

THE SINCEREST FORM OF FLATTERY:  
PLAGIARISM IN A STRANGE INTERSTICE OF COPYRIGHT  
AND ANTITRUST LAW, WITH SPECIAL APPEARANCES BY  
ANDY WARHOL AND A PAIR OF PRINCES

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## I. AN ORIGINAL INTRODUCTION

Imitation is the sincerest form of flattery that mediocrity can pay to greatness.<sup>1</sup>

Ascribed to Oscar Wilde, the oft-cited aphorism in the epigram self-referentially engages in its own plagiaristic imitation insofar as it adapts uncited the original bon mot by Charles Caleb Colton.<sup>2</sup> The original version in *Lacon* was more pithy: “Imitation is the sincerest of flattery.”<sup>3</sup> Colton was a celebrated epigrammatist of the Victorian era, whose *Lacon* was much republished in America, largely at the energetic promotion of its commercially-minded author.<sup>4</sup> But Colton might accrue his own accusation of unacknowledged borrowing: Oxford’s Clarendon Press, with customary etymological punctiliousness,<sup>5</sup> traces the phrase beyond Colton in 1820 all the way back to the second-century Roman emperor Marcus Aurelius.<sup>6</sup> In Wilde’s defense, his additional flourish about mediocrity palpably changes the tenor of Colton’s earnest observation to a bone-dry mockery of social and artistic hierarchies—and that mere defense elides too the metasyntactic parody of plagiarizing an aphorism about plagiarism. But is

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- <sup>1</sup> No citation is made here in the interests of not endorsing any misattribution, but see the following notes for the provenance. The apothegm is usually attributed to Oscar Wilde.
- <sup>2</sup> See PHILOSOPHY AS EXPERIMENTATION, DISSIDENCE AND HETEROGENEITY 199 (José Miranda Justo et al. eds., 2021) (“Wilde was the one who said that ‘imitation is the sincerest form of flattery that mediocrity can pay to greatness,’ adding the part about mediocrity to Charles Caleb Colton’s dictum about flattery in *Lacon*.”).
- <sup>3</sup> 1 CHARLES CALEB COLTON, *LACON; OR MANY THINGS IN FEW WORDS; ADDRESSED TO THOSE WHO THINK* 135 (Bridgeport, M. Sherman 1828) (1820).
- <sup>4</sup> WILLIS GOTH REGIER, *IN PRAISE OF FLATTERY* 6 (Gerald Prince et al. eds., Univ. Neb. Press 2007) (“[Colton’s] book sold well, thanks in large part to his energy in promoting it. Colton sailed away from money trouble in Britain to publish the work in the United States, where it was quickly taken up and often reprinted.”).
- <sup>5</sup> This author refers, of course, to the unequalled *Oxford English Dictionary* whose authoritativeness as to the history of the English language defines the notion of authoritativeness, see *THE COMPACT OXFORD ENGLISH DICTIONARY* 1083 (2d ed. 1982); cf., e.g., *infra* notes 16, 37–38, *pace* perhaps only Dr. Samuel Johnson. Cf. *infra* notes 26–36 and accompanying text.
- <sup>6</sup> See *Imitation Is the Sincerest Form of Flattery*, *THE OXFORD DICTIONARY OF PROVERBS* 163 (Jennifer Speake ed., 6th ed. 2015).

Wilde's apophthegm an instance of plagiarism, and if plagiarism be defined so, is there anything wrong with it, legally or morally? Surely, mankind is the better for the allowance of Wilde's witticism.

These are not easy questions, and the cognoscenti have been asking them for thousands of years. Part II surveys the long history and modern application of plagiarism, noting especially those who have dared to question the common wisdom vilifying it, including sitting justices of the Supreme Court.<sup>7</sup> Parts III and V deal with the law of copyright and competition respectively, each of which had parts to play in *Warhol*.<sup>8</sup> Part IV, aptly nestled in the interstice of copyright and antitrust, explores the Court's judgment in *Andy Warhol Foundation for the Arts v. Goldsmith*, a modern case weighing the rights of the public and artists.<sup>9</sup> Part VI seeks to reconcile the rejection of common antitrust wisdom with the practice of copyright law, recurring to the age-old bogeyman of plagiarism to plumb the depths of the dispute, illustrating that copyright is in the end as nebulous a concept as plagiarism.<sup>10</sup> The conclusion in Part VII offers both a condemnation and defense of copyright law and the *Warhol* decision, reflecting that a certain degree of incoherence is desirable in this peculiar niche of the law.<sup>11</sup>

Ruminating on *Warhol* half a year later, the National Public Radio offered a verdict of sorts: "[A]t what point does a derivative work become transformative? The answer, it seems, has less to do with what art critics think, and more with what the market thinks."<sup>12</sup> But who, exactly, is the market for art if not the critics? That fundamental complication motivates this Article's meandering through first copyright and then antitrust law in search of an ultimate answer to the riddle of plagiarism in modern times.

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<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Parts III, V.

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part VI.

<sup>11</sup> See *infra* Part VII.

<sup>12</sup> Jeff Guo et al., *The Andy Warhol Supreme Court Case and What It Means for the Future of Art*, NAT'L PUB. RADIO (Sept. 6, 2023, 5:48 PM), <https://www.npr.org/2023/09/05/1197609729/prince-warhol-goldsmith-supreme-court> [<https://perma.cc/5BGQ-CN9Q>].

## II. FIGHTING WORDS: PLAGIARISM AS BOTH PLAGUE AND PAEAN

Plagiarism has been described in criminal terms from its inception, just as some speech has always been held beyond the aegis of protected freedom of expression, including “fighting words.”<sup>13</sup> In elder days, the idea of plagiarism *per se* was unknown, but such was its innominate logical force that its exponents (authors, naturally) arose as early as ancient Rome to advocate for the moral right of authors, invoking the metaphors of the criminal law to illustrate by analogy why such violations should be prohibited and punished.<sup>14</sup> And yet, perplexingly, no such crime was ever promulgated then or now.<sup>15</sup> Perhaps this is because there persisted an equally strong current of thought that imitation, or “mimesis” in Greek,<sup>16</sup> in fact constitutes the surest paeon to, schooling in, and propagation of the wisdom and art of yore, muddying the waters of the putative plague of plagiarism unto modern times.<sup>17</sup>

### A. MARTIAL’S WORDS: THE ORIGINS OF PLAGIARISM AND EVOLVING VIEWS

The notion was originally given a name by the celebrated Roman epigrammatist Marcus Valerius Martialis of the first century AD, known to history by his Anglicized cognomen as Martial.<sup>18</sup> In his surviving writings, he is recorded

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<sup>13</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

<sup>14</sup> *See infra* Section A.

<sup>15</sup> *See infra* Section B.

<sup>16</sup> *See Mimesis*, THE COMPACT OXFORD ENGLISH DICTIONARY 1083 (2d ed. 1982) (stating as the first definition, with a usage tag for rhetoric (“Rhet.”), a “figure of speech, whereby the supposed words or actions of another are imitated,” with usages dating through the latter twentieth century).

<sup>17</sup> *See infra* Section C.

<sup>18</sup> Audrey Wolfson Latourette, *Plagiarism: Legal and Ethical Implications for the University*, 37 J.C. & U.L. 1, 10 (2010) (“There is a general consensus among

as complaining to his friend and patron Quintianus that one Fidentinus had been purveying his epigrams without credit, which despite his manumission of his wit to the world, this *plagiarius* now “held in durance vile, like a slave stolen from its rightful master.”<sup>19</sup> That was the original meaning of *plagiarius*: one who engages in kidnapping and human trafficking, far more heinous than a simple sneakthief.<sup>20</sup> The crime of *plagium* “can denote either someone who steals another person’s slave or child or someone who forces a freeborn person or freedman into slavery,” and Martial conceived of his plagiarist as the latter, a slaver of emancipated words.<sup>21</sup>

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commentators that the first written use of the word plagiarism was offered by the first century-A.D. Roman poet Martial, who utilized the term *plagiarius* to mock a competitor, Fidentinus.”); cf. Henry Goudy, *Plagiarism—A Fine Art*, 20 JURID. REV. 302 (1908–1909) (the term was “used . . . by Martial.”).

- <sup>19</sup> MARCUS VALERIUS MARTIALIS, *EPIGRAMMATA SELECTA* I.ii at 18–19 (F.A. Paley & W.H. Stone eds., Whittaker & Co. 1881) (“Commendo tibi, Quintiane, nostros | nostros dicere 6it amen libellos | possum, quos recitat tuus poeta | Si de servitio gravi queruntur, | Assertor venias satsique praestes, | Et, cum se dominum vocabit ille, | Dicas esse meos manuque missos. | Hoc si terque quaterque clamitaris, | Impones plagiaro pudorem.”). Self-translated by this author, Martial writes: “Quintianus, I put in your hands the matter of my little writings, if I can still call those mine that your poet repackages as his own. As they cry out from this durance vile, be their vindicator and supply the proof; even when he calls himself their master, just say that they are manumissions of mine. If you declaim this three or four times, you will instill shame even in this slaver of words.”
- <sup>20</sup> See Latourette, *supra* note 18, at 10; cf. Goudy, *supra* note 18, at 302 (defining *plagium* as “the stealing of a slave from his master, or the stealing of a free person in order to keep him or sell him as a slave”); see also *Plagiarius*, OXFORD LATIN DICTIONARY 1386 (P.G.W. Glare ed., 1982) (defining as a kidnapper, deriving from *plagium*, for which a sense of kidnapping evolved from the primary meaning of the taking of game, ultimately from *plaga*, a net used in venery); see George Long, *Plagium*, in *DICTIONARY OF GREEK AND ROMAN ANTIQUITIES* 921 (William Smith ed., John Murray, London 1875), [https://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA\\*/Plagium.html](https://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Plagium.html) [<https://perma.cc/KN9M-X7D7>] (“The word *Plagium* is said to come from the Greek *πλάγιος*, oblique, indirect, *dolosus*. But this is doubtful. Schrader (Inst. 4 18 §10) thinks that the derivation from *plaga* (a net) is more probable.”).
- <sup>21</sup> SCOTT MCGILL, *PLAGIARISM IN LATIN LITERATURE* 88 (Cambridge Univ. Press 2012) (“In relating that he has manumitted his poetry (*dicas esse meos manuque missos* [7]), Martial makes it clear that he was figuring Fidentinus as

Fidentinus featured in an entire cycle of Martial's epigrams excoriating his competitor's misappropriations, allegedly self-evident by juxtaposition to the former's own lackluster prose.<sup>22</sup> The archetypal epigrammatist concluded one of his several sallies: "indice non opus est nostris nec iudice libris, stat contra dicitque tua pagina 'fur es.'" —*viz.*, my books need neither marque nor judge; your own page rebukes you, saying "you are a thief."<sup>23</sup> Martial did not leave plagiarism likened only to kidnapping or theft; the modern Roman scholar Scott McGill writes that, in a later epigram, "plagiarism is an offense incidental to the larger one of sodomizing Martial's *puer*."<sup>24</sup>

Later authorities, however, held not *quite* so harsh a view of artistic license as slavery or sodomy. Audrey Wolfson Latourette provides a précis of plagiarism in antiquity and the Middle Ages, characterized better as having "engendered laughter rather than lambasting," because "[i]n the ancient world, the prevailing view was that art was imitative and thus, *mimesis* or copying from, and improving upon, the work of others was recommended as the vehicle whereby 'Western writers established their authority.'"<sup>25</sup> For most of history, there was no legal protection of copyright as such; there would have been little use before the advent of the printing press, with which came the first rudiments of intellectual rather

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a stealer of freedmen. . . . proceed[ing] to re-enslave the texts."); see Long, *supra* note 20, at 921 ("He who committed *plagium* was *plagiarius*, a word which Martial (Ep. I.53) applies to a person who falsely gave himself out as the author of a book; and in this sense the word has come into common use in out [sic] language."); see also Goudy, *supra* note 18, at 302 ("[P]lagiarius was also sometimes applied by the Romans in popular language to a literary thief, *i.e.* one who falsely gave himself out as the author of another person's writings.").

- <sup>22</sup> MARTIALIS, *supra* note 19, at 19–20 (with notation that epigrams I.xxix, I.lxvi, and I.lxxii are also addressed to the same Fidentinus).
- <sup>23</sup> MCGILL, *supra* note 21, at 94; MARTIALIS, *supra* note 19, at 20. The translation is this author's. The English term *marque*, used here to translate the Latin *indice*, strives to get at the ancient meaning: a ribbon affixed to a text used to indicate its provenance. *Id.* ("*index* (in books), was a strip of red paper hanging from a MS. and giving the title and name of the author."). The chrome ornaments affixed to cars to indicate their makers seem the most apt analogue.
- <sup>24</sup> MCGILL, *supra* note 21, at 88.
- <sup>25</sup> Latourette, *supra* note 18, at 9–10 (quoting Rebecca Moore Howard, *Plagiarism, Authorships, and the Academic Death Penalty*, 57 C. ENG. 788, 789 (1995)).

than real property.<sup>26</sup> After Gutenberg, authors did on occasion seek to rein in copycats who would trade commercially in their works via the mass production of the printing press, but classical norms prevailed until the Romantic period of Blake and Byron, when an exaltation of the auteur as a font of originality began to assert itself.<sup>27</sup>

All the same, many of the icons of literature were acknowledged as reusing their forebears' art, from Virgil's oft-cited borrowing from Homer onward.<sup>28</sup> (Homer seems to have escaped opprobrium only because there was no earlier known author from whom to appropriate.) Continuing from Virgil, Justice Joseph Story cited also Bacon, Coke, Shakespeare and Milton as proto-plagiarists all—if the truism that the “thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection” sufficed for recrimination.<sup>29</sup> A century later, Mark Twain was so vigorously embroiled in a controversy with Danish author Steen Blicher in 1910 that Twain's (né Clemens) secretary was obliged to confirm publicly that “‘Tom Sawyer, Detective’ is original with Mr. Clemens, who has never been consciously a plagiarist.”<sup>30</sup> Closer to home, Justice Story observed that legal luminaries like Blackstone and Kent, writing centuries

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<sup>26</sup> *Id.* at 11 (“During the Middle Ages, reverent adherence to the philosophy of antiquity continued. While some medieval writers sought to protect their writings from unauthorized copying, in the absence of modern ideas of literary property, individualism, and originality, the contemporary notion of plagiarism did not exist. The invention by Johannes Gutenberg of the printing press in 1440, deemed a ‘crucial precondition of modern authorship, supported a “growing artistic consciousness, albeit one not yet . . . protected by copyright laws.””) (citations omitted).

<sup>27</sup> *Id.* at 11–12 (In the Romantic era, ““authorship” and “originality” emerged as significant cultural values’ and in which ‘the norm of attribution and the taboo of plagiarism came to the fore.”) (citations omitted).

<sup>28</sup> Leon R. Yankwich, *Intent and Related Problems in Plagiarism*, 33 S. CAL. L. REV. 233, 233 (1960) (“Virgil . . . himself was accused of copying from Homer and others. . .”).

<sup>29</sup> *Emerson v. Davies*, 8 Fed. Cas. 615, 619 (No. 4,436) (D. Mass. 1845) (Story, J.).

<sup>30</sup> Henry G. Leach, *Was “Tom Sawyer” Danish or American? Why Mark Twain Is Charged with “Borrowing” from Steen Blicher’s Story of “The Vicar of Weilby,”* N.Y. TIMES (Feb. 6, 1910), <https://timesmachine.nytimes.com/timesmachine/1910/02/06/102035433.pdf> [<https://perma.cc/V3R3-9EQ4>].



before, would be tarred by the same brush.<sup>31</sup> For, “what are all modern law books, but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copy-right?”<sup>32</sup> Plagiarism *qua* mimesis has always been essential to legal thought under the common law. This very paragraph, for example, owes much to a 1960 treatment by Leon R. Yankwich in the *Southern California Law Review*.<sup>33</sup>

And the term *plagiarism* has proven popular as well to describe this putative plague,<sup>34</sup> beginning in the seventeenth century. In 1753, the great exponent and proponent of the English language Dr. Samuel Johnson,<sup>35</sup> offered an apologia for plagiarism denominated as such in his customary forum of the *Adventurer* magazine:

It is often charged upon writers, that with all their pretensions to genius and discoveries, they do little more than copy one another . . . The allegation of resemblance between authors is indisputably true; but the charge of plagiarism, which is raised upon it, is not to be allowed with equal readiness. A coincidence of sentiment may easily happen without any communication, since there are many occasions in which all reasonable men will nearly think alike. . . . It is necessary, therefore, that before an

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<sup>31</sup> *Emerson*, 8 F. Cas. at 619.

<sup>32</sup> *Id.*

<sup>33</sup> See Yankwich, *supra* note 28, at 233–34 (opining on the difficulty of tracing ideas to previous creators or discerning the originality of them, and citing to Justice Story’s own thoughts on the issue). Of course, modern legal scholarship is littered with citations to the authors before, so it can hardly be called plagiarism as such.

<sup>34</sup> See Latourette, *supra* note 18, at 2 (turning the phrase “plague of plagiarism”). Although many have commented on the similarity between *plagiarism* and *plague*, it is skin-deep only. As noted, *plagiarism* derives by way of *plagium* from *plaga*, a hunting net, see Latourette, *supra* note 18, at 10, whilst *plague* derives from the discrete sense of *plaga* that came mean slaughter or destruction in Late Latin, likely derived from *plangere*, to lament or beat the breast, from Greek *plaga*, meaning a physical blow. *Plague*, THE COMPACT OXFORD ENGLISH DICTIONARY 1354 (2d ed. 1982).

<sup>35</sup> *Samuel Johnson’s A Dictionary of the English Language*, JOHNSON’S DICTIONARY ONLINE, <https://johnsonsdictionaryonline.com> [<https://perma.cc/KCU9-PCQ5>].

author be charged with plagiarism, one of the most reproachful, though, perhaps, not the most atrocious of literary crimes, the subject on which he treats should be carefully considered. We do not wonder, that historians, relating the same facts, agree in their narration . . . .<sup>36</sup>

The word followed the practice apace, as the Oxford English Dictionary compiles dozens of usages throughout the 1600s, from the original translation via the French of *plagiary* to its neo-Latinate *plagiarism* and thence *plagiarist* and *plagiarize*.<sup>37</sup> The latter forms soon came to predominate, though the now-obsolete *plagiary* had a final triumph in 1880 when the Victorian wit Algernon Charles Swinburne adjudged in his *Study of the recidivistic Shakespeare*: “No parasitic rhymester . . . ever uttered a more parrot-like note of plagiary.”<sup>38</sup>

Psittacine he may have been, but Shakespeare undoubtedly had the last laugh. True, his *Romeo and Juliet* has been “exposed” by Judge Richard Posner as derivative of several earlier *Romeos* and *Juliets*, all of which were glosses on Ovid’s tale of *Pyramus and Thisbe*, yet Shakespeare’s reputation is none the worse for it.<sup>39</sup> His contemporary Robert Greene famously named Shakespeare “an upstart crow, beautified with our feathers” in Greene’s *Groatsworth of Wit*, perhaps imagining himself a modern *Martial* bearding his own *Fidentinus*.<sup>40</sup> “Time has rendered its verdict,” however, and it is not kind to the critic and his *groatsworth*

<sup>36</sup> SAMUEL JOHNSON, *THE WORKS OF SAMUEL JOHNSON, LL. D. IN NINE VOLUMES, VOLUME 04 65* (Project Gutenberg 2004) (1846).

<sup>37</sup> *Plagiary*, *THE COMPACT OXFORD ENGLISH DICTIONARY 1354* (2d ed. 1982).

<sup>38</sup> *Id.*

<sup>39</sup> *Pickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000) (Posner, J.) (“The Bernstein-Sondheim musical *West Side Story*, for example, is based loosely on Shakespeare’s *Romeo and Juliet*, which in turn is based loosely on Ovid’s *Pyramus and Thisbe*, so that if ‘derivative work’ were defined broadly enough (and copyright were perpetual) *West Side Story* would infringe *Pyramus and Thisbe* unless authorized by Ovid’s heirs.”); see Latourette, *supra* note 18, at 2 (“‘*West Side Story*’ is a thinly veiled copy . . . of ‘*Romeo and Juliet*,’ which in turn plagiarized Arthur Brooke’s ‘*The Tragicall Historie of Romeo and Juliet*,’ . . . which in turn copied from several earlier *Romeo and Juliets*, all of which were copies of Ovid’s story of *Pyramus and Thisbe*.”) (quoting Richard A. Posner, *The Truth About Plagiarism*, *NEWSDAY*, Combined Editions, May 18, 2003, at A34).

<sup>40</sup> Brian Vickers, ‘Upstart Crow’? *The Myth of Shakespeare’s Plagiarism*, 68 *REV. ENG. STUD.* 244 (2017); Warren B. Austin, *A Supposed Contemporary Allusion to Shakespeare as a Plagiarist*, 6 *SHAKESPEARE Q.* 373, 373–74 (1955).

of wit: “Greene himself is no more than a name in the annals of letters. Shakespeare lives.”<sup>41</sup> Only time will tell who is the Martial and who is the Fidentinus, who is Shakespeare and who Greene, whose wit is worth but a groat and whose is priceless. That principle of temporal humility has been the enduring theme on which Justice Story and Dr. Johnson expounded: Only by freely tolerating mimesis, with posterity as its sole and supreme judge, will the annals of mankind be as enriched as they have been with the variegated offerings of authors and artists.<sup>42</sup>

B. COMBATting WORDS: THE ENDURING INFEASIBILITY OF  
CRIMINALIZING PLAGIARISM

The crime of *plagium*—*i.e.*, literal kidnapping and human trafficking—was outlawed in the Roman Republic by the *Lex Fabia de plagiaris* of 183 BC.<sup>43</sup> Plagiarism as an offense against authorship was not, and notwithstanding Martial’s exhortations to the prosperous Quintianus in the first century AD, it never was.<sup>44</sup> McGill introductorily concedes that “[i]t remains the case today in the United States and elsewhere that no law criminalizes plagiarism.”<sup>45</sup> To be fair, McGill argues cogently that Roman mores did recognize the “culpable reuse of

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<sup>41</sup> Latourette, *supra* note 18, at 1–2, n.1 (quoting ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 74–75 (1952)).

<sup>42</sup> See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting). Allowing lawyers to quash creativity would be a travesty, despite the vitality of their function. Even the great plagiarist Shakespeare did not endorse the eradication of those lawyers who plagued mankind with their intricacies in his time, putting his oft-quoted words in the mouth of the villain in his play. See *id.* (“That function was, however, well understood by Jack Cade and his followers, characters who are often forgotten and whose most famous line is often misunderstood. Dick’s statement (“The first thing we do, let’s kill all the lawyers”) was spoken by a rebel, not a friend of liberty. . . . As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.” (internal citation omitted)). Properly understood, the law should conduce authorial creativity and innovation against authoritarian hegemony, not the opposite.

<sup>43</sup> *Lex Fabia de plagiaris*, BLACK’S LAW DICTIONARY (11th ed. 2019); Long, *supra* note 20, at 921; MCGILL, *supra* note 21, at 88.

<sup>44</sup> MCGILL, *supra* note 21, at 10 (“In fact, to plagiarize in ancient Rome was never to break the law.”).

<sup>45</sup> *Id.*

earlier texts, customarily described in terms of stealing, in which a person wins false credit by presenting another's work as his own," distinguishing the reuse of ideas (licit) from the unauthorized restatement of words (illicit).<sup>46</sup> But no evidence exists of any prosecution on the basis of custom, or of any law that might have been a basis for such a prosecution, as McGill avidly admits from the start.<sup>47</sup> Plagiarism, to the extent it was understood, was a "pragmatic phenomenon, just as it is today," difficult to define beyond the intent of its practitioners and the resultant impact on commerce in intellectual pursuits.<sup>48</sup> Antiquity lacked a word for authorial misappropriation beyond the metaphor of thievery or kidnapping, and the absence is telling.<sup>49</sup>

This peculiar juxtaposition of some sort of moral culpability (à la Martial) with the dearth of legal framework pervades the situation of the successor nations to the Roman Republic. To be sure, roughshod reduplication without the "dress and decoration" of Dr. Johnson or the "improve[ment] by his own genius or reflection" of Justice Story might be more culpable, and the former did situate it amongst the "literary crimes," albeit a lesser one.<sup>50</sup> The archetypal struggle of Martial and Fidentinus could imply that it was easy to determine when a reuse was transformative and to the greater benefit of mankind, or basely commercial and only to the pecuniary benefit of one larcenous man.<sup>51</sup> That, however, was not the trajectory adopted by the wise: Even as the denominations and accusations of plagiarism multiplied after Gutenberg in the Romantic era, "while valuing originality," authors and authorities of the time alike "deemed improvement upon the original as justification for borrowing," and respectable writers did so unreservedly.<sup>52</sup> Nonetheless, it is fair to note that Britain adopted a law of

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<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.* at 4 ("It needs to be said here at the outset that no clear and verifiable cases of plagiarism survive from Latin antiquity. . . . Most of the evidence breaks down into accusations and denials of plagiarism. . . .").

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.* at 8–10 ("Less vividly, authors sometimes have no term for 'theft' or 'stealing' and refer to plagiarism through the use of possessive adjectives, with the idea that someone is presenting another's work *pro suo*, 'as his own.'").

<sup>50</sup> JOHNSON, *supra* note 36, at 65; *Emerson v. Davies*, 8 Fed. Cas. 615, 619 (No. 4,436) (D. Mass. 1845) (Story, J.); *see generally* Yankwich, *supra* note 28; *see generally* Leach, *supra* note 30.

<sup>51</sup> Compare *infra* Section III.B with Section III.C.

<sup>52</sup> Latourette, *supra* note 18, at 13–15.

copyright in 1710 in the Statute of Anne, expressly recognizing the rights of an author to benefit in and control the commercialization of his words.<sup>53</sup> Latourette, who duly makes note of the statute, suggests that it was only at this point that “plagiarism commenced to be viewed as a moral offense,”<sup>54</sup> but that temporal nicety is belied by her excellent recapitulation of Martial and his philippics as foundational to the behavior of medieval and modern society.<sup>55</sup>

There is little debate today that plagiarism extends beyond mere copyright infringement and encompasses some more amorphous universe of misappropriations of authorial creativity.<sup>56</sup> It is that amorphism that is resistant to legalism, for the law has always proven inadequate to enunciate the contours of any crime committed in reusing unheralded the work of others without counterproductively stifling the advance of artistic progress. Only the culpability of Fidentinus seems obvious: the fraudulent republication of an innocent author’s work unembellished, inuring only to the fisc of the fraudster.<sup>57</sup> Unjust enrichment by fraud has always been a cause of action in equity.<sup>58</sup> And the offense *per se*—

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<sup>53</sup> *Id.* at 12 (“The British enactment of copyright law, as evidenced in the 1710 Statute of Anne, extended protection and rights of reproduction to the author, thus fortifying the notion of literary production being construed as property from which the creator could profit.”) (citations omitted).

<sup>54</sup> *Id.* (“As authorship defined by Romantic literary theory merged with personal virtue, the divine gifts of the original genius were extolled; the slavish adherence to revising the classics was denigrated. . . .”).

<sup>55</sup> *Id.* at 9–11.

<sup>56</sup> See Brian L. Frye, *Plagiarism Is Not a Crime*, 54 DUQ. L. REV. 133, 141–42 (2016) (discussing the overlap of elements between copyright and plagiarism); see also Ralph D. Mawdsley, *Plagiarism Problems in Higher Education*, 13 J.C. & U.L. 65, 65–66, 89–90 (1986) (examining an expansive definition of plagiarism and relation to copyright); see also MCGILL, *supra* note 21, at 3–6.

<sup>57</sup> MCGILL, *supra* note 21, at 10 (“The distance between plagiarism and copyright undercuts the claim made by some that the former could exist as a recognized transgression only with the advent of the latter”).

<sup>58</sup> *E.g.*, *Sheldon v. Metro-Goldwyn Pics. Corp.*, 309 U.S. 390, 399 (1940) (“[T]he principles governing equity jurisdiction [are] not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim ‘that which, *ex aequo et bono*, is theirs, and nothing beyond this.’”) (quoting *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 560, 14 L.Ed. 809 (1853)); *Martin v. Little, Brown & Co.*, 450 A.2d 984, 988 (1981) (“Where one person has been unjustly enriched at the expense of another he or she must make restitution to the other.”).

which is to say that of Fidentinus—was long ago addressed by the grant of a copyright and the imprimatur of the law to exercise the right to extirpate the practice of empty mimesis for profit, void of the evolutionary embroidery of Johnson or Story.<sup>59</sup>

Modern courts are no more definitive on the subject of historically indefinite plagiarism. In a *qui tam* action, the Fourth Circuit concluded that the underlying claim of plagiarism was “far too attenuated to any federal right for us, or any federal court, to decide,” observing that “none of these ‘ideas’ were original to Berge, and thus none of these could have been taken by Fowler from Berge and passed off as her own.”<sup>60</sup> For decades, courts have been resisting pleas to denounce as plagiarism any similarity between an earlier work and a later, however conceptual.<sup>61</sup> State courts trying to make sense of plagiarism suits confronted incoherent conjectures of criminality, and generally concluded plagiarism was a matter of tort at best, guided to demur by their legislatures.<sup>62</sup> Courts grappled with the question of mens rea: Does plagiarism require an intent to deceive, or will reckless or negligent handling of sources suffice for the ill-defined offense?<sup>63</sup> Perhaps “objective plagiarism” in which words are reduplicated

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<sup>59</sup> See *infra* Part III.

<sup>60</sup> United States *ex rel.* Berge v. Bd. of Trs. of Univ. of Ala., 104 F.3d 1453, 1461–62 (4th Cir. 1997).

<sup>61</sup> E.g., *Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 612, 613 (2d Cir. 1945) (“The action as a whole has been built up, partly upon a wholly erroneous understanding of the extent of copyright protection; and partly upon that obsessive conviction, so frequent among authors and composers, that all similarities between their works and any others which appear later must inevitably be ascribed to plagiarism.”); see also *Klekas v. EMI Films, Inc.*, 150 Cal. Rptr. 198 Cal. Rptr. 296, 303 (Cal. Ct. App. 1984) (quoting *Dellar*).

<sup>62</sup> See, e.g., *Weitzenkorn v. Lesser*, 256 P.2d 947, 953 (Cal. 1953) (explaining that “an action to recover damages arising out of alleged plagiarism has been classified [by the state Legislature] as a tort action” as opposed to a criminal violation).

