

A CRITIQUE OF THE REASONABLE OBSERVER: WHY FAIR USE FAILS TO PROTECT APPROPRIATION ART

SHOSHANA ROSENTHAL*

INTRODUCTION	445
I. BACKGROUND.....	448
<i>A. Current Inconsistent Adjudications in Fair Use Litigation</i> ..	448
<i>B. Cariou v. Prince – What is “Transformative” Enough?</i>	450
II. ANALYSIS.....	453
<i>A. Evolving Notions of “Authorship” and “Originality” in Copyright Law</i>	453
<i>B. Appropriation Art Critiques the Reasonable Observer</i>	455
<i>C. Navigating the Expert, Discerning Observer, and Reasonable Observer Standards in Copyright Infringement</i>	460
III. INCLUDE THE BROADER ART COMMUNITY TO DETERMINE “TRANSFORMATIVENESS”	462
CONCLUSION	466

INTRODUCTION

Since the mid-twentieth century, modern artists have appropriated existing images and objects in consumer culture to create their own conceptual commentaries on the modern world.¹ In his notorious piece *Fountain*, celebrated artist Marcel Duchamp bought a urinal from a plumber’s shop, turned it upside down, signed it “R. Mutt,” and submitted it as a sculpture for an open exhibition in

* University of Colorado Law J.D. Candidate 2015. I am extremely grateful to Professor Amy Griffin for the time she spent speaking with me about these ideas and reading through drafts from the initial stage. I’d also like to thank David DiGiacamo for his calming guidance throughout this project. Finally, I’d like to thank the quiet cubicles of the Teton County Library for their comfort, from which I always left satisfied.

1. Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 5 (1992).

New York.² Duchamp's gesture transformed a readymade and banal urinal into a work of art, deserving of its own pedestal.³ *Fountain* shows just one method of how the unconstrained appropriation of "readymade" objects can create a critical dialogue between art, consumer culture, and socio-economic factors.⁴ One leading exponent of Conceptual art, Joseph Kosuth, cited Marcel Duchamp's invention of the "unassisted Ready-made" as the single event that changed the focus of art "from the form of the language to what was being said," or put another way, "from 'appearance' to 'conception'"⁵

In order to successfully rely on a fair use defense under current copyright law, an appropriation artist must sufficiently "transform" the original (copyrighted) work from the perspective of a "reasonable observer." First, this article will discuss how fair use adjudications neither clarify nor consistently ensure security for appropriation artists because "transformativeness" is determined from the perspective of the "reasonable observer." The Second Circuit's decision in *Cariou v. Prince*, decided in April of 2013, highlights the notion that delegating a "reasonable observer" to decide "transformativeness" infantilizes the fair use analysis into a side-by-side comparison. The court's analysis in *Cariou* neither promotes nor enhances the artistic profession, but rather casts doubt and uncertainty about copyright's ability to protect artists.

Second, this article will examine the modern shift in conceptions of "authorship" and "originality." Appropriation artists today follow the legacy left by Duchamp by using their work to criticize and comment on the very meaning and definition art. They use pre-existing "readymade" cultural imagery and objects to pursue their conceptual work. They directly attack "the primacy of originality, . . . the integrity of the masterpiece, and . . . the line between mischievous copying and artistic breakthrough."⁶ Artists—like Richard Prince, Jeff Koons, and Sherry Levine—appropriate "whole images, often copyrighted, and use them virtually unchanged in works attributed only to the appropriator."⁷ "These artists . . . strive to erase all authorship from their work, replacing individual

2. ANNE RORIMER, *NEW ART IN THE 60S AND 70S: REDEFINING REALITY* 29 (2001).

3. *MODERN ART: IMPRESSIONISM TO POST-MODERNISM* 206 (David Britt ed., 1989).

4. Marco Livingstone, *Pluralism Since 1960*, in *MODERN ART: IMPRESSIONISM TO POST-MODERNISM* 359, 400 (David Britt ed., 1989).

5. *Id.* at 381 (citing Joseph Kosuth, *Art After Philosophy*, *STUDIO INTERNATIONAL*, Oct. 1969).

