Sanzgiri, the "specificity"[194] of the image matters, a word that strangely resonated with the *Goldsmith* majority's emphasis on the "necessity"[195] of the source material to the secondary use:

> Part of the impact of the work is where it's not just that it's, 'Oh, here's just an image of whatever, like, here's some random propaganda.' It's like, 'No, this is a very specific colonial archive.'

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[193] Telephone Interview with Deborah Druick (Feb. 9, 2023).

[194] Telephone Interview with Suneil Sanzgiri (Jan. 6, 2023).

[195] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1305 (2023) (Kagan, J., dissenting) (criticizing "[t]he majority's preference for the directed work, apparently on grounds of necessity").

> [T]he impact of it *is* the theft….That's where the emotional impact of the actual art is….The art would not be as impactful or effective if it's not for the act of appropriating from specific contexts in which there's a legacy of theft themselves, or a legacy of questions of problematic forms of ownership, or insidious forms of ownership.

In instances such as the one Sanzgiri is describing, the artist thinks of himself as punching up: taking a stance against propaganda or colonialism or corporate power. Kim, the gallery director, had said that he thought artists "are most concerned about exploitation and punching down."[196] On the other hand, he said, they were far less likely to be "losing sleep over…punching up."

Kim, who also trained as a lawyer, suggested that appropriating from corporate imagery, for example, not only constituted "punching up"—he also believed they were more likely to constitute fair use.[197] This is because the would-be infringer has specifically appropriated an image for purposes of commenting on the image and/or the rightsholder—as discussed in this section, for Dean, that might be on how certain corporate advertising proved instrumental in constructing the capitalist subject, for Sanzgiri, the specific image as colonialist propaganda. As discussed in Part II *supra*, the Court in *Warhol*, in line with previous lower court decisions, held that a use is more likely to be fair if it comments on, or critically targets, the original work—that is, has some "justification" for the use.[198] In doing so, the Court contrasted Warhol's Campbell soup silkscreens, which "uses Campbell's copyrighted work for an artistic commentary on consumerism," and thus is more likely to constitute fair use, with Warhol's appropriation of Goldsmith's photograph, which "does not target" the work, and thus weighs against fair use.[199]

b. Appropriation With Permission

In contrast to appropriations that purposefully use corporate imagery without licenses as a comment on corporate or postcolonial power, other artists

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[196] Mask-maker Ellie María Rentería made an analogy to punch up/punch down practices in comedy, stating: "I think this idea in comedy, it's okay to punch up, but not okay to punch down in jokes." *See also infra* subsection III.B.3.a (on the artist Liz Nielsen comparing Sherrie Levine's artistic practice to "punching up").

[197] Telephone Interview With Kibum Kim (Dec. 28, 2022) [hereinafter Kim Interview] (describing the artist Danielle Dean's work as "a slam-dunk first factor transformative use" because it had "new meaning" and new "rationale" because "it's all about punching up with her").

[198] *See Goldsmith*, 143 S. Ct. 1258 at 1276-1282.

[199] *Id.* at 1281.

I spoke to who use appropriation techniques for other purposes *do* attempt to get informal permissions—not for legal reasons, but for moral or ethical ones.

The artist Kang Seung Lee, for example, meticulously redraws images that other queer photographers have taken of those in their circle, such as Peter Hujar's photographs of the artist David Wojnarowicz.[200] Lee says that he does so because his work is about "intergenerational relationships among artists, across many generations, and how as young artists or as a new generation of artists, we're really influenced by the people who came before." Because the very point of his meticulous redrawings is to honor the creator of the original work, Lee noted to me that he would frequently get in touch with the copyright owner of the work he redraws (in most cases, as the original author has died, it will be the family or the estate). This, he emphasized to me, was important to him for moral and ethical, rather than legal reasons—which is why he emphasized that he wasn't receiving "licenses" from them, but rather, what he calls their "blessing." "I think that their care is so important," he says. Those "who are taking care of their estate, taking care of their work and their legacy….[I]t's important to let them know that I learned about their loved one's art and life through their labor of love," Lee continued. He added that "a lot of times…they really appreciate what I'm doing, because by recreating these works and presenting them, I'm paying homage to them and also…giv[ing] new visibility to their work."

Lee also recalled to me some instances in which he was "unable to reach out to the original publishers or the people who created the original source." He told me he ultimately chose not to use those images, not because he was "afraid of [the] legal process getting involved, but more about writers or publishers not being familiar with appropriation, and those people taking my artmaking process or my act [as] something offensive to their authorship."

Likewise, Gala Porras-Kim, whose works consist of hand-drawn reproductions of objects from museum collections (for example, Mexican ceramics from the Los Angeles County Museum of Art),[201] told me that every museum whose works she has reproduced in drawings is aware of her doing so. "I've talked to the museum and been like, 'Can I use your picture?'," she says. She clarifies that it's not because she "feel[s] like [she] need[s] permission. It's more like it's not like I'm hiding it….It has come up in conversation, and everybody is aware of it."

The artist Liz Nielsen, whose own works do not use third-party source imagery, noted that she has seen a shift in how artists go about obtaining permissions. "[P]eople are just more respectful," she says. "[A] lot of

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[200] *See* Harley Wong, *Intergenerational Care: Kang Seung Lee's Queer Archives*, ART IN AMERICA (Oct. 27, 2021), https://www.artnews.com/art-in-america/columns/kang-seung-lee-1234608004/.

[201] Alexandra Pechman, *The irresistible, transcontinental art of Gala Porras-Kim*, ARTBASEL (2018), https://www.artbasel.com/news/gala-porras-kim-artist-los-angeles?lang=en.

artists…have asked me, 'Could I pay for this piece to be on my thing?'….That's happened probably ten times….Even if it's like…. 'Hey, I have $500'….they still are willing to offer something, and I think, artist to artist, 'Thank you for asking. Yes, you may have it.'"[202]

c. In-Group/Out-Group Norm Enforcement

Nielsen's remark about informal licenses from "artist to artist" brings up an important theme reflected throughout my interviews: that participants were more likely to police in-group, versus out-group, appropriations.[203] That is, one might perceive the difference between the permissions-based practices described by Nielsen, Porras-Kim, and Lee, and Sanzgiri or Dean's adamant permissionless appropriations of corporate advertising, as coming down to whether the artist views the author of the source imagery as a peer. It is easy to see corporate advertisements as having been created by the bland machinery of multibillion dollar companies if you're just one artist. But Buck Ellison, a fine art photographer who has also shot advertising campaigns, seemed notably more sympathetic to licensing corporate works than other interviewees—and less sympathetic to appropriating campaign images without compensation.[204] First, he pointed out to me that he has "purchased a stock photograph under the normal license usage of a stock photograph to use as my work, the way that any company would." "And I'm happy to do that," he said. Second, Ellison recounted to me another famous artist (who he refused to name), whose works consisted of rote recreations of advertising campaigns, re-painting the advertisements stroke by stroke. Ellison stated that he did not believe the other artist ever licensed those campaign images, and bristled at that idea: "Really famous people have shot [those campaign images]," he said. "It's really clear who they are. And someone has made, like, a solid young career just painting those ads." Ellison, having emphasized that he has worked on "[advertising]

[202] Likewise, Professor Silbey reports how a filmmaker would offer to pay a small fee to the original author for use of copyrighted material, even if the original author offers it for free. SILBEY, AGAINST PROGRESS, *supra* note 13, at 241.

[203] This is consistent with other literature that emphasizes how norm enforcement works best in small, insular communities. *See, e.g.*, Casey Fiesler, *Everything I Needed to Know: Empirical Investigations of Copyright Norms in Fandom*, 59 IDEA 65, 84 (2018) (on the fan community); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121, 1155 (2007).

[204] See Balenciaga Spring Summer 2019 Campaign, OWL AND THE ELEPHANT, https://www.owlandtheelephant.com/colin-donahue/balenciaga--campaign-ss19--robert-yager.

campaigns and negotiate[d] quite strenuously to be paid a certain payrate for a certain usage," is more likely to see an artist (someone like himself) behind the lens of an otherwise anonymous-seeming corporate ad.