<sup>63</sup> See, e.g., *Newman v. Burgin*, 930 F.2d 955, 962 (1st Cir. 1991) (“[Plaintiff-Appellant Professor] argues that the finding of plagiarism is arbitrary because several academic sources define plagiarism as involving an ‘intent to deceive;’ and the University concedes that it has not shown such an intent. Other academic sources, however, define plagiarism without reference to intent . . . [and] suggest[] that one can plagiarize through negligence or recklessness without intent to deceive. Moreover, the University did not characterize Professor Newman’s subjective state of

slavishly might imply guilt straightforwardly, but the mulling of the plagiarist's mental state requires a more intractable analysis.<sup>64</sup> Yet other courts have cut the Gordian knot and inferred intent from the "mosaic" assembled of another author's ideas, presuming the purpose to "pass off" the congeries as one's own to be self-evident.<sup>65</sup>

At least some outright plagiarists may be punished by noncriminal watchdogs. In 1982, the Illinois Supreme Court took up an appeal from an attorney disciplined for academic plagiarism, which the appellant claimed was too far removed from the practice of law to warrant professional censure, and that no basis "would support this court in disciplining attorneys for conduct arising outside the practice of law when that conduct is considered deceitful and immoral but not criminal."<sup>66</sup> The supreme court disagreed, albeit conceding that no lawbreaking was alleged.<sup>67</sup> Given that "[t]he extent of the respondent's plagiarism displays an extreme cynicism towards the property rights of others . . . incorporat[ing] verbatim the work of other authors as a substantial portion of his thesis," such arrant dishonesty could be punished in a lawyer.<sup>68</sup> Nevertheless, the court believed that the authors plagiarized had suffered no appreciable harm nor any violation of trust, and so there was no victim except inasmuch as "[a]ll honest scholars are the real victims in this case."<sup>69</sup> With the plagiarist having already been

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mind. It said she was guilty of 'objective plagiarism,' and 'seriously negligent scholarship.'" (internal citation omitted)).

<sup>64</sup> *Id.*

<sup>65</sup> *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 263, 276 (N.J. Super. Ct. App. Div. 1982) ("Our independent examination of the record satisfies us that the COD properly concluded that plaintiff had plagiarized. Her paper constitutes a mosaic of the Ludmer work in an attempt to pass off Ludmer's ideas as plaintiff's own. While plaintiff persists in her argument that she did not intend to plagiarize and that there is nothing in the proofs to show that she did so intend, the mosaic itself is the loudest argument against her.").

<sup>66</sup> *In re Lamberis*, 443 N.E.2d 549, 550-51 (Ill. 1982).

<sup>67</sup> *Id.* at 551 ("Although no violation of law or fraud on the court is alleged here, and although the academic forum may appear to be fairly distant from the practice of law, we believe that the respondent's conduct warrants discipline.").

<sup>68</sup> *Id.* at 551-52 (also noting the importance of honesty as "fundamental to the functioning of the legal profession").

<sup>69</sup> *Id.* at 552 ("Although the respondent's plagiarism displayed a defect in character, it did not directly cause harm to any person. The respondent's fraudulent appropriation of the two works did not diminish the value of the

expelled from Northwestern, the court selected censure rather than disbarment as proper discipline.<sup>70</sup> Other courts have not been so merciful: A half-year suspension was exacted on an attorney who plagiarized a court brief and then billed the court for the misuse, citing the threat of dishonest counselors to the bar at large.<sup>71</sup> Yet a recent iconoclastic author, Aaron M. Carter, has interrogated what threat plagiarized briefs actually pose, citing pointedly the case of a copycat detected because of the brief's "unusually high quality."<sup>72</sup>

As Northwestern exemplifies, university authorities have little reluctance to penalize plagiarists by ouster and ostracism.<sup>73</sup> Although dismissal is severe enough, Latourette notes (dutifully quoting the *Chronicle of Higher Education*) that "an accusation of plagiarism is academe's version of a scarlet letter";<sup>74</sup> Carter likewise called it the "academic equivalent of the mark of Cain" (also with citation).<sup>75</sup> On occasion, courts have been invoked for claims that the proscribed scholars were denied due process or discriminated against with plagiarism as the pretext, but judges have been hesitant to second-guess the university's prerogative to enforce academic honesty.<sup>76</sup> Plagiarism is viewed as distinct from rote employee

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works to the authors, nor did it expose the authors to any risk of loss.

Moreover, in appropriating their property, the respondent did not violate any trust which the authors had reposed in him.").

<sup>70</sup> *Id.* at 552–53.

<sup>71</sup> Iowa Sup. Ct. Bd. of Ethics & Conduct v. Lane, 642 N.W.2d 296, 302 (Iowa 2002) ("Lane's excessive billing for writing a largely plagiarized brief cannot go undisciplined. Honesty is fundamental to the functioning of the legal profession, and Lane's conduct in this case has compromised that honesty.").

<sup>72</sup> Andrew M. Carter, *The Case for Plagiarism*, 9 U.C. IRVINE L. REV. 531, 531-34 (2019) (citing *In re Burghoff*, 374 B.R. 681, 757 (Bkrtcy. N.D. Iowa 2007)).

<sup>73</sup> Latourette, *supra* note 18, at 59-87 (detailing, comparing, and contrasting the consequences of plagiarism committed by academic faculty to those committed by student plagiarists).

<sup>74</sup> *Id.* at 64 (quoting Courtney Leatherman, *At Texas A&M Conflicting Charges of Misconduct Tear A Program Apart*, 46 CHRON. HIGHER EDUC., Nov. 5, 1999, at A18).

<sup>75</sup> Carter, *supra* note 72, at 534 (quoting K.R. ST. ONGE, *THE MELANCHOLY ANATOMY OF PLAGIARISM* 61 (Univ. Press of Am. 1988)).

<sup>76</sup> *See, e.g.*, Newman v. Burgin, 930 F.2d 955, (1st Cir. 1991) ("The Due Process Clause of the Constitution, however, does not require the University to follow any specific set of detailed procedures as long as the procedures the University actually follows are basically fair ones (which in this case they



misbehavior, as a species of academic fraud animated by uniquely pedagogical standards.<sup>77</sup> Likewise, students *vis a vis* universities are not merely parties to a contract or members in a club, but enjoy a *sui generis* time-honored relationship.<sup>78</sup> Judges must therefore respect “the necessity for independence of a university in dealing with the academic failures, transgressions or problems of a student” as

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were.”); *Hill v. Trs. Of Ind. Univ.*, 537 F.2d 248 (7th Cir. 1976) (“The fact that Professor Garnier did not comply with section 3.2(3) of the *Student Code of Conduct* when he gave plaintiff failing grades does not, in itself, constitute a violation of the Fourteenth Amendment. Nor does the single fact that Indiana University adopted a grievance procedure which provides for a hearing before a plagiarism penalty may be imposed require a court to find that the procedure afforded plaintiff in the present case violated his right to due process.”); *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 263 (N.J. Super. Ct. App. Div. 1982) (finding “nothing unreasonable” with the university-assessed penalty for plagiarism).

<sup>77</sup> *Napolitano*, 453 A.2d at 271 (“It is clear that plaintiff was charged with plagiarism—in other words, that plaintiff attempted to pass off as her own work, the work of another. That act, if proven, constituted academic fraud. We do not view this case as involving an appeal from a finding of general misconduct; instead, we are concerned with the application of academic standards by the authorities at Princeton.”).

<sup>78</sup> *Id.* at 272 (“We do not believe, however, that the law of private associations delineates completely the relationship between a student and a university. The relationship is unique. . . . The student comes to the academic community (the university) seeking to be educated in a given discipline. The student pays a tuition which might, in some instances, represent a contractual consideration. The university undertakes to educate that student through its faculty and through the association of other students with that student and the faculty. Transcending that bare relationship is the understanding that the student will abide by the reasonable regulations, both academic and disciplinary, that the student will meet the academic standards established by the faculty and that the university, on the successful completion of studies, will award the degree sought to the student. Such a relationship, we submit, cannot be described either in pure contractual or associational terms.”); see also Jared S. Sunshine, *Antitrust Precedent & Anti-Fraternity Sentiment: Revisiting Hamilton College*, 39 CAMPBELL L. REV. 59, 100–21 (2017) [hereinafter Sunshine, *Hamilton*] (discussing the “unique relationship between university and student” within the context of antitrust litigation between fraternities and universities over the student housing market).

distinct from extramural behavioral misconduct.<sup>79</sup> It was not the place of judges to substitute their views on the proper penalty for plagiarism—as an academic offense, not a criminal one—for those of university deans.<sup>80</sup> Even in his iconoclasm, Carter too thought academia had a unique role to play in advancing original research and development of thought.<sup>81</sup>

But all this extrajudicial excursus only underlines the indubitable: plagiarism is not a crime, to copy the title of Brian L. Frye’s fine work unabashedly.<sup>82</sup> Or as a Colorado trial judge put it in the coincidentally-captioned *Fry v. Lee*: “It is undisputed that there is no such crime as plagiarism. A reasonable person simply could not come to that conclusion.”<sup>83</sup>

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<sup>79</sup> *Napolitano*, 453 A.2d at 273–74 (“We have noted heretofore that we regard the problem before the court as one involving academic standards and not a case of violation of rules of conduct. Plaintiff, apparently ignoring the distinction, seeks a full panoply of procedural safeguards under a claim of due process. Courts have been virtually unanimous in rejecting students’ claims for due process in the constitutional sense where academic suspensions or dismissal are involved.”) (citing cases).

<sup>80</sup> *Id.* at 277 (“From the very institution of this action until the time he rendered his final decision, the judge expressed personal disagreement with the decision of the COD and President Bowen to defer the granting of plaintiff’s degree from June 1982 until June 1983. Despite that disagreement the judge correctly held that he could not substitute his own views for those of a duly constituted administrative body within a private institution.”).

<sup>81</sup> See Carter, *supra* note 72, at 534–36 (“There is a modest amount of scholarship examining broad plagiarism norms. A fundamental precept in all this scholarship is that rules against plagiarism do not rest on some universal philosophical notion; rather, all plagiarism norms are context-specific. They are conceived and enforced to serve the discrete needs of the institution in which a potential plagiarist operates.”).

<sup>82</sup> Brian L. Frye, *Plagiarism Is Not a Crime*, 54 DUQ. L. REV. 133 (2016). Then again, Frye’s essay concludes that “norms prohibiting non-copyright infringing plagiarism are not efficient and should be ignored,” so perhaps no citation is needed. *Id.* at 133. And courts (including another *Fry*) have used Frye’s exact words, and nobody could reasonably complain that Frye’s very title is another Wildean plagiarism about plagiarism. See, e.g., *Richards v. Univ. of Alaska*, 370 P.3d 603, 610 (Alaska 2016); e.g., *Fry v. Lee*, 408 P.3d 843, 852 (Colo. App. 2013) (“It is undisputed that there is no such crime as plagiarism. A reasonable person simply could not come to that conclusion.”).

<sup>83</sup> *Fry*, 480 P.3d at 847 (quoting district court).

## C. ICONOCLASTIC WORDS: APOLOGIAS FOR PLAGIARISM IN DISSENT

Noncriminal though it may be, plagiarism still bears with it an odious odor, but is its stench fairly come by? Carter thought the prevailing view of plagiarism as *malum in se* ill-founded, gingerly tendering an apologia favoring plagiarism as one of the few willing to “give it a shot.”<sup>84</sup> Carter addressed himself to a less refined realm than *ars gratia artis*, that of legal practice and scholarship, where “simply put, plagiarism saves time and money.”<sup>85</sup> In turn, freer and cheaper attorneys mean more services for the underserved—and for the well-heeled too, whose counsel avails itself of “brief banks” to facilitate its associates’ bald-faced copying of one another.<sup>86</sup> He swiftly rebutted the idea that either clients or courts are disserved by appropriation *per se*.<sup>87</sup>

This left only the original authors as potential victims, a label that “has immediate appeal” in its derivation from the metaphor of plagiarism as theft.<sup>88</sup> Copyright, however, addresses their pecuniary interests (if any exist), and does not concern itself with more rarefied interests in attribution of their own creations.<sup>89</sup> Carter finds the latter inapt to legal writing, quoting Thomas Mallon for a sentiment that might have come from Martial: “To see the writer’s words

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<sup>84</sup> Carter, *supra* note 73, at 536 (“This is all a long way of saying that plagiarism is not a *malum se* offense. . . . Indeed, plagiarism doctrine proves so unexpectedly complicated that you begin to wonder if it is worth the chase. And, perhaps, this explains the courts’ reluctance to go beyond conclusory explanations for their antiplagiarism rule: a fuller explanation just doesn’t seem worth the effort. After all, who is going to argue in *favor* of plagiarism? I will give it a shot.”).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 536–37.

<sup>87</sup> *Id.* at 545 (“I do not quarrel with the notion that by ‘writing’ her case, an attorney obtains a fuller command of her argument. As an aspirational goal for practice, original composition as a norm has much to argue for. But the economic reality remains that many of those in need of legal services simply do not have the resources to pay for their lawyer’s ‘high-end’ cognitivist endeavors. For these under-resourced Americans, a plagiarized brief is surely better than no brief at all.”).

<sup>88</sup> *Id.* at 545–46.

<sup>89</sup> *Id.* at 546–47 (“The goal of copyright is to protect a writer’s economic interest in controlling the copying of her work. But with the plagiarism offense, copying the work of another is only a predicate act; it is the subsequent failure of attribution that is the essential element.”).

kidnapped, to find them imprisoned, like changelings, on someone else's permanent page is to become vicariously absorbed by violation."<sup>90</sup> Calling this self-regard "a bit overwrought," Carter observes shrewdly that such a norm presumes a "romantic" conception of inviolable auctorial creativity with little grip on the modern world—and certainly not the legal scrivener's works.<sup>91</sup> He is not the only modern scholar to conclude that the game of denouncing plagiarism *per se* is not worth the candle,<sup>92</sup> although perhaps the most bold.

To the cohort of those flirting with the virtues of plagiarism may be added Justice Elena Kagan, joined by Chief Justice John Roberts, dissenting in 2023's *Andy Warhol Foundation v. Goldsmith*.<sup>93</sup> At issue in the case was Andy Warhol's vividly hued silkscreen-print image of Prince commissioned by Vanity Fair in 1984—or rather, the fact that Vanity Fair also provided as the basis for Warhol's work a photograph of Prince by Lynn Goldsmith.<sup>94</sup> Warhol proceeded to make a dozen or so prints without license (the "Prince Series"), from which Vanity Fair selected one (the "Purple Prince") to grace the cover of its magazine, consistent with its paid licensing fee for a single use of Goldsmith's photograph.<sup>95</sup> The problem arose thirty-two years later when Condé Nast sought to publish another one of the Prince Series silkscreens (the "Orange Prince") on its cover memorializing the singer's death.<sup>96</sup> Although Warhol was by that point dead too, Goldsmith was not, and avowedly first became aware of the extent of the Prince Series when she saw the Orange Prince published in 2016, recognizing it as derived from her

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<sup>90</sup> Carter, *supra* note 72, at 552 (quoting THOMAS MALLON, *STOLEN WORDS: FORAYS INTO THE ORIGINS AND RAVAGES OF PLAGIARISM* xiii-xiv, 237 (1989)).

<sup>91</sup> *Id.* at 552-53 ("As composition theorists have long argued, modern plagiarism norms already reflect an antiquated 'romantic' model of an autonomous and original author toiling away day upon day alone in a room. However, since the 1600's, when modern notions of the plagiarism offense rooted, production of the written word has changed dramatically—think the Guttenberg Press vs. Google Docs or Dropbox. The meaning of authorship has changed with it; composition in nearly every realm has become more social and collaborative.").

<sup>92</sup> *E.g.*, Frye, *supra* note 82.

<sup>93</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 558-593 (2023) (Kagan, J., dissenting).

<sup>94</sup> *Id.* at 514-15.

<sup>95</sup> *Id.* at 517-19.

<sup>96</sup> *Id.* at 518-20.

photograph.<sup>97</sup> Litigation ensued, and eventually reached the Supreme Court, on the question of whether Warhol had infringed Goldsmith's copyright in licensing the Orange Prince to Condé Nast.<sup>98</sup> As all agreed Warhol had used Goldsmith's photograph as artistic reference, the only question was whether the adaptation in the Orange Prince as licensed to Condé Nast was "fair use" under copyright law.<sup>99</sup>

To preterm it for the moment the majority's analysis,<sup>100</sup> Justice Kagan believed it was, albeit in dissent. Pointedly, she began by noting that the Court had recently "used Warhol paintings as the perfect exemplar of a 'copying use that adds something new and important'—of a use that is 'transformative,' and thus points toward a finding of fair use."<sup>101</sup> Recognizing the vitality of such evolutionary plagiarism, she explained that "artists don't create all on their own; they cannot do what they do without borrowing from or otherwise making use of the work of others."<sup>102</sup> Justice Story, naturally, makes several appearances defending such a proposition from the earliest days of the republic, albeit the latter days of the arc of human artistic endeavors.<sup>103</sup>

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<sup>97</sup> *Id.* at 518, 520.

<sup>98</sup> *Id.* at 520. As does the dissent, this author will also simply refer to the Andy Warhol Foundation for the Visual Arts, Inc. as "Warhol," too, given it stood as the artist's successor in interest in regard of the Prince Series. *Id.* at 558 n.1 (Kagan, J., dissenting).

<sup>99</sup> *Andy Warhol Found.*, 598 U.S. at 525.

<sup>100</sup> The majority is given its due *infra* Part IV.

<sup>101</sup> *Andy Warhol Found.*, 598 U.S. at 559 (Kagan, J., dissenting) (quoting *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1202–03 (2021)).

<sup>102</sup> *Id.* at 560 (Kagan, J., dissenting).

<sup>103</sup> *Id.* at 568 ("Our seminal opinion on fair use quoted the illustrious Justice Story"), 571, 582 ("[I]n literature, in science and in art, there are, and can be, few, if any, things" that are 'new and original throughout.') (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Emerson v. Davies*, 8 Fed. Cas. 615, 619 (No. 4,436) (C.C.D. Mass. 1845) (Story, J.)), 592 (Kagan, J., dissenting).

As a whole, the dissent verges upon a paean to plagiarism, beginning with its thesis that “Andy Warhol is the avatar of transformative copying.”<sup>104</sup> First comes a lesson on the *Zeitenwende* that Warhol instigated in modern art, complete with a step-by-step tutorial on the elaborate craft of silkscreen reproductions.<sup>105</sup> (Iconic mononymic works abound: “Marilyn, Elvis, Jackie, Liz—and, as most relevant here, Prince,”<sup>106</sup> not to mention the Campbell Soup cans!<sup>107</sup>) Then come the arrayed opinions of a phalanx of experts, elaborating on how Warhol’s Prince Series may have been based on a photograph, but transcended its source material in creating something wholly new and vital to the discourse of ideas, the very function of art itself.<sup>108</sup> So too the Court’s past cases, Justice Kagan thought, had robustly legitimated the fair use of prior creations absent which “works—however new and important—might never have been made or, if made, never have reached the public. The prospect of that loss to ‘creative progress’ is what lay behind the Court’s inquiry into transformativeness—into the expressive novelty of the follow-on work.”<sup>109</sup>

A veritable smorgasbord of the arts as stolen shamelessly by artists follows in due course by way of illustration. Mark Twain, whose secretary diligently denied one plagiarism scandal,<sup>110</sup> acknowledged for himself that he had “drawn from a million outside sources” in the bulk of his work, adding for good measure (by way of appropriating the words of Oliver Wendell Holmes *père*): “I have never originated anything altogether myself, nor met anybody who had.”<sup>111</sup> Shakespeare’s impudence is trotted out again, now exemplified with iambic

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<sup>104</sup> *Id.* at 561 (Kagan, J., dissenting) (Google “select[ed] Warhol, from the universe of creators, to illustrate what transformative copying is”).

<sup>105</sup> *See id.* at 562–63 (Kagan, J., dissenting).

<sup>106</sup> *Id.* at 558–59 (Kagan, J., dissenting).

<sup>107</sup> *Andy Warhol Found.*, 598 U.S. at 592 (Kagan, J., dissenting) (“Warhol is a towering figure in modern art not despite but because of his use of source materials. His work—whether Soup Cans and Brillo Boxes or Marilyn and Prince—turned something not his into something all his own.”); *see also id.* at 538–39 (referencing Warhol’s “Campbell’s Soup Cans” series).

<sup>108</sup> *See id.* at 565–67 (Kagan, J., dissenting) (discussing the contrasts observed by artists between Goldsmith’s and Warhol’s works).

<sup>109</sup> *Id.* at 573 (Kagan, J., dissenting).

<sup>110</sup> *See Leach, supra* note 30.

<sup>111</sup> *Andy Warhol Found.*, 598 U.S. at 582 (Kagan, J., dissenting).

pentameter stolen nigh verbatim but for the scansion.<sup>112</sup> Vladimir Nabokov's *Lolita* turns out to be the second nymphette of that name in a scandalously precocious literary love affair, following that of Heinz von Lichberg.<sup>113</sup> In the musical arts, "Stravinsky reportedly said that great composers do not imitate, but instead steal," as he did.<sup>114</sup> And Justice Kagan lavishes the reader with gorgeous (yet undeniably reduplicative) images of Giorgione's *Sleeping Venus*, Titian's *Venus of Urbino*, and Manet's *Olympia*, before juxtaposing portraits of Pope Innocent X by Diego Velázquez and Francis Bacon, the latter openly a pastiche of the former—and yet both are celebrated masterpieces.<sup>115</sup> "Warhol may have been the master appropriator within that field," she concluded, but "he had plenty of company; indeed, he worked within an established tradition going back centuries (millennia?)."<sup>116</sup>

Yet despite the compelling logic and tales of so-called borrowing, mimicry, piracy, imitation, copying, and outright theft, only once did Justice Kagan utter the dread dekagrammaton *plagiarism*—and that was only because Robert Louis Stevenson had laid the charge, adjudging himself as guilty in his classic *Treasure Island*: "It is my debt to Washington Irving that exercises my conscience, and justly so, for I believe plagiarism was rarely carried farther."<sup>117</sup> Justice Kagan turns the self-flagellation into a drollery, commenting: "Odd that a book about pirates should have practiced piracy? Not really, because tons of books do. . . . The point here is that most writers worth their salt steal other writers' moves—and put them to other, often better uses."<sup>118</sup> Once again, she refused to actually say the quiet part out loud: that *plagiarism* has always served a purpose in the advancement of the creative arts. Perhaps she did not wish to freight her argument with the semantic ambivalence that so loaded as term as plagiarism

<sup>112</sup> See *id.* at 583 (Kagan, J., dissenting) ("Art thou a man? Thy form cries out thou art.").

<sup>113</sup> See *id.* at 584 (Kagan, J., dissenting) (comparing two eerily similar story plots involving preteen girls named *Lolita*).

<sup>114</sup> *Id.* at 585 (Kagan, J., dissenting).

<sup>115</sup> See *id.* at 587–90 (Kagan, J., dissenting).

<sup>116</sup> *Id.* at 587 (Kagan, J., dissenting).

<sup>117</sup> *Andy Warhol Found.*, 598 U.S. at 584 (Kagan, J., dissenting) ("Billy Bones, his chest, the company in the parlor, the whole inner spirit and a good deal of the material detail of my first chapters—all were there, all were the property of Washington Irving.") (quoting Robert Louis Stevenson, *My First Book—Treasure Island*, 21 SYRACUSE U. LIBR. ASSOCS. COURIER NO. 2 77, 84 (1986)).

<sup>118</sup> *Id.* at 584–85 (Kagan, J., dissenting).

would introduce. But whether denominated as plagiarism, or by a milder euphemism (“borrowing”) or a jolly metaphor (“piracy”), her point is the same: The stringent suppression of evolutionary mimesis “will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer.”<sup>119</sup>

### III. COPYRIGHT, FAIR USES, AND TRANSFORMATIONS

If Justice Kagan shied from overt celebration of plagiarism writ large, the lower courts had not hesitated from its condemnation, even when the perpetrator was an icon of the highest order. Indeed, the Second Circuit considering the Warhol case had commented in rejecting his defense that to do otherwise “would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist’s style, the greater leeway that artist would have to pilfer the creative labors of others.”<sup>120</sup> (Pilfering: an even jollier euphemism for the practice!) But in the face of Justice Kagan’s cogent *cri du cœur* on behalf of one of America’s most celebrated artistes and the very history of art itself, how then did the Supreme Court’s majority come out so differently—and, more broadly, why is plagiarism still so reviled?

#### A. THE COMMON LAW AND THE CONSTITUTION

Simplistically, the Constitution states in the Intellectual Property Clause<sup>121</sup> that Congress has power “[t]o promote the progress of science and useful arts, by

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<sup>119</sup> *Id.* at 593 (Kagan, J., dissenting).

<sup>120</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 43 (2d Cir. 2021); *see also Andy Warhol Found.*, 598 U.S. at 524 (quoting the court of appeals).

<sup>121</sup> Despite the label being, at best, a gloss of the words in the Constitution referring to authors and inventors, denomination as the “Intellectual Property Clause” has won out as an efficient descriptor of its gist, percolating up from the district courts to the highest. *Compare Allen v. Cooper*, 140 S. Ct. 994, 997 (2020), *and Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting) (citing EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 125–26 (2002)) (foregoing a nickname for Art. I, § 8, cl. 8), *with 321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1103 (N.D. Cal. 2004), *and Infodek, Inc. v. Meredith-Webb Printing Co., Inc.* 830 F. Supp. 614, 621, n.8 (N.D. Ga. 1993) (utilizing the moniker “Intellectual Property Clause”).



securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>122</sup> Since the Statute of Anne in 1710,<sup>123</sup> the right secured to the author (or other artist) has been nomenclated a copyright, and has been conceptualized as a sinecure secured by the state upon the development of an original creation. In the United States, the Copyright Act of 1909 lent federal imprimatur to those who registered their copyrights under the scheme, and accorded them various rights and legal presumptions in any lawsuits.<sup>124</sup> One of the earliest Supreme Court cases in America on the subject, *Wheaton & Donaldson v. Peters & Grigg*, far before Congress bestirred itself, noted that “perhaps no topic in England has excited more discussion, among literary and talented men, than that of the literary property of authors.”<sup>125</sup> (It is unremarkable that literary men were much exercised with literary property.)

Looking back to its mother country, the Court explicated that in the “great case” of *Miller v. Taylor* hoped to bring some decisive answer, the four judges split two and two in their opinions as to the cogency of a copyright at the common law.<sup>126</sup> That left the courts of chancery applying equity rather than the common law to decide the question, and in proceedings in the House of Lords, the highest resort of the law besides the King, the Supreme Court recapitulated that the Lords had found the Statue of Anne had “taken away” any preexisting natural right to creative works,<sup>127</sup> and replaced it with a system of societally enforced control—copyright.<sup>128</sup> So too in the United States a compromise had been struck in the

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<sup>122</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>123</sup> See Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 21 (1710) (Gr. Brit.).

<sup>124</sup> Copyright Act of 1909, Pub. L. No. 60-349, §§ 1 *et seq.*, 35 Stat. 1075 (1909).

<sup>125</sup> *Wheaton v. Peters*, 33 U.S. 591, 654 (1834).

<sup>126</sup> See *id.* at 655 (describing *Miller* as “a case of great expectation; and the four judges, in giving their opinions, seriatim, exhausted the argument on both sides”).

<sup>127</sup> See *id.* at 656 (“It would appear from the points decided, that a majority of the judges were in favor of the common law right of authors, but that the same had been taken away by the statute.”).

<sup>128</sup> *Id.* at 657 (“From the above authorities, and others which might be referred to if time permitted, the law appears to be well settled in England, that, since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute.”).

Constitution balancing the free commerce in ideas and the encouragement of ideators:

The argument that a literary man is as much entitled to the product of his labour as any other member of society, cannot be controverted. And the answer is, that he realises this product by the transfer of his manuscripts, or in the sale of his works, when first published. A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these?<sup>129</sup>

Perhaps in the natural right of England, he had;<sup>130</sup> but he did not under the primordial Statute of Anne.<sup>131</sup> The Court went on to compare the author to “an individual who has invented a most useful and valuable machine” whose mind was just as engaged in the creation, whether a book or a contraption.<sup>132</sup> Even if the cases of England presently were to afford answers, the Court found that the law of Britain as forebear of the common law “was then unknown” as to intellectual property when the colonies were settled, and the king alone reserved the right of publication.<sup>133</sup> Even so, at best the law of Britain was unsettled, and hardly incorporated sub silentio into the law of the American states at the founding.<sup>134</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> *See id.* at 596 (“They agreed not only, that an author had a property at common law, but that it was perpetual: notwithstanding the statute of Anne.”).

<sup>131</sup> *Wheaton*, 33 U.S. at 680.

<sup>132</sup> *Id.* at 657–58.

<sup>133</sup> *See id.* at 659–60.

<sup>134</sup> *See id.* at 660 (“No such right at the common law had been recognized in England, when the colony of Penn was organized. Long afterwards, literary property became a subject of controversy, but the question was involved in great doubt and perplexity; and a little more than a century ago, it was decided by the highest judicial court in England, that the right of authors could not be asserted at common law, but under the statute. The statute of 8 Anne was passed in 1710. Can it be contended, that this common law right, so involved in doubt as to divide the most learned jurists of England, at a period in her history, as much distinguished by learning and talents as any other; was brought into the wilds of Pennsylvania by its first adventurers.”).

But it was the Constitution that settled the issue, in the Intellectual Property Clause.<sup>135</sup> To be sure, the proponents of perpetual right averred that the Clause, in “securing” a right to authors, “clearly indicates an intention, not to originate a right, but to protect one already in existence.”<sup>136</sup> But the Court found this far too thin a reed on which to rest a perpetual copyright dubiously sourced in the English common law, and that the Constitution had created the right of its own, by positive law.<sup>137</sup> And as a creature of positive law, the claimant to its protection must fulfill the prerequisites prescribed by statute, in the case at hand, notice of publication and deposition of the holotype with the government—and the right existed only as delimited in statute as well.<sup>138</sup>

Justice Smith Thompson dissented to set forth his “an examination of the common law right, and the effect and operation of the acts of congress upon such right.”<sup>139</sup> Thompson thought there no doubt that the common law protected a right in authorship.<sup>140</sup> Citing Blackstone, he explained: “The great principle on which the author’s right rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property, as well as by the faculties of the body,” noting that “from the time of the invention of printing, in the early part of the fifteenth century, such a right seems to have

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<sup>135</sup> *See id.* (“[T]here is another view still more conclusive. In the eighth section of the first article of the constitution of the United States it is declared, that congress shall have power ‘to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.’ And in pursuance of the power thus delegated, congress passed the act of the 30th of May 1790.”).

<sup>136</sup> *See id.* at 661.

<sup>137</sup> *Wheaton*, 33 U.S. at 661 (“Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.”).

<sup>138</sup> *Id.* at 664–65 (“All the conditions are important; the law requires them to be performed; and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests; and this was essential to its protection under the statute.”).

<sup>139</sup> *Id.* at 669 (Thompson, J., dissenting).

<sup>140</sup> *Id.* (Thompson, J., dissenting) (“I think I may assume as a proposition not to be questioned, that in England, prior to the statute of Anne, the right of an author to the benefit and profit of his work, is recognized by the common law.”).

been recognized.”<sup>141</sup> And, he said, before the Statute of Anne, it was assuredly a perpetual copyright, “of a permanent nature, suitable for family settlement and provisions.”<sup>142</sup> And absent statute, its permanence would work no ill on those who used literary works as they were intended: “for the instruction, information or entertainment to be derived from it, and not for republication of the work,” although allowing that “if, in consequence thereof, he can write a book on the same subject, he has a right so to do.”<sup>143</sup> The question of derivative works that reused an original in part but were not mere “republication,” however, had not swum into view.