6. Greenberg, *supra* note 1, at 14.

7. E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 *COLUM. L. REV.* 1473, 1477 (1993).

signature with the trademarks of mass-produced commodities.”⁸ “In so doing, they radically deny the notion of ‘creative authorship.’”⁹

Because appropriation art critiques “the very attributes that copyright law uses to define art: namely, artistic creativity and originality,” the fair use doctrine is becoming increasingly uncertain and irrelevant as notions of twenty-first century art and authorship evolve.¹⁰ For modern art that uses existing copyrighted works as a vehicle for its commentary and criticism on the modern world, determining fair use from the perspective of a “reasonable observer” is an ill-suited and outdated standard. How can the “reasonable observer” standard determine “transformativeness” if some of modern art’s whole purpose is to critique the reasonable observer?

Lastly, this article will propose that in order to analyze “transformativeness,” the “reasonable observer” standard must be guided by informed opinions from the broader art community. The “reasonable observer” insufficiently assesses “transformativeness” in copyright; the broader art community has a better grasp on the historical and critical underpinnings of appropriation art. Fair use analysis ought to shadow modern trends in copyright infringement cases which allow “a more discerning reasonable observer” or “expert” to support its evidentiary basis. Supplementing the “reasonable observer” standard can enable the broader art community to introduce a sophisticated and uniform opinion on “transformativeness,” enable complex fair use defenses, and recognize and protect the contribution of appropriation artists.¹¹

A recent study among academia and visual artists by the College Art Association demonstrates how uncertainty in fair use causes considerable risk to appropriation artists who need to learn what and what is not legal. This study reported that visual artists and other expressional artists “pay a high price for copyright confusion and misunderstanding. Their work is constrained and censored, most powerfully by themselves, because of that confusion and the resulting fear and anxiety.”¹² Furthermore, this report suggests what is at stake with the uncertainty about fair use. Facts and figures show that:

8. Greenberg, *supra* note 1, at 6.

9. *Id.*

10. *Id.* at 1.

11. See Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 730–31 (2010).

12. PATRICIA AUFDERHEIDE, PETER JASZI, BRYAN BELLO & TIJANA MILOSEVIC, COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 5 (2014), available at <http://www.collegeart.org/pdf/FairUseIssuesReport.pdf>.

one-third of visual artists and visual arts professionals have avoided or abandoned one work in their field because of copyright concerns . . . [E]xamples of thwarted missions in the visual arts include art historians and editors who avoid modern-era art history, overviews of an artistic movement, and digital scholarship, museums that are stalled in developing digital access to their works, curators who avoid group exhibitions, controversial exhibitions, and exhibitions where copyright permissions make cost prohibitive, artists who avoid collage, pop-culture critiques, digital experiments, and multimedia.¹³

Thus, this is not a minor issue in the art community. In order to promote, recognize, and encourage appropriation art, the legal framework must confront the inconsistent adjudications in the current fair use doctrine, recognize evolving definitions of authorship and originality, and craft a new approach to analyze “transformativeness.”

I. BACKGROUND

A. Current Inconsistent Adjudications in Fair Use Litigation

The Framers intended to carefully balance the promotion of art with the security of authors to their respective rights.¹⁴ The copyright clause sought to secure for authors “the exclusive Right to their respective Writings.”¹⁵ The Copyright Act of 1976 further secures, defines, and provides rights for an author’s “original works of authorship fixed in any tangible medium of expression.”¹⁶ These objectives were designed to stimulate activity and progress in the arts for the intellectual enrichment of the public, while allowing authors to reap the rewards of their creative efforts.¹⁷

The doctrine of fair use establishes an affirmative defense to copyright infringement; however, the “enigmatic” makeup of its four-factor framework makes this doctrine unsystematic and amorphous for court adjudication.¹⁸ The Copyright Act allows a proper defense for copyright infringement if the secondary work fairly uses a copyrighted work “for purposes such as criticism, comment, news

13. *Id.*

14. *See* U.S. CONST. art. I, § 8, cl. 8.

15. *Id.*

16. 17 U.S.C. § 102 (1990).

17. *See* U.S. CONST. art. I, § 8, cl. 8.

18. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 551 (2008).

reporting, teaching. . . scholarship, or research.”¹⁹ The fair use doctrine attempts to balance “the property rights . . . in creative works . . . 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.”²⁰ Thus, fair use limits the scope of an artist’s monopoly over his or her work by permitting a secondary referential use for educational or “illuminating” purposes.²¹

In order for the court to find that a secondary work has legally and fairly used an original, copyrighted piece of work, the court looks to four factors: (1) the purpose and character of the secondary use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect of the use upon the potential market or value of the copyrighted work.²² Although none of these factors are dispositive, a finding of fair use is improved if a defense lies within the boundaries of these categories.²³ In order to determine the purpose and character of the secondary work under the first factor, the court puts itself in the shoes of a “reasonable observer” to determine whether the secondary work sufficiently “transforms” the original into a “new expression, meaning, or message.”²⁴

Currently, the line between legitimate copyright protection and appropriate fair use is blurred, inconsistent, and ineffectual at promulgating the inherent purpose and balance of copyright: to benefit society with the creative works of artists, while simultaneously protecting the fruits of those artists’ labor.²⁵ Pierre Leval, in his treatise on fair use *Toward a Fair Use Standard*, first criticized the inconsistency inherent in the fair use doctrine.²⁶ Leval

19. 17 U.S.C. § 107 (1992).

20. *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006) (emphasis added).

21. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

22. 17 U.S.C. § 107.

23. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994); *See also* Beebe, *supra* note 18, at 597 (finding that a court’s holding on the first factor, the purpose and character of the secondary use, holds heavier dispositive weight in an ultimate finding of fair use than the remaining three factors).

24. *Campbell*, 510 U.S. at 579 (citing Leval, *supra* note 21, at 1111). Judges have long removed themselves from an analysis of artistic merits. As Justice Story declared, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

25. Leval, *supra* note 21, at 1107.

26. *Id.*

felt that courts “had failed to fashion a set of governing principles or values” on which to consistently adjudicate these factors.²⁷

Leval influentially suggested that “the purpose and character of the secondary use” ought to turn on “whether, and to what extent, the challenged use is transformative.”²⁸ He wrote that in order to be properly transformative for a valid fair use defense, the secondary use “must employ the quoted matter in a different *manner* or for a different *purpose* from the original.”²⁹ If the quoted matter is “used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings,” then the secondary work is protected.³⁰ If the secondary work criticizes, exposes the character of the original author, proves a fact, or summarizes an idea, then Leval would find a sufficiently fair secondary use.³¹ Thus, “transformativeness” is determined by content and perception, rather than intent.³²

Even with Leval’s guidelines, the definition of “transformativeness” has yet to be developed to ensure consistency in adjudication and security for appropriation artists. A fair use defense by an appropriation artist, who blurs the boundaries between conceptual art and “copying,” aggravates this already inconsistent and ineffectual fair use analysis. By analyzing where the fair use doctrine is incompatible with modern appropriation art, the courts can improve fair use adjudications by maintaining a consistent definition of “transformativeness” and including evidentiary support by the broader art community.

B. Cariou v. Prince – What is “Transformative” Enough?

A case decided recently, *Cariou v. Prince*, highlights the shortcomings of the fair use doctrine in the context of appropriation art.³³ The Second Circuit’s holding in this case reflects the inconsistency and dislocation of fair use in today’s litigation landscape. This case confirms that as artists continue to practice appropriation art all around the globe, the legal framework must provide a better rubric for protecting and securing their appropriated work. The precedent set in *Cariou v. Prince* infantilizes

27. *Id.* at 1105.

28. *Id.* at 1111.

29. *Id.* at 1111 (emphasis added).

30. *Id.*

31. *Id.*

32. Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 453 (2008).

33. 714 F.3d 694, 698 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

appropriation art by requiring courts to compare two works of art based on facially observable content alterations, as opposed to the purpose or conceptual innovation of the artist.