Or take Carmen Winant, an artist who admits to "exclusively work[ing] in appropriated images" (a decision that she admits puts her at "some dissonance" between her and "a larger cultural moment or way of working"). Winant, however, was adamant that she drew certain lines around the types of material she appropriates, stating: "For myself, I make a really deliberate decision not to ever use another artist's images.[205] Winant then described her images as mostly pulled from archival material, from instructional and scientific books. I asked her how she makes the determination that images pulled from those books are not images by an artist. "I appreciate what you're saying," she said, and acknowledged that it was "a blurry line." Nonetheless, she noted that "it would not be unreasonable to say that the photographs that appear in those books…are not photos made by, like, capital A artists." She contrasted photographs appearing in these more factual books—scientific or instructional books—with "arts monographs" (which are large books that contain works from a particular artists' oeuvre). Winant's invocation of the art monograph was interesting, precisely because one has to be of a certain artistic fame to have one's works be in a monograph.

But if observed examples like these suggest that at least some artists are more likely to take from those outside the peer group without asking and/or payment, many of the other artists I spoke with seemed to recognize that this, too, was its own form of punching down. Druick, the painter, at once acknowledged the art world's value distinctions between "art" and other forms of visual expression, and expressed discomfort with it. Many of the appropriation cases she knew of, she said, was "really not artists stealing from other artists. It's artists using a photographer's image. And why is that image any less valid…?" Ellison also used the word "valid" in describing fine art appropriations of commercial photography: "[I]f it's a living, working commercial photographer, the gesture there is also in some way implying, like, your work isn't valid. Your work isn't art," he said. Another self-taught artist (who I'll call K.), when our conversation turned to Koons' appropriation of *String of Puppies*,[206] first said, "[I]f there's a post card that's literally…two humans and a string of puppies, and then [Koons] turn[s] that into a sculpture, that seems fine to me." But then they paused. "[Y]ou know what? I think that's just me kind of looking down on the post card, and that's not fair." K. took another beat. "Yeah, I'm rethinking my position." (K. ultimately decided that Koons should have probably paid some royalties for reproducing the work.)

[205] Telephone Interview with Carmen Winant (July 13, 2022).

[206] *See supra* subsection I.C.1.

2. Creating Around

Whereas many copyright scholars believe that copyright laws generally act as a tax on downstream creators—greatly inhibiting follow-on creation[207]—some legal scholars have argued that constraint could have a "generative upside."[208] A few of my interviews provided concrete examples of this theory in action. Ellison, whose fine art photography has been shown at the Whitney Biennial, the Hammer Museum, and the Lyon Biennial, among others, is known for staged portraits, using actors to reenact everyday scenes of the wealthy and privileged.[209] They look simultaneously *like* the stock photographs that Ellison had occasionally licensed and worked with in the past, but underneath lurks something sinister: as the *New York Times* put it, "[t]hese could be stock photos if they weren't pricked with reality—the housekeeper behind" a scene of preppy girls eating peppers in a perfect airy kitchen, for example.[210] Whereas the art world has uniformly praised Ellison for his these eerily off-kilter photographs—corporate advertising with just a glint of nastiness—Ellison recalled in his interview with me that he found this artistic style through what copyright scholars would call "creating around"[211]:

> [W]hen I was in grad school, I was really enamored with these Deutsche Bank advertisements. And I really strenuously tried to find out who had taken them….But…with most commercial photography, you cannot for the life of you figure out who it is. And I imagine Deutsche Bank may not want people just contacting the artists in order to pay them to reuse campaign images….Which is…what led me to casting people and recreating this in the first place—was like this frustration with, oh, I can't just buy these images, I have to now remake them.[212]

I asked Ellison to imagine a different world, one in which he would have simply forged ahead and just used the Deutsche Bank images anyway, cutting and pasting them, rather than have to go through his own process of casting actors and photographing similar scenes—resulting in photos that look almost

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[207] *See* Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1346-51 (2015) (summarizing the arguments).

[208] *See id.* at 1358-1369.

[209] Travis Diehl, *Buck Ellison's Great White Society*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/arts/design/buck-ellison-white-men.html.

[210] *Id.*

[211] Fishman, *supra* note 207; *see also* Dan L. Burk, *Inventing Around Copyright*, 109 Nw. U. L. Rev. 547, 558 (2015).

[212] Ellison Interview, *supra* note 191.

like the stock photos he couldn't figure out how to license, but with his trademark sinister, off-kilter, eerie twist. "I think I would have gotten bored of that in a year," he answered. Corporate advertising like the Deutsche Bank images excited him because they are "often a really sterile, strange picture," he said. "But yeah, I won't be able to have like, men making pasta with their butt showing had I gone down that route." In other words: the insertion of the weird, the slightly off-kilter, that critics now routinely praise as innovative elements in his work.[213]

Similarly, Porras-Kim, whose works consist of meticulous re-drawings of museum artifacts, told me that she did not believe that there is ever a "specific original work" that is the "essential one you need." She said to me: "If it had to be some object specifically…[and] if I couldn't use an image of it, I would find another way. Like, the shadow of it, or the dust from it, or the air around it, or some other way to represent it." Porras-Kim analogized it to "changing the handwriting of a text…..I wanted this really flowery handwriting and I couldn't get it, so I had to do Comic Sans, but then I'm going to add this other stuff like perfume!" She says, laughing. "When you are beginning to make an artwork, you could go in infinite ways."

Likewise, in my interview with Danielle Dean, she noted that she was currently dealing with a copyright issue for a video art work she was filming. The video depicts a party, and she wanted the people she films in the scene "to feel like they can dance." But she worried that if she uses "generic music, they're not going to dance." The likely outcome, she noted, would have to be playing a popular song during the filming and then overlaying a public domain or wholly original song in the video in post-production. I asked her why she didn't feel like she could just keep in the original (unlicensed, popular) song. "You can't…because that is illegal," she said immediately. But, she continued, she wasn't particularly bothered by the substitution: "The work actually doesn't really necessarily often need that actual pop song to be on there. That doesn't happen that often."

Of all the artists I interviewed, Sanzgiri, the multimedia artist, was the most attuned to the law, and fair use law in particular—likely from his previous life spent as a journalist. And while Sanzgiri was the rare artist I interviewed who had been following the pending *Goldsmith* decision, worrying about what its effect might be on artists, he nonetheless noted that "the idea of what could be

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[213] *See* Diehl; Jonathan Griffin, *Buck Ellison's American Freaks*, ARTREVIEW (Jun. 9, 2022), https://artreview.com/buck-ellison-american-freaks/; Rebecca Bengal, *A Photographer's Canny Investigation of American Privilege*, APERTURE (Mar. 30, 2022), https://aperture.org/editorial/buck-ellison-canny-investigation-of-american-privilege/; Drew Sawyer, *Openings: Buck Ellison*, ARTFORUM (Summer 2017), https://www.artforum.com/print/201706/openings-buck-ellison-68692; Buck Ellison Artist Biography, LA BIENNALE DE LYON (2022), https://www.labiennaledelyon.com/en/les-artistes/details/buck-ellison.

considered fair use, both legally and conceptually, really just opens me to thinking about my own work in a different way."

3. Re-Evaluating Appropriation

Writing in 2013, the art critic and historian David Joselit noted that contemporary art production was not about the production of "new content, but its retrieval"—the endless use and reuse of "existing images" in potentially "new formats."[214] Similarly, the press coverage leading up to the Supreme Court's decision in *Warhol v. Goldsmith* made proclamations suggesting that the Court was "rethink[ing] 500 years of art."[215] But my interviews suggested that appropriation techniques are not some integral or primal part of how artists make art. Nor is it to be applied indiscriminately, leaving any source material free for the taking so long as the appropriator deems it art. Instead, many of my interviewees drew moral boundaries between ethical and unethical appropriation—and, alongside it, value judgments about the place of appropriation art in the contemporary art world.

a. First: Is It Any Good?