Justice Thompson’s all-consuming view of natural authorial right did not carry the day, then or now. The statutory right defined by Congress came to encompass more limitations, even as the Constitution itself restricted copyright to “limited times” and for a limited purpose.<sup>144</sup> *Wheaton & Donaldson* had gestured at the so-called idea/expression dichotomy: that abstract ideas could not be protected, only their tangible expression in words or pictures.<sup>145</sup> Future cases gave the doctrine a name—the “idea/expression dichotomy.”<sup>146</sup> There was also already in 1834 the intimation of the knotty notion of what could come to be known as fair

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<sup>141</sup> *Id.* at 669–70 (Thompson, J., dissenting).

<sup>142</sup> *Id.* at 671 (Thompson, J., dissenting).

<sup>143</sup> *Wheaton*, 33 U.S. at 674–75 (Thompson, J., dissenting).

<sup>144</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>145</sup> See *Wheaton*, 33 U.S. at 596 (“Mr J. Yates, the great opponent of literary property, and who has probably said all that ever was or can be said against it, urges that it is impossible to appropriate ideas more than the light or air (4 Burr. 2357, 2365); forgetting that books are not made up of ideas alone, but are, and necessarily must be clothed in a language, and embodied in a form, which give them an individuality and identity, that make them more distinguishable than any other personal property can be.”); *id.* at 672–73 (Thompson, J. dissenting) (“[I]t is a well established maxim, that nothing can be an object of property which has not a corporal substance.”).

<sup>146</sup> *E.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *e.g.*, *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 546–48, 556 (1985); *e.g.*, *Sid & Marty Krofft T.V. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977); see also *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”); *F.W. Woolworth Co. v. Contemp. Arts, Inc.* 193 F.2d 162, 164 (1st Cir. 1951) (“It is the well established rule that a copyright on a work of art does not protect a subject, but only the treatment of a subject.”).

use.<sup>147</sup> Again, the courts gave it a name,<sup>148</sup> and Congress eventually sought to codify some particularities of that perplexingly gray area in the Copyright Act of 1976.<sup>149</sup>

It may seem peculiar given the long-hallowed role of plagiarism in the “Progress of . . . useful Arts” to imagine how such a monopoly could accrue to that selfsame progress. Yet the escape valves of the idea/expression dichotomy and fair use would serve to accommodate the compromise between the First Amendment and the evolutionary advancement of art and the proprietary incentive for authorship itself.<sup>150</sup> The latter is not so alien a concept: The very rudiments of competitive capitalism dictate that to encourage the creation of art, the artists themselves must be able to profit from the commerce in their creations, without allowing the free-riding of interlopers to deny them their due profit without the investment of toil and genius.<sup>151</sup> That was, after all, the *cri du cœur* of Martial, and the world would indeed be poorer had his inspired wit not been made possible by

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<sup>147</sup> See *Wheaton*, 33 U.S. at 625 (“The notions of personal property of the common law, which is founded on natural law, depend materially on possession, and that of an adverse character, exclusive in its nature and pretensions. Throw it out for public use, and how can you limit or define that use? How can you attach *possession* to it at all, except of a subtle or imaginative character? If you may read, you may print.”); *id.* at 674–75 (Thompson, J., dissenting) (quoted *supra* text accompanying note 143).

<sup>148</sup> See *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306–09 (2d Cir. 1966); *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (“[T]he issue of fair use, which alone is decided, is the most troublesome in the whole law of copyright, and ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain.”); *Sheldon v. Metro-Goldwyn Pics. Corp.*, 81 F.2d 49, 54 (2d Cir. 1936).

<sup>149</sup> 17 U.S.C. § 107.

<sup>150</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const. art. I, § 8, cl. 8).

<sup>151</sup> See *Warner Bros. Ent. v. RDR Books*, 575 F. Supp. 2d 513, 540 (S.D.N.Y. 2008) (“At stake in this case are the incentive to create original works which copyright protection fosters and the freedom to produce secondary works which monopoly protection of copyright stifles—both interests benefit the public.”) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990)); Frye, *supra* note 82, at 137–38 (citing RONALD A. CASS & KEITH N. HYLTON, *LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS* (2013)).

the financial support of his commercial patrons, and his “brilliant epigrams” come down to modernity through the ages.<sup>152</sup>

## B. THE PRINCE AND THE PAPARAZZI

Setting aside that celebrity of the Roman Empire, *Warhol* was not the first brush of the modern celebrity Prince Roger Nelson (for that was his given name<sup>153</sup>) with copyright law, by a long shot. Before returning to the fate of the Prince Series in *Warhol* under the gaze of the Supreme Court of the United States of America, it is well worth attending to a few of Prince’s lesser trials and tribulations as a flavor of how copyright law works in practice for the rich and famous and their ever-inventive paparazzi, as adjudicated in the inferior courts that are typically tasked with such disputes’ resolution.

### 1. *Ferdinand Pickett and His Iconic Guitar*

Pride of priority belongs to the aforementioned 2000 case in which Judge Richard Posner decried Shakespeare’s infringements to the world, *Pickett v. Prince*.<sup>154</sup> In the first instance, Judge Posner resolved to refer to the defendant as Prince, though the artist had recently adopted “an unpronounceable symbol” in substitute of his name “which rather strikingly resembles the Egyptian hieroglyph

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<sup>152</sup> W.Y. Sellar, *Introduction to MARCUS VALERIUS MARTIALIS, EXTRACTS FROM MARTIAL*, at viii (W.Y. Sellar ed., Edinburgh: James Thin 1884). Even as of the publication of the text in the late nineteenth century, Sellar felt obliged to add as suffix to the introduction that “[s]everal sentences and expressions in this Introduction have already appeared in an article on Martial contributed to the ‘Encyclopedia Britannica,’” *id.* at xxxix, presumably lest he be accused of so-called “self-plagiarism,” as silly as such a concept may be from a theoretical point of view. Cf. Jared S. Sunshine, *A Head-On Collision Between Attorney-Client Privilege and the Free Press as the Clash of Truth, Justice, and the American Way*, 45 N.C. CENT. L. REV. 33, 63, n.193 (2023). The consequences of even an accusation of plagiarism were no doubt as dire in academia then as now. See Latourette, *supra* note 18, at 64 (“[A]n accusation of plagiarism is academe’s version of a scarlet letter’ . . .”); Carter, *supra* note 72, at 534 (“[T]o be labeled a plagiarizer is the ‘academic equivalent of the mark of Cain.’”). This author’s assiduous cross-referencing and due citation of even tangential inspiration serve as oblique testimony to their continuing fearsomeness.

<sup>153</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

<sup>154</sup> *Pickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000); Latourette, *supra* note 18, at 2.

*ankh*.”<sup>155</sup> The issue, it transpired, sprang directly from that symbol, which the artist formerly known as Prince had omitted to register for purposes of copyright for some time after its adoption by him as a name.<sup>156</sup> Picking up the story after addressing the sequelae of that omission, Judge Posner narrated that the awestruck plaintiff Ferdinand Pickett had idolatrously created a guitar in the shape of Prince’s iconic symbol in 1993, and contrived to show it to the artist; Pickett now sought recompense when the artist himself commissioned an instrument in alleged imitation of his humble prototype.<sup>157</sup> At base, Pickett argued that Prince had infringed his copyright in the unique form of the guitar, whilst Prince argued that no claim could be laid because Pickett had used Prince’s own now-copyrighted symbol in the creation of the prototype.<sup>158</sup>

The court was not impressed with Pickett’s claim, as evidenced by its summary that “Pickett claims the right to copyright a work derivative from another person’s copyright without that person’s permission and then to sue that person for infringement by the person’s own derivative work.”<sup>159</sup> It further doubted that the construction (however ingenious) of a functional guitar in the shape of Prince’s symbol “could show the requisite incremental originality,” notwithstanding the artisanal difficulty of accommodating an arbitrary symbol to the mechanical requirements of a guitar’s acoustics.<sup>160</sup> Rather, the court held that the mechanical requirements of a guitar’s operation meant that whatever ingenuity Pickett applied to adapt the symbol to those constraints “is not copyrightable as a work of visual art.”<sup>161</sup> The Seventh Circuit did admit the possibility that “the juxtaposition of the symbol and the guitar is enough to confer on the ensemble sufficient originality as a work of visual art to entitle the designer to copyright it,” given that all works of art depend on their predecessors.<sup>162</sup> But it did not see the need to “pursue the issue of originality of derivative works,”

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<sup>155</sup> *Pickett*, 207 F.3d at 403.

<sup>156</sup> *Id.* at 403–04.

<sup>157</sup> *Id.* at 404.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 405.

<sup>161</sup> *Pickett*, 207 F.3d at 405 (“A guitar won’t work without strings, frets, etc. arranged in a pattern dictated by musical considerations, and to the extent that the pattern is what it is because otherwise the guitar won’t sound right, it is not copyrightable as a work of visual art.”).

<sup>162</sup> *Id.*

because the Copyright Act gave the exclusive rights to create such works to the originator, *viz.* Prince.<sup>163</sup> The court concluded:

So Pickett could not make a derivative work based on the Prince symbol without Prince's authorization even if Pickett's guitar had a smidgeon of originality. This is a sensible result. A derivative work is, by definition, bound to be very similar to the original. Concentrating the right to make derivative works in the owner of the original work prevents what might otherwise be an endless series of infringement suits posing insoluble difficulties of proof. Consider two translations into English of a book originally published in French. The two translations are bound to be very similar and it will be difficult to establish whether they are very similar because one is a copy of the other or because both are copies of the same foreign-language original. Whether Prince's guitar is a copy of his copyrighted symbol or a copy of Pickett's guitar is likewise not a question that the methods of litigation can readily answer with confidence. If anyone can make derivative works based on the Prince symbol, we could have hundreds of Picketts, each charging infringement by the others.<sup>164</sup>

The cautionary tale of sparring French translations is illuminating, but the most enduring lesson of *Pickett v. Prince* is its disapprobation of attributing copyright protection in the first place to any and every conceivable derivative work.<sup>165</sup> Eventually, Judge Posner conceded that "[d]efined too broadly, 'derivative work' would confer enormous power on the owners of copyrights on preexisting works."<sup>166</sup> Effectively employing a *reductio ad absurdum* proof, Judge Posner declared that, if derivatives were so construed, Bernstein and Sondheim's

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<sup>163</sup> *Id.* at 405.

<sup>164</sup> *Id.* at 406.

<sup>165</sup> *See id.* at 406–07 (“The suggestion [that a stranger can make a derivative work without the permission of the owner of the copyright of the original work if the original work does not “pervade” the derivative work], if taken seriously (which it has not been), would inject enormous uncertainty into the law of copyright and undermine the exclusive right that section 106(2) gives the owner of the copyright on the original work. It also rests on a confusion between the determination of whether a work is derivative and the determination of who has the right to make the derivative work.”).

<sup>166</sup> *Id.* at 407.



West Side Story, Shakespeare's *Romeo and Juliet*, and all the mimeses before, "would infringe *Pyramus and Thisbe* unless authorized by Ovid's heirs."<sup>167</sup> Derivativeness (and so the right of the original author to benefit thereby) must be informed by how pervasive be the connection of the new work to the original<sup>168</sup>—*i.e.*, what transformative novelty the innovation adds.

But as for Pickett and his guitar, who brought no originality other than adaptation (however skillful) of someone else's intellectual property to the mechanics of a musical instrument, there was scant *artistic* creativity allowed by those constraints.<sup>169</sup> Novelty of mechanical design—how something shaped like an ankh could sound like a guitar—sounds not in copyright but in the patent prong for inventors under the Intellectual Property Clause, as the Second Circuit had long ago observed.<sup>170</sup>

## 2. Rodney Herachio Dixon: the Perils of Public Prominence

Owing to his fame, Prince was a frequent target of fraudsters and others seeking to directly merchandize his much-loved songs and performances,<sup>171</sup> or

<sup>167</sup> *Pickett*, 207 F.3d at 407. *Pyramus and Thisbe* was a classic tale of the annals of Roman literature recorded in Ovid's *Metamorphoses*—published in the reign of the Caesar Augustus—in which the titular adolescents were foreclosed by their feuding families from consummating their serendipitous love, eventuating in their mutual demise rather than bear life apart. Publius Ovidius Naso, *The Tale of Pyramus and Thisbe*, in *METAMORPHOSES* 266–73 (Sir Samuel Garth et al. trans., Stanhope Press 1812). Sound familiar?

<sup>168</sup> *Pickett*, 207 F.3d at 407. ("We can thus imagine the notion of pervasiveness being used to distinguish a work fairly described as derivative from works only loosely connected with some ancestral work claimed to be their original.").

<sup>169</sup> *See id.* at 407.

<sup>170</sup> *See Marvel Co. v. Pearl*, 133 F. 160, 161 (2d Cir. 1904) ("In the absence of protection by patent, no person can monopolize or appropriate to the exclusion of others elements of mechanical construction which are essential to the successful practical operation of a manufacture, or which primarily serve to promote its efficiency for the purpose to which it is devoted.").

<sup>171</sup> *E.g.*, *Comerica Bank & Tr., N.A. v. Habib*, 433 F. Supp. 3d 79 (D. Mass. 2020) (see *infra* notes 180 *et seq.* and accompanying text); *Paisley Park Enters., Inc. v. Ziani*, No. 18-CV-2556 (DSD/TNL), 2018 WL 6567828, at \*1 (D. Minn. Dec. 13, 2018) (alleging infringement by a phonographic "Bootleg label dedicated to Prince"); *NPG Recs., Inc. v. Roc Nation*, No. CV 16-3909 (JRT/FLN), 2018 WL 6437103, at \*1 (D. Minn. Feb. 9, 2018) ("This case primarily stems from a dispute between the NPG Entities and the Tidal Entities regarding the

even his personal effects.<sup>172</sup> Some overt thieves with a modicum of musical talent simply expropriated Prince's oeuvre verbatim, reperforming it themselves for profit.<sup>173</sup> Others sought more subtly to profit from his celebrity and goodwill by presenting themselves as intermediaries without any such authorization, operating "an unofficial 'fan' magazine, and...web site, both devoted to Nelson," having "created an entire business based on exploiting [Nelson]'s image and persona to their own economic benefit."<sup>174</sup> Still other ersatz intermediaries pretended to represent Prince in scheduling appearances, to obtain fees for facilitating appearances that would never occur.<sup>175</sup>

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streaming rights to Prince's music catalogue."); *Paisley Park Enters., Inc. v. Boxill*, 299 F. Supp. 3d 1074, 1078-79 (D. Minn. 2017) (alleging that a sound engineer had retained copies of Prince recordings and "began distributing the Prince Recordings through the website [www.princerogersnelson.com](http://www.princerogersnelson.com), using the name 'Prince' to promote and sell the Prince Recordings via the website"); *Paisley Park Enters., Inc. v. Boxill*, 253 F. Supp. 3d 1037, 1042-43 (D. Minn. 2017) (alleging the sound engineer had effected the commercial record release of certain recordings without authorization).

<sup>172</sup> *E.g.*, *Nelson v. Beaufort Liquidation Ctr., LLC*, C.A. No. CV 9:07-811-PMD, 2007 WL 9747705, at \*1 (D.S.C. Apr. 2, 2007) (alleging defendants' "advertising, promoting, and marketing clothing, artifacts, and other personal property 'with unique and "collectible" value as the personal property of Prince'" without authorization); *see, e.g.*, *Friend v. Paisley Park Enters., Inc.*, No. B169989, 2004 WL 2211931, at \*2 (Cal. Ct. App. Oct. 4, 2004) (involving a romantic associate of Prince selling the artist's memorabilia).

<sup>173</sup> *E.g.*, *Girlsongs v. 609 Indus., Inc.*, 625 F. Supp. 2d 1127, 1129 (D. Colo. 2008) ("Defendants' conduct in causing the Copyrighted Works to be performed on their premises without a license was knowing and deliberate. For over eighteen months before the infringing performances on which this action is based occurred, Defendants knew that The Snake Pit was not licensed to perform copyrighted musical compositions in the ASCAP repertory, and that the unlicensed performances of such music constituted copyright infringement.").

<sup>174</sup> *E.g.*, *Paisley Park Enters., Inc. v. Uptown Prods.*, 54 F. Supp. 2d 347, 347 (S.D.N.Y. 1999) (quoting secondly the complaint, with alteration in the S.D.N.Y. opinion).

<sup>175</sup> *E.g.*, *Wallace v. Cousins*, No. 1:14-CV-3343-MHC, 2015 WL 13767621, at \*1 (N.D. Ga. June 18, 2015). In the end, the plaintiff proved so persistent that *res judicata* had to be invoked—albeit unsuccessfully—to cut off the serial reinstitution of the suit. *See Wallace v. Cousins*, No. 1:14-CV-3343-MHC, 2015 WL 13841444, at \*2 (N.D. Ga. Dec. 15, 2015).

One particularly outré case involved an applicant aggrieved because she had been denied the ability to legally change her name to the same unpronounceable symbol as had Prince, with which she felt a deep “spiritual” connection.<sup>176</sup> The Texas appellate court upheld the denial.<sup>177</sup> Even Paisley Park and Comerica Bank & Trust, each of which had represented Prince’s interests in various regards,<sup>178</sup> ended up in litigation themselves over the settlement of the artist’s estate.<sup>179</sup>

Pickett’s impertinence in suing the creator of the artistic creation he himself had copied for infringement was no anomaly. Espying a deep pocket, some litigants attempted to claim that Prince had plagiarized *their* work on the thinnest of similarities.<sup>180</sup> In one protracted case, the plaintiff claimed that Prince’s song “Phone Sex” infringed his copyrighted song lyrics including the phrase “girl six” by virtue of two consonants in the latter monosyllable, lodged repeatedly in

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<sup>176</sup> *In re Perez*, No. 13-22-00254-CV, 2022 WL 3651980, at \*1, 3 (Tex. App. Aug. 25, 2022) (“As Perez acknowledges, the symbol to which she seeks to change her name was originally adopted by pop star Prince. In her petition, Perez identified the reason for her requested change as ‘[t]he new name has a very spiritual meaning to [her].’ While we do not doubt the sincerity of Perez’s intention, ‘[i]mposition by assuming the name of a celebrity or other well-known entity . . . may negate the right to a legal change of name.’”) (citations omitted).

<sup>177</sup> *Id.* at \*3.

<sup>178</sup> *E.g.* cases cited *supra* note 171.

<sup>179</sup> *P Park Mgmt., LLC v. Paisley Park Facility, LLC*, No. 21-2128 (MJD/JFD), 2022 WL 14882465, at \*1 (D. Minn. Oct. 26, 2022). Comerica was a codefendant with the artificial Facility entity.

<sup>180</sup> *See, e.g., Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1142–43 (8th Cir. 1989) (alleging infringement based on similarity of plaintiffs’ lyrics—“I glanced up and saw you, a smile so pretty,” “Makeup was rolling down my face,” “What’s cooking in this book, what’s cooking in this book,” and “Take a look,”—to Prince’s lyrics—“I woke up, I’ve never seen such a pretty girl,” “A whole hour just to make up your face,” “U sho ‘nuf do be cooking in my book,” and “U got the look,” respectively); *High Tymes Prods., Inc. v. PRN Prods., Inc.*, No. C-1-93-298, 1995 WL 17806819, at \*5 (S.D. Ohio Aug. 8, 1995) (“The title and chorus in High Tymes’ *Feel For You* and Defendants’ *I Feel For You* are similar in their mutual use of the phrase ‘feel for you.’ The phrase, however, is composed of common words not subject to copyright protection.”).

Florida and New York,<sup>181</sup> until the Second Circuit finally sustained dismissal with prejudice on *res judicata* grounds.<sup>182</sup> By that time, the doubtful *res* had been *judicata*ed quite to death.<sup>183</sup> The gold medal for frivolity, however, surely goes to Rodney Herachio Dixon, who claimed to have secretly authored all of Prince's songs over the years and licensed them for first the sum of one million and then (upon renegotiation) one billion dollars, which sum he sought to collect through numerous meritless actions over the course of twenty-three years,<sup>184</sup> until finally being formally designated a "vexatious litigant" requiring judicial permission to file further suits in 2017, a year after Prince's death.<sup>185</sup>

### 3. *Kian Andrew Habib, Paragon of the Paparazzi*

By contrast to all the utterly frivolous suits, the arguments in *Comerica Bank & Trust v. Habib*, offer a useful look at the contours of fair use, transformative adaptation, and overt plagiarism under copyright law.<sup>186</sup> The court opened by reciting Prince's enormous contribution to musical art, and recalled too his reputation for aggressive control over his music, including by assertion of his intellectual property rights.<sup>187</sup> In that spirit, Prince's estate as administered by

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<sup>181</sup> Compare *Brandon v. New Power Generation*, No. 15-22738-CIV, 2017 WL 1437560, at \*3 (S.D. Fla. Apr. 3, 2017) (granting motion to dismiss without prejudice) with *Brandon v. NPG Recs., Inc.*, No. 1:19-CV-01923-GHW, 2020 WL 2086008, at \*3 (S.D.N.Y. Apr. 30, 2020), *aff'd*, 840 F. App'x. 605 (2d Cir. 2020) (granting motion to dismiss with prejudice).

<sup>182</sup> See *Brandon v. NPG Recs.*, 840 F. App'x. 605, 607–08 (2d Cir. Dec. 28, 2020) (affirming district court's motion to dismiss).

<sup>183</sup> *Id.* at 609 ("As the district court here aptly noted, if Brandon took issue with the Florida court's decision against him on the merits, 'the proper recourse was an appeal to the Eleventh Circuit Court of Appeals, not a second bite at the apple in the Southern District of New York.'").

<sup>184</sup> See *Dixon v. NPG Music Publ'g, LLC*, No. 517-CV-00363-ODW (DTB), 2017 WL 2469352, at \*1–2 (C.D. Cal. June 6, 2017).

<sup>185</sup> See *id.* at \*6–9.

<sup>186</sup> See *Comerica Bank & Tr., N.A. v. Habib*, 433 F. Supp. 3d 79 (D. Mass. 2020).

<sup>187</sup> *Id.* at 85–86 ("A virtuosic performer and prolific songwriter, Prince crafted a unique amalgam of funk, rock, rhythm and blues, and soul, yielding chart-topping studio recordings and electrifying live shows. . . . Over the course of his 38-year career, Prince also earned a reputation as a musician who demanded control over the release and use of his music, 'enforc[ing] his intellectual property rights aggressively' to achieve that end.").

Comerica sued Kian Andrew Habib, a concert-goer who had recorded on-stage performances by the late artist and published several of them for consumption on YouTube, bypassing the official channel for Prince's videos that yielded "well over \$1 million" in revenues annually.<sup>188</sup> After Prince's copyright-monitor vendor provided notice to YouTube of infringement in the offending videos, Habib resisted, filing counter-notices asserting fair use, and after YouTube passed on this development, Comerica filed suit to seek relief and have the videos removed.<sup>189</sup> Meanwhile, Habib persisted in posting clips of live performances, declaring in a deposition that "[t]here's nothing wrong with posting concert videos."<sup>190</sup>

There was little doubt of Prince's (and thus now Comerica's) copyright in the songs performed in the recordings.<sup>191</sup> Habib, however, asserted that the copyrights did not cover the unique qualities of the live performances he had witnessed.<sup>192</sup> Offering a brief tutorial on the meaning of phonorecords under the Copyright Act, the court explained that properly understood, separate performances were not even derivative works but instantiations of the copyrighted phonorecord.<sup>193</sup> Every performance need not be separately registered.<sup>194</sup>

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 87–88.

<sup>190</sup> *Id.* at 88.

<sup>191</sup> *Id.* at 89.

<sup>192</sup> *Habib*, 433 F. Supp. 3d at 89–90.

<sup>193</sup> *See id.* at 90–91 ("It is of no moment that the performances recorded by Habib were 'far removed from, and not recognizable as, the studio version[s] of . . . particular song[s].' Doc. No. 85 at 4. Indeed, each performance of a given musical composition—whether fixed in a specific sound recording or played with a live band at a concert venue—falls well within the scope of the copyright protection afforded to musical compositions. Notably, courts have consistently held that an arrangement of a musical composition may not be considered a separate derivative work if the arrangement is 'merely a stylized version of the original song . . . [that] may take liberties with the lyrics or the tempo' and regurgitates 'basically the original tune.'") (quoting *Woods v. Bourne Co.*, 60 F.3d 978, 991 (2d Cir. 1995)).

<sup>194</sup> *Id.* at 91.

The court then turned to Habib's primary affirmative defense of fair use. Quoting *Campbell v. Acuff-Rose Music* at length, the court noted the foremost prong of the analysis asked "whether and to what extent the new work is 'transformative,'" that is, "whether the new work merely supersedes the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>195</sup> Habib insisted that he had done just that, employing diverse vantage points as an act of creativity, editing the clips to juxtapose both audience and artist in a thoughtful manner, and supplying "comments and descriptions of the performances themselves."<sup>196</sup> But the court was unimpressed with the extent of Habib's editorial judgments.<sup>197</sup> "Typically," it wrote, "such 'verbatim' copying may only be considered transformative when the copying serves 'a purpose separate and distinct from the original artistic . . . purpose for which the [works] were created,' like news reporting or documentary filmmaking."<sup>198</sup> Habib's videos served no such metapurpose, serving only to repackaging Prince's music *qua* music "albeit in a 'grainy' and 'blurry' fashion."<sup>199</sup> Even if Habib was not directly paid for his postings, he accrued the palpable benefits of drawing traffic as an alternative source for Prince aficionados—he was not a noncommercial player.<sup>200</sup>

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<sup>195</sup> *Id.* at 92 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>196</sup> *Id.* For clarity, the court explained that this last font of creativity evidently referred not to written analysis but to the one-line captions that Habib had assigned to the uploaded videos, citing "Nothing Compares 2 U – Amazing LIVE rare performance– 2013" and "Prince showing off all his talents! LIVE at Mohegan Sun, Connecticut 2013" as examples. *Id.*

<sup>197</sup> *Id.* ("These arguments miss the mark. Critically, Habib did not imbue Prince's musical compositions with new meaning or add any of his own expression to the underlying works.").

<sup>198</sup> *Habib*, 433 F. Supp. 3d at 92–93 (quoting *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 60 (1st Cir. 2012)).

<sup>199</sup> *Id.* at 93.

<sup>200</sup> *Id.* at 93–96 Habib also argued noncommercial use as an affirmative defense, which the court rejected on the law. ("Similarly, Habib's sixth defense, protesting that he should not be held liable because he did not profit from his use of Prince's compositions, also fails as a matter of law." (citing *Capitol Records, Inc. v. Alaujan*, 626 F. Supp. 2d 152, 155 (D. Mass. 2009)).

Likewise, the fourth fair-use factor of the effect on the market weighed against Habib, for his recordings directly “usurp[ed]” the role of and “divert[ed]” the demand for Prince’s own channel, even as markedly inferior substitutes.<sup>201</sup> Indeed, Comerica had complained (like Martial<sup>202</sup>) that Habib was debasing Prince’s valuable art with his “low quality videos” featuring “muffled sound” and “pervasive audience din”—a legitimate concern reserved to the artist.<sup>203</sup> And the third factor, measuring the amount and substantiality of use, pointed the same way, because “while ‘[c]opying does not become excessive . . . merely because the portion taken was the original’s heart,’” quoting *Campbell* again,<sup>204</sup> it does “when copying is carried out ‘for the same intrinsic purpose for which [the composer] intended [the song] to be used.’”<sup>205</sup> With the second factor favoring Comerica as well,<sup>206</sup> all signs pointed to infringement.<sup>207</sup>

Moreover, Comerica sought summary judgment on Habib’s willful infringement permitting enhanced damages, which the court proceeded to entertain despite general judicial reluctance to assess state of mind in a dispositive motion.<sup>208</sup> The record was damning: Habib had persisted in his posting of concert

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<sup>201</sup> *Id.* at 95–96 (quoting *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013), as to “usurp” and *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 231 (D. Mass. 2009) as to “divert”).

<sup>202</sup> See *MARTIALIS*, *supra* note 19, at 19–20.

<sup>203</sup> *Habib*, 433 F. Supp. 3d at 95–96. (“Additionally, Comerica argues that the proliferation of ‘low quality videos,’ like Habib’s, harms the Estate’s ability to ‘preserv[e] . . . its reputation for excellence . . . [by] rob[bing] [the Estate] of the ability to control the quality distribution of its works.’ [. . .] Similarly, the Court is persuaded that Habib’s decidedly poor-quality recordings harm the Estate’s interest in policing the caliber of secondary uses of Prince’s musical compositions.”) (quoting *Penguin Grp. (USA) Inc. v. Am. Buddha*, No. CV-13-02075-TUC-JGZ, 2015 WL 11170727, at \*6 (D. Ariz. May 11, 2015)) (citing *Soc’y of Holy Transfig. Monastery, Inc. v. Gregory*, 689 F.3d 29, 39 (1st Cir. 2012)).

<sup>204</sup> *Id.* at 95 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994)).

<sup>205</sup> *Id.* (quoting *Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 63 (1st Cir. 2012) (quoting *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983)).

<sup>206</sup> *Id.* at 94 (finding that “the nature of the copyrighted work” in question was “highly creative” and “within the core of copyright’s protection”).

<sup>207</sup> *Id.* at 96.

<sup>208</sup> *Id.* at 97.

videos despite numerous notifications of copyright infringement, and throughout the litigation had maintained an “unflagging conviction” that concert-goers are entitled to post their videos for public consumption.<sup>209</sup> And the court took an exceedingly dim view of Habib’s “casual” counter-notifications to YouTube submitted without resort to legal advice, affording him no basis for a reasonable belief in the rectitude of his actions.<sup>210</sup> Whether or not Habib’s protestations as a paragon of the people were heartfelt, they were a recklessly unreasonable view of the law, and accordingly the court allowed summary judgment on willfulness.<sup>211</sup> Habib had misappropriated Prince’s work, plain and simple, even if he subjectively believed himself to be acting in good faith.<sup>212</sup>

### C. THE PRINCE OF APPROPRIATION ARTISTS

By contrast to Habib and his misappropriations of Prince, Justice Kagan had named Warhol the “avatar of transformative copying.”<sup>213</sup> Perhaps better to call him a progenitor or precursor, for he was not the last to practice in the artistic genre that would come to be known aptly as appropriation art. Prince was, as proclaimed by President Barack Obama upon the artist’s death, a highly original artist—indeed, as the court added, one highly mindful of intellectual property rights.<sup>214</sup> None of the various frivolous plagiarism or copyright infringement accusations lodged against him ever came to anything.<sup>215</sup>

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<sup>209</sup> *Habib*, 433 F. Supp. 3d at 97.

<sup>210</sup> *Id.* (“Moreover, his ‘casual[ ]’ counter-notification submissions, Doc. No. 81-4 at 11, recklessly assumed that parroting the statutory fair use factors is an adequate substitute for either seeking out legal advice or carefully evaluating the applicability of the fair use doctrine.”).

<sup>211</sup> *Id.* at 97–98.

<sup>212</sup> *See id.* at 96–97 (rejecting Habib’s other affirmative defenses such as waiver, estoppel, and laches, as well as his contention that “his conduct was in good faith . . . and lacked any wrongful intent”).

<sup>213</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 561 (2023) (Kagan, J., dissenting) (quoted *supra* note 104).

<sup>214</sup> *Habib*, 433 F. Supp. 3d at 85 (citing Press Release, The White House, Statement by the President on the Passing of Prince (Apr. 21, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/21/statement-president-passing-prince> [<https://perma.cc/D96K-MDDA>]).