In 2000, professional photographer Patrick Cariou published the book *Yes, Rasta*, a collection of “extreme classical” portraits of Rastafarians and the Jamaican landscape.³⁴ The book had limited commercial success and is currently out of print.³⁵ Except for a few private sales, Cariou never sold or licensed the individual photographs from the book.³⁶

In 2007, the appropriation artist Richard Prince held a show in St. Barths that included a piece where Prince ripped about 35 images out of *Yes, Rasta* and pinned them to a piece of plywood.³⁷ By June 2008, Prince had created thirty additional artworks in what he eventually entitled the *Canal Zone* series.³⁸ This series incorporated all or part of at least twenty-nine of Cariou’s photographs that had been previously printed in *Yes, Rasta*.³⁹ Prince collaged, enlarged, cropped, tinted, over-painted and/or combined the Cariou photographs with other appropriated imagery to create his finished pieces.⁴⁰ In 2011, Cariou sued Prince and the Gagosian Gallery (which represents Prince’s work) for copyright infringement and contributory infringement, respectively.⁴¹

Initially, the district court in New York held that Prince’s appropriation of Cariou’s photographs denied Prince’s fair use defense.⁴² Prince did not convince the district court that Cariou’s photographs constituted “raw material.” Instead, the court stated that a work merely “recast[ing], transform[ing], or adapt[ing] an original work into a new mode of presentation,” is insufficient to be “transformative” under the first factor of fair use.⁴³ The court took Prince’s bad job of explaining his art as an indication that Prince failed to directly comment on Cariou’s photographs.⁴⁴ Because Prince did not show that his work commented on, related to the historical context of, or critically referred back to Cariou’s original

34. *Id.* at 699, quoting Cariou Dep. 187: 8–15, Jan 12, 2010.

35. *Id.* at 699.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Cariou v. Prince*, 784 F.Supp. 2d 337, 344 (S.D.N.Y. 2011), *judgment rev’d in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

41. *Id.* at 345, 354.

42. *Id.* at 353–54.

43. *Id.* at 348.

44. *Id.* at 359.

works, the court denied Prince's fair use defense.⁴⁵ The court ordered an injunction to destroy these works, some of which were valued over one million dollars.⁴⁶

In April of 2013, the Second Circuit reversed the district court with a decision that deepens the potential for inconsistent fair use adjudications and increases the insecurity of modern artists in knowing their rights. The court found that in order to qualify as a fair use, a secondary work must alter the original with "new expression, meaning, or message," instead of specifically commenting on the work of the original artist.⁴⁷ The court had to determine whether Prince's work "merely supersede[d]" Cariou's photographs, or instead added "something new, with a further purpose or different character."⁴⁸ In order to determine if Prince's art was sufficiently "transformative" under this analysis, the Second Circuit questioned how Prince's art "may reasonably be perceived" by a reasonable observer.⁴⁹ The Second Circuit's test for "transformativeness" differed from that of the district court. First, the Second Circuit focused on the facial differences between Cariou's and Prince's works, instead of the Prince's intent to comment on the original or historical context from Cariou's photographs.⁵⁰ And second, the Second Circuit concentrated on whether a "reasonable observer" would detect "transformativeness."⁵¹

By "looking at the artworks and the photographs side-by-side," the court found that twenty-five out of thirty of Prince's prints were transformative because they give "Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's" work.⁵² Confusingly, while the Second Circuit found "transformativeness" in these twenty-five images, the court could not make a confident determination about whether the five remaining images were sufficiently transformative as a matter of law.⁵³ The court evaluated "transformativeness" for some, but not all of the disputed images. Instead, the court remanded these five photographs back to the district court to be evaluated based on whether their transformative

45. *Id.* at 348.

46. *Id.* at 355.

47. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) (quoting *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994)).

48. *Campbell*, 510 U.S. at 579.

49. *Cariou*, 714 F.3d at 707.

50. *Id.*

51. *Id.*; *Id.* at 713.

52. *Id.* at 707-08.

53. *Id.* at 710.

nature may be perceived by a reasonable observer.⁵⁴ The court continued its aesthetic analysis: “[a]lthough the minimal alterations that Prince made in those instances 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.’”⁵⁵ Thus, even though the Second Circuit’s decision crafted a refined test to determine “transformativeness,” the choice to arbitrarily remand five out of the twenty-five images established no secure model on how to determine what is sufficiently transformative from the perspective of the reasonable observer.