It is true, according to Whitney Museum curator and art historian Drew Sawyer, that copying—combines, collages, appropriation—is the "sort of visual language[] and strateg[y] that artists use that are immediately recognized as art….You can probably go anywhere in the world and there would be artists appropriating, recombining, re-collaging materials that now 'reads' as contemporary art." But the mere *recognition* of something that "seems" ("reads") like art is different from being *good* art: "We should think deeply about, and be critical of, any time any practice becomes a sort of accepted or dominant form or reads as a visual language that is recognized immediately as, quote unquote, contemporary art," Sawyer continued. "What I want from an artist is somebody that's pushing against convention. And when something becomes convention, even within the art world, that needs to be questioned in some way." Or, as the painter Marton Nemes put it, "if appropriation is a circle or is a room that has four corners, we've been in every corner and every part and we looked at every part of the ceiling" of that room.

Artist-critic-educator Ernest Bryant concurred: "[P]eople can be collaging or making these huge montages of digital images and saying, hey this

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[214] JOSELIT, *supra* note 8, at 58.
[215] Gopnik, *supra* note 25.

is mine. This is the thing I produced. And it's like, okay, but is it any good? It's like a cacophony of images, yeah, but is it any *good*? Does it communicate?" Even the artist Olivier Mosset, whose works have been questioning the concept of originality and authorship since the 1960s,[216] said, with regard to appropriation techniques more generally: "I'm not sure it's that interesting, but it certainly was at one point."

Richard Prince's Instagram series, in particular, came up in several interviews, unprompted, as an example of a "bad" work of contemporary appropriation. One under-35 artist noted: "[I]t just sounded like an old person who didn't know the first thing about Instagram, and then the tiniest little thing that stuck out to them was so profound and it's really not." Gallery co-director Kibum Kim echoed that language, stating: "People's discomfort with the Instagram works is really a value judgment on the fact that it's just bad art. You know, it just wasn't that interesting. It just wasn't that good….It really felt like a creepy uncle who doesn't know how to use the Internet." (Interestingly, in commentary published after the Supreme Court's *Warhol* ruling, art critic Ben Davis confirmed what some interviewees had told me off the record: that late Warhol, including the Prince Series, just wasn't very *good*.[217])

As a counterexample to Prince and Koons, one artist's name came up again and again in my interviews, albeit one who has not produced new work in quite some time: the 1980s Pictures Generation artist Sherrie Levine. Mosset described Levine as a "postmodern smart way to do things"; Bryant described her work as "conceptual" and "theoretical," notwithstanding the fact that Levine literally reproduces others' images; Rooney noted that Levine's appropriations depend on "the work being exactly the same as [the] original"; and Nielsen noted that Levine's appropriations felt "like punching up rather than punching down." In Nielsen's telling, Levine's appropriations of photographs by older male photographers like Edward Weston were valid because "her reclaiming that [is] important, in the sense that a lot of women photographers weren't even getting" recognized. In naming Levine as a positive example, artists are drawing lines between acceptable and unacceptable appropriation—between "lazy"[218] or "rapacious"[219] appropriation and appropriation that makes an innovative, conceptual, or political point. Or, as Rooney put it, in relation to Levine:

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[216] *See* WHITNEY BIENNIAL 2008, OLIVIER MOSSET, https://whitney.org/www/2008biennial/www/index.php?section=artists&page=artist_mosset (last visited May 11, 2023).

[217] Ben Davis, *Why Andy Warhol's 'Prince' Is Actually Bad, and the Warhol Foundation v. Goldsmith Decision Is Actually Good*, ARTNET (June 1, 2023), https://news.artnet.com/opinion/warhol-foundation-v-goldsmith-fair-use-2311801.

[218] Clarke Interview, *supra* note 27.

[219] Telephone Interview with Ernest A. Bryant III (Feb. 7, 2023); *see also* Davis, *supra* note 217 (noting "lazy, un-creative uses of appropriation by powerful artists who are out of ideas and would like to coast on other people's unique works").

"[T]here's a kind of…ethical compass which I think about when I judge whether I think an artist is being exploitative or is actually just…challenging a norm or challenging a history."

As noted above,[220] some interviewees suggested that while they were fairly confident that U.S.-based artists were no longer interested in appropriation as a technique, those in other art worlds—in particular, in the burgeoning Chinese art market—may differ. While this study was focused primarily on the U.S., I thought it might be interesting to speak to a curator and expert in Chinese contemporary art, who could speak more generally to trends across and within the Chinese art world, as contrasted with the U.S.-based one. Philip Tinari, the director and CEO of the UCCA Center for Contemporary Art in Beijing, nonetheless told me that he was "hard-pressed to think of [Chinese] artists for whom that's really an innovative strategy….I just don't think it's really conceptually innovative at this point, right? It's kind of like been there, done that." "The trope of the copyist and the knockoff…allowed people in the West to reassure themselves of their superiority or a certain faith in innovation and creativity over rote productive capacity," he observed.

b. Second: Is It Doing The Work?

Recent critical commentary has derided appropriation that "consist[s] of little more than the co-option of aesthetic sensibilities that already exist in the world….without any justifying labor, whether conceptual, technical, or other."[221] As the art critic David Salle wrote in *Artforum* recently: "Younger artists today are keenly aware of what technique brings to the party. Craft no longer has to be defended, and there's a recognition that where the brush (or whatever tool) hits the canvas is where it all happens."[222] The qualitative data gathered in this study tracks the published commentary on the importance of "doing the work" in artistic practice today. Clarke, for example, noted the problematics of "lazy" appropriative practices that took advantage of those who "actually did the work or actually did work beyond just taking." Gallery co-director Kibum Kim noted that often times, copying images was a way to "save time…like, 'Oh, I'm making this work and I just need to fill it up with some imagery, so I'm just going to Google a bunch of sh** and—' Yeah, I guess, but I think that's just not good art."

Perhaps unsurprisingly, then, a number of artists whose works reproduce other source imagery emphasized the importance of labor to the

[220] *Supra* subsection III.A.1.

[221] Sean Tatol, *Openings: Libby Rothfeld*, ARTFORUM (Oct. 2022), at 181.

[222] David Salle, *Medium Cool*, ARTFORUM (Feb. 2023), at 122.

copying process.[223] Porras-Kim emphasized the importance of re-drawing the objects, rather than just photocopying images of the objects from the museum catalogs: "I feel pretty stubbornly stuck with the drawing because I thought, oh, well, if the point is to talk about the organization, why not just print it? But I think that so much of drawing is the labor and time that you take to create an image." She noted that the "time and labor" involved with re-drawing the artifacts "add[s] to the content of the work in some form," enhancing the "aesthetic…value" of them. She added:

> I think it's also mainly because I want to have a sort of personal relationship with these works. If I just drag onto a desktop and print, it's like it just came through my life and left immediately. And so it's just making some space to actually think about it. It takes about three months to make a drawing, and so it's three months thinking about the conditions in which that collection might *be* or mean something, you know, instead of the five minutes that it would take to photoshop and print.

Lee, likewise, found it important to redraw others' photographs at great labor cost, rather than simply photocopy it, because "in the process of doing that, there's this change between myself and the image, and there's a new relationship that's being born in the process of that." To Lee, "labor can be translated [into] something…poignant."

c. Most Importantly: Is It Ethical?

Previous studies had suggested that artists—more broadly defined, not necessarily those who have achieved success in the art world—have found their work deeply chilled because copyright law prohibited them from engaging in appropriation.[224] But Whitney Museum curator and art historian Sawyer suggested that, at least for those who play in the art world game, that's not the main story: "I do think a lot of artists are maybe less comfortable with this sort of directly appropriately something the way Richard Prince has. And I'm sure that's not only to do with the fact that Prince has been sued and other artists have been sued." Instead, he says, the question is largely "an ethical" one:

> [A]rtists today are much more aware of sort of [the] hierarchy of the art world and the sort of ethical implications of making

[223] Professor Silbey gleaned similar findings from her interviews with creators. *See* SILBEY, EUREKA MYTH, *supra* note 14, at 86-87.

