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Art After Warhol

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ABSTRACT

Copyright law generally prohibits copying. Contemporary art has increasingly come to rely on copying. Thus, the two are 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 refused to find that Warhol’s famous brand of unlicensed appropriations constituted fair use. The dissent, and much of the commentary published after the decision, largely replicated the traditional argument, warning that the Court’s holding will have existential consequences—striking at the very heart of the way in which artists today have been raised to make and understand art.

This Article presents qualitative empirical evidence that calls the traditional argument into question for two reasons. First, because the traditional argument overestimates the role of law in artists’ day to day practice, and second, because artistic practice may be moving away from the type of wholesale copying (often called “appropriation art”) that characterized much of postmodern artistic practice. Through twenty interviews with leading contemporary artists, museum curators, and gallerists, this Article highlights an art world more attuned to 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. Other artists disavowed appropriative practices altogether, citing the power and capital imbalances that often attend such takings. Where artists did take without asking, it was from corporations rather than individuals, and they did so to comment on how the appropriated image specifically perpetuates systems of unequal power and capital—a form of critical appropriation that *Warhol* leaves, hopefully, intact.

This Article outlines how contemporary artists are developing an ethics of appropriation almost entirely independent from the law—but one that may be more consonant with copyright law than the traditional argument has assumed.



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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 . . . 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.

- New York City-based artist Liz Nielsen²

It would be difficult to overstate the effect that the postmodern turn³—favoring pastiche,⁴ repetition, and remix culture⁵ as a critical reaction to modernism, originality, and the Romantic author—has had on intellectual property law and scholarship. At the turn of the twenty-first century, as digitization picked up pace and user-generated websites like YouTube revolutionized the way that consumers engaged with content, scholars theorized that we were on the cusp of a broad cultural shift, from a

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1. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 586 (2023) (Kagan, J., dissenting) (quoting Brief for The Robert Rauschenberg Foundation, Roy Lichtenstein Foundation, Joan Mitchell Foundation, Brooklyn Museum, and College Art Association as Amici Curiae Supporting Petitioner at 6, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869)) (internal quotations omitted).
 2. Telephone Interview with Liz Nielsen (Jan. 25, 2023) [hereinafter Nielsen Interview] (notes on file with author).
 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, 1413 (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. On what constitutes “pastiche,” see *infra* Part II.A.
 5. See LAWRENCE LESSIG, REMIX 28 (2008).

“Read/Only” to a “Read/Write” culture.⁶ The law, many scholars argued, was wholly out of step with our new digital age of copying, remixing, collage, cut-and-paste, and mash ups—with copyright law, which generally prohibits such copying, as the foremost culprit.⁷

Perhaps most emblematic of this purported clash between the law and the practice on the ground is fine art production,⁸ which, according to the art critic David Joselit, increasingly “marginalizes the production of [new] content in favor of producing new formats for existing images.”⁹ This practice, in which source imagery by one creator is reproduced in *toto* by another for some different purpose, is sometimes referred to as “appropriation art”—though use of the terminology to refer to “a relatively small segment of creators . . . misunderstands,” in leading art law scholar

6. *Id.*

7. See, e.g., 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, 1 (2004); LESSIG, *supra* note 5; Sonya G. Bonneau, *Ex Post Modernism: How the First Amendment Framed Nonrepresentational Art*, 39 COLUM. J.L. & ARTS 195, 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 FORDHAM L. REV. 347, 348 (2005) (describing the “postmodern” copyright user as one who celebrates rote copying, because copying that favors transformation over rote copying privileges romantic authorship).

8. Throughout this Article, I use the term “art” to refer to works made by individuals participating in the “art world” as it is conventionally understood. See, e.g., Pamela M. Lee, *Boundary Issues: The Art World Under the Sign of Globalism*, ARTFORUM (Nov. 2003), <https://www.artforum.com/features/boundary-issues-the-art-world-under-the-sign-of-globalism-167783> [<https://perma.cc/MYQ2-GQ55>] (“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; see 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) (describing the delineations between “art” and “other forms of visual expression”); Stephen Frailey, *Objects of Desire: Photography and the Language of Advertising*, ARTFORUM (Mar. 2023), <https://www.artforum.com/events/objects-of-desire-photography-and-the-language-of-advertising-250983> [<https://perma.cc/968U-JQV4>] (“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.”).

9. See Adler, *supra* note 8, at 571 (citing DAVID JOSELIT, *AFTER ART* 58 (2013)).

Amy Adler's view, just "how central and pervasive" this type of copying has become to contemporary art.¹⁰

Indeed, the academic literature is rife with anecdotal theories that "[c]opying is now so ubiquitous in art that some have complained it has become 'hegemonic.'"¹¹ This framework—emphasizing the ubiquity, normativity, and inevitability of copying, often rote copying—I call: intellectual property's postmodern turn.¹² Professor Sonia Katyal sums up the purported clash between the postmodern turn and the laws that regulate copying—what she calls the "traditional argument"—thusly: "artists and activists have been forced to abandon artistic projects for fear of being sued for infringement."¹³

But in recent years, many within and outside of the academy have highlighted how copying often comes at the expense of those with less power and visibility. Creators have increasingly called for more attribution and fair compensation, bringing heightened awareness to the widening gap between the superstar artists who appropriate and the marginalized creators behind some of the most notoriously-appropriated works.¹⁴ Some scholars, in conversations surrounding how the field of intellectual property might be revitalized by Critical Legal Studies, have pointed out that copyright doctrines, such as fair use, may well open the door for "well-financed artists

10. Adler, *supra* note 8, at 571 (citations omitted). 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 who engaged in wholesale copying of others' works for *critical* purposes. *See id.* at 571 n.42. According to Adler, our current era has given way to what I will call uncritical appropriation—appropriation without critical intent. *See id.* 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. Brief for Amici Curiae Barbara Kruger and Robert Storr in Support of Petitioner the Andy Warhol Foundation for the Visual Arts, Inc. at 3–4, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869) [hereinafter *Artists' Brief*]. It is *this* type of copying—the incorporation of third-party source imagery into one's own work—that this Article is concerned with.

11. Adler, *supra* note 8, at 572.

12. *See infra* Part I; *see also* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT Soc'y U.S.A. 1, 7 (1997) (using the term postmodernism to refer to concepts invoking the "death of the author"); Cohen, *supra* note 7, at 348 n.4 (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," and acknowledging that while "'postmodern' properly understood has both a broader and more specific definition than this formulation suggests . . . [w]hether rightly or not, . . . 'postmodern' is the adjective that copyright scholars most commonly associate with this user").

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

14. *See infra* Part II.B.

like Richard Prince to come along and appropriate the work of less well-financed artists,” resulting in “distributive consequences.”¹⁵

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.¹⁶ Yet the dominant narrative posited that a loss for Warhol would be a loss for art.¹⁷ Indeed, the Warhol Foundation—and numerous amicus briefs—advised the Justices that finding against the Foundation would have existential consequences. As one artists’ foundation amicus 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.”¹⁸ As Professor Adler highlights, Warhol epitomized 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*.”¹⁹

But what if the dominant scholarly argument is out of step with how artists *today* actually create? To date, there have been few studies investigating how contemporary working artists—those who are actively making new work and exhibiting that work—actually approach such hotly

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15. Sonia K. Katyal, Peter Goodrich & Rebecca L. Tushnet, *Panel I: Critical Legal Studies in Intellectual Property and Information Law Scholarship*, 31 *CARDOZO ARTS & ENT. L.J.* 601, 617 (2013) (footnotes omitted).
 16. The majority opinion in *Warhol* starts with this seeming David-and-Goliath struggle. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 514 (2023).
 17. See Brief for The Robert Rauschenberg Foundation, Roy Lichtenstein Foundation, Joan Mitchell Foundation, Brooklyn Museum, and College Art Association as Amici Curiae Supporting Petitioners, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023) (No. 21-869) [hereinafter *Art Institutions’ Brief*]; see also Brief of Art Law Professors as Amici Curiae in Support of Petitioner, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869) [hereinafter *Art Scholars’ Brief*]; Artists’ Brief, *supra* note 10; see also Blake Gopnik, *The Supreme Court May Force Us to Rethink 500 Years of Art*, *N.Y. TIMES* (Mar. 2, 2023), <https://www.nytimes.com/2023/03/01/arts/design/appropriation-warhol-renaissance-copyright.html> [<https://perma.cc/TXB2-NX9L>].
 18. *Art Institutions’ Brief*, *supra* note 17, at 34; see also *Art Scholars’ Brief*, *supra* note 17, at 10 (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 10, at 25 (arguing that the Second Circuit’s fair use decision “will chill artists’ creative expression”); Artists’ Brief, *supra* note 10, 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 . . .”).
 19. Adler, *supra* note 8, at 572.

contested issues of appropriation, licensing, attribution, and permissions.²⁰ This Article seeks to fill that gap. It presents novel qualitative data that provides a real, on-the-ground picture of how fine artists—including those who are exhibiting and showing work at some of the most influential museums and galleries in the world—conceive of art’s relationship to appropriation.²¹ This qualitative evidence, gathered from twenty extensive interviews with visual artists, museum curators, and gallerists calls the traditional argument into question for two reasons: First, by underscoring that contemporary artists work mostly independently of those legal frameworks long-critiqued as chilling artistic production, and second, by suggesting that the system of ethical norms that govern the contemporary art world are more compatible with copyright law than the traditional argument has assumed.

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.²² 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.²³ Other artists disavowed licenses but engaged in appropriation techniques anyway; they believed that the theft of a particular image—usually one owned by a more powerful corporate entity—was necessary for purposes of commenting critically upon that image, a set of practices that I will 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

20. 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* 287 (2015) [hereinafter *EUREKA MYTH*]. Professor Silbey then applied the method to the latter question in *AGAINST PROGRESS: INTELLECTUAL PROPERTY AND FUNDAMENTAL VALUES IN THE INTERNET AGE* (2022) [hereinafter *AGAINST PROGRESS*]. See also Mark McKenna & Jessica Silbey, *Investigating Design*, 84 U. PITT. L. REV. 127 (2022) (discussing how industrial and graphic designers approach their practice). Outside of Silbey’s influential work, other studies have likewise sought to understand how the law conditions creative production, albeit on narrower grounds, such as the doctrine of fair use specifically. See Patricia Aufderheide, Tijana Milosevic & Bryan Bello, *The Impact of Copyright Permissions Culture on the U.S. Visual Arts Community: The Consequences of Fear of Fair Use*, 18 NEW MEDIA & SOC’Y 2012, 2021, 2024 (2016).

21. For a list of interview subjects and their biographies, see Appendix A.

22. Aufderheide et al., *supra* note 20, at 2021, 2024.

23. *Infra* Part III.B.1.b.

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 U.S. Supreme Court took Warhol to task for²⁴—as “lazy” or “careless.”²⁵ Moreover, almost uniformly, the interviewees expressed a belief that we have moved past postmodernism—that the movement's once-transgressive strategies of criticizing originality and authorship while simultaneously vaunting the copied image has become hackneyed and trite, now demanding new forms of artistic innovation.

While it is, of course, impossible to draw definitive conclusions from a limited qualitative data set, this data is valuable insofar as it captures nuances and richness that quantitative data cannot by providing “meaning, rather than measurement, to the phenomena observed.”²⁶ Unlike quantitative research, qualitative research does not seek to answer questions like “how many”: whether more artists use appropriation techniques than not or whether the majority of artists support Warhol or Goldsmith. Instead, qualitative research seeks to answer the *whys* and *hows* of artists who use appropriation. *Why* might they do so? And *how* do they use appropriation—are they, for example, indiscriminate as to whom they appropriate from? Of the artists who do not use appropriation, why might that be so? Digging into these nuanced answers complicates the notion that artists today simply cut and paste with abandon, that all the world is 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 overwhelmingly paint a picture of artists “transforming” others' images “to ask critical questions about” them;²⁷ of artists deeply attuned to potential imbalances in power, capital, and visibility between the creator of the source material and the appropriator;²⁸ of artists “creating around” legal issues;²⁹ and, above all else, of artists striving to make an original

24. See *infra* Part II.C.

25. For how copyright's fair use doctrine has demanded (or not demanded) that a work “comment on” the original, see *infra* Part II.