<sup>215</sup> *See* cases cited *supra* Section III.2.



Not so Richard Prince, “a well-known contemporary appropriation artist,” and latter-day scion of Warhol’s ilk.<sup>216</sup> Of this provocatively-named profession, the court elaborated: “Appropriation art, as one expert describes it, involves a ‘radical transformation of the original image or text using strategies such as aesthetic alteration, conversion of authorship, recontextualization, cultural commentary, and pastiche or parody.’”<sup>217</sup> That all sounds quite suitably transformative, until one learns from the Second Circuit that “Prince’s work, going back to the mid-1970s, has involved taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in different contexts, as his own.”<sup>218</sup> Yet Prince is warmly received rather than ostracized in artistic circles, with his pieces hanging in the Guggenheim, Whitney, and LACMA.<sup>219</sup> The courts have not been as friendly.

1. *Patrick Cariou and the Case of the Rustled Rasta, Episode I*

Prince’s first brush with copyright infringement arose in *Cariou v. Prince*.<sup>220</sup> Patrick Cariou was a professional photographer who had published a book entitled *Yes, Rasta* showcasing his photography of individuals and landscapes from Jamaica in 2000.<sup>221</sup> In a show running from 2007 to 2008 in a Saint Barthélemy hotel, Prince exhibited a piece of work he called *Canal Zone (2007)*, “which consisted of 35 photographs torn from *Yes, Rasta* and attached to a wooden backer board,” with some effaced so some portions were omitted or “painted over.”<sup>222</sup> This was only the beginning: Prince ultimately created over two dozen more images in his contemplated *Canal Zone* series, employing more images from *Yes, Rasta*, albeit once again “collaged, enlarged, cropped, tinted, and/or overpainted,” and the whole series was put on sale at the Manhattan Gagosian Gallery later in 2008.<sup>223</sup> Cariou, meanwhile, had been in negotiations with Christiane Celle to sell the *Yes, Rasta* photos as original artworks in her gallery—but when she found out

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<sup>216</sup> *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 WL 3383029, at \*1 (S.D.N.Y. May 11, 2023).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* (quoting *Cariou v. Prince*, 714 F.3d 694, 699 (2d Cir. 2013)).

<sup>219</sup> *See id.*

<sup>220</sup> *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *rev’d in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

<sup>221</sup> *Id.* at 343.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 344.

about the Gagosian show, she cancelled the exhibition “because she did not want to seem to be capitalizing on Prince’s success and notoriety . . . and because she did not want to exhibit work which had been ‘done already’ at another gallery.”<sup>224</sup> After discovery, the parties cross-moved for summary judgment, with the defendants Prince and Gagosian asserting fair use.<sup>225</sup>

The court explained first of all that fair use was intended—and required—to mediate between otherwise untenable “tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others, which must be protected up to a point.”<sup>226</sup> Of the four factors installed by the Copyright Act to guide the assessment of fair use, the first—transformativeness—was the most vital, because it measures directly if the new work literally represents progress in the arts.<sup>227</sup> The defendants invited the court to find Prince’s use of Cariou’s photography as “raw materials” in the production of new artistic works to be just such a transformation.<sup>228</sup>

But the court was unconvinced, noting that the Second Circuit had held that “the fact that a work ‘recast[s], transform[s], or adapt[s] an original work into a new mode of presentation,’ thus making it a ‘derivative work’ under 17 U.S.C. § 101, does not make the work ‘transformative’ in the sense of the first fair use factor.”<sup>229</sup> A transformative work must do more than adapt and improve, it must

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 342.

<sup>226</sup> *Cariou*, 784 F. Supp. 2d at 346–47 (quoting *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006)).

<sup>227</sup> *Id.* at 347–48 (“Although a transformative use is not strictly required for the Defendant to establish the defense of fair use, ‘the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.’”) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>228</sup> *Id.* at 348 (“Nevertheless, Defendants invite this Court to find that use of copyrighted materials as raw materials in creating ‘appropriation art’ which does not comment on the copyrighted original is a fair use akin to those identified in the preamble to § 107. The cases Defendants cite for the proposition that use of copyrighted materials as ‘raw ingredients’ in the creation of new works is per se fair use do not support their position, and the Court is aware of no precedent holding that such use is fair absent transformative comment on the original.”).

<sup>229</sup> *Id.* (quoting *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 143 (2d Cir. 1998)).

offer some metacommentary on the original, as do parodies and the examples given in the statute like criticism and scholarship.<sup>230</sup> To grant a *per se* license to appropriation art as transformational would allow fair use to overtop its levees, quoting the Second Circuit again: “If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer’s claim to a higher or different artistic use . . . there would be no practicable boundary to the fair use defense.”<sup>231</sup> Prince’s work was thus only protected as transformative fair use to the extent it interpreted the *Yes, Rasta* photography.<sup>232</sup> Yet Prince had disclaimed any interest in the originals’ meaning or exegesis thereon, instead explaining that he had sought simply to appropriate their substance for his own creative purposes.<sup>233</sup> As for the remainder of the prong, Prince’s use was highly commercial in character, as his works had been heavily marketed and sold for over ten million dollars.<sup>234</sup> And Prince’s callous lack of regard for Cariou’s or anyone else’s auctorial rights, as “an habitual user of other artists’ copyrighted work, without permission,” weighed heavily against him.<sup>235</sup>

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<sup>230</sup> *Id.* (“To the contrary, the illustrative fair uses listed in the preamble to § 107—‘criticism, comment, news reporting, teaching [ . . . ], scholarship, [and] research’—all have at their core a focus on the original works or their historical context, and all of the precedent this Court can identify imposes a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works.”).

<sup>231</sup> *Id.* at 348 (quoting *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992)).

<sup>232</sup> *Cariou*, 784 F. Supp. 2d at 349 (“Accordingly, Prince’s Paintings are transformative only to the extent that they comment on the Photos; to the extent they merely recast, transform, or adapt the Photos, Prince’s Paintings are instead infringing derivative works.”).

<sup>233</sup> *Id.* at 349 (“That is, he chooses the photographs he appropriates for what he perceives to be their truth—suggesting that his purpose in using Cariou’s Rastafarian portraits was the same as Cariou’s original purpose in taking them: a desire to communicate to the viewer core truths about Rastafarians and their culture.”).

<sup>234</sup> *Id.* at 350–51.

<sup>235</sup> *Id.* at 351 (“Here, Prince testified that he does not have a different standard or weigh different considerations when appropriating works with a disclosed author than he does when using materials that are in the public domain; to Prince, the question of whether an image is appropriate for his use is ‘just a question of whether [he] like[s] the image.’”).

With the *Canal Zone* series held minimally transformative at best, the subsidiary fair-use factors readily aligned. Of the nature of the copyrighted work, the court admonished that judges must hark to Justice Story's rationale and resist the urge to "pass on [artistic] quality, but rather to consider whether the protected [work] is of the creative or instructive type that the copyright laws value and seek to foster."<sup>236</sup> Original photography was.<sup>237</sup> The "amount and substantiality" factor clearly favored Cariou, since numerous photographs, each independently copyrighted, had been appropriated in their entirety.<sup>238</sup> Finally, the effect on the market was damning: Cariou's own opportunity to merchandise his photographs had been supplanted by Prince's infringement, irrespective of whether Cariou had not been as vigorous as he could have been in seeking pecuniary benefits from his work; there was no laches of copyright merchandizing.<sup>239</sup> With all four factors favoring Cariou decisively, the fair use defense was denied.<sup>240</sup> The court ordered the defendants to surrender all of the infringing works in their possession "for impounding, destruction, or other disposition," and to notify any buyers thereof that their purchases infringed and "cannot lawfully be displayed."<sup>241</sup>

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<sup>236</sup> *Id.* at 352 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1117 (1990)).

<sup>237</sup> *Id.*

<sup>238</sup> *Cariou*, 784 F. Supp. 2d at 352 ("In a number of his Paintings, Prince appropriated entire Photos, and in the majority of his Paintings, Prince appropriated the central figures depicted in portraits taken by Cariou and published in *Yes, Rasta*. Those central figures are of overwhelming quality and importance to Cariou's Photos, going to the very heart of his work. Accordingly, the amount of Prince's taking was substantially greater than necessary, given the slight transformative value of his secondary use . . .").

<sup>239</sup> *Id.* at 352–53 ("The fact that Plaintiff has not marketed his work more aggressively is therefore irrelevant. Here, it is undisputed that a gallery owner discontinued plans to show the *Yes, Rasta* Photos, and to offer them for sale to collectors, because she did not want to appear to be capitalizing on Prince's Paintings . . .").

<sup>240</sup> *Id.* at 353.

<sup>241</sup> *Id.* at 355–56.

But the story was not over, for Prince appealed to the Second Circuit.<sup>242</sup> The panel there tellingly reintroduced Prince as a “leading exponent of the genre” of appropriation art, listing the august institutions in which his work was displayed.<sup>243</sup> Also providing an inkling of its leanings, the court resituated Prince’s *Canal Zone* series as drastically different from Cariou’s in format, medium, and size, stressing that Prince had often used mere snippets of the underlying photographs in far larger heterogeneous collages.<sup>244</sup> It provided the reader with side-by-side comparisons of a number of the original and derivative works for inspection, albeit acknowledging that in a few cases, “Cariou’s original work is readily apparent” as barely modified at all.<sup>245</sup> Finally, the court recharacterized Cariou’s intercourse with Celle as more ambivalent, though it still seemed unavoidable that Celle had opted not to exhibit Cariou’s *Yes Rasta* work because of their appearance in Prince’s own show, whatever her motivations.<sup>246</sup>

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<sup>242</sup> Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).

<sup>243</sup> *Id.* at 699 (such institutions included New York’s Solomon R. Guggenheim Museum and Whitney Museum, San Francisco’s Museum of Modern Art, Rotterdam’s Museum Boijmans van Beuningen, and Basel’s Museum fur Gegenwartskunst).

<sup>244</sup> *See id.* at 699–700 (“The portions of *Yes Rasta* photographs used, and the amount of each artwork that they constitute, vary significantly from piece to piece. In certain works, such as *James Brown Disco Ball*, Prince affixed headshots from *Yes Rasta* onto other appropriated images, all of which Prince placed on a canvas that he had painted. In these, Cariou’s work is almost entirely obscured. The Prince artworks also incorporate photographs that have been enlarged or tinted, and incorporate photographs appropriated from artists other than Cariou as well. *Yes Rasta* is a book of photographs measuring approximately 9.5” × 12”. Prince’s artworks, in contrast, comprise inkjet printing and acrylic paint, as well as pasted-on elements, and are several times that size.”).

<sup>245</sup> *See id.* at 700–02 (contrasting the barely recognizable Cariou imagery in the Prince piece *James Brown Disco Ball* with the highly recognizable source material in Prince’s *Graduation*).

<sup>246</sup> *Id.* at 703–04 (“At that point, Celle decided that she would not put on a ‘Rasta show’ because it had been ‘done already,’ and that any future Cariou exhibition she put on would be of photographs from *Surfers*,” a later Cariou collection.).

The Second Circuit restated that copyright law strikes a necessary balance between author's rights and derivative transformations, in service of promoting authorship at large, relying once again on its own jurist Pierre Leval.<sup>247</sup> The district court had been wrong to limit transformativeness to exegesis and metacommentary only: the question was far more holistic and plenary than such a test, encompassing any conversion of the art's purpose.<sup>248</sup> The Supreme Court had enunciated this as measuring the creation of "a new expression, meaning, or message," whilst the Second Circuit's gloss added "new information, new aesthetics, new insights and understandings."<sup>249</sup> And the question was not of subjective auctorial intent, but only how an objective observer would compare the original with the nominal adaptation: as something new or as a mere copy?<sup>250</sup> When a secondary work is transformative, it is not germane whether it harms, or even eradicates, the market for the original, unless it *usurps* or *substitutes* for the role of the original—which by definition it cannot, if it is truly transformed.<sup>251</sup>

Asking this revised legal question, the Second Circuit majority answered that most of Prince's *Canal Series* qualified as fair use.<sup>252</sup> Prince's irreverently kaleidoscopic collages, it thought, would not strike any audience as a substitute for Cariou's traditionalist black-and-white photography.<sup>253</sup> In five of Prince's images, however, only minor adjustments were made to Cariou's, and although

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<sup>247</sup> *Id.* at 705 ("As Judge Pierre Leval of this court has explained, '[t]he copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.'" (quoting Leval, *supra* note 236, at 1107)).

<sup>248</sup> *Cariou*, 714 F.3d at 706 ("The district court imposed a requirement that, to qualify for a fair use defense, a secondary use must 'comment on, relate to the historical context of, or critically refer back to the original works.' . . . The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute.").

<sup>249</sup> *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) and *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006)).

<sup>250</sup> *Id.* at 707.

<sup>251</sup> *Id.* at 709.

<sup>252</sup> *Id.* at 707–08.

<sup>253</sup> *Id.* at 709 ("Prince's work appeals to an entirely different sort of collector than Cariou's.").

these embellishments (such as painting lozenges over the subject's eyes or superimposing the incongruous image of an electric guitar) "moved the work in a different direction from Cariou's classical portraiture and landscape photos, we can not say with certainty at this point whether those artworks present a 'new expression, meaning, or message.'"<sup>254</sup> Accordingly, the court of appeals remanded to the district court to determine whether such "relatively minimal alterations" could support a fair use finding under the proper law.<sup>255</sup> By contrast, the partial dissent would have remanded all of Prince's paintings to perform the factual analysis in the first place rather than act an impromptu board of art criticism.<sup>256</sup> Upon application, the Supreme Court denied certiorari.<sup>257</sup>

## 2. *Donald Graham and the Case of the Rustled Rasta, Episode II*

Prince did not have long to savor the legal victory. Next aggrieved was one Donald Graham, who lodged infringement claims only four years later, in 2017.<sup>258</sup> Graham was a professional photographer who in 1998 published an image entitled *Rastafarian Smoking a Joint* captured during a 1996 trip to Jamaica.<sup>259</sup> The photograph received critical approbation and awards, and Graham was able to sell prints commercially to fine art collectors in limited editions, though he neglected to register his copyright until litigation emerged.<sup>260</sup> Prince eventually came across a reposting of *Rastafarian* on the account of Instagram user *rastajay92*, and after adding his own comment to the repost, took a screenshot of *Rastafarian* and the Instagram comments to print onto a canvas, constituting a work he dubbed *Untitled*.<sup>261</sup> *Untitled*, along with three dozen other such Instagram posting portraits were exhibited in the Gagosian Gallery in 2014 as the *New Portraits*

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<sup>254</sup> *Cariou*, 714 F.3d at 711.

<sup>255</sup> *See id.* (stating the reason for remand as that the District Court was in the best position to determine if the use of the five particular works constituted a fair use).

<sup>256</sup> *See id.* at 713–14 (Wallace, J. dissenting) (arguing the District Court was in the best position to determine if the use of all of the works at issue constituted a fair use).

<sup>257</sup> *Cariou v. Prince*, 571 U.S. 1018, 1018 (2013).

<sup>258</sup> *Graham v. Prince*, 265 F. Supp. 3d 366 (S.D.N.Y. 2017).

<sup>259</sup> *Id.* at 371.

<sup>260</sup> *See id.* at 372 (stating that Graham sold prints of *Rastafarian Smoking a Joint* and did not register it with the copyright office until 2014).

<sup>261</sup> *Id.* at 372–73.

series, and gallery owner Lawrence Gagosian purchased *Untitled* himself.<sup>262</sup> Graham became aware of *Rastafarian's* role in *New Portraits* after a friend visited the exhibition, and sent a cease-and-desist letter immediately.<sup>263</sup> Graham complained that Prince had nonetheless continued to make use of *Rastafarian*, arranging to have it displayed on a Manhattan billboard and reposting it on his personal Twitter account amidst his complaints about fair use and copyright law.<sup>264</sup> Seeking redress, Graham filed suit for willful infringement in the *New Portraits* exhibition and catalogue, the billboard, and the Twitter post.<sup>265</sup>

The court introduced the *Cariou* saga as “essentially a prequel to this action” that “illustrates the application of the statutory fair use factors to cases involving appropriation art,” noting the parallel subject matter of “copyrighted photographs of Jamaican Rastafarians.”<sup>266</sup> As it transpired, Cariou and Prince settled their dispute on the remanded five pictures from the prior suit.<sup>267</sup> After summarizing the Second Circuit’s findings on the four fair use factors, the court observed how the first was the real linchpin, guiding and informing the analysis of all the rest.<sup>268</sup> Applying the Second Circuit’s guidance, however, the Graham court found that *Untitled* had made no “substantial aesthetic alterations,” and so a “side-by-side comparison” could not support a finding of transformative usage at the motion-to-dismiss stage.<sup>269</sup>

Prince gamely tried his argument again that *Rastafarian* merely served as “raw materials” for a piece conveying wholly different message from the original.<sup>270</sup> But the court demurred: the only distinction of the copy from the original was its insertion into a “social media frame” captioned by a single line of written “gobblygook.”<sup>271</sup> Thus, *Untitled* was far more like the five barely obscured

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<sup>262</sup> *Id.* at 373.

<sup>263</sup> *Id.* at 374.

<sup>264</sup> *Graham*, 265 F. Supp. 3d at 374–75.

<sup>265</sup> *Id.* at 375–76.

<sup>266</sup> *Id.* at 377.

<sup>267</sup> *Id.* at 378.

<sup>268</sup> *See id.* at 380 (stating that “the ‘purpose and character of the use’ factor, and in particular, whether or not a use is transformative, has a significant impact on the remainder of the fair use inquiry”).

<sup>269</sup> *Id.*

<sup>270</sup> *Graham*, 265 F. Supp. 3d at 380 (quoting *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006)).

<sup>271</sup> *Id.*



works that *Cariou* did not find protected by fair use.<sup>272</sup> Indeed, *Untitled* was far less worthy, for unlike *Cariou* where the works had been cropped, tinted, overpainted with incongruous imagery, and collaged to some extent, the central image of *Untitled* was a wholly unaltered rendition of Graham's *Rastafarian*.<sup>273</sup> Far more extrinsic proof of some transformative purpose would be necessary to substantiate a fair use defense given that the entirety of the original was used.<sup>274</sup> And as usual, once the court determined it could not find Prince's work transformative as a matter of law, the other factors aligned.<sup>275</sup> The motion to dismiss was denied because, at the present point to discovery, all of the factors weighed against Prince.<sup>276</sup>

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<sup>272</sup> *Id.* at 380–81.

<sup>273</sup> *Id.* at 381.

<sup>274</sup> *Id.* at 382 (“Given Prince’s use of essentially the entirety of Graham’s photograph, defendants will not be able to establish that *Untitled* is a transformative work without substantial evidentiary support. This evidence may include art criticism, such as the articles accompanying defendants’ briefing, which the Court may not consider in the context of this motion.”).

<sup>275</sup> *Id.* at 383–84 (“But, perhaps more significantly for this motion, *Cariou* shows that even a distinctly commercial purpose will be discounted if the work is sufficiently transformative. Here, due to the Court’s inability on this motion to dismiss to determine transformativeness conclusively, it is impossible to definitively assess the commerciality sub-factor. . . . According to defendants, Prince needed to use the entirety of *Rastafarian Smoking a Joint* because he was commenting on an Instagram post which itself already contained Graham’s complete photograph. But, as defendants effectively concede, only a determination that Prince’s use of the photograph was transformative could enable this factor to weigh in their favor.”).

<sup>276</sup> *Id.* at 390–91 (“[T]he Court concludes that each of them weighs against a finding that Prince’s *Untitled* makes fair use of *Rastafarian Smoking a Joint*. Because Prince has reproduced Graham’s portrait without significant aesthetic alterations, *Untitled* is not transformative as a matter of law. Moreover, *Untitled* is a work made with a distinctly commercial purpose; Graham’s original *Rastafarian Smoking a Joint* is, without question, expressive and creative in nature; Prince’s use of the entirety of Graham’s photograph weighs against a finding of fair use; and the Complaint adequately alleges usurpation of the primary market for *Untitled*.”).

By 2023, discovery had proceeded and the case returned to Judge Sidney Stein on cross-motions for summary judgment.<sup>277</sup> With the benefit of factual development, Prince had claimed that “the series was intended ‘as a serious and an amusing commentary on social media and art’ and ‘to satirize and provide commentary on the manner in which people today—all people—communicate, present themselves, and relate to one another through the new technology of social media.’”<sup>278</sup> (The offending Prince work *Untitled* was now titled *Portrait of Rastajay92*.<sup>279</sup>) Graham, meanwhile, established that his work had appeared in the Metropolitan Museum of Art, and prestigious magazines like *Vanity Fair*, *Elle*, *Vogue*, *Paper*, *Time*, and *Sports Illustrated*.<sup>280</sup> Moreover, another plaintiff had joined the cause: Eric McNatt.<sup>281</sup> McNatt’s own work had appeared in many similar magazines—*Esquire*, *Glamour*, and *GQ*—and *Paper* had commissioned him to photograph musician Kim Gordon in 2014 for a story it was running.<sup>282</sup> *Paper* ran one of the ensuing photographs, *Kim Gordon I*, under license, and McNatt later licensed it to *Vogue* as well.<sup>283</sup> Prince, however, took a screenshot of *Kim Gordon I*, posted it in full under his own Instagram account, added some comments the court quoted Prince in calling “gobbledygook,” and then reimaged the post and printed it on canvas, calling it *Portrait of Kim Gordon*, publishing it as his own in the *New Portraits* series.<sup>284</sup>

Yet again, the court recited that although “copyright law grants creators a limited monopoly over the dissemination of their original works,” the purposes stated in the Constitution also imply that the “doctrine of ‘fair use’ is an important limitation on the original creator’s monopoly rights.”<sup>285</sup> The court noted that at the motion-to-dismiss stage, the transformativeness prong had not been met, and now added that “even after extensive discovery,” Prince had still failed to establish fair use as a matter of law.<sup>286</sup> Prince pointed to a litany of changes he had allegedly

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<sup>277</sup> *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 WL 3383029 (S.D.N.Y. May 11, 2023).

<sup>278</sup> *Id.* at \*2.

<sup>279</sup> *Id.* at \*3.

<sup>280</sup> *Id.* at \*2.

<sup>281</sup> *Id.* at \*4.

<sup>282</sup> *Id.*

<sup>283</sup> *Graham*, 2023 WL 3383029, at \*4.

<sup>284</sup> *Id.* at \*5.

<sup>285</sup> *Id.* at \*7.

<sup>286</sup> *Id.* at \*8.

made, including “intentional cropping of images in an homage to Andy Warhol,”<sup>287</sup> but plaintiffs rejoined that at base, the “dominant element” remained their copyrighted works without material modification.<sup>288</sup>

The court rejected the defendants’ contention that the “reasonable observer” comparing the two works be “an individual who has a ‘general interest in and appreciation of, but not specialized knowledge of, the arts.’”<sup>289</sup> That standard, it found, was “drawn from whole cloth,” after searching for provenance in vain: the correct vantage was that of an ordinary observer viewing the works side by side, citing *Cariou*.<sup>290</sup> Under that standard, Prince’s *New Portraits* were simply not new.<sup>291</sup> The court acknowledged the alterations that Prince had made, finding they “altered the content and message of plaintiffs’ photographs, but only minimally.”<sup>292</sup> Such minutiae, however, “do not begin to approach those found to be transformative as a matter of law by the Second Circuit,” as the court went on to detail.<sup>293</sup> In particular, far less had been modified than in the five paintings remanded in *Cariou*.<sup>294</sup>

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<sup>287</sup> *Id.* at \*8 (stating “(1) the novel canvas; (2) the three-dimensional look and feel; (3) the colored inks resulting in different coloration; (4) the “absurdly proportioned scale and *Alice in Wonderland*-dreamlike quality”; (5) the ‘intentional cropping of images in an homage to Andy Warhol’; and (6) his comments below the images”) (emphasis in original).

<sup>288</sup> *Id.* at \*9.

<sup>289</sup> *Graham*, 2023 WL 3383029, at \*9.

<sup>290</sup> *Id.* (stating that “[t]he standard, as set forth above, is whether from the standpoint of a ‘reasonable observer,’ ‘looking at the artworks and the photographs side-by-side,’ the secondary images ‘have a different character, . . . a new expression, and employ new aesthetics with creative and communicative results distinct’ from the original”).

<sup>291</sup> *Id.* at \*10 (stating that the “New Portraits” cannot be said to have an “entirely different aesthetic” from the plaintiffs’ original photographs).

<sup>292</sup> *Id.* at \*9.

<sup>293</sup> *Id.*

<sup>294</sup> *See id.* at \*10 (stating that the five works in *Cariou* were “closer questions” than the alterations Prince made in *Portrait of Rastajay*<sup>92</sup> and *Portrait of Kim Gordon* and the alterations of the two later portraits were “materially less significant”).

Prince further asserted now that his works had a parodical and satirical character, establishing a transformative purpose even if the substance of Cariou's works was used unmodified.<sup>295</sup> The court readily admitted that Graham's, McNatt's, and Prince's objectives in creating their works undoubtedly differed.<sup>296</sup> As an axiom, the court reminded that "...whether a work is a parody is a question of law, not a matter of public majority opinion."<sup>297</sup> It then compared the treatment in *Rogers v. Koons* and *Blanch v. Koons*.<sup>298</sup> In the former, a parody finding was denied because, although Koons claimed to be perpetrating a satire on materialistic society at large, a legally cognizable parody must also at least partially target the work appropriated, lest there be no need to copy it.<sup>299</sup> In the latter, the court found the borrowing justified because the uncontroverted evidence supported that the societal satire intended required an object exemplar of ridicule.<sup>300</sup> By contrast, Prince had been far more ambivalent about his need for *Rastafarian* as opposed to any old picture of a Rastafarian<sup>301</sup>—his appropriation of Graham's work was

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<sup>295</sup> See *Graham*, 2023 WL 3383029, at \*11.

<sup>296</sup> See *id.* at \*11 ("Taken at face value, the artists indeed had different objectives in creating their works, which does lend support to Prince's assertion that this use is transformative.").

<sup>297</sup> *Id.* (quoting *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003)).

<sup>298</sup> See *Graham*, 2023 WL 3383029, at \*12 (discussing and comparing *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) and *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (declining to accept contentions of parodical or satirical purpose at face value and finding such purposes applicable, respectively)).

<sup>299</sup> *Graham*, 2023 WL 3383029, at \*12 ("It is the rule in this Circuit that though the satire need not be only of the copied work and may, as appellants urge of 'String of Puppies,' also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work.") (quoting *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992)).

<sup>300</sup> See *id.* ("The court held that Koons indeed established a 'justification for the very act of his borrowing' relying on Koons's uncontradicted statement that '[t]he photograph is typical of a certain style of mass communication. . . . By using an existing image, I also ensure certain authenticity or veracity that enhances my commentary—it is the difference between quoting and paraphrasing—and ensure that the viewer will understand what I am referring to.'" (alterations in original) (quoting *Blanch*, 467 F.3d at 255)).

<sup>301</sup> See *Graham*, 2023 WL 3383029, at \*13 (noting that Prince himself "observ[ed] that he 'could have used many other images of Rastafarians . . . and it would have had the same visual impact or value as the Rastafarian in the *Portrait of*

merely a expediency, not a necessity to his message, and did not target Cariou or his work.<sup>302</sup> Finally, the court observed that nothing in the Second Circuit's decision in *Warhol*, then pending on certiorari before the Supreme Court, suggested otherwise.<sup>303</sup> In short,

Defendants' attempt to cast the images as satire or parody fails, and Prince's stated purpose in creating these portraits has been both inconsistent and has only limited relevance in light of the similarities between the original and secondary works. *Google* and *Warhol* only serve to affirm this conclusion. The Court concludes that the disputed images do not present a "new expression, meaning, or message" and are therefore not transformative.<sup>304</sup>

It need hardly be added again that Prince's works were highly commercially oriented, commanding eyewatering prices on the art market.<sup>305</sup> And, as usual, the lesser factors fell into line once transformativeness was rejected.<sup>306</sup> Relying on expert testimony, however, the court did find that Prince's work did not *usurp* the market for Graham's or McNatt's original photography, even in their potential for secondary licensure, and thus weighed the fourth factor marginally in favor of the defendants.<sup>307</sup> Indeed, the evidence showed the works were not

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*Rastajay92''* (second alteration in original) (quoting Declaration of Richard Prince in Support of Defendants' Motion for Summary Judgment at 10, *McNatt v. Prince*, No. 1:16-cv-08896-SHS (S.D.N.Y. Oct. 5, 2018))).

<sup>302</sup> *See id.* at \*11–13; *cf. id.* at \*12 ("The question is whether Koons had a genuine creative rationale for borrowing Blanch's image, rather than using it merely to get attention or avoid the drudgery in working up something fresh." (quoting *Blanch*, 467 F.3d at 255)).

<sup>303</sup> *See id.* at \*13–14 (citing *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021)) (noting that the Second Circuit's *Warhol* decision confirmed the court's analysis).

<sup>304</sup> *Id.* at \*14 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>305</sup> *See id.* at \*14–15 (noting that the core factor in determining whether an allegedly infringing work was made for a commercial purpose is unfairness that results from a secondary user making significant revenues directly from the unauthorized use of copyrighted material).

<sup>306</sup> *See id.* at \*15–16 ("Because Prince's use is not transformative, his use of nearly the entirety of plaintiffs' photographs cannot be deemed 'reasonable.'").

<sup>307</sup> *See Graham*, 2023 WL 3383029, at \*17–19 (noting that the market for Prince's work is different than the market for Graham and McNatt's work because people buy Prince's works for the Prince name).

displayed in similar venues,<sup>308</sup> and the actual buyers of Prince's work testified they would not consider Graham's or McNatt's portraits as substitutes.<sup>309</sup> In the balance, however, the defendants had not established fair use, and thus summary judgment was denied: the case would proceed to trial.<sup>310</sup> The court concluded that "the work of appropriation artists 'inherently raises difficult questions about the proper scope of copyright protection and fair use doctrine.' As boundaries between technology and art blend, these questions become increasingly difficult. Prince indeed tested the boundary between appropriation art and copyright infringement when he created *Portrait of Rastajay92* . . . ." <sup>311</sup> At least as of May 2023 on the eve of *Warhol*, Richard Prince failed that test.

#### IV. ON THE FATE OF PRINCES

And as they were the sins of princes, it is the princes who have also suffered the penalty.<sup>312</sup>

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<sup>308</sup> See *id.* at \*17 ("In comparing the photographs with Prince's portraits, Schwartzman concludes that the photographs are 'visually distinguishable,' 'judged by different standards, critics, and professionals,' and 'are displayed in substantively different kinds of venues and contexts.'" (footnote omitted) (quoting Exhibit 58 of Declaration of Nina D. Boyajian in Support of Defendants Richard Prince, Blum & Poe, LLC and Blum & Poe New York, LLC's Motion for Summary Judgment at 2–3, *McNatt v. Prince*, No. 1:16-cv-08896-SHS (S.D.N.Y. Oct. 5, 2018)); *id.* at \*17 n.8 ("It is undisputed that while Prince has had several solo exhibitions at the Guggenheim and Whitney, Graham has never had a show at any major museum featuring only his work." (citations omitted)).