[224] *See* Aufderheide et al., *supra* note 13.

> money or profiting off the work of somebody else who might operate in a very different commercial sphere where their work is never going to go for hundreds of thousands of dollars.[225]

Ellison, the fine art photographer, made a similar statement: "I think what's…interesting to think about with Richard Prince and a lot of artists of that generation, despite their wealth and maleness, [is that] I don't know if they understood themselves as privileged. I think they thought of themselves as bohemian." These days, Ellison notes, "anyone who's done anything with a museum I think is…pretty well aware of…who pays the bills and who greases these wheels….I think we're more sensitive to that than maybe an older generation was."[226] Rooney, the painter, agrees: "[T]here's just more awareness in the art world now around authorship, and compensation, and power, and the ways that often those things are not perfect within the art world." Bryant, the artist/educator/curator, put himself in the shoes of the less-famous artist being appropriated from: "[I]f somebody takes something that I've spent years of my life making, and because they have some particular social connections, they can turn it into money, [then] I want what's coming to me, you know?" Or, a less idealistic, slightly more cynical version of this answer might come in the form of the artist Jacob Kassay's comment: "I don't believe anymore in appropriation; it's all about who it's going to benefit."

Six decades after Warhol's first "appropriations…landed like a thunderclap,"[227] artists are now starting to fill in what was left out of rapturous accounts of Warhol's genius.[228] Perhaps Nielsen put it best:

> All of what Andy [Warhol]'s done is really important, and I really, really respect him as an artist. I also think him getting called to the plate right now about the appropriation…is relevant, because it's also connected to the fact that people didn't get "Me too'd" until not long ago….There's kind of a time where people are like, "Wait a second. We have to *make* these

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[225] Telephone Interview with Drew Sawyer (Dec. 27, 2022).

[226] As Professor Deborah DeMott has noted, the notion that artists operate in a vacuum of solitary greatness, divorced from power and capital, their fortunes entirely self-made by the merit of their work, is a false one. Rather, artists' "greatness" is "constructed…by the practices of critics, art historians, art markets, museums, and private collectors," *i.e.,* shaped by wealth, money, and access to power. Deborah A. DeMott, *Looking Beyond the Easel: Artists' Contexts and Resale Payments,* 27 DUKE J. GENDER L. & POL'Y 135, 137 (2020).

[227] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1293 (2023) (Kagan, J., dissenting).

[228] Or consider another iconic feminist reckoning with the disparities of the white male-dominated art world, Linda Nochlin's *Why Have There Been No Great Women Artists?* In *Woman in Sexist Society: Studies in Power and Powerlessness* (1971).

> moments. They just can't happen anymore, so we have to call people out."[229]

To some, the ubiquity of the Internet would seem to bring hyperreality to the conditions that postmodern theorists like Douglas Crimp were writing about at the advent of "reproductive technologies," which, per Crimp, normalized the "quotation, excerptation, accumulation and repetition of already existing images."[230] Yet the artists I interviewed had a different take: that the rise of the Internet makes it easier than ever to ferret out and criticize copying. It's true, Nielsen told me, that "media is everywhere and you can have access to any information at any point." Yet, she went on, "people will kind of catch you because *they* also have access to that information. So it might just be because the panopticon is everywhere now." Druick, who is in her 70s, agreed: "[W]ith the Internet, everyone sees everything that everyone's doing." And, she added, "it's not like, oh God, I see so many images, I can't remember where it came from. That's bullshit. I think people do remember."

The educator, critic, and curator David Pagel, who has been teaching art students for almost two decades, noted that in instances where an art student included an image that others recognized as having been taken from another source, the student feels a "moral pressure" to take it out of the final work. He was careful to clarify that they "do not feel a legal pressure." Rather, he said, they take it out because "they want to make stuff that's theirs and has artistic integrity. And if anything compromises that integrity, they're going to get rid of it." These digitally-savvy natives "know enough that they don't control the meanings of their works when they go out in[to] the world….And…if you're perceived as being a parasite or a leech or a copycat, [you're] done."

Likewise, and tracking what other scholars have observed in other creator communities like fan fiction, the Internet also makes attribution easier to engage in—and failure to do so more problematic.[231] Rooney, the painter, compared retweets and reposts on Instagram to a "form of citation"—a way of acknowledging the original source material. On the other hand, "with Warhol," she noted, "the only real language that he could use was the image, and the image divorced from its original maker," because he was "functioning in this analog way." Rooney, whose own work engages with the shift from analog to digital media,[232] used the example of NFTs as a way of "opening up a question around authenticity and tracing back to the, quote-unquote, original." In that vein,

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[229] Nielsen Interview, *supra* note 3.

[230] *Supra* note 50.

[231] *See* Casey Fiesler, *Everything I Need To Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content,* 10 VAND. J. EN'T & TECH. L. 729, 753 (2008).

[232] *See* JULIA ROONEY, FREIGHT AND VOLUME, http://www.freightandvolume.com/artists/julia-rooney (last visited May 29, 2023).

Porras-Kim, who redraws images of artifacts from museum collections, said it was important to her to state in the title of her work that she is depicting "artifacts from this collection." It's "not like I've ever said, like, 'I made this original thing,'" she says. Likewise, Lee's redrawings of photographs taken by others "always include the original image, the author…[and] the title of the [original] work…as part of the titles."[233] Having that attribution "accessible…is quite important to me," he says.

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To critics writing at the germinal moment of postmodernism, the "critical attack" on the Romantic ideal of the author-genius was not just "another step in the forward march of the avant-garde," of progress.[234] In other words, art historians did not view the postmodern vaunting of the obvious or rote copy as just a different attempt to say something new.[235] It was instead intended as a sort of end of history, the only form of creation the late capitalist subject seemed to know how to do—through "frank confiscation, quotation, excerptation, accumulation and repetition of already existing images."[236]

And yet, and as with all "end of history" type arguments, sixty years later, my interviews suggested that on the ground, artists well-trained in the postmodernist discourse nonetheless continued to strive for originality or some version thereof. Artists variously used the term "voice,"[237] "style,"[238] "gesture,"[239] or digging one's "own path"[240] as proxies of getting at that idea. "They just want to do something that's theirs," Pagel, the art critic and educator, said to me.

Ellie María Rentería, a mask-maker who purposefully identifies as a fine artist, clearly delineated this struggle by describing her relationship with her teacher. She describes instances where she copied her teacher's "style" in making masks early on, and noted that she doesn't "like to advertise them as much or use them as…my original work."[241] But Rentería simultaneously acknowledged that the concept of originality was a culturally-specific idea: "I want to be original in my art in artwork, and art is inherently this Western idea." Rentería concluded that originality was important because of the art world's economics: it was all

[233] Telephone Interview with Kang Seung Lee (Mar. 21, 2023).

[234] Krauss, *supra* note 48.

[235] *See id.*

[236] *Supra* note 50.

[237] Nielsen Interview, *supra* note 3.

[238] Interview with Ellie María Rentería (Feb. 23, 2023).

[239] Clarke Interview, *supra* note 27.

[240] Zoom Interview with Marton Nemes (Jan. 26, 2023).

[241] Professor Jessica Silbey's interviews with literary creators echo this idea of "imitating the masters." SILBEY, AGAINST PROGRESS, *supra* note 13, at 250.

fine and good to learn and borrow and create together in her own culturally-specific community, but once money became involved, once sales became involved, it was a wholly different story.