26. EUREKA MYTH, *supra* note 20, at 287 (citing PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 243, 248 (2007)).

27. Telephone Interview with Allana Clarke (Jan. 23, 2023) [hereinafter Clarke Interview] (notes on file with author).

28. *Infra* Part III.B.3.c.

29. *Infra* Part III.B.2.

contribution in the world—just like those who had first engaged in the postmodernist critique of originality were doing.³⁰

This Article consists of four parts. Part I provides a brief overview of intellectual property's postmodern turn, when legal scholars reacted to large-scale shifts in criticism and culture that questioned Romantic authorship, which often used the wholesale appropriation of works created by others as a means of questioning authorship and originality.³¹ This, however, presented a problem for copyright law, which generally prohibits such rote copying unless the secondary user can assert a fair use defense.³² Part II examines several major decisions—involving famous appropriation artists like 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 were 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 call the dominant narrative into question. The data paints a complex and nuanced picture of how artists think about issues like appropriation and permission in an art world fraught with disparities in status, capital, and power. The artists I spoke to often sought permissions or licenses—but for ethical or moral reasons, rather than legal ones. Where they did not 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 how the appropriated image perpetuates systems of unequal power and capital, a form of critical appropriation that is more likely to constitute fair use, even after *Warhol*.³³

Part IV considers the implications of this evidence and what it means for intellectual property law. My findings tentatively suggest that long-standing legal assumptions about the chilling effect of copyright, at least in the contemporary art world,³⁴ may be overstated: both because artists work largely independently of the law and because artistic practice itself might be moving away from the appropriative art that has dominated the legal

30. *Infra* Part III.B.2.

31. *See generally* DOUGLAS CRIMP, *Appropriating Appropriation*, in *ON THE MUSEUM'S RUINS* 126–37 (1993) (outlining artistic practices that fall into the definition of “appropriation” as art historians defined it).

32. *See generally infra* Part II.

33. *See infra* Part III.B.1.a.

34. *See supra* note 8 for the definitions of the contemporary art world.

imagination. Yet, these findings also highlight how in other areas, copyright *does* marginalize the issues that artists feel most strongly about—fairness, equity, and artistic labor. The challenge for intellectual property scholars, then, 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,³⁵ 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.³⁶ And it is true that the age of the “artist as brand”³⁷ means a superstar artist like Richard Prince can simply take any “old photo”³⁸ taken by some lesser known artist, put his name on it, and receive 10x the returns, as the tech-world value-speak goes.³⁹ 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 simply shrug their shoulders, they are imagining what a fairer world looks like. In the pages that follow, I outline how artists are working towards an ethics of appropriation.

35. Scott Reyburn, *JPG File Sells for \$69 Million, as ‘NFT Mania’ Gathers Pace*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/11/arts/design/nft-auction-christies-beeple.html> [<https://perma.cc/6FVB-YABH>].

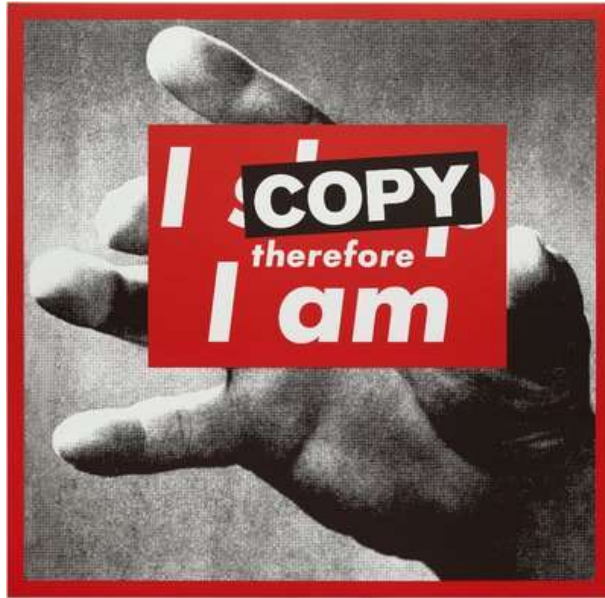
36. See Harmon Siegel, *Quondam Theory*, ARTFORUM (Feb. 2023), https://www.artforum.com/columns/harmon-siegel-on-benjamin-h-d-buchlohs-gerhard-richter-painting-after-the-subject-of-history_-252435 [<https://perma.cc/PQ8Z-B6ZW>].

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

38. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 574 (2023) (Kagan, J., dissenting).

39. George Deeb, *How to Model a 10x Return for Your Investors—The Bare Minimum to Get Their Attention*, FORBES (Dec. 3, 2013, 9:38 AM), <https://www.forbes.com/sites/georgedeeb/2013/12/03/how-to-model-a-10x-return-for-your-investors-the-bare-minimum-to-get-their-attention/> [<https://perma.cc/KVB7-SRKZ>].

I. INTELLECTUAL PROPERTY'S POSTMODERN TURN



Superflex, *I Copy Therefore I Am* (2011)⁴⁰

Perhaps no field of law has been more influenced by postmodernist thought than intellectual property. 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, that refuses to acknowledge the one “sine qua non” of copyright—originality?⁴¹ Throughout the 90s and 2000s, intellectual property law scholars wrestled with this seemingly intractable divide between the artistic practice and the law that seemed to inhibit it.⁴² This Part provides a brief overview of the postmodern shift, in theory and in art historical practice, revealing how scholars advocated for a new framework to accommodate their copy-centric practices—reshaping the fields of copyright, First Amendment, and art law scholarship in the process.

It is difficult 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, to provide a rough conception of

40. This image appears in Adler, *supra* note 8, at 561. I use it here because the image nicely sums up what I term the “postmodern turn.”

41. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

42. See *infra* Part II.

the developments in criticism and culture that legal scholars were reacting to.

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

In a 1984 essay later developed into a book, the critic-philosopher Fredric Jameson used “postmodernism” to describe a “break” from the “hundred-year-old modern movement.”⁴³ Jameson, along with other critical theorists and philosophers writing at the time—like Richard Rorty, Jean Baudrillard, and Jean-Francois Lyotard—simultaneously embodied and documented a new “incredulity” toward modernism’s belief in overarching truths, grand narratives, and history’s progression toward general betterment.⁴⁴ Calling this new movement postmodernism, these philosophers called for a break from the century-old modernist project.⁴⁵ To 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, and the architecture of Robert Venturi and Denise Scott Brown.⁴⁶ The postmodern movement was marked by a fondness for pastiche over parody,⁴⁷ an integration of aesthetic production with commodity production,⁴⁸ and the purposeful erasure of artistic subjectivity, intentionality, and affect.⁴⁹

Postmodernists were explicitly reacting to what they perceived to be Romantic—and modernist—posturing about creation *ex nihilo* that had

43. FREDRIC JAMESON, *The Cultural Logic of Late Capitalism, in POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM* 1 (1991).

44. See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION* xxiv (Geoff Bennington & Brian Massumi trans., Manchester Univ. Press 1984).

45. See JAMESON, *supra* note 43, at 1; see also LYOTARD, *supra* note 44, at xxiii–xxv; JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* (Sheila Faria Glaser trans., Univ. of Mich. Press 1994) (on the simulacrum as a copy without an original); *THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD* (Richard Rorty ed., 1992) (highlighting postmodernism as a mere semantic turn, but noting that the framework—of society as simulation, of truth as societal narrative—has always existed).

46. See JAMESON, *supra* note 43, at 1–2; see also ROBERT VENTURI, DENISE SCOTT BROWN & STEVEN IZENOUR, *LEARNING FROM LAS VEGAS* (1972).

47. See JAMESON, *supra* note 43, at 17.

48. *Id.* at 4.

49. *Id.* at 11.

come before.⁵⁰ 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.”⁵¹ Yet, rather than envision some form of progressing beyond that false Romantic sensibility of creation *de novo*, postmodernists wanted its total opposite. As Jürgen 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?”⁵²

The postmodernists chose the latter. To challenge the “fiction of the creating subject,” Romantic art needed to “give[] way to the frank confiscation, quotation, excerptation, accumulation and repetition of already existing images”—to the rote copy.⁵³ And technological changes—most obviously, the invention of photography—made emphasis on the rote copy as the perfect mechanism for challenging “[n]otions of originality, authenticity and presence.”⁵⁴ It is as if, to fully complete the imperative “schism” from the Romantic Enlightenment ideal, the postmodern subject could no longer create at all—only take from what already existed.⁵⁵

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—then Andy Warhol, the subject of last year’s highly-anticipated Supreme Court case,⁵⁶ was the perfect front man for the new postmodern aesthetic.⁵⁷ Critics, such as Jameson, hailed Warhol as a premier example of postmodernist art, noting how his works, centering around bottles of Coke or Campbell’s soup cans, “explicitly foreground the commodity fetishism of a

50. 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. See Xiyin Tang, *That Old Thing, Copyright . . . : Reconciling the Postmodern Paradox in the New Digital Age*, 39 AIPLAQJ. 71, 74–77 (2011).

51. ROSALIND E. KRAUSS, *The Originality of the Avant-Garde*, in *THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS* 151, 157 (1986).

52. Jürgen Habermas, *Modernity—an Incomplete Project*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 9–10 (Hal Foster ed., 1983).

53. Douglas Crimp, *On the Museum’s Ruins*, in *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* 53 (Hal Foster ed., 1983) (internal citation omitted).

54. *Id.*

55. See KRAUSS, *supra* note 51, at 170.

56. See *infra* Part II.C.

57. Cf. JAMESON, *supra* note 43, at 9 (on Warhol as an example of a postmodern painter, devoid of affect and “turn[ing] centrally around commodification”); HAL FOSTER, ROSALIND KRAUSS, YVE-ALAIN BOIS, BENJAMIN H.D. BUCHLOH & DAVID JOSELIT, *ART SINCE 1900: 1945 TO THE PRESENT* 411–15 (3rd ed. 2016) (commenting on the art critic Clement Greenberg’s championing of Jackson Pollock as a true modernist painter).

transition to late capital,” emphasizing a choice by Warhol to strip works of any evocation of feelings or emotions in favor of displaying random objects culled from the detritus of everyday advertising.⁵⁸ Warhol, with his prior background as a commercial illustrator for women’s shoes, presaged our current moment of art-market-as-stock-market—and the artist as a businessman.⁵⁹

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 a myriad of legal problems.⁶⁰ As Part II details further, such charges seemed to directly clash with postmodernism: “[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.”⁶¹ Art historians such as Hal Foster trace such methods back further to the master of the readymade object, Marcel Duchamp, who was similarly charged with “plagiarism” when he presented a urinal as art almost five decades earlier.⁶² Pop artists like Warhol, 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.⁶³

The artist Richard Prince, a frequent antagonist of copyright law,⁶⁴ can also be said to have arisen firmly in the postmodern tradition. In particular, Prince has been named as part of a broader movement, fittingly called “appropriation art.”⁶⁵ The term “emerged around 1980 to characterize work by artists such as Richard Prince and Sherrie Levine,”⁶⁶ who rephotographed (“appropriated”⁶⁷) existing photographic works with “no transformations, no additions.”⁶⁸ Art historian Douglas Crimp noted that such appropriation practices were postmodern because in these “undisguised theft[s] of already

58. JAMESON, *supra* note 43, at 9.

59. *See id.*; *see also* Tang, *supra* note 37.

60. MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 86 (2005).

61. *Id.* at 88.

62. FOSTER ET AL., *supra* note 57, at 515.

63. *See id.* at 445–47; *see also* BUSKIRK, *supra* note 60, at 86–87.

64. *See infra* Subpart II.B.