<sup>309</sup> See *id.* at \*17 ("As further evidence of this conclusion, the individuals who purchased *Portrait of Kim Gordon* and *Portrait of Rastajay92* explain that they would have never purchased the original photographs without Prince's alterations.").

<sup>310</sup> See *id.* at \*24 (noting that Prince crossed the boundary between appropriation and copyright infringement).

<sup>311</sup> *Id.* (quoting *Blanch v. Koons*, 467 F.3d 244, 263 (2d Cir. 2006) (Katzmann, J., concurring)).

<sup>312</sup> NICOLO MACHIAVELLI, *THE PRINCE* 98–99 (W. K. Marriott trans., E.P. Dutton & Co. 1908).

By the time of the *Warhol* suit, Prince Rogers Nelson, like Warhol, was decidedly deceased.<sup>313</sup> Indeed, the trigger for the proceedings was Condé Nast's bid to commemorate his decease by employing another of Warhol's impressions made at the acme of Prince's popularity in the 1980s.<sup>314</sup> Justice Kagan in dissent noted that the decision to use Warhol's silkscreen rather than Goldsmith's photograph or any other depiction was the product of editorial choice that the Court ought not to gainsay.<sup>315</sup> But the Court gainsaid the editors the same, albeit importantly allowing that it expressed "no opinion as to the creation, display, or sale of any of the original Prince Series works"—that is, Warhol's unlicensed creations constituting the Prince Series themselves were not being declared verboten.<sup>316</sup> The public gaze and exhibition of the Prince Series, many pieces of which were by then hanging in august institutions of art, were not in jeopardy: no doubt such galleries breathed a sigh of relief.<sup>317</sup>

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<sup>313</sup> See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 546 (2023) (noting that "even if such commentary is perceptible on the cover of Condé Nast's tribute to 'Prince Rogers Nelson, 1958–2016,' on the occasion of the man's death, AWF has a problem"); *In re Est. of Nelson*, No. A17-0927, 2018 WL 1145876, at \*1 (Minn. Ct. App. May 29, 2018) ("Prince Rogers Nelson died intestate on April 21, 2016.").

<sup>314</sup> See *Andy Warhol Found.*, 598 U.S. at 534–35.

<sup>315</sup> See *id.* at 567 (Kagan, J., dissenting) ("In any event, the editors of *Vanity Fair* and Condé Nast understood the difference—the gulf in both aesthetics and meaning—between the Goldsmith photo and the Warhol portrait. They knew about the photo; but they wanted the portrait. They saw that as between the two works, Warhol had effected a transformation.").

<sup>316</sup> *Id.* at 534 (footnote omitted).

<sup>317</sup> See Winston Cho, *Andy Warhol Ruling Limits Fair Use for Copyrighted Images, With Far-Reaching Hollywood Implications*, HOLLYWOOD REP. (May 18, 2023, 1:49 PM), <https://www.hollywoodreporter.com/business/business-news/supreme-court-andy-warhol-prince-copyright-1235495647/> [<https://perma.cc/6W6Q-A299>] ("Warhol created a series of 16 images, cropping and painting over the original images to make what his foundation's lawyers argue are entirely new creations that comment on celebrity and consumerism. The works have been displayed in museums, galleries and other distinguished public venues and have sold for over six figures.").

But the majority did not see Warhol's silkscreen as a novel work of genius standing in isolation. First, it highlighted how it was Goldsmith's initiative to focus on Prince as an emerging artist, and the ensuing photographs were very much hers.<sup>318</sup> Next it presented Goldsmith's original picture, and then the Purple and Orange Princes that Warhol created from it, stressing that Goldsmith received only \$400 at the time for the Purple Prince license,<sup>319</sup> and nothing at all—not even credit—for the Orange Prince, whilst Warhol netted \$10,000.<sup>320</sup> It was not as though Goldsmith was a nonentity: The majority listed the many magazine covers on which her photography of Prince had appeared between 1981 and 2016, duly paying Goldsmith and crediting her work, and illustrated other covers crediting the artists they had chosen.<sup>321</sup> Nor was the Orange Prince so grand a transformation, in the majority's view, as it only "crops, flattens, traces, and colors the photo but otherwise does not alter it."<sup>322</sup> To underline the point, the Court placed Goldsmith's photograph side by side with the same image with the Orange Prince superimposed, to show how little was changed fundamentally.<sup>323</sup>

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<sup>318</sup> *Andy Warhol Found.*, 598 U.S. at 516 ("In 1981, Goldsmith convinced Newsweek magazine to hire her to photograph Prince Rogers Nelson, then an 'up and coming' and 'hot young musician.' Newsweek ran one of the concert photos, together with an article titled 'The Naughty Prince of Rock.' Goldsmith retained the other photos. She holds copyright in all of them." (citations omitted)).

<sup>319</sup> *Id.* at 517–19 figs.1, 2 & 3.

<sup>320</sup> *Id.* at 520 ("Condé Nast paid AWF \$10,000 for the license. Goldsmith received neither a fee nor a source credit.").

<sup>321</sup> *Id.* at 520–22 figs.4 & 5 ("All of them depicted Prince on the cover. All of them used a copyrighted photograph in service of that object. And all of them (except Condé Nast) credited the photographer.").

<sup>322</sup> *Id.* at 522.

<sup>323</sup> *Id.* at 522 fig.6.



At base, the problem was that the Condé Nast magazine cover could have been occupied in theory either by Goldsmith's photograph or Warhol's silkscreen, and thus the two were in direct, actual commercial competition.<sup>324</sup> When Warhol licensed the portrait to the magazine, therefore, he deprived Goldsmith of the same opportunity, and because his offering was derivative of Goldsmith's, that competition was not allowable. The commercial usage of the work must be measured alongside the creative contribution;<sup>325</sup> the opposing benefits to commerce and creativity had to be balanced mindfully.<sup>326</sup> And the Court's command was that the purpose of the first prong of the "fair use" test was to evaluate whether the new usage was in commercial competition with the original work, and if so, the factor weighed against allowance of fair use.<sup>327</sup>

The Court averred that in some cases, artistic novelty might weigh in favor, and disclaimed the notion that "derivative works borrowing heavily from an original cannot be fair uses"—but only where the transformative novelty served a noncommercial purpose rather than merely intrinsic adaptation.<sup>328</sup> For example, lavishing the reader with her own imagery, Justice Sotomayor noted that the transformation of the iconic Campbell soup can label into an *objet d'art* was not and had never been employed to compete with Campbell for the purpose of

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<sup>324</sup> See *Andy Warhol Found.*, 598 U.S. at 532–33 ("In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.").

<sup>325</sup> See *id.* at 526–27.

<sup>326</sup> See *id.* ("This balancing act between creativity and availability (including for use in new works) is reflected in one such limitation, the defense of 'fair use.'").

<sup>327</sup> See *id.* at 526–27; see also *id.* at 529 n.5 ("In theory, the question of transformative use or transformative purpose can be separated from the question whether there has been transformation of a work. In practice, however, the two may overlap."); *id.* at 527–29 ("Most copying has some further purpose, in the sense that copying is socially useful *ex post*. Many secondary works add something new. That alone does not render such uses fair. Rather, the first factor (which is just one factor in a larger analysis) asks 'whether *and to what extent*' the use at issue has a purpose or character different from the original." (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994))).

<sup>328</sup> See *id.* at 538.

labelling or commercializing soup, serving instead to parody the commercialism of Campbell's consumeristic ubiquity.<sup>329</sup> Indeed, pressed the majority, had Warhol licensed his adaptation to Campbell's soup-selling competitors to label their products (a "fanciful" idea, the majority admitted), the legal result might well be adverse, as it was in the case of Goldsmith's photograph.<sup>330</sup> The Court adverted to its decision on the permissibility of VCR recordings,<sup>331</sup> decided on the premise that a recording for private replay neither competed with nor superseded the original work.<sup>332</sup> By contrast, the licensure of the Orange Prince *had* "supersede[d]" and supplanted the opportunity for Goldsmith's work to occupy precisely the same place of honor.<sup>333</sup>

The Court's interpretation of copyright law is not utterly schismatic. Copyright law has always existed to aid the commerce of an author's creative works, ensuring the profits of commerce accrue to the author to promote authorship itself.<sup>334</sup> It does seem instinctively unfair that a copycat should be

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<sup>329</sup> *Andy Warhol Found.*, 598 U.S. at 539 ("In fact, Soup Cans well illustrates the distinction drawn here. The purpose of Campbell's logo is to advertise soup. Warhol's canvases do not share that purpose. Rather, the Soup Cans series uses Campbell's copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup.").

<sup>330</sup> *Id.* at 539 n.15 ("The situation might be different if AWF licensed Warhol's Soup Cans to a soup business to serve as its logo. That use would share much the same purpose of Campbell's logo, even though Soup Cans has some new meaning or message.").

<sup>331</sup> *Id.* at 533 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–51 (1984)). For the benefit of the current generation, VCR stands for "[V]ideo[C]assette [R]ecorder," and it represents the technology used before DVRs (digital video recorders) were developed for private parties to record to their own media (videocassettes, a recording medium employing a magnetizable tape) an audiovisual transmission made available to them over broadcast, and later cable, television. The case dealt with yet another acronym, VTRs, an even broader category encompassing VCRs. *See Sony*, 464 U.S. at 423–25.

<sup>332</sup> *Sony*, 464 U.S. at 456.

<sup>333</sup> *Andy Warhol Found.*, 598 U.S. at 535–36 (alteration in original) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>334</sup> *Id.* at 549 ("Recall, payments like these are incentives for artists to create original works in the first place. Nor will the Court's decision, which is consistent with longstanding principles of fair use, snuff out the light of Western civilization, returning us to the Dark Ages of a world without Titian, Shakespeare, or Richard Rodgers."); *cf. supra* Section III.A.

permitted to take another artist's work, to retool (and perhaps even improve) it, and then to reinsert the result into the marketplace as competition against the very original.<sup>335</sup> The arrogation seems even more arrant if perpetrated during the life of the original creator; surely, the creator deserves the right to benefit from and have a right of control over any upstart adaptors of the work she created under copyright law. To grant a Warhol absolute license to copy by virtue of his "genius" would prejudice his ultimate place in history, contrary to the principle of posterity,<sup>336</sup> as the Second Circuit feared of a "celebrity-plagiarist privilege" granted to contemporary luminaries.<sup>337</sup> Seizing Judge Posner's example, *Warhol* is best analogized not to Ovid's hundredfold heirs invoking derivative rights of *Pyramus* and *Thisbe*, but to Ovid himself accusing a plagiarist of the now-storied tale during his own lifetime.<sup>338</sup> In this latter character, the offense is nearer the charge of Martial against Fidentinus.<sup>339</sup> Justice Sotomayor's majority opinion thus hews closer to the heartland of precedent on invidious, not evolutionary, plagiarism than Justice Kagan admits.<sup>340</sup>

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<sup>335</sup> See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) ("The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work.").

<sup>336</sup> See sources cited *supra* note 42 and accompanying text.

<sup>337</sup> See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 43 (2d Cir. 2021).

<sup>338</sup> See *Pickett v. Prince*, 207 F.3d 402, 406–07 (7th Cir. 2000) (Posner, C.J.); *cf. supra* Section III.1.

<sup>339</sup> Although there is no evidence that Ovid and Martial ever met or corresponded, both flourished in the first century AD, and scholars have speculated freely over what intercourse and debt to one another the two might have had. See Stephen Hinds, *Martial's Ovid / Ovid's Martial*, 97 *J. ROMAN STUD.* 113 (2007); *e.g., id.* at 113 n.2 (collecting such scholarship to date).

<sup>340</sup> *Andy Warhol Found.*, 598 U.S. at 548 ("The dissent would rather not debate these finer points. It offers no theory of the relationship between transformative uses of original works and derivative works that transform originals." (citing *id.* at 560 n.2)).

## V. ANTITRUST, MARKETS, AND USURPATIONS

Yet Justice Kagan too has an irresistible point, not least because it seems nigh every artist in history has violated the proscription that *Warhol* seeks to endorse and enforce.<sup>341</sup> The Intellectual Property Clause has always made for an unlikely bedfellow with antitrust law, expressly authorizing the grant of the most anticompetitive device of all: an absolute, government-sanctioned monopoly,<sup>342</sup> and after Congress's first Copyright Act, a monopoly presumed to be valid upon registration.<sup>343</sup>

### A. WHY COMPETITION COUNTS AND MARKETS MATTER

Antitrust policy presupposes that the greatest benefit of the commonwealth is to be had from the uninhibited competition of those seeking to bring products to market, with the preferences of society at large the one and only judge of success, much like the principle of posterity. Copyright—or any monopoly—stands athwart that aim by artificially reserving to one purveyor the supply of society's needs, and installing force of law to prohibit competition. This is not to say many have not sought to obtain such sinecures more generally, a practice often known as “rent-seeking,” pursuing the imprimatur of government granting an advantage over competitors, or even a monopoly.<sup>344</sup> But even if precedent dictates that when the government *does* grant such sinecures, they are beyond the reach of domestic antitrust law,<sup>345</sup> the overarching theme of antitrust law is that such impediments are a stumbling block and anomaly to be reprehended, as the Second Circuit stated in the epochal *United States v. Aluminum Co. of America* case, in an extraordinary sitting as the highest court in the land:<sup>346</sup>

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<sup>341</sup> See *supra* Section II.C.

<sup>342</sup> See *supra* Section III.A.

<sup>343</sup> Copyright Act of 1790, Pub. L. No. 1-15, §§ 1-3, 1 Stat. 124, 124-25.

<sup>344</sup> See *Sunshine, Hamilton, supra* note 78, at 94 & nn.243-47.

<sup>345</sup> See *id.* at 94-95 & nn.248-49 (discussing *Parker v. Brown*, 317 U.S. 341 (1943)).

<sup>346</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945). Under the law in effect at the time, if a sufficient quorum of the Supreme Court could not sit on an eligible case because of disqualifications from conflicts, then it was to be certified to the regional court of appeals for decision as the final authority. See *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811-13, 812 n.10 (1946). The Supreme Court in short order found an

Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. . . . These considerations, which we have suggested only as possible purposes of the [Sherman] Act, we think the decisions prove to have been in fact its purposes.<sup>347</sup>

It bears emphasis that the United States was an originator of the very concept of “antitrust law,” and to this day perseveres in that nomenclature even other nations denominate the discipline as competition law, given their legal codes regulate the practice of commercial competition.<sup>348</sup> Other countries began to adopt such rules as long ago as fifty years, or closer to seventy-five in the case of Canada; in the same half century many too have adopted rules aimed to frustrate America’s long arm in wielding its exceptional innovation.<sup>349</sup> No nation remotely rivals America’s history either in the Sherman Act or the state laws prior in regulating companies who strove too audaciously to dominate their industries.<sup>350</sup> The proudly exceptional term “antitrust” derives from the happenstance that when Senator John Sherman of Ohio proposed his law in 1890, the apparent villains were organized in the form of common-law trusts like John D. Rockefeller’s consolidation his of oil interests into a syndicate whose control lay in a fiduciary trust inuring to his family: thus Senator Sherman’s law was literally an anti-trust act.<sup>351</sup> The law’s provident and capacious language, however, condemns any

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opportunity to confirm the Second Circuit’s sentiment collaterally, lest there be any doubt. *Id.* at 813.

<sup>347</sup> *Aluminum Co. of Am.*, 148 F.2d at 427.

<sup>348</sup> See Jared S. Sunshine, *Observations at the Quinceañero of Intel Corp. v. AMD, Inc. on International Comity in Domestic Discovery for Foreign Antitrust Matters*, 69 DRAKE L. REV. 295, 298–99 & nn.12–15 (2021) [hereinafter Sunshine, *Quinceañero*].

<sup>349</sup> See *id.* at 310–11, nn.114–16 (discussing foreign statutes intended to block American antitrust reach and noting Canada’s as the first in 1947).

<sup>350</sup> *Id.* at 298–99.

<sup>351</sup> See Jared S. Sunshine, *The “Rarely Discussed and More Rarely Applied” Antitrust Implications of Contractual Releases of Antitrust Liability, with a Modest Proposal*, 48 OHIO N.U. L. REV. 239, 324 (2022) [hereinafter Sunshine, *Modest Proposal*] (describing the late Victorian and Edwardian era trusts in America’s public eye and citing suits to break them up); Wayne D. Collins,

“combination, in the form of a trust or otherwise,” which operates to restrain trade or commerce, or threatens monopoly.<sup>352</sup> Upon that rock, the United States has built a church of “full-throated” capitalism,<sup>353</sup> and founded a worldwide hegemonic regime of competition law.<sup>354</sup>

In the celebrated case *United States v. E.I. du Pont de Nemours & Co.*,<sup>355</sup> the Supreme Court set out the recognized rationale for why markets matter to the antitrust laws.<sup>356</sup> Merely because a manufacturer holds a patent—“the most familiar type of classic monopoly”—does not mean there is no competition: in some sense, every manufacturer has a sole hold over its trademarked soft drink or a particular retail location.<sup>357</sup> Aside from a purely fungible commodity in which there is complete competition,<sup>358</sup> to the extent

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*Trusts and the Origins of Antitrust Legislation*, 81 *FORDHAM L. REV.* 2279, 2315–28 (2013); Jeffrey C. Sun & Philip T.K. Daniel, *The Sherman Act Antitrust Provisions and Collegiate Action: Should There Be a Continued Exception for the Business of the University?*, 25 *J.C. & U.L.* 451, 453–54 (1999).

<sup>352</sup> See 15 U.S.C. §§ 1–2 (decreeing that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal” and that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a felony”).

<sup>353</sup> Sunshine, *Modest Proposal*, *supra* note 351, at 335 (providing that “[a]ntitrust law exists to promote full-throated competitive capitalism”); *cf. id.* at 319 (“A volunteer who freely sets his own terms of participation can scarcely be a stable rock upon which to build the secular church of economic welfare.”); *id.* at 340 (describing antitrust’s “centrality to the American system of governance, even if it was pioneered only after a century of the American experience”).

<sup>354</sup> See Sunshine, *Quinceañero*, *supra* note 348, at 397–99 (arguing that the United States cannot ‘go it alone’ in the doctrinal war against anticompetitive concerns in the international arena of commerce).

<sup>355</sup> *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

<sup>356</sup> *Id.* at 391–93.

<sup>357</sup> *Id.* at 392–93.

<sup>358</sup> *Id.* at 392 (“If a large number of buyers and sellers deal freely in a standardized product, such as salt or wheat, we have complete or pure competition.”).

“significant differentiations of quality, designed [sic], or packaging in the product . . . permit differences of use, competition becomes to a greater or less degree incomplete and the producer’s power over price and competition greater over his article and its use, according to the differentiation he is able to create and maintain.”<sup>359</sup>

There will always be points of difference between products.<sup>360</sup> True, du Pont held a monopoly in cellophane, but cellophane alone was not necessarily a well-defined market of competition.<sup>361</sup> The question was whether the availability of other “flexible packaging materials” served to restrain du Pont from raising its prices: “Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa.”<sup>362</sup>

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<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 394 (“But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market. To accept the Government’s argument, we would have to conclude that the manufacturers of plain as well as moistureproof cellophane were monopolists, and so with films such as Pliofilm, foil, glassine, polyethylene, and Saran, for each of these wrapping materials is distinguishable. These were all exhibits in the case. New wrappings appear, generally similar to cellophane, is each a monopoly?”).

<sup>361</sup> *E.I. du Pont de Nemours & Co.*, 351 U.S. at 391–92 (“If cellophane is the ‘market’ that du Pont is found to dominate, it may be assumed it does have monopoly power over that ‘market.’ . . . Moreover, it may be practically impossible for anyone to commence manufacturing cellophane without full access to du Pont’s technique.”).

<sup>362</sup> *Id.* (“Monopoly power is the power to control prices or exclude competition. It seems apparent that du Pont’s power to set the price of cellophane has been limited only by the competition afforded by other flexible packaging materials. . . . However, du Pont has no power to prevent competition from other wrapping materials. The trial court consequently had to determine whether competition from the other wrappings prevented du Pont from possessing monopoly power in violation of § 2.” (footnote omitted)).

After examining the cross-elasticity of demand for various materials, the Court concluded that cellophane was only one among several options in the properly defined broader market for flexible packaging materials.<sup>363</sup> The Government objected that “the variation in price between cellophane and other materials demonstrates they are noncompetitive.”<sup>364</sup> It was certainly true that cellophane had been priced higher than some other wrapping materials, but it was “the variable characteristics of the different flexible wrappings and the energy and ability with which the manufacturers push their wares that determine choice.”<sup>365</sup> Du Pont itself recognized the price of cellophane was an obstacle to its adoption, and had steadily lowered its price to encourage switching by users of other materials like glassine or waxed paper.<sup>366</sup> Customers, in turn, responded to price decreases as expected, by increased use of cellophane.<sup>367</sup> And there was no evidence that du Pont had the power to exclude competitors—“the trial court found that du Pont could not exclude competitors even from the manufacture of cellophane,” though the Court hastily added that this was “an immaterial matter if the market is flexible packaging material.”<sup>368</sup>

The minority, led by Chief Justice Earl Warren, dissented strongly, claiming that “[i]n defining the market in which du Pont’s economic power is to be measured, the majority virtually emasculate § 2 of the Sherman Act.”<sup>369</sup> It pointed out that other wrappings’ physical properties were inferior on many indices like bursting strength or permeability.<sup>370</sup> But the dissent rested primarily on the evidence of pricing behavior: The only other substantial manufacturer of

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<sup>363</sup> *Id.* at 400 (“An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market. . . . We conclude that cellophane’s interchangeability with the other materials mentioned suffices to make it a part of this flexible packaging material market.” (footnote omitted)).

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 402.

<sup>366</sup> *Id.* at 401 n.29.

<sup>367</sup> *E.I. du Pont de Nemours & Co.*, 351 U.S. at 401 n.31.

<sup>368</sup> *Id.* at 403–04.

<sup>369</sup> *Id.* at 414 (Warren, C.J., dissenting).

<sup>370</sup> *Id.* at 415–16.



cellophane had aped du Pont's pricing changes precisely, whilst manufacturers of other materials "displayed apparent indifference to du Pont's repeated and substantial price cuts."<sup>371</sup> And internal business documents showed that du Pont viewed cellophane as categorically different from other materials, and diligently husbanded its dominant position in the superior product.<sup>372</sup> The majority, thought the Chief Justice, had misconstrued antitrust and economic theory in inferring competition from du Pont's price cuts.<sup>373</sup> Fundamentally, the majority had missed that although some users may be able to use other products, others wanted only cellophane, and they were being denied a competitive market.<sup>374</sup> But, of course, that view did not prevail.

Or take another case from the golden age of American antitrust coming out the other way: *International Boxing Club of New York, Inc. v. United States*.<sup>375</sup> Relying on *E.I. du Pont*, the appellants asserted uncontroversially that "any boxing contest, whether championship or not, always includes one ring, two boxers and one referee, fighting under the same rules before a greater or lesser number of spectators either present at ringside or through the facilities of television, radio, or moving pictures."<sup>376</sup> But the Court rejected their proffered syllogism that all

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<sup>371</sup> *Id.* at 417–18 ("Surely there was more than 'a slight decrease in the price of cellophane' during the period covered by the complaint. That producers of glassine and waxed paper remained dominant in the flexible packaging materials market without meeting cellophane's tremendous price cuts convinces us that cellophane was not in effective competition with their products.").

<sup>372</sup> *Id.* at 418–20 ("For example, when du Pont was contemplating entry into cellophane production, its Development Department reported that glassine 'is so inferior that it belongs in an entirely different class and has hardly to be considered as a competitor of cellophane.' This was still du Pont's view in 1950 when its survey of competitive prospects wholly omitted reference to glassine, waxed paper or sulphite paper. . . ." (footnote omitted)).

<sup>373</sup> *E.I. du Pont de Nemours & Co.*, 351 U.S. at 422–23 ("This further reveals its misconception of the antitrust laws. A monopolist seeking to maximize profits cannot raise prices 'arbitrarily.' Higher prices of course mean smaller sales, but they also mean higher per-unit profit. Lower prices will increase sales but reduce per-unit profit. Within these limits a monopolist has a considerable degree of latitude in determining which course to pursue in attempting to maximize profits.").

<sup>374</sup> *Id.* at 426.

<sup>375</sup> *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242 (1959).

<sup>376</sup> *Id.* at 249–50.

boxing matches must therefore compete in the same market, quoting *E.I. du Pont* to explain that the “price, use, and qualities” of the respective products must also be considered, not only their essential nature.<sup>377</sup> The Court looked to the revenue obtained, television rights, and Nielsen ratings achieved by championship and nonchampionship fights respectively, detailing a chasm between the two in each.<sup>378</sup> Spectators pay “substantially more” for championship tickets, as would those seeking to license the rights.<sup>379</sup> Looking to precedent on monopolization of first-run movies as “the cream of the exhibition business,” the Court concluded that, “[s]imilarly, championship boxing is the ‘cream’ of the boxing business, and, as has been shown above, is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes.”<sup>380</sup>

The point is that markets matter when assessing competition; indeed it is unintelligible to assess competition as an abstraction untethered to the product market in which it occurs. Consumers may debate between spending their hard-earned money on a flat-screen television or a Hawaiian vacation, but the former does not substitute for the latter, however crisp its rendition of *Hawaii Five-0* and *Magnum P.I.* reruns.

#### B. DEFINING ANTITRUST MARKETS: SSNIPs AND SALES (AND PUPPY DOG TALES)

The Supreme Court’s newfound emphasis on competition in copyright invites attention to the question of how artwork in fact competes with one another for consumers. The two most frequently employed modern methodologies for determining what items are actually in competition are imported from the academic discipline of econometrics, analyses of the cross-elasticity of demand and a hypothetical monopolist’s “small but significant non-transitory increase in price” (“SSNIP”).<sup>381</sup> The Ninth Circuit has explained each with admirable simplicity for the layperson:

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<sup>377</sup> *Id.* at 250 (quoting *E.I. du Pont de Nemours & Co.*, 351 U.S. at 404).

<sup>378</sup> *Id.* (\$154,000 versus \$40,000 for revenue; \$100,000 versus \$45,000 for television rights; and 74.9% versus 57.7% for ratings).

<sup>379</sup> *Id.* at 250–51.

<sup>380</sup> *Id.* at 251–52 (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 172–73 (1948)).

<sup>381</sup> See *Theme Promos., Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1002 (9th Cir. 2008) (“Determining the relevant market can involve a complicated economic analysis, including concepts like cross-elasticity of demand, and

Cross-elasticity of demand measures the percentage change in quantity that consumers will demand of one product in response to a percentage change in the price of another. When demand for the commodity of one producer shows no relation to the price for the commodity of another producer, it supports the claim that the two commodities are not in the same relevant market. Similarly, a SSNIP analysis asks whether a monopolist in the proposed market could profitably impose a small but significant and nontransitory price increase. If a significant number of customers would respond to a SSNIP by purchasing substitute products, the SSNIP would not be profitable for the hypothetical monopolist. If a monopolist could not profitably impose a SSNIP, the market definition should be expanded to include those substitute products that constrain the monopolist's pricing.<sup>382</sup>

SSNIP is not an exclusive method, but what it measures is—interchangeability.<sup>383</sup> But ever since the United States antitrust agencies embraced the SSNIP methodology, there have been debates over how to apply it.<sup>384</sup> Notably, opposing experts debated whether conventional and “health-food” supermarkets occupied the same competitive market—whether Whole Foods could profitably impose a SSNIP without losing too many customers to the Albertsons of the world.<sup>385</sup> The Government argued that Whole Foods benefitted from a discrete submarket of “core customers” who could be charged higher prices without switching to a regular grocery because of their particular characteristics, even if many more marginally motivated customers might flee.<sup>386</sup> In such cases, this “core

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‘small but significant non-transitory increase in price’ (‘SSNIP’) analysis.” (quoting *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1108 (N.D. Cal. 2004)).

<sup>382</sup> *Id.* (citations omitted).

<sup>383</sup> *Ky. Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 918 (6th Cir. 2009).

<sup>384</sup> *See, e.g., FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) (noting regulator adoption of SSNIP).

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 1038–39 (“In appropriate circumstances, core customers can be a proper subject of antitrust concern. In particular, when one or a few firms differentiate themselves by offering a particular package of goods or services, it is quite possible for there to be a central group of customers for whom ‘only [that package] will do.’ . . . Such customers may be captive to

group of particularly dedicated, ‘distinct customers,’ paying ‘distinct prices,’ may constitute a recognizable submarket, whether they are dedicated because they need a complete ‘cluster of products,’ because their particular circumstances dictate that a product ‘is the only realistic choice,’ or because they find a particular product ‘uniquely attractive.’<sup>387</sup> In the case at hand, the Federal Trade Commission (“FTC”) had convincingly documented exactly such a core market of consumers who found natural and organic food idiosyncratically desirable, even if its nutritive qualities were comparable to, and in some objective sense interchangeable, with other food.<sup>388</sup>

Ultimately, demonstrable consumer preferences and behavior define *reasonable* substitutability, not academic generalizations.<sup>389</sup> It is therefore vital to identify the appropriate set of potential buyers and their interests.<sup>390</sup> For example, in health care markets, the buyers of hospital medical services are not the

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the sole supplier, which can then, by means of price discrimination, extract monopoly profits from them while competing for the business of marginal customers.” (second alteration in original) (quoting *United States v. Grinnel Corp.*, 384 U.S. 563, 574 (1966)).

<sup>387</sup> *Id.* at 1039 (first quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); then quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 356 (1963); then quoting *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1278 (8th Cir. 1981); and then quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 112 (1984)).

<sup>388</sup> *Id.* at 1039–40 (“The FTC’s evidence delineated a PNOS submarket catering to a core group of customers who ‘have decided that natural and organic is important, lifestyle of health and ecological sustainability is important.’ . . . The FTC connected these intangible properties with concrete aspects of the PNOS model, such as a much larger selection of natural and organic products. . . . Further, the FTC documented exactly the kind of price discrimination that enables a firm to profit from core customers for whom it is the sole supplier. . . . Finally, evidence of consumer behavior supported the conclusion that PNOS serve a core consumer base.” (citations omitted)).

<sup>389</sup> *Id.* at 1039 (“After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by ‘settled consumer preference.’” (quoting *Phila. Nat’l Bank*, 374 U.S. at 357)).

<sup>390</sup> *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015) (“Market definition thus perforce focuses on the anticipated behavior of buyers and sellers. In the health care industry, insurance companies effectively act both as buyers and sellers.” (citation omitted)).

consumers themselves—patients—but rather their insurance companies. Patients can and do discriminate amongst insurance providers, but it is the providers who in turn choose which doctors to include in the plan and negotiate the terms of payments and pricing.<sup>391</sup> The Ninth Circuit there concluded that the plaintiff hospital could indeed profitably impose a SSNIP because local consumers strongly prefer local hospitals (and thus their insurers could not satisfy them with alternative far-off clinics).<sup>392</sup> To the defendant's complaint that the trial court had not considered that some patients might indeed prospectively alter their preferences in the event of a price hike, the Ninth Circuit rejoined it had done exactly that—it just had not come to the conclusion the plaintiff desired, finding patients largely insensitive to price because of the intermediary insurers as the true buyers in the market.<sup>393</sup> Other courts of appeals have acknowledged that it is insurance payors whose behavior is relevant, and patients are germane only insofar as their preferences inform those of payors.<sup>394</sup>

Sometimes the question of the proper buyer is even more fundamental. In one case, the properly defined market for a baseball hot dog vendor comprehended not the baseball spectators who purchased the hot dogs as buyers, but the ball teams or stadiums as sellers and the vendor as buyer.<sup>395</sup> The relevant

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<sup>391</sup> *Id.* (providing that “the vast majority of health care consumers are not direct purchasers of health care—the consumers purchase health insurance and the insurance companies negotiate directly with the providers” (quoting *Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke’s Health Sys., Ltd.*, No. 1:12-CV-00560-BLW, 2014 WL 407446, at \*6 (D. Idaho Jan. 24, 2014))).