Other artists who specifically stated that they did not believe in concepts like originality or authorship also objected to the idea of rote copying as artistic creation—at least for economic purposes. The self-taught artist who I refer to as K. in this Article was adamant that they "decry authorship as a whole….I don't think there's authorship in artwork….[E]ach person has their own perceptual apparatus that filters the world, but they're not creating something new," they said. Nonetheless, they were equally adamant that they thought it was "cheesy and corny when artists'…whole artwork is just printing some famous poem on the ceiling….It's like, 'Why didn't you just write your own poem on the ceiling'?" I asked K. how they reconciled these two ideas: that there was nothing new under the sun, and yet could make a negative value judgment associated with artists who copied others' work. Inherent in the idea of the word "own," after all, is that works *do* have authorship and ownership—that works *do* originate from a particular author. "I think copyright and…the concept of plagiarism only really ha[ve] validity under capitalism," K. responded. They noted that they would ordinarily have no issues with other artists reproducing their works, "except…capitalism. If there's scarcity and I'm trying to eat, and someone else is making the coin that I should be making, that's an issue."

Finally, Tinari made the same observation with regard to Chinese contemporary artists:

> [A]rtists who are showing at places like UCCA [the Center for Contemporary Art, in Beijing] and top galleries and international galleries, *of course* they buy into the construct of originality at some level. And to the extent that they use appropriation, it's as a strategy to do something original….I think for the people who are participants in [the art world], originality is still kind of everything.[242]

Tinari, like other interviewees, observed that the postmodernist claim that originality is a myth was itself an attempt at originality. Recalling a review of a Pictures Generation retrospective from the late 2000s, he recited me the following quote: "The real problem—and here's where an older generation may have had its cake and eaten it, too—is not so much saying there's no such thing as an original image, but knowing full well that it's not a very original thing to say." Pagel, the art critic and educator, concurred: "I used to a be a Postmodern geek myself. But…it wore out, and it doesn't hold up. And the critique of originality was itself just another way of being original." Other interviewee

[242] Zoom Interview with Philip Tinari (March 14, 2023) [hereinafter Tinari interview].

answers were uniform on the seeming unoriginality of appropriation art in our contemporary moment: that at the time it gained prominence in the 1980s,[243] it *was* an original gesture, "a radical gesture."[244] But, as Clarke says, "we are so many decades past those moments."

IV. IMPLICATIONS

To non-copyright scholars, perhaps the most surprising thing about the *Warhol* opinion was not what it held, but the deeply scathing commentary traded between Justice Sotomayor, who penned the majority opinion, and Justice Kagan, who wrote the dissent.[245] And indeed, Kagan's dissent seemed to take on an almost existential tone when it warned: "In declining to acknowledge the importance of transformative copying, the Court today, and for the first time, turns its back on how creativity works."[246]

Commentary published after the decision was published suggests that to the extent the creative process *won't* suffer, it is only because the majority opinion was remarkably narrow. It was, after all, limited to just one licensing transaction, not Warhol's initial creation of the Prince series.[247] But the general consensus was that to the extent the opinion will be interpreted more broadly by subsequent courts, it will "impose a deep chill on artistic progress, as creative appropriation of existing images has been a staple of artistic development for centuries."[248] "We know self-censorship is real," one lawyer tells the *Times*.[249] Yet not only did my interviews reflect a waning of the type of unlicensed appropriation that has loomed large in the legal imagination, but the artists I spoke with, by and large, did not view law as an obstacle to creation. Instead, they created original works, opted to receive the "blessing" of rightsholders to honor their legacy, appropriated for purposes of "punching up" with little fear

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[243] *See supra* notes 62-66 and accompanying text.

[244] Clarke Interview, *supra* note 27; *see also* Kim Interview, *supra* note 197 ("[T]hat sort of like wholesale reconsideration of authorship and appropriation, copying, blah-blah-blah, I don't think is that interesting to anybody right now…[W]e've mulled that for decades…like, let's move on.").

[245] In a pithy footnote, Justice Kagan wrote: "[T]he majority opinion is trained on this dissent in a way majority opinions seldom are. Maybe that makes the majority opinion self-refuting?....[W]hen you come across an argument that you recall the majority took issue with, go back to its response and ask yourself about the ratio of reasoning to *ipse dixit*." *Goldsmith*, 143 S. Ct. 1258 at 1308 (Kagan, J., dissenting).

[246] *Id.* at 1311.

[247] *See supra* section III.C.

[248] Blake Gopnik, *Ruling Against Warhol Shouldn't Hurt Artists. But It Might.*, N.Y. TIMES (May 19, 2023), https://www.nytimes.com/2023/05/19/arts/design/warhol-prince-supreme-court-copyright.html.

[249] *Id.*

of copyright infringement,[250] and, in cases where copyright did seem to present an issue, simply created around the problem. Far from a community filled with "fear" and "self-censorship,"[251] the arts, it seems, are as vibrant as ever.

While the data gathered here is limited and would greatly benefit from further testing, I offer some preliminary reflections, in this final Part, on what these artists might tell us about the law—and what the law might learn from artists.

A. The Insufficiency of Utilitarian Theories

What are we to make of the fact that, for the majority of my interviewees, it was fairness, rather than the law, that played the outsized role? As gallerist Kibum Kim put it: "I don't think artists are losing sleep over the outcome of this [case against Warhol]. They are more concerned about fighting for what they think is just." In this sense, Kim, who is also trained as a lawyer, suggested that copyright law and the art world were at odds, *not* because copyright prohibits the type of appropriation that art "depends on," as other scholars have posited,[252] but for an entirely different reason: because most artists are preoccupied with fairness, and copyright law does not encode those values.[253]

In my conversation with the artist-educator-critic Ernest Bryant, he invoked fairness when describing a particular type of use of third-party source imagery, a "rapacious copying" that happens when a more powerful artist capitalizes on a less powerful artist. The latter is the artist who created the original image, but who "doesn't have the capital or doesn't have the connections or the social capital to market themselves or market this thing in conjunction with their name, to have it actually attributed to them." This was the one time in our over hour-long interview that Bryant brought up the law. "We have copyright law…for this particular reason, so somebody can't just come in and take something," he said. But the instances that seemed to most rile Bryant, leading him to invoke words like "fairness," "theft," and "rapacious," involved instances of what others in my interviews would call "punching down"[254]: a more powerful person, with less monetary "capital" and "connections" and "social capital," taking from a less powerful one.

Bryant, like most of my interviewees, was not quite right about how copyright law works. U.S. copyright law, utilitarian in its underpinnings, assumes that authors are rational creatures who are best incentivized by economic

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[250] On why such uses are more likely to weigh in favor of fair use, see *supra* Part III.B.1.

[251] *See* Aufderheide, *supra* note 13, at 10.

[252] Adler, *supra* note 7, at 625.

[253] Kim Interview, *supra* note 197 ("[L]aw is not necessarily always about fairness, and I think a lot of artists would think more about fairness, which is why this kind of power dynamic thing is so important to people.").

[254] *See supra* notes 196-197 and accompanying text.

rewards, and it generally seeks to maximize efficiency in the way that artistic works are created and distributed to the public.[255] It has little to say about slippery concepts like fairness—especially when questions of privilege and status, and whether one is truly "punching up" or "punching down", are often complex and intersectional and thus impossible to determine objectively. Indeed, one would assume that the word "privilege," a theme that came up over and over again in my interviews, has little place in copyright law.

And yet, "privilege" appeared several times in *Warhol v. Goldsmith*—first, in the Second Circuit's refusal to create a "celebrity-plagiarist" privilege.[256] On appeal before the Supreme Court, however, something even more interesting happened: Justice Sotomayor, writing for the majority, took the dissent to task for calling "Goldsmith's original work…just an 'old photo'."[257] "In other words," Justice Sotomayor wrote, "the dissent…treats the first factor as determined by a single fact: 'It's a Warhol.' This Court agrees with the Court of Appeals that such logic would create a kind of *privilege* that has no basis in copyright law."[258] Undoubtedly, Justice Sotomayor was echoing back to the circuit court's language of the celebrity-plagiarist, but the opinion's evocation of the word "privilege," by itself, seems to do more.