65. Sven Lütticken, *The Feathers of the Eagle*, 36 *NEW LEFT REV.*, Nov.–Dec. 2005, at 109, 109 (2005).

66. *Id.*

67. CRIMP, *supra* note 31, at 129.

68. *Id.*

existing images,” an artist like Levine “lays no claim to conventional notions of artistic creativity.”⁶⁹ Prince too fits into this category through his “appropriation of advertising images, his thrusting unaltered pictures into the context of the art gallery, exactly duplicated”—again, with no transformations and no additions.⁷⁰

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, working well before the age of the Internet, somehow cannily predicted our age of the “infinite scroll”⁷¹: of endless feeds, screening, and scanning.⁷² Indeed, Professor Adler argues that “while art has always relied on copying, the technique has taken on a new urgency in contemporary culture. Because of shifts in both art and technology, copying has now become a central subject of art—as well as a basic tool of how people make it.”⁷³ Adler’s evocation of the so-called “hegemon[y]” of copying is fully consistent with how copying is portrayed more broadly in legal scholarship.⁷⁴ I call this framework—that focuses on the ubiquity, importance, and, well, hegemony, of copying, often rote 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. One might conceive of the framework’s import for intellectual property law to have been shaped by influential scholarship published 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 deliberation⁷⁵ and towards what he termed a “democratic

69. *Id.*

70. *Id.* at 135.

71. Dayna Tortorici, *Infinite Scroll: Life Under Instagram*, THE GUARDIAN (Jan. 31, 2020, 1:00 PM), <https://www.theguardian.com/technology/2020/jan/31/infinite-scroll-life-under-instagram> [<https://perma.cc/PFP9-JS55>].

72. See FOSTER ET AL., *supra* note 57, at 449.

73. Adler, *supra* note 8, at 568.

74. *Id.* at 572 (internal quotation marks omitted).

75. Balkin, *supra* note 7, at 1.

culture,” in which “people are free to appropriate elements of culture.”⁷⁶ Under this model, “freedom of speech is *interactive* and *appropriative*.”⁷⁷ Writing that “consumers of digital media products are not simply empowered to copy digital content,” Balkin noted that “they are also empowered to alter it, annotate it, combine it, and mix it with other content.”⁷⁸

In an article published one year later, Professor Julie Cohen termed this new digital consumer the “postmodern user.”⁷⁹ 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,⁸⁰ Professor Cohen defines the postmodern user as one “who exercises limited and vaguely oppositional agency in a world in which all meaning is uncertain and all knowledge relative.”⁸¹ 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”?⁸² 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.”⁸³ 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.”⁸⁴

Thus, throughout the 2000s, the postmodern turn came to frame wider debates about intellectual property. Proponents hewing roughly to the lines of Balkin’s “democratic culture” argued that copyright laws must be changed because new technologies that made it easier for consumers to cut and paste had rendered “the form and reach of copyright law . . . radically out of date.”⁸⁵ Art historians, too, seemed to be in agreement: as the critic and historian Sven

76. *Id.* at 4.

77. *Id.* (emphasis in original).

78. *Id.* at 8 (footnotes omitted).

79. Cohen, *supra* note 7, at 349.

80. *See supra* Subpart I.A.

81. Cohen, *supra* note 7, at 348.

82. *Id.* at 369.

83. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

84. Cohen, *supra* note 7, at 367.

85. LESSIG, *supra* note 5, at 253.

Lütticken noted, “Contemporary culture is built on appropriation. With digital technology, it has become ever easier for consumers to reuse and manipulate images.”⁸⁶ Meanwhile, opponents lamented the marriage of postmodernist theory with the rise of the Internet—what they dubbed a form of “techno-postmodernism”—and the damage that the marriage wrought upon individual authorship.⁸⁷ 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.”⁸⁸

This debate was further exemplified by a series of art law cases in the 1990s and early 2000s that seemed to lay bare the tensions between postmodern theory and practice and the law, as the following Part sets forth.

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.⁸⁹ Note that the second element, copying, requires copying not of mere ideas, but of protected expression.⁹⁰ In cases where a plaintiff has established both elements, the defendant could then argue fair use, which “permits other people to use copyrighted material without the owner’s consent in a reasonable manner for certain purposes.”⁹¹ 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.⁹² The second evaluates “the nature of the copyrighted work” (such as whether it is more factual or more creative in nature).⁹³ The third looks to “the amount and

86. Lütticken, *supra* note 65, at 109.

87. Ginsburg, *supra* note 12, at 8.

88. *Id.*

89. *See, e.g.*, *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992).

90. *See, e.g.*, 4 NIMMER ON COPYRIGHT § 13.03[B][2] (2023) (discussing how copying of unprotected matters—including ideas or material in the public domain—cannot establish infringement).

91. *Koons*, 960 F.2d at 308.

92. 17 U.S.C. § 107(1).

93. § 107(2).

substantiality of the portion used in relation to the copyrighted work as a whole,”⁹⁴ and the fourth looks to “the effect of the use upon the potential market” for the copyrighted work.⁹⁵

But copyright law—even with the fair use defense—proved hostile to the postmodernist art described in the previous Part. 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 the fair use doctrine to respond to fine art production.

A. Jeff Koons

Jeff Koons places himself in a lineage of artists dating back to Duchamp, and his predecessors, through Warhol.⁹⁶ Like other postmodernists, Koons pulled imagery from the detritus of modern life, believing them to be commonplace and familiar.⁹⁷ 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.⁹⁸ Koons got to work, tearing off the portion of the postcard that showed the original photographer’s, Art Rogers, copyright in the work.⁹⁹ Koons 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, Koons instructed his artists: “the ‘work must be just like photo—features of photo must be captured;’ later, ‘puppies

94. § 107(3).

95. § 107(4).

96. *Koons*, 960 F.2d at 304–09.

97. *Id.* at 305; see also JAMESON, *supra* note 43, at 9.

98. *Koons*, 960 F.2d at 305.

99. *Id.*

need detail in fur. Details—Just Like Photo!”¹⁰⁰ After Art Rogers brought suit, Koons testified that he chose the image because it was “typical, commonplace and familiar . . . ‘rest[ing] in the collective sub-consciousness of people.”¹⁰¹ Koons argued that his appropriation of the plaintiff’s photograph was fair use because he was “acting within an artistic tradition of commenting upon the commonplace.”¹⁰² The argument was rejected by the Second Circuit. In rejecting Koons’ fair use defense, the court first emphasized that the point of parody, a type of artistic expression that is “encouraged . . . by copyright law,” 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.”¹⁰³ Thus, to constitute a protected parody, “*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.”¹⁰⁴ That rule was necessary, the court reasoned, 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 separate expression, attributable to a different artist.”¹⁰⁵ Koons, by failing to make “any parody of the photograph ‘Puppies’” itself, could not satisfy that definition.¹⁰⁶

The problem is, of course, that postmodernism refuses to recognize that there is anything unique about the original work to comment upon or criticize in the first place. As Jameson documented, where 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.¹⁰⁷ In other words, pastiche outright refuses to recognize that there is anything unique about the original work to comment or criticize in the first place.¹⁰⁸

Accordingly, 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, that question became the central point of contention in a case involving the appropriation artist Richard Prince.

100. *Id.*

101. *Id.*

102. *Id.* at 310.

103. *Id.* at 309.

104. *Id.* at 310 (emphasis added).

105. *Id.*

106. *Id.*

107. JAMESON, *supra* note 43, at 16–19.

108. *See id.*

B. Richard Prince

While much of Richard Prince's most well-known works consist of rephotographs of advertising,¹⁰⁹ his appropriations also extended to other types of images. In 2008, Prince exhibited a series titled *Canal Zone* at the blue-chip Gagosian Gallery.¹¹⁰ *Canal Zone* consisted of 28 images appropriated from a book titled *Yes, Rasta*, which was published in 2000.¹¹¹ The photographs in *Yes, Rasta* were taken and owned by professional photographer Patrick Cariou, who had "spent time with Rastafarians in Jamaica over the course of some six years, gaining their trust and taking their portraits."¹¹² Prince's *Canal Zone* "consist[ed] almost entirely of images taken from *Yes, Rasta*, albeit collaged, enlarged, cropped, tinted, and/or over-painted."¹¹³

Cariou had been in discussions with a smaller gallery to display photographs from *Yes, Rasta* around the same time that Prince began exhibiting *Canal Zone*.¹¹⁴ But that display, which would have post-dated *Canal Zone*, was cancelled because the smaller gallery "did not want to exhibit work which had been 'done already' at another gallery."¹¹⁵ Cariou then sued for copyright infringement. In the ensuing case, much of the district court's opinion focused on Prince's seeming lack of transformative intent, writing:

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.¹¹⁶

In many ways, Prince's testimony was true to the heart of postmodern art: refusing to "lay[] ... claim[s] to conventional notions of artistic creativity," and utilizing appropriations with "no combinations, no transformations, no additions, no synthesis."¹¹⁷ And illustrative of the traditional argument's point that copyright law was hostile to such

109. See FOSTER ET AL., *supra* note 57, at 587 (discussing Prince's famous rephotographs of Marlboro advertisements and newspaper ads).

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

111. *Id.* at 343–44.

112. *Id.* at 343.

113. *Id.* at 344.

114. See *id.*

115. *Id.*

116. *Id.* at 349 (internal citations omitted).

117. CRIMP, *supra* note 31, at 129.

postmodern appropriations,¹¹⁸ the district court found that this testimony showed that Prince had no transformative intent “within the meaning of Section 107,” the fair use statute.¹¹⁹ The court noted that while “a transformative use [was] 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.¹²⁰ Accordingly, the district court found against Prince.

On appeal, the Second Circuit reversed, taking 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.’”¹²¹ Rather than focusing on Prince’s intent or message, the Second Circuit noted that what was important for evaluating transformativeness was the *court’s* observation of the artwork.¹²² Here, the Second Circuit’s observation was that “[w]here 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.”¹²³

While the court’s unabashed foray into artistic critique (notwithstanding the Supreme Court’s famous admonishment against doing so¹²⁴) was notable, it was the appeals court’s analysis of the fourth fair use factor—which analyzed whether Prince’s use of Cariou’s work harmed the potential market or value of the original—that became the most notorious. The Second Circuit once again disagreed with the district court, which had found that the fourth factor favored Cariou because his gallerist cancelled a showing of his photographs once she learned of Prince’s Gagosian show. The appellate court, by contrast, highlighted how “Prince’s work appeals to an entirely different sort of collector than Cariou’s.”¹²⁵ Whereas Cariou had only made \$8000 from sales of his book, Prince’s “*Canal Zone* artworks have sold for two million or more dollars.”¹²⁶ The court went on to emphasize “[t]he invitation list for a dinner that Gagosian hosted in conjunction with [Prince’s

118. See Katyal, *supra* note 13 and accompanying text.

119. *Cariou*, 784 F. Supp. 2d at 349 (“Pri[n]ce’s own testimony shows that his intent was not transformative within the meaning of Section 107 . . .”).

120. *Id.* at 347.

121. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (citing *Cariou v. Prince*, 784 F. Supp. 2d 337, 348 (S.D.N.Y. 2011)).

122. See *Prince*, 714 F.3d at 707.

123. *Id.* at 706.

124. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903); see *infra* Subpart IV.C.

125. *Cariou*, 714 F.3d at 709.