In the dissenting opinion in *Cariou*, Judge Wallace wrote that this decision gives no applicable framework to “‘confidently’ draw a distinction between twenty-five works that [the court] identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination.”⁵⁶ This perspective supports the notion that *Cariou v. Prince* is the most recent litigation that continues to widen inconsistencies in fair use. The holding highlights a general trend in fair use that the “courts routinely assess the degree to which the defendant has transformed the plaintiff’s work, seeking, like Goldilocks, to find the amount of transformativeness that is ‘just right.’”⁵⁷

II. ANALYSIS

A. Evolving Notions of “Authorship” and “Originality” in Copyright Law

The difficulty in ascertaining what constitutes an *original* work of art has been a consistent problem in case law since the system’s infancy.⁵⁸ Justice Story explained in *Emerson v. Davies*:

[i]n truth, literature, in science and in art, there are and can be, few, if any, things which in an abstract sense are strictly new and original throughout. Every book in literature, science and art borrows, and must necessarily borrow [sic], and use much which was well known and used before.⁵⁹

54. *Id.* at 711.

55. *Id.* (quoting *Campbell*, 510 U.S. at 579).

56. *Id.* at 713.

57. Heymann, *supra* note 32, at 448.

58. *See* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

59. *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

While one prerequisite for an author to obtain copyright is that the work must be an “original work of authorship,” courts have held that the threshold of creativity necessary to satisfy the originality requirement is quite low.⁶⁰ “All that is needed to satisfy both the Constitution and the statute is that the author contributed something more than a ‘merely trivial’ variation, something recognizably his own.”⁶¹

The history of photography demonstrates how the legal term of art ‘original’ can shift with time and innovations to the medium. Shortly after photography was invented, this artistic medium was considered “the mere mechanical reproduction of the physical features or outlines of some object . . . and involve[d] no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture.”⁶² In the early stages of the development of photography, a photographer was considered the “operator of a machine.”⁶³ A photograph was only a recordation or compilation of facts and because the photographer only pressed a button, and the machine did the rest of the work, the law did not ascribe “originality” to the photograph.⁶⁴

This notion of “originality” has changed through time because today, a photographer has unequivocally obtained the title of “author” of his photographs. In *Burrow-Giles Lithographic Co. v. Saroni*, the Supreme Court found that a photographer was the author of an original portrait of Oscar Wilde because the photographer selected Wilde’s pose, arranged the accessories, chose the lighting, and ultimately crafted the expression of the photograph.⁶⁵ Because the photographer crafted the photograph “entirely from his own original mental conception,” he was the author and therefore the photograph was copyrightable.⁶⁶

The recent case *Bridgeman Art Library, Ltd. v. Corel Corp.* refined this reasoning, finding that routine photographic documentation of transparencies is insufficiently original to qualify for copyright protection.⁶⁷ In *Bridgeman*, a district court in New York denied

60. 17 U.S.C. § 102; *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-103 (2d Cir. 1951).

61. *Alfred Bell & Co.*, 191 F.2d at 102-03.

62. *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 59 (1884).

63. Justin Hughes, *The Photographer’s Copyright—Photograph As Art, Photograph As Database*, 25 HARV. J.L. & TECH. 329, 343 (2012).

64. *Id.*

65. *Burrow-Giles Lithographic Co.*, 111 U.S. at 60.

66. *Id.*

67. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F.Supp. 2d 191, 199 (S.D.N.Y. 1999).

copyright protection for photographic transparencies because these transparencies were the direct and facial reproduction of the original images.⁶⁸ Because these reproduced transparencies had no “distinguishable variation”—something beyond technical skill,” on the face of the reproduction, they failed to satisfy the originality requirement for copyright protection.⁶⁹ The court found that mere reproduction is insufficient to afford copyright protection because it did not achieve even a modicum of creativity.⁷⁰

Although once considered a mechanical art, undeserving of the title of “an original work of authorship,” photography has evolved into an original work of authorship abetted by historical and technological understandings of the medium.⁷¹ In appropriation art, original and copyrighted work becomes the “raw material” for artists to create conceptual and critical commentary. Appropriation art distinguishes itself from this “raw” original work either on the face of the reproduction, or through the conceptual underpinning of the secondary work. Thus, (most) appropriation art satisfies the *Bridgeman* test for originality by being conceptually and critically more than “slavish copying,” and adding a “distinguishable variation.”⁷² However, the traditional legal framework has not confronted appropriation art’s challenges to the primacy of originality. Furthermore, this lack of understanding of appropriation art’s conceptual meaning aggravates the inconsistency in the definition of “transformativeness.”