<sup>392</sup> *Id.* at 784–85.

<sup>393</sup> *Id.* at 785.

<sup>394</sup> *See, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 341–43 (3d Cir. 2016) (“Patients are relevant to the analysis, especially to the extent that their behavior affects the relative bargaining positions of insurers and hospitals as they negotiate rates. But patients, in large part, do not feel the impact of price increases. Insurers do. And they are the ones who negotiate directly with the hospitals to determine both reimbursement rates and the hospitals that will be included in their networks.”).

<sup>395</sup> *Twin City Sportserv., Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1272–73 (9th Cir. 1975) (“These facts lead us to conclude that the trial court erred in treating Sportservice as a seller of concession services to major league baseball teams. Such services are sold to spectators who directly and immediately pay therefor—not to the major league baseball teams. The relationship between the major league baseball team or stadium owner and the concessionaire is one in which a *franchise* is sold by the ball team or stadium owner to the purchasing concessionaire.”).

items being sold were not hot dogs and beer at all, but franchises to operate in the ballpark as a concessionaire.<sup>396</sup> Conversely, a court rejected the notion that the relevant buyers in the market for NASCAR events were speedway operators, instead focusing on the consumers of live entertainment, who could choose from a far more variegated suite of spectacles: most obviously, other sporting events like baseball games, but also amusement parks, movies, or even opera.<sup>397</sup> It was irrelevant that speedways could not host a baseball game (let alone stage an opera), because, properly conceived, speedways were not the buyer, but rather bidders to be an input in the product being created and sold by NASCAR to the ultimate buyers.<sup>398</sup>

### C. USURPATION AS A DIFFERENT KIND OF COMPETITION

Under the ordinary tests for antitrust markets, it would seem difficult if not impossible to place Goldsmith and Warhol (and other such appropriation artists) in direct competition. The very fact that Goldsmith's photos were licensed for hundreds of dollars whilst Warhol's silkscreen went for \$10,000 is prima facie evidence that the two are not interchangeable: as *E.I. du Pont* taught, indicia of price are tantamount to those of competition.<sup>399</sup> Why else would any rational editor spend orders of magnitude more money if not to obtain a crucially different product? Like the health food lovers who constituted the "core customers" at Whole Foods, editors' preferences might be idiosyncratic and intangible, and the

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<sup>396</sup> *Id.* at 1272 ("The market in which the franchise is sold is the franchise market—a market quite distinct from the concession products market. It follows that the relevant market with which we are concerned here is one in which the articles of commerce are franchises, not concession services.").

<sup>397</sup> *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 916–17 (6th Cir. 2009).

<sup>398</sup> *Id.* at 917 ("KYS contends, however, that racetracks—rather than broadcasters, corporate sponsors, and fans—are the consumers in the Sanctioning Market, and that these tracks cannot switch to hosting another sporting event such as baseball or football. But this argument conflicts with Zimbalist's own deposition testimony that racetracks are *not* consumers in the Sanctioning Market. Zimbalist testified that '[racetracks] are not final consumers; they are inputs. They are purchasing the right to be—[o]r they're negotiating the right to be a part of the production process.' We thus decline to critique the district court for failing to view Zimbalist's expert testimony from a perspective rejected by Zimbalist himself." (alterations in original)).

<sup>399</sup> *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 392 (1956) (quoted *supra* note 362).

products might be interchangeable at some level of abstraction, but that generalized substitutability does not mean that the buyers who value organic food or Warhol silkscreens do not *in fact* view the products as noninterchangeable.<sup>400</sup> Likewise, in *Graham*, the evidence showed that the purchasers of Prince's appropriation artworks would not even have considered buying Graham's photography unaltered: it was not the product they were looking for, and they would not consider it even as an inferior substitute.<sup>401</sup>

The kind of interartist competition that the Supreme Court found fatal to Warhol, therefore, is something subtly different from that of an ordinary antitrust market: "Both are portraits of Prince used in magazines to illustrate stories about Prince. Such 'environment[s]' are not 'distinct and different.' AWF's licensing of the Orange Prince image thus "'supersede[d] the objects,'" *i.e.*, shared the objectives, of Goldsmith's photograph, even if the two were not perfect substitutes."<sup>402</sup> Of course, even in antitrust markets, products need not be *perfect* substitutes, but they must be *actual* substitutes in the eyes of the applicable consumers.<sup>403</sup> In a recent case in the saga of tobacco antitrust enforcement,<sup>404</sup> *FTC v. Swedish Match*, the court found that loose-leaf tobacco and moist snuff were "functionally interchangeable" in light of their purpose as similar noncombustible

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<sup>400</sup> See *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) (discussed *supra* notes 386–388).

<sup>401</sup> *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 WL 3383029, at \*5–6 (S.D.N.Y. May 11, 2023) (discussed *supra* notes 307–309).

<sup>402</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 535–36 (2023) (alterations in original) (citations omitted).

<sup>403</sup> See *Va. Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 98 F. Supp. 2d 729, 737 (W.D. Va. 2000) ("When Schwartz considered substitutes in his analysis by looking at price correlation to determine whether or not different products were in the same market, he focused on finding the perfect substitute for vermiculite. Hence, Schwartz excluded products such as perlite in defining the market. By doing this, Schwartz gave the inflexible buyers, unable to substitute vermiculite despite price increases, too much weight and ignored the power of the flexible elastic buyer. There are elastic buyers that will find substitutes, even if the substitutes are imperfect."); see also *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1107 (N.D. Cal. 2004) ("The product of each vendor possesses certain features or qualities so that none is a perfect substitute for any other. As the testimony indicated, and the court finds, no vendor is capable of meeting all of the high function needs, as defined by plaintiffs, of all customers.").

<sup>404</sup> See, e.g., *Am. Tobacco Co. v. United States*, 328 U.S. 781, 791 n.7 (1946); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

nicotine delivery systems.<sup>405</sup> But antitrust law concerns itself with actual economic behavior, not merely function,<sup>406</sup> and the evidence suggested that users would not substitute one for the other given price changes, employing the hypothetical monopolist SSNIP test.<sup>407</sup> More compelling, the companies themselves did not think their users would be persuaded to switch by any increase in price, as one vice president testified: "I still have no indication that loose-leaf users would switch to moist snuff because of price. They use moist snuff for particular reasons, and they use loose leaf for particular reasons."<sup>408</sup> The court found the two did not compete in the same market.<sup>409</sup>

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<sup>405</sup> *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 158 (D.D.C. 2000) ("[W]hile loose leaf and moist snuff tobacco are not identical, in light of substantial similarities between them and in light of the rising trend in dual usage by consumers, the Court ultimately finds the products to be functionally interchangeable for the purpose of outlining the relevant product market.").

<sup>406</sup> *Id.* at 158–59 ("Finding two products to be functionally interchangeable, however, does not end the analysis. The Supreme Court did not stop after finding a high degree of functional interchangeability between cellophane and other wrapping materials in the *E.I. du Pont de Nemours* case. Instead, the Court also found that 'an element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other.'" (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956))).

<sup>407</sup> *Id.* at 159–60 ("With respect to *Brown Shoe's* price sensitivity factor, the evidence shows that substitution to moist snuff is unlikely in the event of a price increase in loose leaf tobacco. While the Commission has been unable to bring forward the same degree and type of pricing evidence the Court found compelling in *Staples*, it has made an adequate showing that loose leaf is insufficiently price sensitive. One way to evaluate price sensitivity is to apply the U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines' 'hypothetical monopolist' test." (footnote omitted)).

<sup>408</sup> *Id.* at 162 ("The views of Swedish Match and National competitors, statements by loose leaf distributors, and internal documents of Swedish Match and National show that price-based substitution between loose leaf and moist snuff is generally lacking. Swedish Match competitors believe that there is no switching between loose leaf and moist snuff on the basis of price.").

<sup>409</sup> *Id.* at 164 ("To the contrary, the weight of the evidence demonstrates that moist snuff is incapable of inducing substitution sufficient enough to render loose leaf price increases unprofitable and cannot, therefore, be included in the relevant market on this basis.").



Yet the fair use cases seem unconcerned with whether consumers view the competing artworks as *any* kind of substitute, inferior or not. An earlier case from the *Swedish Match* district judge sheds light on what this subtly different test might be, reframing the age-old *E.I. du Pont* statement of interchangeability as “whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other.”<sup>410</sup> The fair use competition test would seem to shear off the latter inquiry demanded by antitrust law, leaving only the question of whether the two works can be employed to achieve the same thing—the functional interchangeability of *Swedish Match*.<sup>411</sup> Indeed, by focusing on “whether two products can be used for the same purpose,” this truncated test neatly aligns with the language of the transformativeness prong of the fair use statute, which inquires into the “purpose and character of the use.”<sup>412</sup>

The fair use cases, indeed, go out of their way to highlight this different kind of competition by calling it something peculiar: *usurpation* or *supplantation* of the copyrighted original’s role. The seminal *Campbell v. Acuff-Rose Music, Inc.* had

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<sup>410</sup> *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) (Hogan, J.); *see Swedish Match*, 131 F. Supp. 2d at 157 (discussing this reframing of *E.I. du Pont*). Although Judge Hogan’s opinions in *Staples* and *Swedish Match* attribute the formulation to *Hayden Publ’g Co. v. Cox Broad. Corp.*, 730 F.2d 64, 70 n.8 (2d Cir. 1984), and the sentiment is generally mirrored there, the exact words supposedly quoted do not. Rather, the phrase first appeared in *Bon-Ton Stores, Inc. v. May Dep’t Stores Co.*, 881 F. Supp. 860, 868 (W.D.N.Y. 1994), *decision supplemented*, No. CIV. A. 94-6454L, 1995 WL 215307 (W.D.N.Y. Mar. 6, 1995).

<sup>411</sup> *Swedish Match*, 131 F. Supp. 2d at 157 (“Whether moist snuff tobacco is similar in character or use to loose leaf tobacco may be termed ‘functional interchangeability.’”); *see, e.g., E.I. du Pont de Nemours & Co.*, 351 U.S. at 399 (discussing the “functional interchangeability” between cellophane and other types of flexible wrappings); *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) (recognizing “functional interchangeability” between sugar and high-fructose corn syrup).

<sup>412</sup> *Staples*, 970 F. Supp. at 1074; 17 U.S.C. § 107(1); *see Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 533 (2023) (“The fair use provision, and the first factor in particular, requires an analysis of the specific ‘use’ of a copyrighted work that is alleged to be ‘an infringement.’ The same copying may be fair when used for one purpose but not another.” (quoting 17 U.S.C. § 107(1))); *id.* at 537–38 (“Taken together, these two elements—that Goldsmith’s photograph and AWF’s 2016 licensing of Orange Prince share substantially the same purpose, and that AWF’s use of Goldsmith’s photo was of a commercial nature—counsel against fair use, absent some other justification for copying.”).

put it just so, asking “whether the use ‘merely supersedes the objects of the original creation . . . (supplanting the original), or instead adds something new, with a further purpose or different character.’”<sup>413</sup> In *Comerica Bank & Trust, N.A. v. Habib*, the district court preferred the language of usurpation in assessing the fourth fair-use factor, holding that Habib’s grainy phone-recorded video stole the original’s role, even if it was only a pale reflection of the real thing.<sup>414</sup> In doing so, it quoted the Second Circuit’s rule from *Cariou*: the question was not “whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.”<sup>415</sup> *Cariou*’s rule flowed from *Campbell*, as the court made clear in *Graham*, adding that “[u]surpation of the market for the original work may occur when an accused infringer’s ‘target audience and the nature of the infringing content is the same as the original.’”<sup>416</sup> At the motion-to-dismiss phase, the court lacked the data to decide the issue, observing only that usurpation was properly pled.<sup>417</sup> On summary judgment, however, the court found that Prince had disproven usurpation, counting in his favor.<sup>418</sup>

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<sup>413</sup> *Id.* at 509 (alteration in original) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>414</sup> *Comerica Bank & Tr., N.A. v. Habib*, 433 F. Supp. 3d 79, 95–96 (D. Mass. 2020).

<sup>415</sup> *Id.* at 95 (emphasis added) (quoting *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013)).

<sup>416</sup> *Graham v. Prince*, 265 F. Supp. 3d 366, 384 (S.D.N.Y. 2017) (quoting *Cariou*, 714 F.3d at 709).

<sup>417</sup> *Id.* (“Although the Court does not now have sufficient factual information to conclude whether or not defendants have actually usurped the market for *Rastafarian Smoking a Joint*, this factor cannot weigh in defendants’ favor at the motion to dismiss stage because plaintiff has adequately pled that the ‘target audience and the nature of [Prince’s *Untitled* work and the *New Portraits* Catalog] is the same as [Graham’s] original.” (quoting *Cariou*, 714 F.3d at 709)).

<sup>418</sup> *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 WL 3383029, at \*17 (S.D.N.Y. May 11, 2023) (“However, at this stage of the litigation, Prince has demonstrated that his ‘work appeals to an entirely different sort of collector,’ which lends support to the conclusion that Prince has *not* usurped the primary market for the original photographs.” (citation omitted)).

In *Cariou* too, the Second Circuit had found no usurpation. The district court had squarely held that Prince had usurped the market for Cariou's work, citing to evidence that the gallery owner Cariou had been negotiating with dropped him as soon as she heard of Prince's exhibition.<sup>419</sup> The Second Circuit saw it differently, attributing the gallerist's volte-face to a misunderstanding.<sup>420</sup> But more importantly, "Prince's work appeals to an entirely different sort of collector than Cariou's."<sup>421</sup> The opinion catalogued a who's who of invitees to Prince's exhibition gala worthy of a gossip columnist, from Jay-Z to Brad Pitt.<sup>422</sup> Cariou had sold only four prints, to personal friends.<sup>423</sup> Prince netted over \$10 million for his *Canal Zone* series; Cariou's royalties from his photography book totaled "just over \$8,000."<sup>424</sup> In sum, "there is no evidence that Prince's work ever touched—much less usurped—either the primary or derivative market for Cariou's work."<sup>425</sup> This was not a case where the copycat had targeted the same audience, seeking to serve the same interest, as where an unlicensed book of *Seinfeld* trivia piggybacked on aficionados of *Seinfeld* itself, usurping the original's prerogative.<sup>426</sup>

<sup>419</sup> See *Cariou v. Prince*, 784 F. Supp. 2d 337, 353 (S.D.N.Y. 2011) ("It is therefore clear that the market for Cariou's Photos was usurped by Defendants."), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

<sup>420</sup> See *Cariou*, 714 F.3d at 709 ("Celle did not decide against putting on a *Yes Rasta* show because it had already been done at Gagolian, but rather because she mistakenly believed that Cariou had collaborated with Prince on the Gagolian show.").

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* ("The invitation list for a dinner that Gagolian hosted in conjunction with the opening of the *Canal Zone* show included a number of the wealthy and famous such as the musicians Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt.").

<sup>423</sup> *Id.* ("He has sold four prints from the book, and only to personal acquaintances.").

<sup>424</sup> *Id.*

<sup>425</sup> *Id.* ("[N]othing in the record suggests that anyone will not now purchase Cariou's work, or derivative non-transformative works (whether Cariou's own or licensed by him) as a result of the market space that Prince's work has taken up.").

<sup>426</sup> See *Cariou*, 714 F.3d at 709 ("For instance, a book of trivia about the television show *Seinfeld* usurped the show's market because the trivia book

With this understanding of competition as usurpation, the *Warhol* holding snaps into focus. It was irrelevant that the Condé Nast editors would never have opted for Goldsmith’s photo over Warhol’s silkscreen at any price—indeed, they could likely have saved a vast sum had they done so.<sup>427</sup> What mattered, as the majority kept repeating like a mantra, was that the photograph and silkscreen were *functionally* interchangeable: Both were susceptible of being used as a magazine cover for an issue dedicated to Prince, regardless of whether the actual buyers at the magazine would choose to do so.<sup>428</sup> There are facial similarities between the relatively unknown photographers Patrick Cariou and Lynn Goldsmith, and the celebrity appropriation artists Richard Prince and Andy Warhol.<sup>429</sup> But the decisive factor in *Warhol* that distinguished it from *Cariou* was the evidence—indeed, the very cause of action—that Warhol (or rather, his foundation) had appealed to exactly the same audience as Goldsmith had: magazine editors looking for cover art.<sup>430</sup> Warhol’s licensing of his copied

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‘substitute[d] for a derivative market that a television program copyright owner . . . would in general develop or license others to develop.’” (alterations in original) (quoting *Castle Rock Ent., Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998))).

<sup>427</sup> Compare *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 567 (2023) (Kagan, J., dissenting) (stating the editors did not want the photograph), *with id.* at 515 (majority opinion) (juxtaposing the \$400 received by Goldsmith from Vanity Fair for the use of the photograph in 1984 with the \$10,000 received by Warhol from Condé Nast); *see also id.* at 520 (noting Goldsmith was paid only \$1000 for a modern license of one of her Prince photos).

<sup>428</sup> *See id.* (Kagan, J., dissenting) (discussing majority’s argument and citing the many mantra-like restatements).

<sup>429</sup> *See id.* at 514–15 (majority opinion) (“This copyright case involves not one, but two artists. The first, Andy Warhol, is well known. His images of products like Campbell’s soup cans and of celebrities like Marilyn Monroe appear in museums around the world. Warhol’s contribution to contemporary art is undeniable. The second, Lynn Goldsmith, is less well known.”); *Cariou*, 714 F.3d at 699 (Cariou is a professional photographer who, over the course of six years in the mid-1990s, lived and worked among Rastafarians in Jamaica. The relationships that Cariou developed with them allowed him to take a series of portraits and landscape photographs that Cariou published in 2000 in a book titled *Yes Rasta*. . . . [T]he book enjoyed limited commercial success. . . . Prince is a well-known appropriation artist.).

<sup>430</sup> *See Andy Warhol Found.*, 598 U.S. at 520 (“Remember that Goldsmith, too, had licensed her Prince images to magazines such as Newsweek, to

silkscreen to that audience therefore *usurped* the prior right belonging to Goldsmith to serve that purpose, assessed in the nexus of the first and fourth fair-use factors.<sup>431</sup> Warhol may have transformed Goldsmith's work a little or a lot aesthetically or communicatively, a judgment best left for the art critics—but he had not transformed its *purpose and character* as a potential magazine cover: the suit's gravamen was that it was used as such.<sup>432</sup>

## VI. GRASPING HEARTS: ANIMUS LUCRI FACIENDI CAUSA

Thus, it did not matter that as “between the Goldsmith photo and the Warhol portrait,” magazine editors “knew about the photo . . . but they wanted the portrait.”<sup>433</sup> Copyright law said they could not have it. But why does copyright law cleave to a different kind of competition than antitrust law, one that denies consumers of artistic work their desired products? If a secondary work is so transformed that it utterly supersedes the original, is that not the very progress of art that is desired? To simply respond that the fair-use language says so is too facile, for the doctrine of fair use is far older than the statute: why then does the *statute* concern itself with the purpose and character of the secondary use, rather than on whether the latter transformation competes with the former from a rigorously econometric point of view? After all, there is a broad and deep body of academic research and jurisprudence to inform the latter assessment. By turning away from the concreteness of antitrust precedent and econometric analysis,

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accompany a story about the musician, and Vanity Fair, to serve as an artist reference. But that was not all. Between 1981 and 2016, Goldsmith's photos of Prince appeared on or between the covers of People, Readers Digest, Guitar World, and Musician magazines.”).

<sup>431</sup> See *id.* at 536 & n.12 (“Under today’s decision, as before, the first factor does not ask whether a secondary use causes a copyright owner economic harm. There is, however, a positive association between the two factors: A secondary use that is more different in purpose and character is less likely to usurp demand for the original work or its derivatives, as the Court has explained. This relationship should be fairly obvious.” (citations omitted)).

<sup>432</sup> See *id.* at 544–46 (“A court should not attempt to evaluate the artistic significance of a particular work. Nor does the subjective intent of the user (or the subjective interpretation of a court) determine the purpose of the use. But the meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original.” (citations omitted)).

<sup>433</sup> *Id.* at 567 (Kagan, J., dissenting).

copyright law forgoes more than just the wisdom of Areeda and Hovenkamp, prodigious as that may be.<sup>434</sup>

A. PROFESSOR HENRY GOUDY, PARAGON OF THE PLAGIARIZED

There are seldom pellucid answers when it comes to public policy dating back to England before the Acts of Union, but winking out this one involves returning full circle to the ancient problem of plagiarism. A 1908 article in the *Juridical Review* by Professor Henry Goudy, Oxonian Regius Professor of Civil Law,<sup>435</sup> provided a précis of plagiarism as prologue:

In its modern sense plagiarism cannot be said to be a crime punishable either by English or Scottish law, or, so far as I am aware, by any European code. Whether it should be made a crime may be a question. Under the Copyright Acts a man acquires a distinct property in his published writings, and for another man to appropriate these as his own, *lucri faciendi causâ*, is very much of the nature of theft.<sup>436</sup> Probably, however, the difficulties of proof that would arise in many cases—especially the difficulty of distinguishing between reasonable and justifiable borrowing and wrongful appropriation—would render the inclusion of plagiarism in a criminal code impracticable. But though not a crime it is an offence in morals universally reprobated.<sup>437</sup>

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<sup>434</sup> See generally Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039 (2015); Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919 (2015).

<sup>435</sup> See Goudy, *supra* note 18; James Mackintosh, *Henry Goudy*, 34 JURID. REV. 53, 55–56 (1922); James F. Whyte, *Henry Goudy: An Appreciation*, 33 JURID. REV. 161, 163 (1921); Obituary Notice, *Henry Goudy*, 2 BRIT. Y.B. INT'L L. 209, 209 (1921–1922).

<sup>436</sup> *Animus lucri faciendi causa* was one of the two traditional elements of theft in the Digest of Justinian (47.2.1.3), meaning an intent of making profit, *contractatio* (the physical appropriation of the object) being the other. See R. Zimmermann, *Theft*, in THE OXFORD CLASSICAL DICTIONARY 1453, 1453 (Simon Hornblower et al. eds., 4th ed. 2012) (citing Tony Honoré, *Justinian's Codification*, in THE OXFORD CLASSICAL DICTIONARY 780, 780–81 (Simon Hornblower et al. eds., 4th ed. 2012)).

<sup>437</sup> Goudy, *supra* note 18, at 302–03.

Professor Goudy had accidentally uncovered a brazen act of plagiarism committed by one Hannis Taylor, “a prominent American” and legal author, in the latter’s recent book *The Science of Jurisprudence*.<sup>438</sup> As the editor of a classic treatise by the late James Muirhead on Roman law, Goudy had noticed sentences with “a strangely familiar ring” in Taylor’s chapter on the same subject.<sup>439</sup> When he set the two side by side, he was appalled to discover that basically the entirety of the chapter—text, footnotes, and even errors—had been duplicated wholesale with no semblance of credit and only “slight disguise.”<sup>440</sup> For half a dozen pages of the *Review*, Goudy laid out the evidence for the reader, illustrating Muirhead’s original and Taylor’s replication in parallel columns, explicating the various transparent yet crafty methods that Taylor had used to effectuate his theft.<sup>441</sup> Goudy left the rest of the Taylor’s putative scholarship to others to plumb, echoing Martial’s plaint,<sup>442</sup> perhaps by design, in declaring only: “*Ex uno disce omnes*,” the axiom of inductive reasoning, that one can judge the whole from a single instance.<sup>443</sup>

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<sup>438</sup> *Id.* at 303.

<sup>439</sup> *Id.*

<sup>440</sup> *Id.* at 303–04 (“I then proceeded carefully to compare the two books, and I found, to my astonishment, that not only were the ideas of Muirhead appropriated wholesale, but that his very words, or words of my own in the notes, were in a vast number of cases reproduced, under a slight disguise, without the slightest acknowledgment. Nay, more, I found that a great mass of the elaborate references in the chapter to continental authorities (French, German and Italian), have been taken bodily from Muirhead’s book without the slightest indication of ever having been consulted by Dr. Taylor at all. Even slips that I had marked for correction in a new edition have been reproduced, while almost no reference (in fact, so far as I can see, none at all) has been made to continental authorities on Roman law later than 1899.”).

<sup>441</sup> *Id.* at 305–11.

<sup>442</sup> MARTIALIS, *supra* note 19, I.l.iii at 20 (quoted *supra* text accompanying note 23). Martial was actually stating the converse: that the single page of Fidentinus’s own insipid work inserted amongst his thieveries demonstrated that all the rest of the publication had been stolen from Martial by the obvious difference in quality. *Id.*

<sup>443</sup> Goudy, *supra* note 18, at 312.

To say that Goudy's charges of flagrant plagiarism against an international eminence like Hannis Taylor ignited a firestorm of controversy is a gross understatement, as John W. Cairns narrated a century later in his fascinating rendition of the saga, spanning eighty pages of the *Tulane European & Civil Law Forum*.<sup>444</sup> Summing up, Cairns observed with equal understatement that "[t]he relationship between plagiarism and breach of copyright is complex," overlapping in some ways but not others.<sup>445</sup> Copyright concerns itself with economic harm, particularly from piracy, while mores against plagiarism serve other purposes.<sup>446</sup> Yet an infringer's profit motivation—*animus lucri faciendi causa*—is no *sine qua non* for copyright infringement: just as Warhol was hardly scheming premeditatedly to obtain licensing fees for the Orange Prince, Taylor appears to have been motivated primarily by the yen for reputational eminence, not the meager royalties from his esoteric tome.<sup>447</sup> Both nonetheless notionally deprived the original creators of the pecuniary benefit of their creations, and that is the cardinal sin of copyright infringement, because the *raison d'être* of copyright is to encourage artists via profit motivation.<sup>448</sup>

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<sup>444</sup> John W. Cairns, *Henry Goudy, Hannis Taylor, and Plagiarism Considered as a Fine Art*, 30 TUL. EUR. & CIV. L.F. 1 (2015).

<sup>445</sup> *Id.* at 64.

<sup>446</sup> *Id.* ("In reality, as many authors have pointed out, the law on copyright developed primarily to protect economic interests, particularly to prevent piracy of works by other publishers; plagiarism, on the other hand, though it may well have economic implications, is rather different." (footnote omitted)).

<sup>447</sup> *Id.* ("When Hannis Taylor set out to use the words and research in Muirhead's *Historical Introduction*, it was certainly not with the aim of appropriating to himself income that ought properly to have gone to the owner of that work's copyright.").

<sup>448</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 549 (2023) (quoted *supra* note 334).



Consider the dictionary definitions of the peculiar words that the courts have used for wrongful competition by a modified copy with the original:<sup>449</sup> usurpation and supplantation.<sup>450</sup> Usurpation incorporates within it the element of wrongfulness, “[t]he action of usurping, illegally seizing, or wrongfully occupying some place or property belonging to a person or persons; unlawful encroachment upon or intrusion into the office, right, etc., of another or others; unjust or illegal possession.”<sup>451</sup> So too supplantation, “[t]he dispossession or displacement of a person in a position, esp. by dishonourable means.”<sup>452</sup> But to supplant has another connotation, as Merriam-Webster puts it: “to take the place of and serve as a substitute for especially by reason of superior excellence or power.”<sup>453</sup> That is, supplantation is to be outmatched and overcome not solely by some impropriety, but by a qualitatively superior competitor—to be beaten, if not fair and square, then at least on the merits.

*Pace* the learned practitioners of art criticism, it must be admitted that the discipline suffers from far more subjective standards than, say, physics or engineering, and thus adjudging which of two artworks is “of superior excellence” is a fraught task. In *E.I. du Pont*, the dissent could compare a suite of measurable,

<sup>449</sup> The Supreme Court has often reminded that dictionary definitions are an appropriate starting point for discerning the meaning of texts, *see, e.g.,* *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070–71 (2018); *Ardestani v. INS*, 502 U.S. 129, 131 (1991); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337–38 (1979) (“As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress. . . . In its dictionary definitions and in common usage ‘property’ comprehends anything of material value owned or possessed.”), even if it has also cautioned against interpreting judicial opinions as though they were statutes, *see Reiter*, 442 U.S. at 341 (“However, the language of an opinion is not always to be parsed as though we were dealing with language of a statute.”). Still, the recurrent use of such unusual vocabulary as usurpation and supplantation deserves interrogation.

<sup>450</sup> *See* cases cited *supra* notes 413–418.

<sup>451</sup> *Usurpation*, THE COMPACT OXFORD ENGLISH DICTIONARY 2206 (2d ed. 1982).

<sup>452</sup> *Supplantation*, THE COMPACT OXFORD ENGLISH DICTIONARY 1968 (2d ed. 1982) (first definition).

<sup>453</sup> *Supplant*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/supplant> [<https://perma.cc/63AX-ZACE>] (definition 2b); *see also* *Supplant*, OXFORD ADVANCED LEARNER’S DICTIONARY, <https://www.oxfordlearnersdictionaries.com/us/definition/english/supplant> [<https://perma.cc/9VKC-JBJK>] (“to take the place of somebody/something (especially somebody/something older or less modern)”).

determinate physical qualities of the various flexible packaging materials to reach a conclusion as to which was superior: bursting strength, gas permeability, resistance to lipids, transparency.<sup>454</sup> On every one, cellophane had more desirable attributes.<sup>455</sup> There is no such objective report card or grading rubric for art.<sup>456</sup> George Orwell argued just that in his own inimitable fashion, as the Ninth Circuit quoted at length in observing that “[t]here is not even a useful vocabulary for most of the distinctions we need to identify ‘artistic excellence.’”<sup>457</sup> Certainly courts have

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<sup>454</sup> *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 415–16 (1956) (Warren, C.J., dissenting).

<sup>455</sup> *See id.* at 398 (majority opinion) (“It may be admitted that cellophane combines the desirable elements of transparency, strength and cheapness more definitely than any of the others. Comparative characteristics have been noted thus: ‘Moistureproof cellophane is highly transparent, tears readily but has high bursting strength, is highly impervious to moisture and gases, and is resistant to grease and oils. Heat sealable, printable, and adapted to use on wrapping machines, it makes an excellent packaging material for both display and protection of commodities.’”).

<sup>456</sup> *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1273 (11th Cir. 2001) (“But we must determine whether the use is fair. In doing so, we are reminded that literary relevance is a highly subjective analysis ill-suited for judicial inquiry.”).