126. *Id.*

show] included a number of the wealthy and famous such as the musicians Jay-Z and Beyoncé Knowles . . . professional football player Tom Brady, model Gisele Bündchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour . . . and actors Robert DeNiro, Angelina Jolie, and Brad Pitt.”¹²⁷

This part of the decision drew particular backlash. In one 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.”¹²⁸ And while some scholars, like Professor Adler, were “unapologetically Team Richard Prince,”¹²⁹ others, like Gilden, pointed out the Second Circuit’s opinion “repeatedly use[d] reasoning infused with racial and gender hierarchies.”¹³⁰ Professor Sonia Katyal noted the “distributive consequences” of a wealthy artist like Prince harnessing the doctrine of fair use to sell million-dollar artworks off the backs of lesser-known artists.¹³¹ Similarly, Professor Anjali Vats noted how cases like *Cariou* “highlight how transformativeness disparately benefits white men.”¹³² 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.”¹³³

Richard Prince, on the other hand, seemed emboldened. A year after his win in *Cariou*, Prince resurfaced with a new exhibit of rephotographed images at the Gagosian.¹³⁴ 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:

127. *Id.*

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

129. Adler, *supra* note 8, at 561.

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

131. See Katyal et al., *supra* note 15, at 617.

132. Anjali Vats, *The Racial Politics of Fair Use Fetishism*, 1 LSU L.J. FOR SOC. JUST. & POL’Y 67, 85 (2022).

133. Gilden, *supra* note 130, at 357; 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.”).

134. See *Graham v. Prince*, No. 15-CV-10160, 2023 U.S. Dist. LEXIS 83267, at *4 (S.D.N.Y. May 11, 2023).



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



Prince's *Untitled* (Fig. 2)

While Prince 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.¹³⁵ In that case, the district court refused to find for Prince on summary judgment, holding that his copying of Instagram images for his “New Portraits” series was not fair use as a matter of law.¹³⁶ The court found it significant that Prince had no intention to “target” the particular images that he appropriated.¹³⁷ According to the court, without that intention, Prince could have used a litany of other images and still achieved the same visual impact. As to what targeting means, the court went on to cite from the 1994 Supreme Court decision in *Campbell v. Acuff-Rose*, which had stated:

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* that 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*

135. *See id.*

136. *See id.* at *73.

137. *See id.* at *38.

*another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.*¹³⁸

For the district court, “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.’”¹³⁹ Thus, Prince suffered the same fate as the Supreme Court would, just a few days later, bestow upon the Warhol Foundation, and on very similar grounds: he could not provide sufficient “justification” for the borrowing, could not show why it was necessary to use *this* particular copyrighted work, rather than any other.¹⁴⁰

In addition to the point that the secondary user need provide some justification as to the use of a particular copyrighted image, the quoted language from *Campbell* can be read as revealing a second point, which I will call the “see-saw” effect: the more the secondary work comments on the original work, the less important the secondary work’s commercial nature (that is, whether it is sold for profit) becomes. On the other hand, if the secondary work uses the original without otherwise commenting on it, then a work’s for-profit nature is more likely to weigh against fair use. Indeed, as discussed below, that is exactly how the Supreme Court interpreted it, almost three decades after *Campbell* was decided, in *Goldsmith v. Warhol*.

C. Andy Warhol

“Warhol had found the original photo in a women’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* series¹⁴¹

In 1984, the magazine *Vanity Fair* ran a profile of the musician Prince (not to be confused with appropriation artist Richard Prince).¹⁴² To accompany the profile, *Vanity Fair* commissioned Andy Warhol to create a

138. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (emphasis added) (internal citations omitted).

139. *Graham*, 2023 U.S. Dist. LEXIS 83267, at *38 (quoting *Campbell*, 510 U.S. at 580).

140. *Graham*, 2023 U.S. Dist. LEXIS 83267, at *37.

141. RAINER CRONE, *ANDY WARHOL 30* (John W. Gabriel trans., Praeger Publishers 1970).

142. *See Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 34 (2d Cir. 2021), *aff’d*, 598 U.S. 508 (2023).

print utilizing his famous “silkscreen” technique, in which a photograph is reproduced “as a high-contrast two-tone image,” sometimes with color or painted embellishments.¹⁴³ The photograph of Prince that underlay the silkscreen was taken by a photographer, Lynn Goldsmith, and appropriately licensed from her.¹⁴⁴ 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.¹⁴⁵

But unbeknownst to Goldsmith (and *Vanity Fair*), Warhol had *also* created an additional fourteen silkscreen prints and two pencil illustrations based on Goldsmith’s photograph, known collectively as the “Prince Series.”¹⁴⁶ In 2016, when *Vanity Fair*’s parent company, Condé Nast, published an issue commemorating Prince’s life, it chose to license a different image—as shown below on the left—from the Warhol Foundation.¹⁴⁷ This time, Goldsmith was not part of the licensing transaction at all and was only made aware of the existence of the Prince Series upon the publication of the commemorative issue.¹⁴⁸



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

143. *Id.* at 34–35.

144. *See id.* at 32.

145. *See id.* at 34.

146. *See id.*

147. *See id.* at 35.

148. *See id.*

When Goldsmith advised the Warhol Foundation of her perceived copyright infringement claim, the Foundation chose to bring suit for a declaratory judgment on the issue of noninfringement, or, in the alternative, fair use.¹⁴⁹ While the Warhol Foundation¹⁵⁰ prevailed on fair use at the trial court, the Second Circuit later 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 well.”¹⁵¹

In a 7–2 ruling, the Supreme Court affirmed the Second Circuit’s holding—but on much narrower grounds. Rather than issuing a holding addressing whether the entirety of the Prince Series constituted fair use as the Second Circuit had, the Court limited its analysis to the specific licensing transaction between the Warhol Foundation and Condé Nast for the magazine cover commemorating the life of Prince.¹⁵² For the Court, the issue with the 2016 licensing transaction was that Warhol’s foundation “came away with \$10,000” while “Goldsmith received nothing.”¹⁵³ From this, the majority concluded that the Foundation’s use was of a commercial nature, which “tends to weigh against a finding of fair use.”¹⁵⁴ Making matters worse, Warhol also appeared to have no intent whatsoever to comment on, or critically target, Goldsmith’s photograph. In other words, Warhol had little “justification” for the use.¹⁵⁵ If *Campbell’s* dicta is interpreted as trading off commerciality with commentary,¹⁵⁶ the Court held that here, both arrows pointed in the same direction: against fair use.¹⁵⁷

149. *See id.*

150. Andy Warhol passed away in 1987; hence, the Warhol Foundation, which manages the artist’s works, was the plaintiff seeking declaratory judgment.

151. *Andy Warhol Found. for Visual Arts, Inc.*, 11 F.4th at 52. 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” equitable remedies, such as enjoining the distribution of, or even ordering the destruction of, infringing works “appropriate in this case.” *Id.* at 45 n.8.

152. *See Andy Warhol Found. for Visual Arts, Inc.*, 11 F.4th at 32 (holding that the Prince Series as a whole did not constitute fair use). By the time the case came before the Supreme Court, Goldsmith narrowed her request for relief to the 2016 Condé Nast transaction only—and her request for forward-looking relief as to “similar” commercial licensing. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 534 n.9 (2023).

153. *Goldsmith*, 598 U.S. at 514.

154. *Id.* at 537 (quoting *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

155. *Id.* at 539.

156. *See supra* Subpart II.B.

157. *Goldsmith*, 598 U.S. at 537.

It is important to note that Warhol, although 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.¹⁵⁸ As Professor 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”¹⁵⁹ In fact, the Warhol Foundation even went so far as to take out *insurance* against future copyright claims.¹⁶⁰

Warhol, like other appropriation artists, often justified his takings with the idea that the source material was ordinary and banal—and that, by putting his artistic touch on the original source material, he could make it better. For example, in a discussion of the photograph on which Warhol’s famous *Flowers* series was based on, Warhol’s dealer Ivan Karp noted that Warhol “was very innocent of doing disservice to th[e] photographer because th[e] photograph *was not* what you might call a ‘remarkable photograph.’ It was not an earthshaking photograph, but Warhol made a *remarkable* series of paintings out of it . . . they were totally successful, and *we sold them all!*”¹⁶¹

Karp’s quote aligns with the dominant art historical narrative, one in which, according to art historian Rainer Crone, “Warhol had found” an old “photo in a women’s magazine,” a bland image that “won second prize in a contest for the best snapshot taken by a housewife,” and transformed it into something significant and worthy.¹⁶² And yet, as Buskirk keenly points out, “for the original photographers, the familiarity or historic significance of a particular image did not make it [an] anonymous[,] authorless image waiting for Warhol to fill the void.”¹⁶³ As she writes:

158. See BUSKIRK, *supra* note 60, at 87 (noting that Warhol had obtained copyright permissions for his 1981 *Myths* series).

159. *Id.*

160. *Id.*

161. Interview by Patrick S. Smith with Ivan Karp, Owner, O.K. Harris Gallery, in WARHOL: CONVERSATIONS ABOUT THE ARTIST 210, 217 (Patrick S. Smith ed., 1988) (first emphasis added).

162. CRONE, *supra* note 141, at 30.

163. BUSKIRK, *supra* note 60, at 87; see SMITH, *supra* note 161; 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.’”).

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 cropping to create the tight arrangement of flowers and foliage that obviously appealed to Warhol.¹⁶⁴

As for the *Flowers* image, when “[a]sked some years later about the whole business, [the photographer of the original image] Caulfield responded, “[w]hat’s irritating is to have someone like an image enough to use it, but then denigrate the original talent.””¹⁶⁵

Buskirk’s critique of the dominant narrative, in which a dealer like Ivan Karp would praise Warhol’s “remarkable” appropriation of an unremarkable photograph, uncannily presages Sotomayor’s majority opinion.¹⁶⁶ That is, just as the *Goldsmith* majority had noted that the dissent, which would have held that Warhol was entitled to use Goldsmith’s works to make historically significant art, “will not age well,”¹⁶⁷ one wonders, too, whether blithe statements like Karp’s or Crone’s have aged well. At the very least, it might be time to reassess 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—in ways that complicate the dominant narrative.

164. BUSKIRK, *supra* note 60, at 86.

165. *Id.* at 87.

166. Smith, *supra* note 161.

167. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 547 (2023).

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—”¹⁶⁸ in fact “remains essential to much of contemporary art,” as the dominant narrative has long argued.¹⁶⁹ Did working contemporary artists—as noted above, those who have achieved success in the art world¹⁷⁰—as well as the curators and critics who define such success, in fact “respect[]” these practices?¹⁷¹ 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 contemporary artists just the highbrow version of the TikTok creator, cutting and pasting source imagery with abandon, with the same lack of critical commentary for which the Supreme Court took Warhol to task?¹⁷² Gleaning some answers to each of these questions is important for answering the all-important one, the one that was debated between the *Goldsmith* majority and the dissent and the one 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?¹⁷³

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

168. See Artists’ Brief, *supra* note 10, at 3–4.

169. Art Institutions’ Brief, *supra* note 17, at 3.

170. See discussion on “art” definitions *supra* note 8.

171. Artists’ Brief, *supra* note 10, at 6.

172. See *supra* Subpart II.C. This Article is limited to an interrogation of appropriation practices among fine artists. See discussion *supra* note 8. It takes no position on copying in other communities, including on TikTok. 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 Ali Johnson, Comment, *Copyrighting TikTok Dances: Choreography in the Internet Age*, 96 WASH. L. REV. 1225, 1274 (2021).

173. Artists’ Brief, *supra* note 10, at 4; Art Scholars’ Brief, *supra* note 17, at 1; Art Institutions’ Brief, *supra* note 17, at 3.

A. Methods

This study set out to interview artists participating in the “art world,” 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.”¹⁷⁴ 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 like¹⁷⁵—but it is also different from previous empirical studies that have taken a broader definition of “art” or “artist,” definitions that are arguably at odds with how other art critics and scholars may conceive of those terms.¹⁷⁶

The conventional definition and usage of the word “art” pervaded much of the amicus briefing filed in support of Warhol before the Supreme Court.¹⁷⁷ This is yet a further reason that this study defined and set out to interview “artists” defined narrowly in this way. Under this narrower conventional definition, Warhol is decidedly an “artist,” while the plaintiff-photographer Lynn Goldsmith’s work lies closer to the type of “commercial art” that thus excludes Goldsmith from the narrower definition. Such value judgments

174. Pamela M. Lee, *Boundary Issues: The Art World Under the Sign of Globalism*, ARTFORUM (Nov. 2003), <https://www.artforum.com/features/boundary-issues-the-art-world-under-the-sign-of-globalism-167783> [<https://perma.cc/SH8H-P2DZ>].