B. Appropriation Art Critiques the Reasonable Observer

Copyright law does not protect concepts because a copyrightable work needs to be “fixed in any tangible medium.”⁷³ In modern appropriation art, however, copying can be a “philosophical gesture.”⁷⁴ This gesture is commonplace to achieve conceptual “comment[ary]” or “criticism” which fits well in the policy of fair use.⁷⁵ Thus, while this fundamental gesture of appropriation art is undoubtedly a new expression, deserving of its own protection, this kind of conceptual commentary does not necessarily fit within a rubric of pre-defined fair use statutory categories. The problem that

68. *Id.* at 196.

69. *Id.*

70. *Id.*

71. *Burrow-Giles Lithographic Co.*, 111 U.S. at 60.

72. *Id.* at 196-97.

73. 17 U.S.C. § 102.

74. Livingstone, *supra* note 4, at 384.

75. 17 U.S.C. §107.

appropriation art brings to the already inconsistent fair use framework is that this medium consists of extracting and building upon existing protected works however, in ways that may not be facially apparent or visible. Thus, in the analysis of a fair use defense, how can the “reasonable observer” standard be preserved if some of modern art’s whole purpose is the critique the reasonable observer?

Jeff Koons is an artist who takes inspiration from the particularly modern daily barrage of images. Just as the remix artist does with bits of culture found in his digital cupboard, Koons utilizes original and commercialized “raw material[s]” to create his transformative secondary works.⁷⁶ His unconstrained appropriation of these images creates a dialogue between different levels of society.⁷⁷ A comparison of several lawsuits against Koons demonstrates the inability of current fair use standards to address conceptual commentary through copying, and also confirms Leval’s thesis, that the courts prioritize the fair use factors inconsistently and according to different standards.⁷⁸

In *Rogers v. Koons*, photographer Art Rogers sued Koons for using Rogers’ photograph as a basis for a life-size sculpture, *String of Puppies*.⁷⁹ After taking the original photograph, Rogers licensed it to Museum Graphics, a company that produces and sells postcards with reproductions of photographs.⁸⁰ Koons found postcard at a tourist shop and found inspiration in it as “part of the mass culture.”⁸¹ Koons directed his team to create a sculpture out of this photograph. He instructed them very specifically to reproduce the sculpture exactly as the figures, lighting, and arrangement is exhibited in the photograph.⁸² After seeing the sculpture, Rogers sued Koons.⁸³ Koons asserted a fair use defense, claiming that his sculpture was “fair social criticism.”⁸⁴ In his defense Koons claimed he belonged to a school of American artists who:

[B]elieve the mass production of commodities and media images has caused a deterioration in the quality of society and . . . this artistic tradition of which [Koons] is a member proposes through

76. Ames, *supra* note 7, at 1517.

77. Livingstone, *supra* note 4, at 400.

78. Leval, *supra* note 21, at 1105.

79. *Rogers v. Koons*, 960 F.2d 301, 303 (2d Cir. 1992).

80. *Id.*

81. *Id.* at 305.

82. *Id.*; Koons didn’t physically make the statue, but he commissioned it to be made by a skilled manufacturer.

83. *Id.*

84. *Id.* at 309.

incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it.⁸⁵

Using the “reasonable observer” test, the *Rogers v. Koons* court analyzed the two images, *physically, side-by-side*, and by doing so, negated both the conceptual reformulation as well as the contextual deconstruction and critique created by Koons. The court did not find Koons’ sculpture was sufficiently transformative because Koons copied Rogers’ physical conception and arrangement *identically*.⁸⁶ Rather than making an inquiry into how Koon’s image may have added a new element of expression (and in doing so benefited the viewing public), the court instead used a formulaic application of side-by-side identicalness. Even more, the court refused to acknowledge that the reasonable observer might find Koons’ displacement of the material, size, and conception of the image might be sufficiently transformative.⁸⁷