Thus in this sense, perhaps gallery co-director Kibum Kim, who previously taught copyright law to art history students, was right when he noted that "copyright law does claim to" care about "power structures," just "a little bit." But to the extent current copyright law manifests it, it does so in erratic, errant, and unsatisfying ways, as with the Court's unexplained invocation of the word privilege. And yet in other places, such as where multiple artists emphasized the importance of "doing the work"—of labor, the artistic process, and the artist's hand—copyright has emphatically disavowed such theories, deeming them mere "sweat of the brow."[259] Thus, the challenge, for IP scholars, will be thinking through how, or if, a predominantly utilitarian-based framework should accommodate other goals like distributive justice or Lockean labor.[260]

Nonetheless, the Second Circuit's decision in *Goldsmith* and the Supreme Court's affirmance of it may have struck the right outcome to some artists, by

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[255] *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37-84 (2003).

[256] Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 31 (2d Cir. 2021), *aff'd sub nom.*, 143 S. Ct. 1258 (2023).

[257] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1284 n. 19 (2023).

[258] *Id.* (emphasis added).

[259] See the iconic case on this issue, *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

[260] *Cf.* SILBEY, AGAINST PROGRESS, *supra* note 13, at 296-97; Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433 (2016); *see also* Betsy Rosenblatt, *Considering the Role of Fairness in Copyright Fair Use* (working draft on file with author).

requiring royalties while denying injunctive relief.[261] Before the decision was handed down, I asked Druick, the painter, what her preferred outcome in the case would be. "I just think if [Goldsmith's] image is being used, she deserves to receive some money from that and also be able to say no further images can be produced. You know, no more tchotchkes," she replied. At the same time, Druick was equally adamant that "they're incredible Warhols, and to shove them in a basement so no one could ever see them again would be a shame, as well."

Another artist had been adamant in distinguishing between what Warhol did as an artist and the Warhol Foundation's activities, which he viewed as purely mercenary in nature. As he put it:

> The Warhol Foundation…they have their own agenda. If Warhol were alive, there should be no recourse for [Goldsmith]. But because it's the Foundation arguing for [fair use], and they are making a lot of money through the reproduction of Warhol's images, I would probably side with [Goldsmith]. But if it's an artist simply making the painting themselves and they don't have this innumerable proliferation of print imagery on tote bags, t-shirts, whatever, then in that case I would side with the artist.

At the time we spoke, I found the artist's forceful distinction between the Warhol Foundation's licensing (and merchandising) activities and Warhol the artist to be almost a distinction without much difference. This "innumerable proliferation" of Warhol's works on "tote bags, t-shirts, whatever," which the artist so clearly despised, seemed, to me, simply just a logical extension of the original Warhol "painting [it]sel[f]." And yet, just a few months after we spoke, the Supreme Court made just that distinction when it narrowed the case to the single "commercial licensing" transaction between the Warhol Foundation and Conde Nast.[262] In so doing, the Court, like the artist in my interview, refused to conflate the Warhol painting itself and any of the ways in which the painting might then be licensed or merchandised.[263] Instead, the Court emphasized that fair use determinations must be made on a use-by-use basis—and, consequently, that its ruling did not reach the actual Warhol painting itself.[264] Instead, its finding of infringement went to the subsequent "reproduction," as the artist I spoke to put it, of that painting by the Foundation—the "proliferation" of that painting on, *inter alia*, a magazine cover.

B. Artistic Progress and the Copyright Clause

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[261] *Id.* at 1278 n. 9.

[262] *See supra* section II.C.

[263] *Goldsmith*, 143 S. Ct. at 1266.

[264] *Id.* at 1273.

If postmodernism arose because of a belief that modernism, "once scandalous," became the dominant mode of production;[265] that modernism, "[o]riginally oppositional" in "def[ying] the cultural order of the bourgeoisie" had become the official culture of the bourgeoisie;[266] that modernism, in short, was "dominant but dead,"[267] then it might be said that the relentless copying that has become emblematic of postmodernism has suffered a similar fate. Perhaps it's obvious that postmodernism's challenge to originality and authorship was itself an attempt to progress beyond modernity—thus rendering equally obvious, six decades on, its inevitable obsolescence. As discussed in Part III.B, interviewees repeatedly noted that appropriation and its attendant critiques *were* "radical," *were* "original"—and that the claim of unoriginality that marked the movement was the most original thing of all. Thus, for an artist like Kang Seung Lee for example, he did not want the subject matter of his art to be about unauthorized appropriations, because there was "very little for [him] to do in terms of how to question originality and authenticity." Instead, the question became, for him, "What can I do next?" Or, as Nemes put it, as "human beings, we want to see the progression."[268]

One might ask why any of this matters—why should it matter whether artists, art critics, and art historians think something is good or bad art, whether the type of appropriation art that was so radical several decades ago is now viewed as derivative and non-innovative—a subject the prior Part discussed in depth?[269] One answer is simply that value judgments will always pervade opinions discussing the arts—notwithstanding Justice Holmes' famous admonition that judges are poor art critics,[270] the fact remains that judges resort to art criticism time and time again. Indeed, artistic judgment might even be inevitable where the first factor of the four-factor fair use test asks judges to

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265 Hal Foster, *Introduction*, *in* THE ANTI-AESTHETIC, *supra* note 49, at ix, x (Hal Foster ed., 1998).

266 *Id.*

267 Habermas, *supra* note 50, at 1, 5.

268 While this Article's focus is on appropriation specifically rather than attempting to excavate the broader, non-legal area of postmodernity as an artistic construct, my interviews reflected the same themes and grappling with a movement that is, as the artist, curator, and critic Aria Dean put it in a recent piece, "dominant but dead" (a critique that had previously been leveled at its predecessor, modernism). *See* Aria Dean, *Volume 4: On Postmodernism*, NOVEMBER, https://www.novembermag.com/content/volume-4-on-postmodernism ("We wager that it might be because postmodernism's situation is changing as we barrel toward the century's midpoint….After everything that's transpired, it is now worth asking: are we still postmodern, if we ever were? And if we are, do we have to continue to be?"). The artist Aria Dean asks: "Can we begin to name new paradigms for our time? (Do we need to?) Shouldn't there be new, robust ways of thinking on the menu? Shouldn't there at least be an *appetite* for programs for thought that *work*?" *Id.*

269 *Supra* subsection III.B.3.a.

270 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

evaluate whether an artist has transformed the original source material[271]—something that the majority in *Warhol v. Goldsmith* answered in the negative, adding their own artistic judgment as to the minimal alterations they believed Warhol made to the original.[272] Yet the dissent, too, made plenty of artistic judgments: emphasizing that Warhol's silkscreens were "eye-popping,"[273] and that art experts had praised the "corporeality and luminosity" of his depictions.[274] (On that point, it is notable that the artists and art historians interviewed in this study offered their opinions without the distorting effect of sizable expert testimony fees that come with any litigation.[275])

Another answer is that progress—what it means to innovate, what it means to advance the arts, and all the attendant value judgment that comes with it—is baked right into the Copyright Clause.[276] As Professor Barton Beebe put it in his research into Justice Holmes' famous admonition: "progress" cannot be some purely accumulationist vision of more and more *stuff*; rather, "progress requires standards to determine what constitutes progress."[277]

IP scholars have previously noted that IP policy can, and does, create normative frameworks under which one particular type of work may flourish (or, in the alternative, perish).[278] Professor Joseph Fishman has suggested, for example, that the derivative works right in copyright law—which gives the copyright holder control over subsequent works that are "based upon" the original copyrighted work[279]—has encouraged the production of ever-more Hollywood franchises (say, *The Avengers*) over smaller, stand-alone films (say, *American Beauty*).[280] Likewise, bolstered by his fair use win in *Cariou v. Prince*, Richard Prince went on to reproduce a number of others' Instagram posts in his

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[271] *See supra* note 89 and accompanying text (outlining the four factors).

[272] *Warhol*, 143 S. Ct. at 1270 (2023) (noting that Warhol's work "crops, flattens, traces, and colors the photo but otherwise does not alter it"). *See also id.* at 1301 (Kagan, J., dissenting) (taking the majority to task for "plant[ing] itself firmly in the 'I could paint that' school of art criticism").

[273] *Id.* at 1298 (Kagan, J., dissenting).

[274] *Id.* at 1298.