175. See discussion on Professor Silbey’s work *supra* note 20.

176. For how this Article defines “art,” see discussion *supra* note 8. Compare this definition with another 2013 study in which Professor Patricia Aufderheide, Tijana Milosevic, and Bryan Bello 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 research of and about the visual arts and humanities.” Aufderheide et al., *supra* note 20, at 2016. The College Art Association allows anyone “interested in the mission and purposes of the Association” to become a member; its by-laws do not otherwise attempt to define what “visual art” is. See *About: By-Laws of the College Art Association, Inc.*, COLL. ART ASS’N OF AM. (Feb. 27, 2019), <https://www.collegeart.org/about/board-of-directors/by-laws> [<https://perma.cc/RF9Y-Z8P9>].

177. See, e.g., Artists’ Brief, *supra* note 1010, 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 17, 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*, 598 U.S. 508 (2023) (No. 21-869).

came up often in my interviews, with various statements expressly or impliedly distinguishing between “taking from another artist” versus taking from other visual material.¹⁷⁸ On those occasions, I attempted to get interviewees to elaborate on their understandings and definitions of “art” versus other visual source material. In so doing, I was able to draw out normative judgments endemic to the art world.

Further, the art and art law scholarship has suggested that it is “artists”—artists participating in the contemporary art world conventionally understood—for which appropriation has become the dominant mode of production.¹⁷⁹ Indeed, the most high-profile cases involving appropriation art, reviewed in the previous Part, all involved an artist recognized by the art world, appropriating from a more commercial artist. The frequency with which the former have ended up in high-profile copyright litigation might lead one to expect such artists to have a more favorable view of appropriation—a conclusion this study calls into question.¹⁸⁰

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.¹⁸¹ Instead, within this set, I attempted to create diversity through ensuring certain variations in the following categories: age, race, gender, and medium (for example, photography, sculpture, painting, video, drawing, mixed-media and installation projects).¹⁸² 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 clearly use appropriation techniques—such as visual material that the artist explicitly disclosed as originating from another

178. See *infra* Subpart III.B.1.c.

179. See *supra* note 10 and accompanying text.

180. See *infra* Subpart III.B.

181. See McKenna & Silbey, *supra* note 20, at 198.

182. These variations, as I came to conclude upon successive workshopping of the results of this Article, might not be exhaustive of all potential variables. Additional variations that could have borne fruitful differences in answers might be national origin and socioeconomic status, especially as it relates to my findings on class, economic power, and the ethics of appropriation. See *infra* Subpart IV.B.

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 group, my goal was to draw out what their sources of inspiration were by digging into the question of how artists may be said to build upon works that came before. Finally, 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, using contacts in the network of galleries, museums, and artists that make up the art world.¹⁸³ The subsequent approximately hour-long interviews, with some 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.¹⁸⁴ Interviewees were given the option of linking quotations used to their name or having certain quotations be anonymized; one interviewee asked to be identified pseudonymously.¹⁸⁵

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

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

185. Note that the critique that interviewees might provide self-serving statements that emphasize fairness and condemn so-called “punching down,” is somewhat contradicted by participants’ choices as to which statements they requested to be made anonymous or pseudonymous. See *infra* Part III.B. The commonality shared by the statements that participants asked to be anonymized is that they were statements *critical* of superstar appropriators like Andy Warhol and Richard Prince, suggesting that to these artists, speaking out *against* unfair takings was expected to be reputation-damaging, rather than the other way around. Nor, in any case, is this the first qualitative study to run up against the general notion that people “might often like to portray themselves in a favorable light.” Bernstein & Rodríguez, *supra* note 183.

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 phenomena.”¹⁸⁶ 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.¹⁸⁷ 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 and, other instances where there are disparities in power dynamics in play, where appropriation is not acceptable; 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 differed, most clearly with variances in gender, race, and age,¹⁸⁸ these themes saturated almost all the interviews with artists and with curators/critics alike.

That said, 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 study primarily 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 provide insights as to general trends and practices across many different types of Chinese artists and works. As discussed in detail in Part II.B, that interview suggests, on a very preliminary basis, that the Western perception of Chinese artists as somehow more amenable to copying and appropriation is more a reflection of long-held stereotypes of China as a site of rampant counterfeiting and cheap fakes than of reality.

186. EUREKA MYTH, *supra* note 20, at 290; *see also* Mario Luis Small, ‘How Many Cases Do I Need?’ *On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 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.

187. *See* EUREKA MYTH, *supra* note 20, at 290.

188. Biographical information on the interviewees, to the extent they wished to provide it, is available in the appendix.

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.¹⁸⁹ Surprisingly (or perhaps unsurprisingly¹⁹⁰), I heard the same thematic responses: 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 permission. But before discussing those findings in full, I 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 providing them with an 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.¹⁹¹ In cases where artists were chosen because their works did not seem to use any such appropriation techniques—that is, 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 their way into the artist’s own works. In the case of artists who had used appropriation techniques, questions then dived into permissions or licenses; in the case of artists who did not use appropriation techniques, I asked whether they had ever previously incorporated someone else’s works in their own. Interviews—in particular, interviews with curators, critics, and art historians—sought to draw out general thoughts on broader art historical movements, currently and where we are headed, including thoughts on the

189. See *supra* note 176 and accompanying text.

190. “Unsurprising” because the art and art law scholarship has suggested that it is artists participating in the contemporary art world conventionally understood for which appropriation has become the dominant mode of production. See discussion on “artist” *supra* note 10; see also *infra* Subpart III.B.

191. 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.

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”¹⁹²—a reminder of the list of topics I wanted to cover, while providing me (and the interview participant) breathing room to explore interesting paths that emerged out of dialogue. Accordingly, as I progressed through the interviews, additional lines of questioning were added, and others modified to accommodate new themes or else more helpful ways of getting at a particular issue.

4. Data Collection Analysis

As interviews were conducted, I took notes on recurring themes, wording, or issues. These 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, that initial framework of codes was edited. All interviews were completed by May 2023—before the Supreme Court issued its decision in *Warhol v. Goldsmith*.¹⁹³

Interview transcripts were 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.¹⁹⁴

B. Findings

This Subpart proceeds in three parts. The first Subpart focuses on artists who use appropriation techniques in their work—that is, those who use third-party source imagery as a foundation in their own works. However, rather than simply cutting and pasting with abandon, the findings suggest that artists are uniquely attuned to the creator of the original source imagery and the person engaged in the appropriation—dynamics that are suffused with questions of power, capital, and empire (what some might call an art

192. Bernstein & Rodríguez, *supra* note 183, at 1684.

193. That decision was issued on May 18, 2023. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

194. Dedoose allows for the collation of coded text, as well as exporting text excerpts corresponding to each coding label into Excel. See DEDOOSE, <https://dedoose.com> [<https://perma.cc/Q86Y-QZRG>]. Special thanks to my research assistant, Tyler Emenev, who proved invaluable in the coding process.

world “me too” reckoning¹⁹⁵). Similarly, the findings also illustrate how artists view appropriation as more permissible when it is a form of what they perceive as “punching up”: an individual artist appropriating from corporate advertising, rather than from other individuals.

The second Subpart focuses on instances where artists could *not* use a particular third-party source image. Whereas prior literature reported “a chilling effect on creativity from copyright confusion,”¹⁹⁶ the artists I interviewed in this study, by and large, did not report feeling stifled because of an inability to use a particular image. Rather, when presented with such situations, artists reported creating either better or altogether different creative works, evidencing the phenomenon that legal scholars have called “creating around.”¹⁹⁷

This Subpart concludes by presenting data that challenges the dominance of the postmodern turn in artistic practice today. Many of the participants expressed a belief that we have 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. Whereas postmodernism questioned originality by resorting to its exact opposite (the duplication and re-duplication of preexisting imagery¹⁹⁸), the artists interviewed are striving for their own original voice and contribution to art history—even as those same artists might repeat 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 Ellison¹⁹⁹

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

195. See *infra* Subpart III.B.3.c.

196. Aufderheide et al., *supra* note 20, at 10.

197. See *infra* Subpart III.B.2.

198. See *infra* Subpart III.B.3.c.

199. Telephone Interview with Buck Ellison (Dec. 29, 2022) [hereinafter Ellison Interview] (on file with author).

that frankly hasn't been fully resolved yet." Kim went on: "I feel like what artists today . . . especially the younger artists, are really 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 (both social and economic capital) taking from an artist with less resources. The 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 license, 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."²⁰⁰ Recalling a series of works she made where she "appropriated Nike slogans," she noted that she "[didn't] feel any form of guilt at all because [Nike] appropriate[s] from other people." Dean felt differently about appropriating from individuals, stating: "[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 notably 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,"

200. Telephone Interview with Danielle Dean (Mar. 1, 2022) [hereinafter Dean Interview] (notes on file with author).

versus Warhol's Prince Series, which was "working off a female photographer who many people don't know." Similarly, the painter Deborah Druick distinguishes between Duchamp's canonical appropriations of shovels and urinals—"things that were readily available to everybody"²⁰¹—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 is 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 is 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," she said.

But Clarke, like others I spoke with, noted that appropriation can be valid when it is commenting "directly [on] systems of power and large corporations."²⁰² Clarke's statement 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."²⁰³

So, too, for multimedia and film-based artist Suneil Sanzgiri, whose works relate 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 described 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.

201. Telephone Interview with Deborah Druick (Feb. 9, 2023) (notes on file with author).

202. Clarke Interview, *supra* note 27.

203. Dean Interview, *supra* note 200.

For Sanzgiri, the “specificity”²⁰⁴ of the image matters, a word that strangely resonated with the *Goldsmith* majority’s emphasis on the “necessity”²⁰⁵ of the source material in evaluating fair use. As he put it:

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.’ [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.

It is in these instances where 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.”²⁰⁶ Conversely, 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 to make commentaries on their power structures not only constituted “punching up” but also constituted fair use.²⁰⁷ Indeed, my interviews reflected a shift from the uncritical appropriation discussed in the previous Part, which courts declined to find was fair use precisely because it did not “comment on” or “criticize” the original.²⁰⁸ By contrast, the permissionless appropriations discussed in this Subpart, in which artists are purposefully stealing corporate imagery to comment on how such advertising entrenches and reproduces those corporations’ hold on power and capital, go beyond merely using source material to avoid the “drudgery

204. Telephone Interview with Suneil Sanzgiri (Jan. 6, 2023) (notes on file with author).

205. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 556 (2023) (Kagan, J., dissenting) (criticizing “[t]he majority’s preference for the directed work, apparently on grounds of necessity”).

206. 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.” Telephone Interview with Ellie María Rentería (Feb. 23, 2023) [hereinafter Rentería Interview] (notes on file with author). *See also infra* Subpart III.B.3.a (on the artist Liz Nielsen comparing Sherrie Levine’s artistic practice to “punching up”).

207. Telephone Interview with Kibum Kim (Dec. 28, 2022) [hereinafter Kim Interview] (notes on file with author) (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 down with her”).

208. *See supra* Part II.

in working up something fresh,” instead supplying the “justification for” the use that courts have demanded of the appropriator.²⁰⁹

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 I spoke to who use appropriation techniques for other purposes *do* often 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.²¹⁰ 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 that he would frequently get in touch with the copyright owner of the work he redraws. In most cases, because the original author has died, he would reach out to the family or the estate. This, he emphasized, was important to him for moral and ethical, rather than legal, reasons—which is why he emphasized that he wasn’t receiving “licenses” from the owner, but rather what he calls their “blessing.”²¹¹ “I think that [the family or the estate’s] care is so important,” he said. Those “who are taking care of [the artist’s] estate, taking care of their work and their legacy . . . [I]t’s important to let [the heir] know that I learned about their loved one’s art and life through [the artist’s] labor of love,” Lee continued. He added that “a lot of times . . . [the artist’s heirs] really appreciate what I’m doing, because by recreating these works and presenting them, I’m paying homage to [the artist] and also . . . giv[ing] new visibility to their work.”

Likewise, Gala Porras-Kim, whose works consist of hand-drawn reproductions of objects from museum collections (for example, Mexican

209. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994).

210. Harley Wong, *Intergenerational Care: Kang Seung Lee’s Queer Archives*, ART IN AMERICA (Oct. 27, 2021, 11:05 AM), <https://www.artnews.com/art-in-america/columns/kang-seung-lee-1234608004> [<https://perma.cc/RRR4-VTT2>].