Furthermore, instead of focusing on Koons’ artistic intent to comment on consumer culture, the court found Koons’ plan to profit from Rogers’ image critical in its analysis. The court emphasized Koon’s plan to profit from *Puppies*, without paying Rogers for his use, and weighed the fourth factor, “the effect of the use on the market value of the original,” against a finding of fair use because of Koons’ commercially exploitative behavior.⁸⁸

In *Blanch v. Koons*, a case with a very similar set of circumstances, the court found in favor of fair use by finding Koons’ artistic intent and purpose dispositive for “transformativeness.”⁸⁹ In *Blanch*, Koons was again sued for an unauthorized use of someone else’s copyrighted photograph.⁹⁰ After Koons used a photograph by fashion photographer Andrea Blanch in his work *Niagara*, Blanch sued Koons for copyright infringement.⁹¹ In analyzing Koons’ fair use defense, the *Blanch* court described Koons’ artistic intent very similarly to the court in *Rogers v. Koons*, but ruled in favor of fair use. The *Blanch* court discussed how Koons used “Blanch’s image as fodder for his commentary on the social and aesthetic consequences of mass media.”⁹² Because Koons’ vision and purpose in creating

85. *Id.*

86. *Id.* at 307.

87. *Id.*

88. *Id.* at 312.

89. *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

90. *Id.* at 249.

91. *Id.* at 247-48.

92. *Id.* at 253.

Niagara differed sharply from Blanch's purpose in her commercial photograph, the court found his work sufficiently "transformative."⁹³ Koons transformed Blanch's photograph by employing it "in the creation of new information, new aesthetics, new insights and understandings."⁹⁴ The *Blanch* court found the "transformative" nature of Koons' work far more dispositive for a finding of fair use than his exploitative intent, which was the central focus of the *Rogers* court. The distinct outcomes and reasoning of these two seemingly similar cases is a microcosm of the inconsistent adjudications of "transformativeness" in the court system.

Koons' use of copyrighted work in his appropriated work complicates an already inefficient fair use doctrine and demonstrates the inability of current fair use law to keep up with artistic practices.⁹⁵ Jeff Koons' litigation signifies that fair use fails to protect, provide, and defend modern artistic practice. He's even stated that after all of this litigation, he gets licenses for his use of any outside material incorporated in work.⁹⁶ By assuming a license is his only protection, Koons' shows that fair use defense is a failure to protect the interests of appropriation artists.

Not only does the current fair use framework fails to address conceptual innovations in appropriation art, but the "reasonable observer" standard does not protect appropriation art where an artist's conceptual innovation is the gesture of copying of an original work. *Bridgeman's* finding that copyright does not protect "slavish copying" must be distinguished from modern appropriation art's conceptually "transformative" re-appropriation of existing, but yes, copyrighted imagery.

Sherrie Levine is an appropriation artist who simulates male artists in order to comment on the dominance of the male aesthetic. Viewed in a particular context, Levine's artwork eschews a feminist reaction by superficially *copying*, water-coloring, or oil painting the photographs of prominent male artists.⁹⁷ By changing the size of the canvas, reproducing these images in miniature, she creates new meaning in these "old masters." She has a series entitled *After Walker Evans* where she physically re-photographed the exact

93. *Id.* at 248.

94. *Id.* at 253, quoting Leval, *supra* note 21, at 1111.

95. Livingstone, *supra* note 4, at 380.

96. Alfred Steiner, *A Few Observations on Art and Copyright*, LANDSLIDE, Vol. 5 No. 3, Jan./Feb. 2013, available at http://www.americanbar.org/publications/landslide/2012_13/january_february/a_few_observations_copyright_and_art.html (last visited March 26, 2014).