[275] *See, e.g.*, Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743, 795 (1999).

[276] U.S. Const. art. I, § 8, cl. 8.

[277] Barton Beebe, *Bleistein, The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 396 (2017). Note that Beebe comes to the conclusion that aesthetic progress should be about personality—about human flourishing, a conclusion that I found echoes of throughout my interviews. *See* Nielsen Interview, *supra* note 2 and accompanying text. Or consider Clarke's objection to appropriation: "[I]f you are taking something from another artist who does not have as much power or prominence in these interacting systems as you, that is completely detrimental to their individual visions and the potential of their practice to grow." Clarke Interview, *supra* note 26.

[278] Joseph P. Fishman, *Derivable Works*, 67 UCLA L. REV. 122, 124 (2020).

[279] 17 U.S.C. § 101.

[280] Fishman, *supra* note 287, at 137.

show *New Portraits*.[281] Is this normatively desirable? Or are artists like Prince and Koons simply the Hollywood studios of the art world, devoid of innovation, making and remaking the same type of fail-safe work? Indeed, Nemes compared the proliferation of appropriation techniques in blue-chip art sales to Hollywood blockbusters: "[T]hey have the budget to pull in a famous actor or actress. And oh my God, this actress or actor…did it, so it must be good. And you start to watch this movie and, oh yeah, I [guess] the story is very similar to so many things." And then you realize, he said, "that I've seen [this] before. It's not exactly the same, but somehow, it doesn't even try to be different." Another artist compared both Koons and Prince to banks, stating: "[T]hey belong in the 'too big to fail' category," such that "it has nothing to do with art anymore."

The comparison between artists and banks might surprise older artists who, as Ellison had pointed out to me, would prefer to think of themselves as bohemian.[282] But this, too, is a form of progress—not aesthetic so much as historical. As Sawyer, the Whitney curator, wrote to me after reviewing a pre-publication version of this Article, the findings struck him because it seems to reflect "the generational divide between older Marxist thinkers and younger people, who have basically accepted advanced capitalism. They see no potential for escape, only fairness within it."

C. On Further Qualitative Empirical Work

Or perhaps all of this merely suggests, some would say unsurprisingly, that academic reductionism rarely accurately reflects the real world. Professor Julie Cohen, after all, had, two decades ago, advocated for a model beyond the stereotypical "romantic" creator and the "postmodern" ones, towards a "situated user" who "has the capacity and will to link her own creative projects aspirationally to larger dreams of artistic and personal progress."[283] Or maybe it's academic philosophizing that's the real culprit: Pagel, the art critic and educator, said to me: "[art history] academics are entrenched in academia with tenure and are doing their own artistic production, in terms of theory, that doesn't really connect to what other artists are doing." Pagel's quote calls to mind what Professor Madhavi Sunder, quoting Amartya Sen, wrote years ago, which is that "[t]heories have lives of their own, quite defiantly of the phenomenal world that can be actually observed."[284]

Through empirical qualitative data, this Article had aimed to begin filling

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[281] Andrew Chow, *Copyright Case Over Richard Prince Show to Go Forward*, N.Y. Times (July 20, 2017), https://www.nytimes.com/2017/07/20/arts/design/richard-prince-instagram-copyright-lawsuit.html.

[282] *Supra* subsection III.B.3.c.

[283] Cohen, *supra* note 5, at 372.

[284] Madhavi Sunder, *IP^3*, 59 STAN. L. REV. 257, 261 (2006) (citing Amartya Sen, *Democracy Isn't 'Western,'* WALL ST. J., Mar. 24, 2006, at A10).

in the missing gap between where art historical theory meets practice. To the extent that intellectual property law, as a law of artistic production, cares about what happens on the ground—opining on whether changes in the law will or will not "stifle creativity of every sort," whether overexpansive copyright laws do or do not "impede new art and music and literature"[285]—qualitative data can provide rich real-time snapshots into what artists actually care about when they set about to create. Some of this work, in areas ranging from photography to fan fiction to folk musicians, has already been done.[286] Much more will help supplement richer and more nuanced accounts—and critiques of—IP's economic, incentives-based framework.

CONCLUSION

At a moment when so much of the art world has succumbed to the logic of the markets, it is more vital than ever that artists stake out their recommitment to art's autonomy. "I do believe that the world right now needs something that's a little bit more spiritual," the painter Marton Names said, echoing the romanticists who came before him, who believed that art should approach the Sublime, that coming face-to-face with God and terror. For those who had come before the onslaught of Pop, postmodernism, and all the glibness that would follow, the Sublime could still *signify*, "is something that gives one the feeling of being where one is, of *hic et nunc*—of the here and now—courageously confronting the human fate, standing alone in front of chaos, without the props of 'memory, association, nostalgia, legend, myth.'"[287]

It may not be surprising that, in the age of automation, at the apex of digital copying technologies and the dehumanizing march of AI, interviewees would emphasize the personal and the spiritual.[288] Or, as critical theorist Walter Benjamin predicted over a century ago, the rise of mechanistic modes of artistic production gave way to the "ultimate retrenchment" of "the human countenance."[289] Thus it is "no accident," Benjamin wrote, that as photography—the ultimate mode of mechanistic reproduction—rose in popularity, the "portrait" of the human face was its "focal point."[290] "This is what constitutes their melancholy, incomparable beauty."[291]

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[285] *Warhol*, 143 S. Ct. at 1312 (2023) (Kagan, J., dissenting).

[286] *See* SILBEY, EUREKA MYTH and SILBEY, AGAINST PROGRESS, *supra* note 13; Fiesler, *supra* note 203, at 65.

[287] FOSTER ET AL., *supra* note 53, at 366.

[288] *See also supra* subsection III.B.3.b.

[289] Walter Benjamin, *Art in the Age of Mechanical Reproduction*, *in* THE WORK OF ART IN THE AGE OF ITS TECHNOLOGICAL REPRODUCIBILITY AND OTHER WRITINGS ON MEDIA 19, 27 (Jennings et al. ed. 2008).

[290] *Id.*

[291] *Id.*

And then there is Richard Prince's *New Portraits*, those enlarged canvases of digital narcissism, others' Instagram posts with the addition of Prince's own artistic contribution—some glib remark, an emoji, left as a comment underneath. In my interviews, one artist summed up Prince's work by analogizing to the "persona non grata" comedian Roseann Barr, who courted controversy with a racist tweet and ultimately found her comeback show cancelled by the network[292]: "It really came from the same application of edgy comedy that she was getting away with in the 1980s. She was fine to court controversy back then, right around the same time as these works by [Jeff] Koons and [Richard] Prince, and more recently she's saying a lot of this more politically driven salacious material—and it got her kind of cancelled or banned." The artist noted that he saw "a lot of similarities" between what an artist like Prince was doing and Barr's actions: "They keep having to up the ante to the point where the plot gets kind of lost and they're just searching for the same level of attention that they've gotten from the initial [appropriative] gesture." Other interviewees similarly suggested that to Prince, copyright law itself—challenging and seeming to court controversy from it—*became* the only art project. "He's kind of like a copyright nihilist or anarchist, right?" one interviewee asked. Another interviewee noted, "When I speak to other artists about Richard Prince, the reaction is, Oh, the copyright artist guy?" In other words, what my interviewees are conjuring up is the notion of "semiotic disobedience," a term coined by Professor Katyal almost two decades ago.[293] "Propertization, by its very act of exclusion, actually and unwittingly perpetuates prohibited speech as a result," Katyal wrote.[294] And this, perhaps, is Prince's greatest contribution to the artistic conversation today.

Some may also object and note that the field of art has always been broad, varied, and heterogenous—that for any one artist who renounces appropriation, another relies upon it. That may be so, but the very point of this study was not only to dig deeper into *how* artists who *do* use appropriation techniques engage with it, but also to provide a counter-narrative to the outsized roles that copyright agitators like Richard Prince or Jeff Koons play in the legal imagination. [295] It is not surprising, perhaps, that copyright scholarship has focused on seemingly such a small slice of the art world: these are the artists for whom infringement, and the law, itself seems to be the medium.