211. Lee used this word in a subsequent e-mail exchange we had regarding an earlier draft of the Article. See Kang Seung Lee mark-up of Xiyin Tang, Draft of *Art After Warhol* (June 9, 2023) (on file with author).

ceramics from the Los Angeles County Museum of Art),²¹² shared 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 is 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 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.’”²¹³

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.²¹⁴ That is, one might perceive the difference between the permissions-based practices described by Nielsen, Porras-Kim, and Lee, and Sanzgiri or Dean’s 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 are just one artist. But Buck

212. 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> [<https://perma.cc/X74A-72PJ>].

213. Nielsen Interview, *supra* note 2. 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. AGAINST PROGRESS, *supra* note 20, at 241.

214. This is consistent with other literature that emphasizes how norm enforcement works best in small, insular communities, an insight first made in Professor Robert Ellickson’s canonical study of Shasta County ranch farmers. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Ellickson’s work has since been applied in the intellectual property context, in studies of creative communities ranging from fan fiction to tattoo art. *See, e.g.*, Casey Fiesler, *Everything I Needed to Know: Empirical Investigations of Copyright Norms in Fandom*, 59 IDEA 65, 84 (2018) (commenting on the fan community); 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) (discussing haute cuisine); Aaron K. Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013) (noting on the tattoo community).

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.²¹⁵ First, he pointed out 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 the 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] 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 creates “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.²¹⁶ 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.”²¹⁷ 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), the latter of which she noted she would never appropriate from because they are

215. For Ellison’s advertising work, see *Balenciaga Spring Summer 2019 Campaign*, OWL & THE ELEPHANT (Spring 2019), <https://www.owlandtheelephant.com/colin-donahue/balenciaga—campaign-ss19—robert-yager> [<https://perma.cc/NDA7-LVZ2>].

216. Telephone Interview with Carmen Winant (July 13, 2022) (notes on file with author).

217. Winant’s definition of who is an “artist” and who is not aligns with how this study defines artists. See discussion *supra* note 8.

“demarcated as artists’ books.” 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 or paying, 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, were “really not artists stealing from other artists. It’s artists using a photographer’s image. And why is that image any less valid . . . ?”²¹⁸ 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. In a conversation with another self-taught artist (who I’ll call K.) about Jeff Koons’ *String of Puppies*,²¹⁹ they noted: “[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.

2. Creating Around

Whereas many copyright scholars believe that copyright laws generally act as a tax on downstream creators—greatly inhibiting follow-on creation²²⁰—some legal scholars have argued that the same constraint could have a “generative upside.”²²¹ 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

218. Druick, like Winant, drew the line between “artists” and other types of creators in much the same way that this study does. *See id.*

219. *See supra* Subpart II.A.

220. *See* Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1346–51 (2015) (summarizing the arguments).

221. *See id.* at 1358–69.

everyday scenes of the wealthy and privileged.²²² They look simultaneously *like* the stock photographs that Ellison had occasionally licensed and worked with in the past,²²³ 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.²²⁴ Whereas the art world has uniformly praised Ellison for his eerily off-kilter photographs—corporate advertising with 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”²²⁵:

[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.²²⁶

I asked Ellison to imagine a different world, one in which he would have simply forged ahead and 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 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

222. See 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> [<https://perma.cc/XV5H-9HLN>].

223. See *supra* Subpart III.B.1.c.

224. *Id.*

225. Fishman, *supra* note 220; see also Dan L. Burk, *Inventing Around Copyright*, 109 Nw. U. L. Rev. 547, 558 (2015).

226. Ellison Interview, *supra* note 199.

the weird, the slightly off-kilter, that critics now routinely praise as innovative elements in his work.²²⁷

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 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, substituting a different song for copyright purposes did not, in her view, affect the artistic integrity of the final artwork: “The work actually doesn’t really necessarily often need that actual pop song to be on there. That doesn’t happen that often.”

Of 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

227. Diehl, *supra* note 222; Jonathan Griffin, *Buck Ellison’s American Freaks*, ARTREVIEW (June 9, 2022), <https://artreview.com/buck-ellison-american-freaks> [<https://perma.cc/H4PL-VFZY>]; 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> [<https://perma.cc/8A76-Y8XC>]; Drew Sawyer, *Openings: Buck Ellison*, ARTFORUM (Summer 2017), <https://www.artforum.com/print/201706/openings-buck-ellison-68692> [<https://perma.cc/FT6Q-AZ2A>]; *Buck Ellison*, LA BIENNALE DE LYON (2022), <https://www.labiennalede lyon.com/en/les-artistes/details/buck-ellison> [<https://perma.cc/1348-NYL8>].

be 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.”²²⁸ 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,” as if Warhol’s appropriations are endemic, almost primal, to art as we know it.²²⁹ But my interviews suggested that appropriation techniques are not some integral 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 continued viability 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 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, well, *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 room that has four corners, we’ve been in every corner and every part” of that room.

228. DAVID JOSELIT, *AFTER ART* 58 (2013).

229. Gopnik, *supra* note 17.

Artist-educator-critic Ernest Bryant concurred: “[P]eople can be collaging or making these huge montages of digital images and saying, hey this 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,²³⁰ 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 *New Portraits* series, in particular, came up in several interviews, unprompted, as an example of a “bad” work of contemporary appropriation. One younger 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.”²³¹ 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 dared to say in print what several of my interviewees also confirmed: that, well, late Warhol, including the Prince Series, just wasn’t very *good*.²³²

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 exemplifying 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

230. See *Olivier Mosset*, WHITNEY BIENNIAL 2008, https://whitney.org/www/2008biennial/www/index.php?section=artists&page=artist_mosset [<https://perma.cc/F9SN-FSH3>].

231. Interview with an unnamed artist who wished to remain anonymous (notes on file with author) [hereinafter Anonymous Interview].

232. 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> [<https://perma.cc/PHE5-GFYW>].

[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"²³³ or "rapacious"²³⁴ appropriation and appropriation that makes an innovative, conceptual, or political point. Or, as Rooney put it, in relation to Levine: "[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, 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, the burgeoning Chinese art market—may differ.²³⁵ Although my 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. 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 [appropriation'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." To the extent, he said, that Western artists might still think Chinese artists engage in such strategies, it is because "[t]he trope of the copyist and the knockoff . . . allow[] people in the West to reassure themselves of their superiority or a certain faith in innovation and creativity over rote productive capacity," he observed. Thus, that the predominantly Western artists and critics I spoke with suggested that those outside of the Western art world might still engage in an artistic practice many had largely derided, suggested yet another form of the type of in-group/out-group enforcement—perhaps another form of punching down.²³⁶

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

233. Clarke Interview, *supra* note 27.

234. Telephone Interview with Ernest A. Bryant III (Feb. 7, 2023) (notes on file with author); *see also* Davis, *supra* note 232 (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").

235. *Supra* Subpart III.A.1.

236. *Supra* Subpart III.B.1.c.

the world . . . without any justifying labor, whether conceptual, technical, or other.”²³⁷ As art critic David Salle wrote in *Artforum*: “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.”²³⁸ 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 copying images is often 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 who use appropriation techniques emphasized the importance of labor in the copying process.²³⁹ Porras-Kim emphasized the importance of re-drawing the objects rather than just photocopying images 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 source material “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 to himself, rather than simply photocopy those photographs,

237. Sean Tatol, *Openings: Libby Rothfeld*, ARTFORUM (Oct. 2022), <https://www.artforum.com/features/sean-tatol-on-the-art-of-libby-rothfeld-252115> [<https://perma.cc/UN3X-SJEP>].

238. David Salle, *Medium Cool*, ARTFORUM (Feb. 2023), <https://www.artforum.com/features/medium-cool-2-252466> [<https://perma.cc/JV6L-EWAY>].

239. Professor Silbey gleaned similar findings from her interviews with creators. See EUREKA MYTH, *supra* note 20, at 86–87.

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 and 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.²⁴⁰ But Sawyer, the Whitney curator, 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 appropriating 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 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.²⁴¹

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.”²⁴² 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.” Illustrative of this increased awareness, Bryant, the artist-educator-

240. See Aufderheide et al., *supra* note 20.

241. Telephone Interview with Drew Sawyer (Dec. 27, 2022) (notes on file with author) [hereinafter Sawyer Interview].

242. 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:” 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).

curator, puts 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?”

One artist, making concrete the growing acknowledgment of the blue-chip art market as capital markets, compared 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.”²⁴³ That comparison—between artists and banks—might surprise older artists who, as Ellison had noted, would prefer to think of themselves as bohemian. The shift, as Sawyer wrote to me after reviewing a pre-publication version of this Article, 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.”²⁴⁴

Six decades after Warhol’s first “appropriations . . . landed like a thunderclap,”²⁴⁵ artists are now starting to fill in what was left out of the rapturous accounts of his genius.²⁴⁶ Artist Liz Nielsen suggested that both could be true—that Warhol made great art and appropriated from others in ways that we would recognize as problematic today:

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

243. Anonymous Interview, *supra* note 231.

244. See also Hal Foster, *The Anti-Aesthetic at Forty*, ARTFORUM (Sept. 2023), <https://www.artforum.com/features/hal-foster-on-the-anti-aesthetic-252932> [<https://perma.cc/X58M-N5WP>] (“[A]ppropriation art . . . can be taken to promote a fragmentation of cultural signs that speaks to the corrosive action of capital more than anything else.”). This, too, is reflected in my interview with the artist Jacob Kassay, who bluntly stated: “I don’t believe anymore in appropriation; it’s all about who it’s going to benefit.” Text Message Interview with Jacob Kassay (June 8, 2023) [hereinafter Kassay interview] (notes on file with author).

245. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 560 (2023) (Kagan, J., dissenting).

246. Or consider another iconic feminist reckoning with the disparities of the white male-dominated art world: Linda Nochlin, *From 1971: Why Have There Been No Great Women Artists?*, ARTNEWS (May 30, 2015, 4:00 PM), <https://www.artnews.com/art-news/retrospective/why-have-there-been-no-great-women-artists-4201> [<https://perma.cc/K73Z-8594>].

a second. We have to *make* these moments. They just can't happen anymore, so we have to call people out."²⁴⁷

These findings, which challenge the ethics of appropriation, might be surprising to those who would have assumed that the ubiquity of the Internet—the ease by which images are copied and shared—would have normalized such practices instead. Indeed, the Internet might seem to bring hyperreality to the conditions that postmodern theorists like Douglas Crimp were writing about during the advent of “reproductive technolog[ies],” which, per Crimp, normalized the “quotation, excerptation, accumulation and repetition of already existing images.”²⁴⁸ Yet, the artists I interviewed had a different take: 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, “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 felt 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.” Those who grew up in a digital age “know enough [to know] 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.”

Similarly, and as observed in other creator communities like fan fiction, the Internet also makes attribution easier to engage in—and failure to do so—more problematic.²⁴⁹ Rooney, the painter, compared retweets and reposts on Instagram to a “form of citation”—a way of acknowledging the

247. Nielsen Interview, *supra* note 2.

248. Crimp, *supra* note 53, at 43, 53 (internal citation omitted).

249. 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. ENT. & TECH L. 729, 753 (2008).

original source material. But “with Warhol . . . 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,²⁵⁰ 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, Porrás-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 “always include the original image, the author . . . [and] the title of [the original] work . . . as part of the titles.”²⁵¹ Having that attribution “accessible . . . is quite important to me,” he says.

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.²⁵² In other words, art historians did not view the postmodern vaunting of the obvious or rote copy as merely a different attempt to say something new.²⁵³ 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.”²⁵⁴

And yet, 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,”²⁵⁵ “style,”²⁵⁶ “gesture,”²⁵⁷ or forging one’s “own path”²⁵⁸ as proxies of getting at that idea. Ultimately, “[t]hey just want to do something that’s theirs,” Pagel, the art critic and educator, said.

250. See Julia Rooney, FREIGHT & VOLUME, <http://www.freightandvolume.com/artists/julia-rooney> [<https://perma.cc/K4PX-AAP7>].