<sup>457</sup> *Finley v. Nat’l Endowment for the Arts*, 100 F.3d 671, 688 (9th Cir. 1996) (“Philosophers have no way to distinguish art from non-art, or good art from bad art. There is not even a useful vocabulary for most of the distinctions we need to identify ‘artistic excellence’: ‘In certain kinds of writing, particularly in art criticism and literary criticism, it is normal to come across long passages which are almost completely lacking in meaning. Words like *romantic*, *plastic*, *values*, *human*, *dead*, *sentimental*, *natural*, *vitality*, as used in art criticism, are strictly meaningless, in the sense that they not only do not point to any discoverable object, but are hardly ever expected to do so by the reader. When one critic writes, “The outstanding feature of Mr. X’s work is its living quality,” while another writes, “The immediately striking thing about Mr. X’s works is its peculiar deadness,” the reader accepts this as a simple difference of opinion. If words like *black* and *white* were involved, instead of the jargon words *dead* and *living*, he would see at once that the language was being used in an improper way.” (quoting George Orwell, *Politics and the English Language*, 13 HORIZON 252 (1946), reprinted in A COLLECTION OF ESSAYS 156, 161–62 (1970))).

acknowledged the limits of judicial capacity to make such unstructured and untrained judgments,<sup>458</sup> up to and including the Supreme Court in *Warhol*.<sup>459</sup>

Perhaps it is this indeterminacy of ranking creative endeavors that animates public policy deeming it unjust for artists to be supplanted by others' novel variations on the very creations they have wrought, usurping from them the rightful fruits of their labors. Copyright law declares that, for a time, the author is protected from being outcompeted even by more popular offerings that make use of the original—a sort of breathing period for the original to reap its own rewards before the ground can be salted by its new-and-improved replacements. Indeed, it does not care even if those offerings are so vastly superior or preferable that no one would even consider the original if allowed to have the new version, premitting antitrust law's evaluation of whether real-life consumers would actually select between the options based on price. On this measuring stick, all boxing matches are equal, from the grandest championship to the meagerest spar of tyros, because their essential purpose is the same.<sup>460</sup> And thus the law does not care that the Condé Nast editors "knew about the photo . . . but they wanted the portrait."<sup>461</sup> They could not have it, at least unless Goldsmith said they could. That is what a monopoly right *means*.

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<sup>458</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) ("[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits" (first alteration added) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903))); *Cariou v. Prince*, 714 F.3d 694, 713–14 (2d Cir. 2013) (Wallace, J., concurring in part and dissenting in part); see also *Miller v. Civ. City of S. Bend*, 904 F.2d 1081, 1098 (7th Cir. 1990) ("The practical effect of letting judges play art critic and censor would be to enforce conventional notions of 'educated taste' . . .").

<sup>459</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 544–45 (2023).

<sup>460</sup> Cf. *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 249–52 (1959) (discussed *supra* text accompanying notes 375–380).

<sup>461</sup> *Andy Warhol Found.*, 598 U.S. at 567 (Kagan, J., dissenting).

But then there is the obscurity where the overlap of infringement and plagiarism begins to weaken, and fair use would absolve the reuse even if remaining amorphyously plagiaristic. Recall that Professor Goudy had despaired of criminalizing plagiarism for that reason,<sup>462</sup> and he took up the issue again in conclusion, after exposing Taylor's audacity:

To a reasonable amount of borrowing by a writer from his predecessors, especially the borrowing of references, no one will object. And in a recondite subject like Roman law, where ancient authorities cannot always readily be consulted, it is commonly recognised as quite legitimate, up to a certain point, to take information at second hand. There are common materials which all may use. But where the words of a writer are borrowed, especially of a writer whose copyright has not expired, it is universally expected, and but common honesty, to acknowledge the source.<sup>463</sup>

Goudy harbored no doubt that Taylor's appropriations, now unmasked, exceeded any boundaries of custom or law and would be prosecutable in Britain as infringement.<sup>464</sup> Echoing Goudy,<sup>465</sup> newspapers urged Taylor to sue for defamation, or defend his honor by reissuing the treatise abroad and brook an infringement suit, but Taylor's publisher prudently had it withdrawn from British circulation.<sup>466</sup> Taylor declined to litigate, declaring tendentiously in the press that if the Crown could not combat Goudy's libels, then a humble country lawyer like him could not from afar.<sup>467</sup> Even so, the matter was not so clear-cut: Taylor bellowed in his defense to anyone who would listen that his book had entirely new and different thesis and argument that merely used the widely known statements in Muirhead's work as raw materials—that his reuse was, in a word,

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<sup>462</sup> See *supra* text accompanying note 437.

<sup>463</sup> Goudy, *supra* note 18, at 314.

<sup>464</sup> See Cairns, *supra* note 444, at 8–10.

<sup>465</sup> See *id.* at 63 (“Goudy, as we have seen, challenged the American to have it circulated once more so that the holders of copyrights could sue.”).

<sup>466</sup> *Id.* at 59 (“Of course, by initiating this correspondence, Taylor had drawn further attention to Goudy's claims; he may have been unwise to do so. His publishers, the Macmillan Company of New York, reacted to the growing scandal, and, as Goudy had pointed out, by mid-April had withdrawn the book from circulation in the United Kingdom.”).

<sup>467</sup> *Id.* at 61 (“If the Crown cannot bring him to justice, certainly I cannot.”).

transformative.<sup>468</sup> Indeed, Taylor's work had been heralded by many as commendable contribution to scholarship.<sup>469</sup> But Goudy thought it a bald-faced appropriation for no evolutionary or productive purpose, indeed no purpose at all beyond fraudulent self-aggrandizement.<sup>470</sup> From a century's distance, Cairns adjudges that Goudy vindicated his mentor Muirhead in the end and proved his charge of plagiarism, but at palpable personal cost.<sup>471</sup>

Certainly too there was an odor of plagiarism about the Orange Prince's publication, lacking as it did even an oblique acknowledgement of Goldsmith's original authorship, an omission the majority stressed repeatedly; the subtext was that Lynn Goldsmith's work had vanished into the vortex of Warhol's fame.<sup>472</sup>

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<sup>468</sup> See *id.* at 48 n.319 ("All this praise of an American discovery of a new thought in the history of Roman law (the best of it coming from German sources) was too much for the self-constituted Oxford guardian of that subject. The worst form of literary jealousy has prompted him to attempt to discredit my book as a whole, despite the fact that he frankly confesses that he has read only one chapter of it. Ignoring the discovery I have made, he charges that I have not given the proper credit to four or five authors as to the general details of the history of Roman law which are the common property of everybody."); *id.* at 49 n.321, 52 nn.334–35, 57 n.350, 67.

<sup>469</sup> See *id.* at 5–7.

<sup>470</sup> Cairns, *supra* note 444, at 10 ("He wanted it to be absolutely clear to his readers, beyond any doubt, that Taylor had committed a deliberate academic fraud. This was why 'the slight disguises' were so significant. They showed Taylor was not naively simply copying; he was also trying to conceal his theft."); *id.* at 46–47 ("For a pushy and ignorant plagiarist to appropriate Muirhead's work and get praise and recognition for it must have been very hard to bear—hence Goudy's desire to ensure that it was clear beyond a peradventure that Taylor was publishing Muirhead's work as his own."). Moreover, the plagiarism was secondary to the infringement at some level: surely Goudy would not have been satisfied had Taylor noted on the verso (no doubt in small type) that he had lifted the entire chapter from Muirhead wholesale.

<sup>471</sup> *Id.* at 47 ("The aftermath made it clear that he had succeeded in vindicating Muirhead's scholarship from Taylor's claims; but there was a personal cost.").

<sup>472</sup> Compare, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 520 (2023) (noting that "Goldsmith received neither a fee nor a source credit" for the Orange Prince), and *id.* at 521 ("And all of them (except Condé Nast) credited the photographer."), with *id.* at 515 (noting that for the

Such a vanishment was not so dissimilar from the offense of which Goudy complained.<sup>473</sup> But manifestly, the question of whether Warhol's cavalier but much-lauded reuse rose to the level of copyright infringement, or whether it should enjoy the safe harbor of fair use, was a far closer call that fractured the Court.<sup>474</sup> Concurring separately for himself and Justice Ketanji Brown Jackson, Justice Neil Gorsuch framed the question as a "narrow" matter of statutory interpretation,<sup>475</sup> in that allowing putative transformative works free rein in the open market would contradict the original author's legal entitlement to create or authorize derivative works herself,<sup>476</sup> emphasizing Goldsmith's autonomy and economic interests.<sup>477</sup> Meanwhile, Justice Kagan argued in dissent, artists had been openly plagiarizing one another more or less without legal consequence for hundreds if not thousands of years, and to declare such acts culpable

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Purple Prince, "[t]he magazine credited Goldsmith for the 'source photograph,' and it paid her \$400"), *and id.* at 518 (same).

<sup>473</sup> See Goudy, *supra* note 18, at 315 ("Had the matter concerned myself alone I should probably have kept silence, though it is not pleasant to see work to which one has given much time and trouble taken credit for by others; but the duty which I owe to my deceased master and friend compels me to write. . . his writings were his own, and one must see that they are not wrongfully appropriated by others after his death.").

<sup>474</sup> Compare *Andy Warhol Found.*, 598 U.S. at 542, 548 (majority comments on the dissent), *with id.* at 558–59 (Kagan, J., dissenting) (critiquing the majority), *and id.* at 579 (Kagan, J., dissenting) (commenting on differences between Justice Gorsuch's concurrence and the majority), *and id.* at 554–55 (Gorsuch, J., concurring) (disagreeing with Justice Kagan's arguments).

<sup>475</sup> *Id.* at 553 (Gorsuch, J., concurring) ("This question before us is a narrow one of statutory interpretation.").

<sup>476</sup> *Id.* at 555 (Gorsuch, J., concurring) ("To hold [that transformative use "automatically" establishes fair use] would risk making a nonsense of the statutory scheme—suggesting that transformative uses of originals belong to the copyright holder (under § 106) but that others may simultaneously claim those transformative uses for themselves (under § 107).").

<sup>477</sup> See *id.* at 553 (Gorsuch, J., concurring) ("The Foundation now owns Mr. Warhol's image of Prince and it recently sought to license that image to a magazine looking for a depiction of Prince to accompany an article about Prince. Ms. Goldsmith seeks to license her copyrighted photograph to exactly these kinds of buyers." (citation omitted)).

infringements rather than evolutionary homages would condemn multitudes ex post facto.<sup>478</sup>

## B. ARS GRATIA ARTIS AND LABORS OF LOVE

Thus, this fly in the ointment that has for so long exercised plagiarism is writ large in copyright law unexorcised. The very philosophical premise of such law is that affording a property right to profit from creative works will motivate their creation, as the market alone would not suffice to encourage artistry.<sup>479</sup> Notwithstanding analogy to theft simpliciter and so the *animus lucri facienti causa*,<sup>480</sup> the moral offense of plagiarism has never depended upon such a profit motivation even as it often assumes it, and copyright law may well err too in assuming its existence so axiomatically.<sup>481</sup> Experience tells that in many if not most cases, profit motivation is lacking in creditable artists' endeavors: their motivators are desire to communicate; to advocate a view; to amuse themselves; or to concomitantly garner public attention, fame, and adulation—not to turn a quick buck.<sup>482</sup> Kate Romanenkova used transparently derivative amateur writings extending a published author's works ("fanfiction") as a lucid example:

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<sup>478</sup> See *id.* at 587 (2023) (Kagan, J., dissenting) (quoted *supra* text accompanying note 116).

<sup>479</sup> Lee Marshall, *Copyright*, in *THE ROUTLEDGE READER ON THE SOCIOLOGY OF MUSIC* 287, 294 (John Shepherd & Kyle Devine eds., 2015) ("The rationale for creating copyright was that cultural and intellectual works were socially valuable but that the market did not adequately provide an incentive for their production. The state thus allowed publishers a monopoly over the right to reproduce the cultural work for a limited time and, at the end of that time, the work became free for all to use, providing raw materials for future creativity."); see *supra* Section III.A.

<sup>480</sup> See *supra* notes 436–437.

<sup>481</sup> Marshall, *supra* note 479, at 293–94 (discussing modern critiques of the fundamental presumption).

<sup>482</sup> 125 CONG. REC. 28984 (1979) (extension of remarks of Rep. Ron Paul) ("Normally, art production is self-selective. Few people produce art for the sake of money. The main reward is intrinsic—*ars gratia artis*. Artists are willing to risk foregoing income for the sake of self-rewarding achievement however much they hope it will be publicly recognized and become materially rewarding as well."); Kate Romanenkova, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 195 (2014); see also Joshua A.T. Fairfield, *Castles in the Air: Greg*

If copyright exists to incentivize creation, it should not punish those who strive to improve or refine existing works . . . Further, the law should not ignore the fact that many artists need no economic incentive to create. If anything, fanfiction is proof that *ars gratia artis* is alive and well.<sup>483</sup>

Perhaps, however, fame or attention can be superficially equated with lucre: that was the lesson in *Habib*, where that paragon of the proletariat paparazzi sought and received no remuneration for his amateur videos portraying Prince's performances from his own perspective.<sup>484</sup> Nonetheless, Habib derived much attention and traffic from his posted recordings, to the detriment of Prince's monetization of that traffic himself, even if Habib did not or could not.<sup>485</sup> Indeed, Habib protested unsuccessfully that every artist implicitly desires that their fans adulate them by such postings.<sup>486</sup> Habib's failing would then be that his offerings derived from extrinsic motivation, in that he would not have made them but for the prospect of public consumption.<sup>487</sup> Yet the equation of fame with money does not fully address the fatal flaw, for much artistry (if not Habib's) can fairly be said to be undertaken wholly for its own sake: the artist would have been driven to create without extrinsic motivation at all, pecuniary or not, being principally a "labor of love."<sup>488</sup> The ideal of the artist as a solitary font of inspiration expressed,

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*Lastowka's Virtual Justice*, 51 JURIMETRICS 89, 97–98 (2010) (book review) (describing profit motivations and lack thereof in creation of virtual art).

<sup>483</sup> Romanenkova, *supra* note 482, at 195 (footnote omitted).

<sup>484</sup> *Comerica Bank & Tr., N.A. v. Habib*, 433 F. Supp. 3d 79, 93–94 (D. Mass. 2020) (““Profit,” in this context, is . . . not limited simply to dollars and coins; instead, it encompasses other nonmonetary calculable benefits or advantages.’ Here, Habib sought to drive traffic to his YouTube channel by posting ‘rare’ and ‘[a]mazing’ videos of Prince performing his musical compositions in concert.” (alterations in original) (quoting *Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 61 (1st Cir. 2012))).

<sup>485</sup> *Compare id.* (Habib's lack of remuneration), *with id.* at 85–86 (allegations of the loss to Prince's estate from diversions of viewers from authorized channels), *and id.* at 95–96 (crediting same).

<sup>486</sup> *Id.* at 97 (Habib's “unflagging conviction”); *id.* at 99–100 (asserting as defense that Prince had impliedly licensed such amateur sharing of his performances).

<sup>487</sup> *See id.* at 93–94.

<sup>488</sup> *E.g.*, Romanenkova, *supra* note 482, at 184, 195 (“Many claim fanfiction is a prime example of non-infringing fair use under the copyright fair use



creating art solely for the sake of art—*ars gratia artis*—is a foundational conceit of the Romantic Era elevation of the ineffable artiste as a paragon and exponent of civilization itself, a notion that persists to this day.<sup>489</sup>

It would be convenient to posit that such traditional notions are literally that—a romantic conceit—and that artists are driven by pecuniary concerns as much as anyone else.<sup>490</sup> As *Graham* put it, quoting *Cariou*, “‘nearly all’ fair uses of copyrighted works are conducted for profit,” to some degree, and “[a]lthough ‘[t]he public exhibition of art is widely . . . considered to have value that benefits the broader public interest,’ this does not eliminate the commerciality of a piece of art exhibited at and sold by a commercial art gallery.”<sup>491</sup> Certainly the cases strive to square the circle, assuring that commercialization of art can coexist with fundamentally creative inspiration and expressive motivation.<sup>492</sup> The commercial character of a creation is therefore informative but not dispositive to fair use.<sup>493</sup> On

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doctrine. Most fanfiction is not written to profit the author and is considered first and foremost a labor of love, which theoretically satisfies the fair use factors under section 107 of the Copyright Act.”).

- <sup>489</sup> Adam Behr, *Cultural Policy and the Creative Industries*, in *THE ROUTLEDGE READER ON THE SOCIOLOGY OF MUSIC* 277, 281–82 (John Shepherd & Kyle Devine eds., 2015); Carter, *supra* note 72, at 553; Latourette, *supra* note 1818, at 12.
- <sup>490</sup> Cf., e.g., Cairns, *supra* note 444, at 64 (“Conventional accounts, though potentially questionable, usually explain (indeed, it is almost a commonplace) that anxiety arose about plagiarism in particular during the Romantic era of literature with its supposed focus on originality and genius”).
- <sup>491</sup> *Graham v. Prince*, 265 F. Supp. 3d 366, 382–83 (S.D.N.Y. 2017) (second and third alterations in original) (first quoting *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013); and then quoting *Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006)).
- <sup>492</sup> See *Cariou*, 714 F.3d at 708 (“‘The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work.’ This factor must be applied with caution because, as the Supreme Court has recognized, Congress ‘could not have intended’ a rule that commercial uses are presumptively unfair.” (first quoting *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994); and then quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994))).
- <sup>493</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 531 (2023) (“The commercial nature of the use is not dispositive. But it is

this reading, art can be created for art's sake, but compensating the artist *allows for* art even when it does not *motivate* the artist; in a legal sense, because even the most dedicated artist must still put bread on the table to live, securing profits to the creator can be a but-for cause even if it is not the proximate cause.<sup>494</sup> And one must look to the marginal increase: Perhaps many artists would create in any case, but security of compensation might motivate some substantial increase in output at the margins.<sup>495</sup>

Kate Romanenkova's treatment of fanfiction in copyright law confronts these issues head-on.<sup>496</sup> Fanfiction is only one expression of a more general modern "remix culture," encompassing also songs featuring samples by rappers and "even art collages."<sup>497</sup> The original copyright holders may not wish to litigate against such parties, wary of alienating their "most dedicated" fans, or of uncertain result.<sup>498</sup> Under the initial guidance of Justice Story, Romanenkova added, copyright law shied from prosecuting mimeses beyond the central concern of unvarnished commercial reduplication of another's work for profit.<sup>499</sup> Quickly, however, the law migrated from Justice Story's fundamentals, heralding the deluge of applicants seeking to extract concessions from popular artists because of some resemblance to their (less popular) works.<sup>500</sup> The 1909 Copyright Act reflected that enlargement, affording copyright holders broad-reaching right in "derivative

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relevant. As the Court explained in *Campbell*, it is to be weighed against the degree to which the use has a further purpose or different character." (citations omitted)).

<sup>494</sup> See 125 CONG. REC. 28984 (1979) (extension of remarks of Rep. Paul) ("Not that hungry artists are better artists. On the contrary.").

<sup>495</sup> *Id.* ("Subsidies, however, will increase art production by attracting producers who, without the subsidy, would not have produced—those whose passion for art was not sufficient, without the subsidy, to induce them to risk sacrificing income.").

<sup>496</sup> Romanenkova, *supra* note 482, at 184.

<sup>497</sup> *Id.* at 183.

<sup>498</sup> *Id.* at 184.

<sup>499</sup> *Id.* at 186–87 ("By mid-nineteenth century, U.S. judges struggled to clearly define infringement that was not just simple copying. . . . As a circuit judge between 1839 and 1845, Justice Story was the first to articulate the idea that some appropriation of a work should be allowed without running afoul of copyright law." (citations omitted)).

<sup>500</sup> Compare *id.* at 188 with cases cited Section III.2 *supra* (modern such cases).

works” rather than simple copies of their creations.<sup>501</sup> With the new law in place, many riffs on existing works were found infringing absent a license.<sup>502</sup>

Whatever the dubious merits of such a regime with regard to commercial writers,<sup>503</sup> Romanenkova argues persuasively that it makes little sense for fanfiction authors:<sup>504</sup> “More often than not, these fan works are created with no profit incentive, no permission from the author of the work, and no desire other than the right to exist in peace.”<sup>505</sup> No usurpation is intended or effected, yet when such tales employ the original work’s characters—which courts have largely held to be copyrightable—they have run afoul of the law.<sup>506</sup> Romanenkova emphasizes how the community standards of “fandom” mirror the equities of copyright law, deploring outright plagiarism of the original and embracing only evolutionary extensions.<sup>507</sup> The dishonored scarlet letter of plagiarism has persisted even amongst avowed thieves.<sup>508</sup> Fundamentally, however, fanfiction authors expect no profit, and “do not compete with published authors in the marketplace.”<sup>509</sup> True, they may command internet traffic on the merits of their riffs,<sup>510</sup> like Habib.<sup>511</sup> But the purpose of copyright is to *encourage* artistic creation, and accordingly Romanenkova suggests a blanket “fair use” allowance for non-commercial fan

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<sup>501</sup> Copyright Act of 1909, Pub. L. No. 60-349, § 1(b), 35 Stat. 1075, 1075 (1909); Romanenkova, *supra* note 482, at 188–89.

<sup>502</sup> Romanenkova, *supra* note 482, at 189–93.

<sup>503</sup> *Id.* at 193–97.

<sup>504</sup> *Id.* at 197.

<sup>505</sup> *Id.*

<sup>506</sup> *Id.* at 200.

<sup>507</sup> *Id.* at 202–03 (“[F]anfiction writers pride themselves on the transformative aspects of their work. While fans may feel entitled to the content and characters in their favorite creative work, plagiarizing—taking someone else’s words and presenting them as one’s own—is still frowned upon.”).

<sup>508</sup> See Romanenkova, *supra* note 482, at 203 (“Whether the distinction between borrowing certain elements from a preexisting work and outright plagiarism is indeed a kind of honor among thieves, the fact that the distinction exists is relevant to how copyright holders should perceive fanfiction.”).

<sup>509</sup> *Id.* at 204.

<sup>510</sup> *Id.* at 204–05.

<sup>511</sup> Comerica Bank & Tr., N.A. v. Habib, 433 F. Supp. 3d 79, 93–94 (D. Mass. 2020).

works.<sup>512</sup> Still, like Pickett's guitar,<sup>513</sup> it would be too much to allow fan authors to turn and sue creators over derivatives of their own compositions because the fan had come up with the idea first—any implied license must be without prejudice to the original author's rights to expand on her own imagined universe.<sup>514</sup>

Moreover, there remains the axiom of antitrust: that unbridled competition for consumers would benefit artistry as much as any other sector of the economy—notwithstanding the inherent lack of standards for judgment.<sup>515</sup> In 1954, Hollywood bigwig Howard Dietz (who had adopted the motto *ars gratia artis* for MGM) responded genially in the New York Times to concerns about the box-office take of their latest movie, *Brigadoon*, under the headline "Art and Money."<sup>516</sup> Albeit not pretending to wholly live up to the Latin creed, Dietz wrote that MGM sought to produce films of a certain "standard of merit," for which "the results are usually reflected in public appreciation at the boxoffice."<sup>517</sup> That is, to actual patrons of art, merit yields reward, encouraging sponsorship of meritorious works and discouraging that of the demeritorious—the market at work. In 1979, Representative Ron Paul adduced scholarly testimony by Dr. Ernest van den Haag about the distorting effects of the state's subsidizing art.<sup>518</sup> In a natural condition, "the high risk of low income deters those more interested in income than in art and leaves mainly those who are artists for the sake of art, whether or not they are able to produce anything valuable."<sup>519</sup> But offering governmental subsidies perversely attracts those laboring for lucre, crowding out the more talented who would have created anyway as a labor of love.<sup>520</sup>

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<sup>512</sup> Romanekova, *supra* note 482, at 206–07.

<sup>513</sup> See *supra* Section III.1.

<sup>514</sup> Romanekova, *supra* note 482, at 209–10 (discussing *Anderson v. Stallone*).

<sup>515</sup> See *supra* notes 454–459 and accompanying text.

<sup>516</sup> Howard Dietz, *Art and Money*, N.Y. TIMES, Oct. 3, 1954, at X5.

<sup>517</sup> *Id.* Dietz was wise not to pretend to pure art devoid of commercial concerns: A large advertisement for *Brigadoon* was running directly overpage to his comments in the Times that day. *Id.* at X6.

<sup>518</sup> 125 CONG. REC. 28984–85 (1979) (extension of remarks of Rep. Ron Paul).

<sup>519</sup> *Id.* at 28984.

<sup>520</sup> *Id.* ("Subsidies may actually make it harder for true artists to succeed. Although more money is made available, there also is more competition for it. In this competition, the true artist is likely to be undone by those who, consciously or unconsciously, are interested mainly in money. They will be more worldly-wise, better competitors. After all, they are not distracted by artistic concerns and ambitions. Lacking original talent, the pseudo artist

The common message of Dietz, Paul, and van den Haag was that artists could and would be best judged and encouraged by the public, unobstructed by governmental intervention. Perhaps more importantly, even as Dr. van den Haag affirmed that starving artists are not better artists,<sup>521</sup> modern literature evinces that despite modern copyright law, the vast majority of artists would indeed starve without their other jobs, minuscule minority of celebrity artists notwithstanding.<sup>522</sup> Under copyright, the princes may prosper, but the paupers still starve—and yet continue to create anyway, driven by their own deep-seated desires rather than profit.<sup>523</sup>

### C. THE PRINCIPLE OF POSTERITY

In many ways, copyright law recognizes the limits of governmental imposition, much as Dr. van den Haag would suggest. Most every court recites how the regime balances the interests of incumbent authors against those of the future, limited by the idea-expression dichotomy, a bounded term of protection, and most saliently, fair use.<sup>524</sup> Fair use, however, is not to be found as such in the

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will be more imaginative and, therefore, more easily understood and more appealing—and more eligible for subsidies.”).

<sup>521</sup> *Id.* (“Not that hungry artists are better artists. On the contrary.”).

<sup>522</sup> See Aaron Bady, *To Be a Consumer of Culture Means Living in a Hostage Situation*, SLATE (Aug. 11, 2023, 5:00 PM), <https://slate.com/culture/2023/08/writers-actors-strike-sag-aftra-wga-hollywood-fans-scabbing-solidarity.html> [<https://perma.cc/D4YE-HBFZ>] (“After all, what makes arts and culture different from most industries—and what makes these distinctions tricky—is that its workers will and do work for free. They’ll hold down a job as a waiter or a package handler or sex worker, all the while going on auditions or working on their poems at night. They’ll struggle through open mics, work for exposure, and display their paintings gratis. They’ll do what they have to do to survive—while making pennies on their actual art—because they want the job more than the job wants them, because money makes it possible to do the job, rather than the reverse.”).

<sup>523</sup> See *id.* (“The image of famous and wealthy pop stars and celebrities has often made it hard to see that most artists tend to labor in working-class penury, the rule to the celebrity exception.”).

<sup>524</sup> *E.g.*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 526-27 (2023) (reciting how statute “limits the duration of copyright, §§ 302–305, as required by the Constitution; makes facts and ideas uncopyrightable, § 102; and limits the scope of copyright owners’ exclusive rights,” as well as fair use); *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013)

Constitution, whereas the temporal limitation is: allowing these monopolies only “for limited Times” in service of “the Progress of . . . the useful Arts.”<sup>525</sup> This suggests, at the least, that the circumscribed durational extent of copyright protection is essential to its nature, unlike the statutory and judicial glosses imposed upon it in a spirit of equity.<sup>526</sup>

From its original promulgation in the Statute of Anne, copyright has been conceived as inherently temporally limited because its entitlement, deriving from the idea that a man’s labor must accrue to him, is untenable where the fruit of that labor is intellectual property, eternally transmissible, unlike the turnip of a farmer or the refrigerator of a manufacturer that will rot or break eventually.<sup>527</sup> The “first sale” doctrine is in accord, for it wrests only a physical embodiment of a copyrighted work from the artist’s control, and such a book (for example) will in time yield to entropy and turn to dust.<sup>528</sup> However, the series of words recorded in that book—the “intellectual property”—are reproducible in perpetuity, and the law will not abet an unnecessary perpetuity.<sup>529</sup> Commentators have criticized

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("[F]air use doctrine 'mediates between' 'the property rights [copyright law] establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them[.]'"); *Cariou v. Prince*, 784 F. Supp. 2d 337, 346–47 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013) (“[T]he balance between the First Amendment and copyright is preserved, in part, by the idea/expression dichotomy and the doctrine of fair use.”); *Graham v. Prince*, 265 F. Supp. 3d 366, 376 (S.D.N.Y. 2017); *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 WL 3383029, at \*7 (S.D.N.Y. May 11, 2023) (“[F]air use’ is an important limitation on the original creator’s monopoly rights.”).

<sup>525</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>526</sup> *Cf.* cases cited *supra* note 524.

<sup>527</sup> *See* *Wheaton v. Peters*, 33 U.S. 591, 657 (1834) (quoted *supra* text accompanying note 129).

<sup>528</sup> *See* *Quality King Distribs., Inc. v. L’anza Rsch. Int’l, Inc.*, 523 U.S. 135, 140 (1998) (“Indeed, we first endorsed the first sale doctrine in a case involving a claim by a publisher that the resale of its books at discounted prices infringed its copyright on the books.” (citing *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 341 (1908), and stating in footnote 4 that “[t]he doctrine had been consistently applied by other federal courts in earlier cases,” citing further cases)).

<sup>529</sup> *See generally* Jared S. Sunshine, *Secrets Clutched in a Dead Hand: Rethinking Posthumous Psychotherapist-Patient Privilege in the Light of Reason and Experience with Other Evidentiary Privileges*, 37 J.L. & HEALTH (forthcoming Apr. 2024) (manuscript at 4–5, 111) (on file with author) (draft sections I &

American law under which the bound of copyright has progressively lengthened, even as the rest of the world remained staid in its durational dedication. Many have pointed to the malign political influence of copyright-holders seeking to perpetuate their monopoly indefinitely.

In the end, though, all good things must come to an end, and all good art must pass into the hands of history. Walt Disney Corporation, often vilified as the instigator of earlier copyright extension acts in America,<sup>530</sup> has recently finally had to address the passage of Mickey Mouse into the public domain, a century after the cartoon rodent's first appearance in the eponymous Walt's original film reel.<sup>531</sup> So too have passed A.A. Milne's delightful tales of Winnie-the-Pooh, allowing for an horrific work that imagined loveable Pooh and timid Piglet as homicidal maniacs after their abandonment by Christopher Robin.<sup>532</sup> The blood-drenched extrapolation may not stand the test of time as surely as has Milne's original, but does it not deserve the opportunity to submit itself to the withering judgment of posterity without the prospect of litigation by Milne's heirs dissuading the creator?<sup>533</sup> Indubitably, however, the film *Winnie-the-Pooh: Blood and Honey* traded

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VIII) (discussing generally the longstanding Rule Against Perpetuities as it relates to attorney-client privilege).

<sup>530</sup> See, e.g., Sarah Sue Landau, Note, *Of Mouse and Men: Will Mickey Mouse Live Forever?*, 9 NYU J. INTEL. PROP. & ENT. L. 249, 254–55 (2020); Kaitlyn Hennessey, *Intellectual Property—Mickey Mouse's Intellectual Property Adventure: What Disney's War on Copyrights Has to Do with Trademarks and Patents*, 42 W. NEW ENG. L. REV. 25, 28 (2020); Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 430–31 (1994).