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[292] *See* John Koblin, *After Racist Tweet, Roseanne Barr's Show Is Canceled by ABC*, N.Y. TIMES (May 29, 2018), https://www.nytimes.com/2018/05/29/business/media/roseanne-barr-offensive-tweets.html.

[293] Katyal, *supra* note 9, at 497.

[294] *Id.*

[295] Somewhat more flippantly, Jacob Kassay put it a different way: "News about [Richard] Prince is the kind of sh** that you hear influencers talking about. You know, his Instagram series—it's for the person who's barely paying attention."

On this point, I found one particular exchange I had with Kang Seung Lee illuminating. When we discussed why he would choose to abandon using a third-party work, I asked if he was aware of a legal doctrine called fair use. Lee knew about it, and noted that he assumed in many instances fair use would permit him to nonetheless use the work. Still, Lee said that he would not use the material. He didn't want his work to be "reduced to 'can I do it or can I not'….[It's] a question that I'm really not interested [in]," he said. "Questioning authorship: I feel like that's already been done, at least in contemporary art. So I wasn't really interested in that part as something subversive, because it's no longer subversive to me."

The Supreme Court may have decided *Warhol*, but legal battles over the value and legitimacy of appropriation art are far from over. Unless Richard Prince chooses to settle the lawsuits over his *New Portraits* series, the case will proceed to a full-blown trial.[296] As one artist put it: "[Prince's] whole thing is to be an asshole and steal people's work"; the very theft is "part of his work." If so, they concluded, "then part of his work should include being sued by that artist….He's probably like….'My artwork is reaching its logical conclusion.'"

[296] *See supra* note 126 and accompanying text.

APPENDIX A: LIST OF INTERVIEWEES

Full names are used with the permission of the interviewee, and are listed roughly in the order in which the interviews were conducted.

Carmen Winant explores representations of women through collage, mixed media, and installation. Her work has been exhibited at, *inter alia*, the Museum of Modern Art, the Columbus Museum of Art, the Wexner Center of the Arts, and Sculpture Center. She is a 2019 Guggenheim Fellow in Photography, and her work is represented in the collections of the Museum of Contemporary Art, Los Angeles and the Minneapolis Institute of Art, among others.

Buck Ellison is an American visual artist and photographer. His work has been exhibited, among others, at the Hammer Museum and the Whitney Museum, with works appearing in the 16th Lyon Biennial in 2022 and the Whitney Biennial. His work has been reviewed in *Aperture*, *Artforum*, *ArtReview*, *The New Yorker*, and *The New York Times*. His solo show is currently on view at Luhring Augustine in New York.

Drew Sawyer is the Sondra Gilman Curator of Photography at The Whitney Museum of American Art. He has previously held curatorial positions at the Brooklyn Museum, where he was the Phillip and Edith Leonian Curator, as well as the Museum of Modern Art and the Columbus Museum of Art. Sawyer holds a Ph.D. in Art History from Columbia University, focusing on North American art and photography and their intersections with histories around labor, class, race, gender, and sexuality.

Jacob Kassay is an American painter, filmmaker, and sculptor who has exhibited at, *inter alia*, the Institute of Contemporary Arts in London and The Kitchen in New York City. Of the latter exhibition, the *New York Times* art critic Roberta Smith described the work as "quietly beautiful." He is represented by 303 Gallery in New York.

Olivier Mosset is a Swiss visual artist who was, alongside Daniel Buren, Michel Parmentier, and Niele Toroni, a member of the 1960s art group BMPT, which famously questioned notions of authorship and originality. In 1990, Mosset represented Switzerland at the 44th Venice Biennale.

Kibum Kim is the Co-Director of Commonwealth and Council Gallery in Los Angeles. Commonwealth and Council has been featured in *The New York Times* and *Artforum*, among others, and has been described as "among the country's most closely watched art spaces" by *ARTnews*.

Gala Porras-Kim is a contemporary interdisciplinary artist whose works have been shown at the Whitney Museum, the Los Angeles County Museum of Art, and the Hammer Museum, among others. In March 2022, her work at Amant in New York was featured on the cover of *Artforum*.

Danielle Dean is a British-American visual artist whose works have been exhibited at the Tate Britain, the Hammer Museum, and the Studio Museum in Harlem. Her works are included in the collections at the Whitney Museum and the Hammer Museum, among others.

Suneil Sanzgiri is an artist, researcher, and filmmaker whose work contends with questions of identity, heritage, culture, and diaspora. His first solo show will open at the Brooklyn Museum in Fall 2023.

Liz Nielsen is represented by Miles McEnery gallery in New York, SOCO Gallery in North Carolina, Black Box Projects in London, and Horizont Galerie in Budapest. Her chromogenic works have been reviewed in *the New York Times*, *Artforum*, and *ArtSlant*, among others.

Kang Seung Lee is a Korean-American multidisciplinary artist whose works have been exhibited at, among others, documenta fifteen, Kassel, the Whitney Museum of American Art, the New Museum Triennial, and MASS MoCA. His works are represented in the collections of the Solomon R. Guggenheim Museum in New York, the Los Angeles County Museum of Art, and the Getty Research Institute, among others.

Marton Nemes is a multimedia artist based in New York. His work focuses on paintings, sculptures, and installation and sound works. He has had solo exhibitions in Hong Kong, London, Budapest, and Munich, among others. He will represent Hungary in the 60th Venice Biennale in 2024.

Allana Clarke is a sculptor and video artist. Born in Trinidad & Tobago, her works have been shown at galleries and fairs in Paris, Basel, New York, London, and Cologne, among others. She is also an Assistant Professor in the art department at Wayne State University.

David Pagel is an American art curator, critic, and educator. He is a professor of art theory and history at Claremont Graduate University, where he has taught in the art department since 1994. He is a regular art critic for the *Los Angeles Times*, and has curated exhibitions at the Parrish Art Museum and the Beacon Arts Building, among others.

Julia Rooney is a multidisciplinary artist whose paintings, paperworks, and installations explore the space between analogue and digital media. She received her MFA in painting from Yale University and her BA in Visual Studies from Harvard University. She is represented by Freight+Volume Gallery in New York City.

Ernest A. Bryant III is an American artist, critic, and educator. He is currently a Clinical Assistant Professor of Art at New York University, after receiving his MFA in Painting from Yale University.

Deborah Druick's paintings use stylized figuration, formal patterns, and saturated color. Druick began focusing exclusively on her studio practice in 2016, and has shown in exhibitions nationally and internationally, including at the Shrine Gallery in New York and at Pulse Miami.

K. (who asked to be identified by first initial only) is a Moroccan-American self-taught artist working across sculpture, photography, installation, video, and text. Their work has been shown in recent solo exhibitions in Montreal, Los Angeles, Columbus, Chicago, and New York.

Ellie María Rentería is a transfemme latinx artist from Southern Arizona. Her creative focus centers on masks as a medium for transformation and self-expression in art and performance. Her work can be found on social media at @elliemadeitout.

Philip Tinari is an American writer, critic, art curator, and expert in Chinese contemporary art. He is currently the director and CEO of the UCCA Center for Contemporary Art in Beijing, and is a contributing editor at *Artforum*, having launched the magazine's Chinese edition in 2008.

APPENDIX B: BREAKDOWN OF ARTIST-INTERVIEW PARTICIPANTS*

Age	**Gender**	**Medium****	**Race****
Under 35 (4)	Male (7)	Photography (3)	Caucasian (8)
35-55 (10)	Female (8)	Painting (5)	Black (3)
56 and up (2)	Nonbinary (1)	Sculpture (5)	Asian (3)
			Other (3)****
		Film/Video (3)	
		Mixed Media (7)	
		Drawing (4)	
		Non-Fine Art (as conventionally defined) (1)	

** Some artists are marked in more than one category.

***One artist is marked in more than one category.

**** The artists in this category are Latinx, Moroccan, and Colombian.

*Excludes the four non-artist (gallerist, curator, critic) interviewees.