251. Telephone Interview with Kang Seung Lee (Mar. 21, 2023) (notes on file with author).

252. KRAUSS, *supra* note 51, at 170.

253. See *id.*

254. Crimp, *supra* note 53, at 53.

255. Nielsen Interview, *supra* note 2.

256. Rentería Interview, *supra* note 206.

257. Clarke Interview, *supra* note 27.

258. Zoom Interview with Marton Nemes (Jan. 26, 2023) (notes on file with the author).

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."²⁵⁹ But Rentería simultaneously acknowledged that the concept of originality was a "culturally specific" idea that was "not shared throughout the world." Nonetheless, Rentería concluded that originality was important because of the art world's economics: it was all 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., 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." Nonetheless, they were equally adamant that they thought it was "cheesy and corny when artists' . . . whole artwork is just printing some[one else's] 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 beliefs: that there was nothing new under the sun but that rote reproduction of another's work diminished the value of a 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. K responded: "I think copyright and . . . the concept of plagiarism only really ha[ve] validity under capitalism." K. 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." Perhaps more so than any other quote I gathered, this dialogue with K. laid bare the gap between postmodern theory's Marxist ideals (no authorship, no ownership, no property) and its co-optation by superstar artists to get richer through such appropriations. The idea of authorless works is only nice if there weren't just a handful of artists who are visibly and materially benefitting through the monetization of such allegedly ownerless works. Months after my interviews were completed, I saw a

259. Professor Jessica Silbey's interviews with literary creators echo this idea of "imitating the masters." AGAINST PROGRESS, *supra* note 20, at 250.

concrete example of this concept in an *Artforum* review of a new exhibit by Pictures Generation artist Sherrie Levine, which nicely summed up this principle. The reviewer noted that Levine’s presentation of works as “authorless” seemed to be a “brute annexation” of the works to her “own program.”²⁶⁰

Finally, Tinari made the same observation regarding 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.²⁶¹

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 recounted: “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 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 interviewees uniformly hit on the seeming unoriginality of appropriation art in our contemporary moment. At the time it gained prominence in the 1980s,²⁶² appropriation *was* an original gesture, “a radical gesture.”²⁶³ But, as the artist Allana Clarke says, “we are so many decades past those moments.”

260. Jeffrey Kastner, *Sherrie Levine*, ARTFORUM (Oct. 2023), <https://www.artforum.com/events/jeffrey-kastner-sherrie-levine-512784> [<https://perma.cc/9S6M-G3ZX>].

261. Zoom Interview with Philip Tinari (Mar. 14, 2023) (notes on file with author).

262. See *supra* notes 65–69 and accompanying text.

263. Clarke Interview, *supra* note 27; see also Kim Interview, *supra* note 207 (“[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.”).

IV. IMPLICATIONS

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

A. Creating Despite Law²⁶⁴

To legal scholars outside of copyright, 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 for the dissent.²⁶⁵ Indeed, Kagan's dissent seems 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."²⁶⁶

To be sure, *Warhol* will undoubtedly have broad, lasting ramifications for copyright law more generally, far beyond this Article's narrower concern with fine art production within the contemporary art world. But make no mistake: much of the commentary published in the wake of the decision fretted specifically *about* the fine arts and suggested that to the extent contemporary art *won't* suffer, it is only because the majority opinion was remarkably narrow.²⁶⁷ It was, after all, limited to only one licensing transaction, not Warhol's initial creation of the Prince series.²⁶⁸ But the

264. This Subpart title is a play on Professor Robert Ellickson's well-known work, *Order Without Law*. See ELLICKSON, *supra* note 214.

265. 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*." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 564 n.2 (2023) (Kagan, J., dissenting).

266. *Id.* at 591.

267. See Amy Adler, *The Supreme Court's Warhol Decision Just Changed the Future of Art*, ART IN AM. (May 26, 2023, 10:47 AM), <https://www.artnews.com/art-in-america/columns/supreme-court-andy-warhol-decision-appropriation-artists-impact-1234669718> [<https://perma.cc/363Q-KRTP>]; Peter J. Karol, *After Warhol*, ARTFORUM (June 5, 2023, 9:20 AM), https://www.artforum.com/columns/the-transformative-impact-of-warhol-v-goldsmith_-252757 [<https://perma.cc/PR5V-TVZ4>]; Blake Gopnik, *Ruling Against Warhol Shouldn't Hurt Artists. But It Might*, N.Y. TIMES (May 23, 2023), <https://www.nytimes.com/2023/05/19/arts/design/warhol-prince-supreme-court-copyright.html> [<https://perma.cc/UB9Y-BERR>].

268. See *supra* Subpart I.I.C.

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.’”²⁶⁹ “We know self-censorship is real,” one fine art lawyer told the *Times*.²⁷⁰

The findings reported in this Article calls into question this narrative on two grounds. The first is that the law simply does not seem to play that large of a role in the day-to-day work of most of the artists I spoke with—a finding that comports with conclusions other scholars like Jessica Silbey have drawn from qualitative research into the work of creators more broadly.²⁷¹ Instead, the artists I spoke with, by and large, worked almost completely apart from the law and its perceived limitations. They created original works, opted to receive the “blessing” of rightsholders to honor their legacy, appropriated for purposes of “punching up” with little concern of infringement, and, in cases where copyright did seem to present an issue, simply created around the problem.²⁷² Far from a community filled with “fear” and “self-censorship,”²⁷³ the arts, it seems, are as vibrant as ever.

These findings may seem at once surprising and completely expected. Perhaps they’re unsurprising because Professor Robert Ellickson first introduced the notion that norms, not laws, may predominate in certain communities, especially insular ones.²⁷⁴ In the intellectual property context, Ellickson’s insights have since been extended into a rich body of so-called “negative space” literature, which showcased how creative communities ranging from research to haute cuisine may prevent freeriding in the absence of laws that directly regulate copying.²⁷⁵ But at the same time, the findings reported herein may be surprising—precisely because the artists that comprised this study do *not* operate in a “negative space,” but rather under a highly-publicized set of legal decisions that were largely assumed to “chill”

269. Gopnik, *supra* note 267.

270. *Id.*

271. EUREKA MYTH, *supra* note 20, at 16.

272. *See* Lee, *supra* note 211.

273. *See* Aufderheide et al., *supra* note 20, at 2019.

274. *See generally* ELLICKSON, *supra* note 214.

275. *See id.*; Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 CORNELL L. REV. 1539, 1543–44 (2017); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008); *CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY* (Kate Darling & Aaron Perzanowski eds., 2017).

the creation of fine art.²⁷⁶ Yet, the data does not show that “copyright [is] a cudgel,” forcing artists into licenses for fear of being sued.²⁷⁷

In fact, that artists sought licenses anyway—for ethical or moral reasons rather than legal ones—leads to the second ground where the results indicate that the dominant narrative is in need of a revision: which is to acknowledge that artistic practice itself is changing. To the extent that legal scholarship nonetheless assumes the primacy of appropriation as relevant to contemporary practice, this may be because for artists like Richard Prince, it is copyright law itself—challenging it, antagonizing it, courting suit, art as transgression—that seems to be the medium.²⁷⁸ 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:²⁷⁹ “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.”²⁸⁰ 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.” This reading might, in fact, explain Prince’s decision to follow up his *Canal Zone* series, which had been vindicated by fair use, with the even more blatantly appropriative *New Portraits* series.²⁸¹ Other interviewees similarly suggested that to Prince, copyright law itself—challenging it 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.²⁸² In other words, my interviewees were conjuring up

276. See *supra* notes 173, 196 and Part II; see *infra* notes 318–319.

277. Aufderheide et al., *supra* note 20, at 2021.

278. See *supra* Subpart II.B (noting Prince’s new, potentially infringing series created shortly after a fair use win). Somewhat more flippantly, the painter 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.” See Kassay Interview, *supra* note 244.

279. 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> [https://perma.cc/2XEU-PLXZ].

280. Anonymous Interview, *supra* note 231.

281. See *supra* Part II.B.

282. Anonymous Interview, *supra* note 231.

the notion of “semiotic disobedience,” a term coined by Professor Katyal almost two decades ago.²⁸³ “Propertization, by its very act of exclusion, actually and unwittingly perpetuates prohibited speech as a result,” Katyal wrote.²⁸⁴ Consistently transgressing copyright’s property boundaries is perhaps Prince’s greatest contribution to the artistic conversation today.

But my interviewees overwhelmingly expressed the sense that we have moved on. Or, as the art historian Hal Foster put it in a recent reconsideration of his seminal work on appropriation art, “[T]he notion of postmodernism was once a great stimulant to art and thought; today, it feels like another anti-aphrodisiac of the just past.”²⁸⁵

On this point, I found one particular exchange 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.²⁸⁶ Lee knew about it and noted that he assumed that in many instances, fair use would permit him to nonetheless use the work. Still, Lee said that he likely 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.”

Thus, contemporary artistic practice may be more consonant with copyright laws than previously assumed. As discussed above, artists who do not license their appropriations do so because they believe that the purposeful theft and reproduction of an image is necessary to comment on how the image and its maker—corporations—entrench power.²⁸⁷ As noted above, fair use doctrine has long been more amenable to such “critical” appropriations: using an image to comment on and criticize it.²⁸⁸

While I completed all the interviews before the Supreme Court handed down its decision, the artists I spoke to seemed to uncannily anticipate the distinction the Court made in the opinion between the Warhol Foundation’s commercial licensing activities and the Warhol artworks themselves.²⁸⁹ Druick, the painter, referred to her preferred outcome in the case as “no more tchotchkes”—the use of that word strangely consonant with what another

283. Katyal, *supra* note 13, at 497.

284. *Id.*

285. Foster, *supra* note 244.

286. *See supra* Part II.

287. *See supra* Subpart III.B.1.a.

288. *See supra* Subpart III.B.1.a.

289. *See supra* Subpart II.C.

painter called the “innumerable proliferation” of images. “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,” Druick said. 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 agreed, distinguishing between the Warhol Foundation’s prolific licensing operations versus the creation of art by Warhol himself:

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.²⁹⁰

At the time we spoke, I found his 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 to be 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 Condé Nast.²⁹¹ In so doing, the Court, like the artist in my interview, refused to conflate the Warhol painting itself with the ways in which the painting might then be licensed or merchandised.²⁹² The Court had instead 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.²⁹³ Instead, its finding of infringement went to the subsequent “reproduction” of that painting by the Foundation and the proliferation of that painting on a magazine cover.²⁹⁴

290. Anonymous Interview, *supra* note 231.

291. *See supra* Subpart II.C.

292. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 514 (2023).

293. *Id.* at 525.

294. *Id.*

Sawyer, the Whitney curator, followed up with me after the *Warhol* decision came out. The dissent, he wrote, “[r]eads really dated[,] because it takes the category of art as a given.”²⁹⁵ In acknowledging that the law may treat a painting differently from subsequent merchandising activities, the majority opinion may in fact prove more adept at navigating the increasingly commercialized art world: if artists want to turn an artwork into a business empire of keychains, tote bags, and mugs, they should license the source material like any other business.

B. The Insufficiency of Utilitarian Theories

What is to be made 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,²⁹⁶ but for an entirely different reason: because most artists are preoccupied with fairness, and copyright law does not encode those values.²⁹⁷

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 occurs when a more powerful artist capitalizes on the work of a less powerful artist 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.” The instances that seemed to most rile Bryant involved what others in my interviews would call “punching down”²⁹⁸: a more powerful person, with less monetary “capital” and “connections” and “social capital,” taking from a less powerful one. This was the only time in our hour-long interview that Bryant brought up the law: “We have copyright law

295. Sawyer Interview, *supra* note 241.

296. Adler, *supra* note 8, at 626.

297. Kim Interview, *supra* note 207 (“[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.”).

298. See *supra* notes 206–209 and accompanying text.

... for this particular reason, so somebody can't just come in and take something," he said.