<sup>531</sup> See Pratap Devarapalli, *Last Days of Disney's Rights on Mickey Mouse: Isn't the Term of Copyright Too Long?*, 15 LANDSLIDE 26, 27 (2023) (evaluating Mickey Mouse's 2023 copyright expiration and arguing for a shortened copyright duration); Landau, *supra* note 530, at 256; Douglas A. Hendenkamp, *Free Mickey Mouse: Copyright Notice, Derivative Works, and the Copyright Act of 1909*, 2 VA. SPORTS & ENT. L.J. 254, 255 (2003); see also Paul E. Adams, *Superman, Mickey Mouse and Gerontology*, 64 TRADEMARK REP. 183, 183 (1974) (comparing theories of cartoons' protection under various intellectual property laws).

<sup>532</sup> WINNIE-THE-POOH: BLOOD AND HONEY (Jagged Edge Productions 2023).

<sup>533</sup> See, e.g., Charles Branescio, *Oh, Bother: The Winnie the Pooh Slasher Movie Is a Bloody Mess*, GUARDIAN (Feb. 16, 2023, 2:02 PM), <https://www.theguardian.com/film/2023/feb/16/winnie-the-pooh-blood-and-honey-movie-review> [<https://perma.cc/LVZ2-BTCH>] (reviewing the new Winnie-the-Pooh slasher film); K.J. Yossman, *Winnie the Pooh: Blood and*

on the familiarity of characters and tropes established by a famous artist long before—even if, in the new adaptation, the homicidal maniacs of the Hundred Acre Wood did consume the morose Eeyore in their hunger and desperation.<sup>534</sup>

But so did Virgil (parrot a predecessor, not devour a donkey) in mimicking Homer’s epic origin story of the Achaeans in his own for Rome.<sup>535</sup> So too, as Justices Story and Kagan observed, has every great artist in history, more or less—but they muddle the mores of plagiarism with the statutes of copyright.<sup>536</sup> Is *Lolita* a lesser work because someone else had written on such a subject before Nabokov? Or even because Nabokov copied it? That professors and students read Vladimir Nabokov rather than Heinz von Lichberg is testament to the judgment of posterity—that one work excels the other, no matter how they came about.<sup>537</sup> The exemplary American Mark Twain embodies the dichotomy of plagiarism: acknowledging that he had never had a new thought of his own even whilst denying he plagiarized a word from a little-known foreign author.<sup>538</sup> No doubt Virgil, Shakespeare, and Milton would likewise all admit their debt to their predecessors whilst insisting they had created something new and valuable.<sup>539</sup> Stevenson admitted for the record that he had stolen entire chapters of his tale

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*Honey’ Director Teases Slasher Film Plot: ‘Pooh and Piglet Go on a Rampage,’*  
 VARIETY (May 26, 2022, 6:31 AM),  
<https://variety.com/2022/film/news/winnie-the-pooh-blood-and-honey-director-1235278405/> [<https://perma.cc/RX2E-XHRF>] (critiquing the Winnie-the-Pooh slasher film after the original’s entry into the public domain).

<sup>534</sup> See Joe George, *Blood, Honey, and the Public Domain*, PROGRESSIVE MAG. (Feb. 23, 2023, 2:58 PM), <https://progressive.org/latest/blood-honey-public-domain-george-230223/> [<https://perma.cc/X6YK-V3PR>]; Carlianna Dengel, *Winnie-the-Pooh: Blood and Honey—Is This What’s to Come for New Public Domain Characters?*, ROMANO L. (Mar. 16, 2023), <https://www.romanolaw.com/winnie-the-pooh-blood-and-honey-is-this-whats-to-come-for-new-public-domain-characters/> [<https://perma.cc/8HF5-MHWF>].

<sup>535</sup> See Makyra Williamson, *Vergil’s Aeneid: The Cornerstone of Roman Identity*, 8 TENOR OF OUR TIMES 159, 164–68 (2019) (describing the connection between Vergil’s *Aeneid* and Homer’s *Iliad* and *Odyssey*).

<sup>536</sup> See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 530 (2023) (Kagan, J., dissenting); *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (D. Mass. 1845).

<sup>537</sup> *Andy Warhol Found.*, 598 U.S. at 584 (Kagan, J., dissenting).

<sup>538</sup> Cf. *supra* notes 30, 111 and accompanying text.

<sup>539</sup> See *supra* notes 28–29 and accompanying text.



from no less a talester than Washington Irving, but his work has been adjudged meritorious nonetheless—and posterity is grateful therefor, and therefore for his arrogation.<sup>540</sup> History exonerates the worthy of all sin, whether they confess them or not. It is only the principle of posterity that can justify a time-delimited copyright, with all its restraints in the present, in deference to this ultimately liberating judgment of the future.

A copyright without delimitation that denied posterity its due would be an ideological tyranny worthy of Orwell and his perpetually-redacting corps in a Ministry of Truth.<sup>541</sup> It may be reasonable to permit a monopoly whilst the judgment of posterity gestates, in order that there be no rush to precipitously overthrow one creator for a slightly newer shiny thing. The principle of posterity presupposes deliberation in remove, and the settlement of transitory fads with time, and so it is fundamentally *time* that copyright law is bounded by. Like a jury, once posterity has had the opportunity to decide upon a verdict, it has the final word.<sup>542</sup> Those who had only a groatsworth of wit will fade into the dry annals of letters, and the geniuses of the past will live forever.<sup>543</sup> And, rightfully, the law does not arrogate itself to stand in the way of inevitability, bowing out once the overarching purpose of its initial restraint—to permit fair deliberation in the unjaded eyes of the far future whilst incentivizing creators with a transitory monopoly in their lifetimes—has passed.

Justice Kagan objected on behalf of modernity to obstructing the further progress of the arts by furthering fear of the law being brought to bear against already-hungry artists.<sup>544</sup> Justice Sotomayor, for the majority, argued the law that Congress passed was intended to support those hungry artists—*other* hungry artists whose work was being misappropriated.<sup>545</sup> Neither is wrong; both are right. Like the amorphous moral crime of plagiarism,<sup>546</sup> it is paradoxically best that there

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<sup>540</sup> *Andy Warhol Found.*, 598 U.S. at 584 (Kagan, J., dissenting).

<sup>541</sup> *See generally* GEORGE ORWELL, 1984 (1949).

<sup>542</sup> *Cf.* *Lewis v. District of Columbia*, 315 F. Supp. 3d 571, 577 (D.D.C. 2018) (“Ordinarily, the jury has the final word at trial; indeed, this is an integral part of having juries adjudicate disputes in the first place.”); *United States v. Husein*, 478 F.3d 318, 338 (6th Cir. 2007) (“The finality of judgments is a key element of the American system of justice.”).

<sup>543</sup> *See* Latourette, *supra* note 18, at 1–2 n.1 (quoting LINDEY, *supra* note 41, at 74–75 (1952)).

<sup>544</sup> *Andy Warhol Found.*, 598 U.S. at 560 (Kagan, J., dissenting).

<sup>545</sup> *Id.* at 514–51 (majority opinion).

<sup>546</sup> *See supra* Sections II.A, II.B, VI.A.

be some gray area around the bounds of copyright infringement, permitting for those sufficiently motivated in their appropriation to do so (and assume the risk of running afoul of the law) without wholesale stripping authors of their ability to earn a living, when so many already cannot with their art.<sup>547</sup> When courts are invoked, they will inevitably have to decide which is which,<sup>548</sup> but they are best served doing so without disclaiming the deliberate definitional indefinitude at the heart of both plagiarism as a moral “crime” and copyright infringement as a statutory one.<sup>549</sup>

How was it that Cairns could conclude with the retrospection of posterity that, even as Goudy vindicated his accusations of plagiarism, it was he who suffered more than Taylor, the celebrity-plagiarist?<sup>550</sup> Martial aside,<sup>551</sup> seldom are plagiarized artists those seeking lucre by accusations of plagiarism;<sup>552</sup> in the modern parlance, they are creatives, driven by their need to create, not to profit from their creations.<sup>553</sup> In his saga of the Goudy-Taylor affair, Cairns records how Taylor sought with some success to pigeonhole Goudy as an obstreperous Oxford don who had never created anything of his own and could only harp and cavil at those who had.<sup>554</sup> Notably, the so-called victims of his plagiarism, Taylor

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<sup>547</sup> See *supra* notes 522–523 and accompanying text.

<sup>548</sup> See *supra* Part III.

<sup>549</sup> Goudy, *supra* note 18, at 302–03 (quoted *supra* text accompanying note 437).

<sup>550</sup> Cairns, *supra* note 444, at 8–10; see *supra* text accompanying note 476.

<sup>551</sup> See *supra* Section II.A.

<sup>552</sup> See Cairns, *supra* note 444, at 65–67; Carter, *supra* note 72, at 545–53 (finding plagiarized legal authors’ complaints largely nonexistent); *In re Lamberis*, 443 N.E.2d 549, 552 (Ill. 1982) (noting plagiarism had not harmed the original authors nor violated any trust); see also Bady, *supra* note 522 (“In publishing, a notoriously low-paying industry, the actual writers of books, of all the workers involved in bringing a title to print, might be the least likely to be making an actual living from doing what they do; most novelists must teach because their novel-writing doesn’t pay the rent, even as multinational publishing conglomerates post huge profits. But how many artists actually can support themselves by making art, rather than by family wealth or subsidizing their craft with other jobs? There may never have been a time when ‘artist’ was a secure way to make a living; there may also have never been a time when it was worse than it is now.”)

<sup>553</sup> See *supra* Section B.

<sup>554</sup> Cairns, *supra* note 444, at 66 (“Taylor marshals these words into an argument, presuming that the literary tropes and *topoi* used to identify a ‘plagiarism hunter’ will be familiar to his readers. He thus emphasized that

declaimed, had praised rather than denounced him—Goudy was a meddling mischief-maker rather than some vicarious moral avenger.<sup>555</sup> In doing so, he benefitted from a widely-held trope in popular perception that those who cannot create themselves seek only to tear down those who can to assuage their envy.<sup>556</sup> Even Cairns, Goudy's great defender in modern literature, could not help but note that Romantic notions of authorial originality were already outmoded in Goudy's

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Goudy had 'never been able to make a book of his own' . . . ." (quoting Hannis Taylor, Letter to the Editor, *The Science of Jurisprudence*, TIMES (London) Mar. 11, 1909, at 19)).

<sup>555</sup> *Id.* at 67 ("In contrast, Taylor claims that noted scholars, such as Mitteis and Sohm, each of whom, in contrast to Goudy, had a 'great mind,' had praised his book and found no problems with it; there was in fact plentiful citation of the books he was supposed to have plagiarized; and Goudy ignored the important and original thesis of the book contained in the chapter supposedly plagiarized." (citing Taylor, *supra* note 554, at 19)).

<sup>556</sup> *Id.* at 65–66 (noting that a critic and scholar, Andrew Lang, proposed the idea that it was usually failed authors who tended to accuse successful authors of plagiarism, and that later, J. Cuthbert Hadden referred back to Lang's proposition; more significantly, Taylor's letters reflected such bitter sentiments of a failed author).

time.<sup>557</sup> As Edgar Allen Poe—a starving artist himself<sup>558</sup>—said, public sympathy is generally with the successive and successful adaptor, not a carping originalist.<sup>559</sup>

Perhaps works of art are best judged on their own terms, in light of the expectations of their creators, not extramural carpers, as Harold G. Fox wrote in 1958 of Canadian law:

Some conceptions are obviously brought into being and embodied in material form as artistic works entitled to copyright and others are obviously created as models to be multiplied by an industrial process and to be protected by design registration. This distinction should be made at the time of creating or making the work. It involves the distinction between such works as Benvenuto Cellini's salt-cellar on the one hand, and on the other hand, such articles as toy soldiers, chinaware, or table silverware. In the latter case the work comes into being with its future life delineated and patterned. It is made for no other purpose than commercialised repetitive reproduction. In the former case, the future life of the work is a matter that depends upon public acceptance and enthusiasm. It was created and made as a work of pure art. Subsequent considerations may affect its subsequent life. In the case of such things as toy soldiers, table flatware,

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<sup>557</sup> *Id.* at 65 (citing ROBERT MACFARLANE, ORIGINAL COPY: PLAGIARISM AND ORIGINALITY IN NINETEENTH-CENTURY LITERATURE (2007)) (“Robert Macfarlane has argued that in the second half of the nineteenth century there was a reaction against the more simple notions of originality attributed to the earlier Romantic period: scholars and writers now engaged in an extensive debate, in both critical and imaginative literature, on the nature of originality and on the use of earlier material in constructing something new.”).

<sup>558</sup> Daniela Carstea, *Embattled National Topics: Parochial and Universal in Edgar Allan Poe's Depiction of the American South*, 6 INT'L J. SOC. SCI. RSCH. & REV. 130, 132 (2023) (“Faflik goes on to distinguish another reason why, ‘as a perennial starving artist,’ Poe would resort to embattled national topics and would include them in his lore, namely his ‘keen professional sense of what made good copy.’” (quoting David Faflik, *South of the “Border,” or Poe's Pym: A Case Study in Region, Race, and American Literary History*, 57 MISS. Q. 265, 272 (2004))).

<sup>559</sup> Cairns, *supra* note 444, at 67 (citing Peter Shaw, *Plagiary*, 51 AM. SCHOLAR 325, 325 (1982)) (“Edgar Allan Poe wrote: ‘When a plagiarism is detected, it generally happens that the public sympathy is with the plagiarist.’”).

chinaware, etc., the course of subsequent life is dictated and established at the time of the making of the work.<sup>560</sup>

As Fox recognized, it is posterity's verdict ("public acceptance and enthusiasm" in light of "[s]ubsequent considerations" which "may affect its subsequent life") upon which a non-utilitarian work depends for its success.<sup>561</sup> The "subsequent life" of tableware manufactured in mass production, on the other hand, is a foregone conclusion from the moment of its creation, however fine the design.<sup>562</sup> Perhaps Lynn Goldsmith's yeomanly photograph of Prince, however fine her talent, should fall into the that category, allowing for the secondary use Warhol made of it—like a can of Campbell's soup, for example.<sup>563</sup> But what then of the career prospects of aspiring paparazzi and shutterbugs who do not view their oeuvre as mere commodity? At the very least, a gray area of copyright law seems critical if the photographers of the future are to be encouraged, let alone prosper.

## VII. A FOREGONE CONCLUSION

Nor do I hold with those who regard it as presumption if a man of low and humble condition dare to discuss and settle the concerns of princes; because, just as those who draw landscapes place themselves below in the plain to contemplate the nature of the mountains and of lofty places, and in order to contemplate the plains place themselves high upon the mountains, even so to understand the nature of the people it needs to be a prince, and to understand that of princes it needs to be of the people.<sup>564</sup>

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<sup>560</sup> Harold G. Fox, *Copyright and Industrial Designs in Canada*, 5 BULL. COPYRIGHT SOC'Y U.S.A. 117, 137 (1958).

<sup>561</sup> *Id.*

<sup>562</sup> *Id.* at 137–38.

<sup>563</sup> *Cf., e.g.,* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 539–40 (2023) (citing the Campbell soup cans as a paradigmatic example of transformative reuse); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994) (explaining that 2 Live Crew's copying and parodying Roy Orbison's opening riff and lyrics transformed the original song).

<sup>564</sup> NICOLO MACHIAVELLI, *THE PRINCE 2* (W. K. Marriott trans., E.P. Dutton & Co. 1908).

Long ago, the government (in its infinite wisdom) opted to enter the market of “starving” artists,<sup>565</sup> to great subsequent political dispute.<sup>566</sup> In the fickle world of art, there will inevitable be winners and losers of the public’s approbation, princes and paupers of the cognoscenti whose patronage makes the difference. The Second Circuit’s fear of the emergence of a “celebrity-plagiarist privilege” is well-founded in the truth, but the fear itself is misdirected.<sup>567</sup> It is inevitable that those who skillfully appropriate the works of their forebears and make them into something better and greater will be lauded and applauded, and in escaping society’s opprobrium and earning eventually the approbation of history, will enjoy functional immunity from legal recourse. No more need be offered as proof than the fact that *Warhol* did not arrogate to condemn Warhol’s Prince Series *per se* as if some vengeful hand of ineffable judgment, deigning only to deny a prerogative of pecuniary merchandizing in direct competition to a living forebear who raised an objection.<sup>568</sup> Ovid’s hundredfold heirs need not be

<sup>565</sup> See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 573–75 (1998); Advocs. for the Arts v. Thomson, 397 F. Supp. 1048, 1051 (D.N.H. 1975) (“Congress, in 1965, recognizing the reality of the allegorical starving artist, established a National Foundation of the Arts and the Humanities.”).

<sup>566</sup> *Finley*, 524 U.S. at 575–77 (describing debates within Congress on reforming and amending the NEA’s grant-making process); see generally DONNA M. BINKIEWICZ, FEDERALIZING THE MUSE: UNITED STATES ARTS POLICY AND THE NATIONAL ENDOWMENT FOR THE ARTS, 1965–1980 (2004) (detailing NEA’s history and changes in national arts policy); see also 125 CONG. REC. 28984–85 (1979) (extension of remarks of Rep. Ron Paul) (illustrating a voice of opposition against funding the arts within Congress).

<sup>567</sup> *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 43 (2d Cir. 2021) (stating that the court’s analysis is “entirely irrelevant” to whether each Prince Series work “is immediately recognizable as a ‘Warhol’” as such reasoning would “inevitably create a celebrity-plagiarist privilege”); see *Andy Warhol Found.*, 598 U.S. at 524 (quoting the Second Circuit).

<sup>568</sup> See *Andy Warhol Found.*, 598 U.S. at 556–58 (Gorsuch, J., concurring) (“It is equally important, however, to acknowledge what this case does not involve and what the Court does not decide. Worried about the fate of artists seeking to portray reclining nudes or papal authorities, or authors hoping to build on classic literary themes? Worry not. This case does not call on us to strike a balance between rewarding creators and enabling others to build on their work. That is Congress’s job. . . . Last but hardly least, while our interpretation of the first fair-use factor does not favor the Foundation in this case, it may in others. If, for example, the Foundation had sought to display Mr. Warhol’s image of Prince in a nonprofit museum or a for-profit book

consulted as to the fate of *West Side Story* or *Romeo and Juliet*.<sup>569</sup> Yet it is not for courts to deliver the decree of history prematurely, and it is only history that can and will declare who is the Martial and who is the Fidentinus.<sup>570</sup> True, courts cannot insulate a party before them on the presumption that it is the Martial prematurely either,<sup>571</sup> and that is where the doctrine of “fair use” becomes paramount—carving out a vitally amorphous gray area of the law whilst the judgment of history percolates.

But as Martial illustrates in his plea to Quintianus,<sup>572</sup> patrons serve a determinative role in the ecosystem of art: Martial begged (in his inimitable verses) that his patron denounce the copycat that Quintianus had evidently also supported, trusting that such a weighty voice would be enough to turn the tide.<sup>573</sup> That the princes of a culture may serve as substitutes for civil law in poorly-defined and fraught circumstances will be no surprise in modern society debating the control that privately-owned forums like Facebook or X (the erstwhile Twitter)

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commenting on 20th-century art, the purpose and character of that use might well point to fair use. But those cases are not this case. Before us, Ms. Goldsmith challenges only the Foundation’s effort to use its portrait as a commercial substitute for her own protected photograph in sales to magazines looking for images of Prince to accompany articles about the musician.” (citation omitted)).

<sup>569</sup> See *Pickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000) (explaining that *Romeo and Juliet* is likely based off of a tale by Ovid, and *West Side Story* was “loosely” based off of *Romeo and Juliet*).

<sup>570</sup> See *Andy Warhol Found.*, 598 U.S. at 556 (Gorsuch, J., concurring) (“[A]re the artistic purposes latent in the two images and their aesthetic character actually more similar than that? Happily, the law does not require judges to tangle with questions so far beyond our competence. Instead, the first fair-use factor requires courts to assess only whether the purpose and character of the *challenged use* is the same as a protected use. And here, the undisputed facts reveal that the Foundation sought to use its image as a commercial substitute for Ms. Goldsmith’s photograph.”).

<sup>571</sup> That, perhaps, was the crucial qualm of the Second Circuit in shying from what it deemed a “celebrity-plagiarist privilege”: a humble refusal to predict the judgment of futurity in rendering such judgments based on its own limited ken in the present—even for a now-celebrated luminary like Andy Warhol. See *Andy Warhol Found.*, 11 F.4th at 43–44.

<sup>572</sup> MARTIALIS, *supra* note 19, I.l.iii at 19.

<sup>573</sup> *Id.*

have over the public square of speech.<sup>574</sup> Far earlier than modern technological advances, aristocrats had controlled or at least exerted strong influence over newspapers, the primary modality of societal dissemination of information,<sup>575</sup> a tradition surviving to the present day in the form of the century-old ownership of the New York Times (surely America's paper of record<sup>576</sup>) by the Sulzberger family,<sup>577</sup> or indeed the acquisition by Jeff Bezos, the CEO and principal

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<sup>574</sup> See Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J. F. 427, 427 (2021) (explaining that people rely on social media to spread ideas and exercise free speech, as they are now the new "marketplaces of ideas").

<sup>575</sup> See Luke Morgan, *The Broken Branch: Capitalism, the Constitution, and the Press*, 125 PENN ST. L. REV. 1, 19 (2020) ("The titans of journalism are no more insulated from the pressures leading to the patronage model—the collapse of traditional business models and the rise of the ultra-rich—than the minnows."); see generally Howard Stanger, Book Review, 26 LAB. STUD. J. 99, 100 (2001) (reviewing GERALD J. BALDASTY, *E.W. SCRIPPS AND THE BUSINESS OF NEWSPAPERS* (1999)) (discussing how Edward Scripps created a successful newspaper and ran it like an "autocrat"); Randy Baker, *Protecting the Press by Protecting the Journalist: A Wrongful Discharge Action for Editorial Employees at Newspapers*, 8 HASTINGS COMM'NS & ENT. L.J. 1, 6 (1985) ("Another, and perhaps the principal reason that critical accounts are underrepresented in newspapers is that newspaper owners, for a variety of reasons, generally do not wish them to be published and are usually in a position to insure that their preferences are respected. The power of newspaper firms to exert this sort of control is due, in part, to the relatively weak market position of newspaper readers." (footnotes omitted)); Michael Gary Chatzky & William Eric Robinson, *A Constitutional Right of Access to Newspapers: Is There Life After Tornillo?*, 16 SANTA CLARA L. REV. 453, 459 (1976) ("Villard, for one, expressed alarm at 'the danger that our dailies will be more and more controlled by individuals of enormous wealth, committed to the preservation of the status quo because of their material prosperity.'").

<sup>576</sup> See Sunshine, *Head-On Collision*, *supra* note 152, at 37 n.16 (citing sources explaining how the New York Times has been called the "paper of record").

<sup>577</sup> See 138 CONG. REC. 67 (1992) (discussing how the Sulzberger family owns a majority interest in the New York Times and how they elect 9 out of 14 of the company's board members); Morgan, *supra* note 575, at 19 (explaining how the patronage method has survived through the New York Times ownership history).



shareholder of internet giant Amazon, of the Washington Post,<sup>578</sup> surely a strong contender for the epithet as well.<sup>579</sup>

There are admittedly profound problems with even fitting the cases concerning Warhol and a pair of Princes to any coherent principle, let alone the entirety of copyright precedent. The result in *Warhol* turned on the happenstance that a facsimile of Warhol's portrait had in fact been licensed to a magazine,<sup>580</sup> whereas (for example) Richard Prince's works had not been reduced to an image for licensed display on a glossy frontsheet measuring eight and one-half by eleven inches, but rather exhibited and sold in all their gargantuan glory. The *Cariou* court of appeals, indeed, made great hay of how *big* Prince's works were compared to the book-sized original prints of Patrick Cariou.<sup>581</sup> It seems indisputable (if any judgment of art can be<sup>582</sup>) that the Orange Prince itself does not generally appeal to the same audience as Lynn Goldsmith's photograph any more than Richard Prince's massive collages appeal to the same audience as Patrick Cariou's photography.<sup>583</sup> The tangible icon of Prince Rogers Nelson that occasioned the dispute—the physical object on canvas, not the eternally transmissible image that

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<sup>578</sup> Mary Serene Carino, *How Did Amazon Reach Its Prime?*, 21 J. INT'L BUS. & L. 193, 1 (2022) (reviewing BRAD STONE, *AMAZON UNBOUND: JEFF BEZOS AND THE INVENTION OF A GLOBAL EMPIRE* (2021)); Morgan, *supra* note 575, at 19.

<sup>579</sup> See generally Ken Doctor, *On the Washington Post and the 'Newspaper of Record' Epithet*, POLITICO (Dec. 3, 2015, 11:21 AM), <https://www.politico.com/media/story/2015/12/on-the-washington-post-and-the-newspaper-of-record-epithet-004303/> [<https://perma.cc/S7ZW-PCSX>] (discussing the revitalization and re-popularization of the Washington Post after it was bought out by Jeff Bezos).

<sup>580</sup> See *Andy Warhol Found.*, 598 U.S. at 550 (explaining that the Lynn Goldsmith pictures were licensed, to Vanity Fair, and then reprised and used, by Condé Nast, without her authority, thus giving rise to the suit.); *id.* at 557 (explaining that the court does not address infringement and instead discusses fair use. Justice Gorsuch believes that the issue stem from Condé Nast's copying of the photo licensed to Vanity Fair).

<sup>581</sup> See *Cariou v. Prince*, 714 F.3d 694, 700 (2d Cir. 2013) (comparing the sizes of Cariou's work and Prince's work).

<sup>582</sup> See *supra* notes 456–459 and accompanying text (discussing the subjective nature of art and how making judgements on it are extremely difficult because those making judgements usually do not have the background or skill to properly understand art).

<sup>583</sup> See *Cariou*, 714 F.3d at 709 (“Prince's work appeals to an entirely different sort of collector than Cariou's.”).

Warhol's foundation licensed to Condé Nast—currently resides in the collection of a private collector.<sup>584</sup> There has been no suggestion, as by the district court in *Cariou*, that the owner must be notified that the portrait cannot be hung legally on a wall for display, or worse, that it was subject to replevin and destruction by Goldsmith.<sup>585</sup> Indeed, the Supreme Court explicitly disclaimed it was opining on the propriety of the existence or display of the object itself,<sup>586</sup> and Justice Gorsuch hastened to reiterate that disclaimer in his mollifying concurrence.<sup>587</sup>

This Article has nonetheless done its best to bring some ratiocination to abstraction, in the spirit of Andrew Carter's yeomanly attempt to proffer an iconoclastic defense to plagiarism in legal writing.<sup>588</sup> The result may not be a popular or even particularly cohesive proposition, but the attempt is worth undertaking: to skeptically interrogate the presumptions and paradoxes that haunt copyright as it intersects with antitrust law, and preconceptions of plagiarism itself. Justice Kagan had a more pleasant task in cataloguing the long roll of unabashed plagiarists that history reveals. Justice Sotomayor, writing for

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<sup>584</sup> See Sarah Cascone, *Did the Supreme Court's Warhol Decision Further Complicate Copyright Law? Experts Weigh in on the Ruling's Ramifications*, ARTNET NEWS (May 26, 2023, 10:39 AM), <https://news.artnet.com/art-world/warhol-goldsmith-prince-ruling-fallout-2307975> [<https://perma.cc/J32R-JZJT>] (“Warhol went on to make 16 different Prince artworks based on the image—even though the contract was for one-time use. (Four belong to the Andy Warhol Museum in Pittsburgh and the rest are in private collections.)”).

<sup>585</sup> *Cariou v. Prince*, 784 F. Supp. 2d 337, 355–56 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

<sup>586</sup> See *supra* note 316 and accompanying text.

<sup>587</sup> See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 556–58 (2023) (Gorsuch, J., concurring) (“It is equally important, however, to acknowledge what this case does not involve and what the Court does not decide. Worried about the fate of artists seeking to portray reclining nudes or papal authorities, or authors hoping to build on classic literary themes? Worry not. This case does not call on us to strike a balance between rewarding creators and enabling others to build on their work. . . . That observation points the way to another. The Court today does not even decide whether the Foundation’s image of Prince infringes on Ms. Goldsmith’s copyright. . . . If, for example, the Foundation had sought to display Mr. Warhol’s image of Prince in a nonprofit museum or a for-profit book commenting on 20th-century art, the purpose and character of that use might well point to fair use.” (citation omitted)).

<sup>588</sup> Carter, *supra* note 72.

the Court's majority, had less opportunity for stirring rhetoric, but took on the thornier task of defining the rules for *objets d'art* that are designedly undefinable in the harsh glare of the present. It is only with the tempering dispassion of long-off posterity that an ultimate judgment is possible,<sup>589</sup> and it is inevitable that judges and scholars will be asked to emulate prophets in discerning the Martials and Fidentinuses (Fidentini?)—and struggle to do so.<sup>590</sup> One Justice of the Supreme Court once quipped that it was not final because it was infallible; it was infallible because it was final.<sup>591</sup> But posterity has the final word over earthly judges. Perhaps mere mortals should not try to overstep their evanescence, but the law has always been normative and aspirational, striving to describe a loftier society

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<sup>589</sup> The ideal of tempering the hot passions of the people has been inherent to United States government since the founding, installed in the structure of government itself. See *About Filibusters and Cloture | Historical Overview*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/filibusters-cloture/overview.htm> [<https://perma.cc/9KQH-UZ4J>] (“While some senators found filibusters to be objectionable, others exalted the right of unlimited debate as a key tradition of the Senate, vital to tempering the power of political majorities.”); *Senate Created*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Senate\\_Created.htm](https://www.senate.gov/artandhistory/history/minute/Senate_Created.htm) [<https://perma.cc/3MQR-RL9Q>] (“To the framers themselves, Madison explained that the Senate would be a ‘necessary fence’ against the ‘fickleness and passion’ that tended to influence the attitudes of the general public and members of the House of Representatives. George Washington is said to have told Jefferson that the framers had created the Senate to ‘cool’ House legislation just as a saucer was used to cool hot tea.”); see also 1 James Madison, *Session of Tuesday, June 26, 1787*, in *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 166, 167 (Gaillard Hunt & James Brown Scott eds., 1920) (“Mr. Madison. . . . This reflection wd. naturally suggest that the Govt. be so constituted, as that one of its branches might have an oppy. of acquiring a competent knowledge of the public interests Another reflection equally becoming a people on such an occasion, wd. be that they themselves, as well as a numerous body of Representatives, were liable to err also, from fickleness and passion. A necessary fence agst. this danger would be to select a portion of enlightened citizens, whose limited number, and firmness might seasonably interpose agst. impetuous councils.”).

<sup>590</sup> Compare *Andy Warhol Found.*, 598 U.S. at 556 (Gorsuch, J., concurring) (quoted *supra* note 570), with *Cariou v. Prince*, 714 F.3d 694, 713–14 (2d Cir. 2013) (Wallace, J., concurring in part and dissenting in part) (quoted *supra* note 256).

<sup>591</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

than humans can fulfill.<sup>592</sup> In that aspiration, the present grasps at eternity, hoping to pave a path found worthy in the austere judgment of the future.

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<sup>592</sup> Cf. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (“What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity.”); *Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1276 (9th Cir. 2017) (“As one court has aptly written, a code of conduct is ‘inherently aspirational.’” (quoting *Andropolis v. Red Robin Gourmet Burgers, Inc.*, 505 F. Supp. 2d 662, 686 (D. Colo. 2007))).