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 rewards, and it generally seeks to maximize efficiency in the way that artistic works are created and distributed to the public.²⁹⁹ It has little to say about slippery concepts like fairness—though other scholars are currently envisioning what a fairness framework might look like.³⁰⁰

One might assume that the word “privilege,” a theme that came up over and over again in my interviews, has little place in a copyright framework that is unabashedly economic.³⁰¹ And yet, “privilege” appeared several times in *Warhol v. Goldsmith*—first, in the Second Circuit’s refusal to create a “celebrity-plagiarist privilege.”³⁰² On appeal before the Supreme Court, the word appeared again, this time in the context of Justice Sotomayor taking the dissent to task for calling “Goldsmith’s original work . . . just an ‘old photo,’ one that was transformed through Warhol’s genius touch.”³⁰³ “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.”³⁰⁴ Undoubtedly, Justice Sotomayor was echoing back the circuit court’s language of the celebrity-plagiarist, but the opinion’s focus on the word “privilege,” by itself, is even more striking, inviting a more expansive view of privilege that goes beyond the celebrity-commoner divide.

Thus, in this sense, perhaps 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 that concern, it does so in erratic, errant, and unsatisfying ways—such as the Court’s use of the word “privilege”

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

300. Betsy Rosenblatt, *Considering the Role of Fairness in Copyright Fair Use*, 61 *HOUS. L. REV.* 261 (2023).

301. See generally LANDES & POSNER, *supra* note 299.

302. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 43 (2d Cir. 2021), *aff’d*, 598 U.S. 508 (2023).

303. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 544 n.19 (2023) (“On its view, the first fair use factor favors [the Foundation’s] use of Goldsmith’s photograph simply because Warhol created worthy art. Goldsmith’s original work, by contrast, is just an ‘old photo,’ one of Warhol’s ‘templates.’”).

304. *Id.*

with little elaboration or explanation as to just *what* “kind of privilege” a fair use ruling in favor of the Warhol Foundation would “create.”³⁰⁵ And yet, in other places, such as where multiple artists emphasized the importance of “doing the work”—of labor to the artistic process—copyright has emphatically disavowed such theories, deeming them mere “sweat of the brow.”³⁰⁶ Thus, the challenge for IP scholars will be thinking through how a predominantly utilitarian-based framework should accommodate other goals like distributive justice or Lockean labor.³⁰⁷

C. Artistic Progress and the Copyright Clause

If postmodernism arose because of a belief that modernism, “once scandalous,” became the dominant mode of production;³⁰⁸ that modernism, “[o]riginally oppositional” in “def[y]ing] the cultural order of the bourgeoisie” had become the official culture of the bourgeoisie;³⁰⁹ that modernism, in short, was “dominant but dead,”³¹⁰ then it could be said that the relentless copying that has become emblematic of postmodernism has suffered a similar fate.

Perhaps it is 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, 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.”

305. *Id.*

306. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), the iconic case on this issue.

307. On Lockean labor justifications for IP, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993); on distributive justice, see Rosenblatt, *supra* note 300. *Cf. AGAINST PROGRESS*, *supra* note 20, at 296–97; Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433 (2016); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 654 (1997) (“Copyright law might be more frequently followed if the lines it drew resembled emerging implicit copyright norms.”).

308. Hal Foster, *Postmodernism: A Preface of THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* ix–x (Hal Foster ed., 1983).

309. *Id.*

310. Habermas, *supra* note 52, at 6.

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.”³¹¹

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?³¹² One answer is simply that value judgments will always pervade opinions discussing the arts. Notwithstanding Justice Holmes’ famous admonition that “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of . . .” art,³¹³ the fact remains that judges resort to art criticism time and time again. Artistic judgment might even be inevitable where the first factor of the four-factor fair use test asks judges to evaluate whether an artist has transformed the original source material, essentially requiring judges to add their own artistic judgment.³¹⁴ One may ask, rather appropriately, whether Justice Kagan would have felt differently if she hadn’t believed that Warhol’s silkscreens were “eye-popping,”³¹⁵ or if art experts had not praised the “corporeality and luminosity” of Warhol’s depictions.³¹⁶

311. While this Article’s focus is on appropriation specifically, rather than attempting to excavate the broader, non-legal area of postmodernity as an artistic movement, my interviews reflected the same themes—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)—that has been emerging in recent critical writings. See Aria Dean, *Volume 4: On Postmodernism*, NOVEMBER, <https://www.novembermag.com/content/volume-4-on-postmodernism> [<https://perma.cc/4RXS-AQNS>] (“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?”). 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.* (emphasis in original).

312. *Supra* Subpart III.B.3.a.

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

314. “The first [factor] 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.” See *supra* Part II; *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 522 (2023).

315. *Id.* at 555 (Kagan, J., dissenting).

316. *Id.* at 556 (Kagan, J., dissenting). 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. See, e.g., Harvey Brown, *Eight Gates for Expert Witnesses*, 36 Hous. L. Rev. 743, 795 (1999).

Another answer is that progress—what it means to innovate and to advance the arts, and all the attendant value judgments that come along with those determinations—is baked right into the Copyright Clause.³¹⁷ As Professor Barton Beebe put it, the Copyright Clause’s invocation of “progress” cannot be some purely accumulationist vision of more and more *stuff*; rather, “progress requires standards to determine what constitutes progress.”³¹⁸

Intellectual property scholars have previously noted that intellectual property policy can, and does, create normative frameworks under which one particular type of work may flourish (or, in the alternative, perish).³¹⁹ For example, Professor Joseph Fishman has suggested that the derivative works right—which gives the copyright holder control over subsequent works that are “based upon” the original copyrighted work³²⁰—has encouraged the production of ever-more Hollywood franchises (say, *The Avengers*) over smaller, stand-alone films (say, *American Beauty*).³²¹ 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 show *New Portraits*.³²² 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, the painter, also 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, “I’ve seen [this] before. It’s not exactly the same, but somehow, it doesn’t even try to be different.”

317. U.S. CONST. art. I, § 8, cl. 8.

318. 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. That same conclusion echoes 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 intersecting systems as you, that is completely detrimental to their individual visions and the potential of their practice to grow.” Clarke Interview, *supra* note 27.

319. See Joseph P. Fishman, *Derivable Works*, 67 UCLA L. REV. 122, 124 (2020).

320. 17 U.S.C. § 101.

321. Fishman, *supra* note 319, at 137.

322. Andrew R. Chow, *Copyright Case Over Richard Prince Instagram 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> [<https://perma.cc/B7MJ-WWDX>].

D. 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. After all, two decades earlier, Professor Julie Cohen had advocated for a model beyond the stereotypical “romantic” creator and the “postmodern” one, towards a “situated user” who “has the capacity and the will to link her own creative projects aspirationally to larger dreams of artistic and personal progress.”³²³ Or maybe it is academic philosophizing that’s the real culprit. As Pagel, the art critic and educator, said: “[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.”

Through empirical qualitative data, this Article aimed to begin filling in the 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”³²⁴—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.³²⁵ But there remains more to do, and additional work will help supplement richer and more nuanced accounts—and critiques—of intellectual property’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 Nemes said, echoing the romanticists who came before him, who believed that art should approach the sublime. For those who had come before the onslaught

323. Cohen, *supra* note 7, at 372.

324. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 593 (2023) (Kagan, J., dissenting).

325. See generally EUREKA MYTH, *supra* note 20; AGAINST PROGRESS, *supra* note 20; Fiesler, *supra* note 214, at 65.

of pop, postmodernism, and all the glibness that would follow, the sublime could still *signify*, as “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.’”³²⁶

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, including through a renewed emphasis on the importance of artistic labor.³²⁷ Multiple interviewees predicted that we would see an increase in the popularity of painting that emphasizes the artist’s hand—whether through “a return to abstraction”³²⁸ or even, per Foster, “a return to the beautiful.”³²⁹ Tinari, the UCCA Director, noted that artists were “bringing process back into it,” with “[t]hese kind of really painterly, pigment-heavy, gestural, worked over—you know, things that just feel like they’ve got a lot of the artist’s hand.” We might view this return to labor-intensive artistic practices as reactions to the ease of copying technologies. Similarly, it is “no accident,” as critical theorist Walter Benjamin wrote, that as photography—the ultimate mode of mechanistic reproduction—rose in popularity, the “portrait” of the human face was its “focal point.”³³⁰

The findings presented in this Article might ring to some as a direct rebuke to the most prominent names in our shared artistic imagination, names that are so ingrained they need only be referred to by one-word monikers: Duchamp, Warhol, Koons, Prince. But equally striking is the distance of history: most of the artists that loom large in the legal imagination passed away decades ago; others are approaching the twilight of their careers. This Article sought to uncover what artists who are actively creating works *today* are thinking about when they set out to create and suggests that our long-ingrained notions about the primacy of appropriation—and the stranglehold of our great postmodern forebears—are in need of an update.

In fact, the findings reported herein may merely reflect what those deeply steeped in the art world have already known for some time: that, as

326. FOSTER ET AL., *supra* note 57, at 366.

327. *See also supra* Subpart III.B.3.b.

328. Ellison Interview, *supra* note 199.

329. Foster, *supra* note 244.

330. WALTER BENJAMIN, *The Work of Art in the Age of Its Technological Reproducibility: Second Version*, in *THE WORK OF ART IN THE AGE OF ITS TECHNOLOGICAL REPRODUCIBILITY AND OTHER WRITINGS ON MEDIA* 19, 27 (Michael W. Jennings et al. eds., Edmund Jephcott et al. trans., 2008).

the art historian Hal Foster put it recently in reconsidering his seminal essay on postmodernism, “the valence of appropriation has obviously undergone a sea change.³³¹ Once central to postmodernist practice, which was often called ‘appropriation art,’ this operation was taken to challenge unexamined assumptions about authorship as authority and art as property. Now the notion is fraught with ethical peril, and the term often functions as an accusation.”³³² Even Sherrie Levine, whose works from the 1970s and 1980s were generally praised by my interviewees as an example of valid appropriation with a critical message, is not immune from the new learning. The same *Artforum* reviewer who critiqued her latest exhibit for the ways in which she presented others’ works as her own³³³ concluded the review thusly: “[T]he suppression and distortion of the histories of one sort of maker for the delectation of another—appropriation not as conceptual gambit, but as structurally malign enterprise—are increasingly understood as decisive problematics in contemporary discourse.”³³⁴

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.³³⁵ 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.” As such, they concluded, “part of his work should include being sued by that artist He’s probably like . . . ‘My artwork is reaching its logical conclusion.’”³³⁶

Those who have long critiqued copyright law for failing to understand artistic practice on the ground may nonetheless resist the new paradigm shift.³³⁷ But if the underlying premise of the traditional argument has always been that lawyers need to understand what is happening on the ground and

331. Foster, *supra* note 308.

332. Foster, *supra* note 244.

333. Kastner, *supra* note 260 and accompanying text.

334. *Id.*

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

336. Interview with “K,” an artist who wished to be identified by this name (notes on file with author).

337. Academic literature commonly agrees that “[c]opying is now so ubiquitous in art that some have complained it has become ‘hegemonic.’” Adler, *supra* note 8, at 572. As the artists foundation amicus brief put it, the Court’s ruling against the Foundation “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.” See Art Institutions’ Brief, *supra* note 17, at 34.

how that practice may be changing, it would be folly to ignore the evidence of shifting artistic practice presented herein. Nor should one hope to dismiss it as merely a reactionary blip to the past few years' social and political upheavals. Instead, those who have long argued that intellectual property laws should take into account artistic practices might instead ask whether we should listen to artists as they seek a more equitable distribution of intellectual property's promised, but so-often illusory, rewards—and whether the law can change in ways to accommodate this worthwhile project.³³⁸

338. See Xiyin Tang, *Intellectual Property as Labor Policy* (unpublished working manuscript on file with author).

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, among others, 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 at, among others, 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 opened at Luhring Augustine in New York in the fall of 2023.

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, among others, 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 opened 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, the Hammer Museum, 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 represented 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 the 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*

<i>Age</i>	<i>Gender</i>	<i>Medium**</i>	<i>Race***</i>
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)
		Film/Video (3)	Other (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.