97. Greenberg, *supra* note 1, at 21 (discussing Sherrrie Levine's aesthetic in the face of inconsistent adjudications on the fair use standard).

images of Evans' Depression-era portraits. Excluding a small wall label on a museum assigning Levine as the artist, "[e]ven the minute flaws in the printing of the originals are mimetically replicated in [Levine's] rephotographs."⁹⁸ Levine's photographs do not slavishly copy Walker's images, even if her and Evans' photographs are virtually indistinguishable.⁹⁹

Levine's photographs employ a conceptual element that the current framework of the legal analysis of copyright and fair use is unable to address. Levine is certainly the "mastermind" behind the creative work under *Sarony*. She constructs her images to evoke her desired expression. Levine's conceptual feminist ideology, the precise framework that makes her point of view stand out, surely constitutes originality. But on the level of a material, side-by-side test, Levine's work fails to facially constitute "transformativeness" according to the current standards of fair use law. Her photographs would not pass in the test for "transformativeness" under the *Cariou v. Prince* holding, where the "reasonable observer" decides "transformativeness" through a facially observable, side-by-side analysis. When placed side-by-side, a reasonable observer would not be able to tell the difference, absent any historical, critical or cultural background of Levine's philosophical and feminist gesture. Because these photographs facially look exactly alike, a reasonable observer would never be able to know the difference between them.

If the "reasonable observer" only views these images on their face, and does not consider Levine's context and concept, the current fair use framework will not protect Levine's work because her "transformative" concept is not on the face of her reproduction.¹⁰⁰ Despite using existing pieces of copyrighted work that appear to be, at times, on their face "slavish copying," the conceptual underpinning of appropriation art, like Levine's postmodern photographs, remains "transformative" but does not pass a facial side-by-side comparison by the "reasonable observer." Thus, the inefficient adjudication system to protect appropriation art, a medium that critiques traditional ways of perception and deconstructs notion of an original author, must be procedurally supplemented by the broader art community in order to combat the inadequacies of the "reasonable

98. *Id.*

99. *See* *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F.Supp. 2d 191, 196 (S.D.N.Y. 1999).

100. *See* *Feist Publ'ns, Inc. v. Rural Telephone Service*, 499 U.S. 340, 362 (1991) (denying copyright protection to a telephone directory because it did not have sufficient originality to satisfy copyright's basic premise of protectable works).

observer” standard.¹⁰¹

*C. Navigating the Expert, Discerning Observer, and Reasonable
Observer Standards in Copyright Infringement*

Recent case law has permitted the inclusion of experts to supplement the “reasonable observer” analysis in copyright infringement, and may serve as a model for an improved fair use framework. Typically in a copyright infringement cases, the court will conduct a two-tiered analysis to determine if a secondary work infringed upon the first.¹⁰² For the first prong, in order to determine whether the secondary work actually copied the first work, the courts look to the level of access of the original work and to whether the defendant’s work actually copied the original, copyrighted work.¹⁰³ For the first prong, expert witnesses are permitted to testify regarding the probative similarity between the two pieces.¹⁰⁴ The second prong questions misappropriation, and analyzes whether, according to the reasonable observer, the secondary creator took too much.¹⁰⁵ The reasonable observer is assigned the task of finding substantial similarity in the two works.¹⁰⁶ Cases have gradually identified a problem with identifying the reasonable observer standard, acknowledging that it “is not clear exactly what works fall into . . . the ‘extraordinary observer category.’”¹⁰⁷

Courts have allowed a “more discerning observer” or an expert witness to testify regarding this second prong of infringement. For example, the Ninth Circuit permitted the “reasonable observer” to consist of the target audience in question.¹⁰⁸ In *Data East USA, Inc. v. Epyx Inc.*, the Ninth Circuit allowed testimony about whether two karate video games were “substantially similar” from the perspective of a “discerning 17.5 year-old boy,” based on the district court’s finding that the “average age of individuals purchasing Karate Champ is 17.5 years, that the purchasers are predominantly male, and comprise a knowledgeable, critical and discerning group.”¹⁰⁹ The Sixth Circuit did not apply the “reasonable observer” test to

101. See Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455, 456–457 (1991).

102. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d. Cir. 1946).

103. Lemley, *supra* note 11, at 720.

104. *Arnstein*, 154 F.2d at 468.

105. Lemley, *supra* note 11, at 720.

106. *Arnstein*, 154 F.2d at 468.

107. Lemley, *supra* note 11, at 730–31.

108. *Data East USA, Inc. v. Epyx Inc.*, 862 F. 2d 204, 209–210 (9th Cir. 1988).

109. *Id.*

musical works, “modifying the basic framework for music sampling cases involving fragmented literal similarity, but gave the question of similarity to the jury even where the similarity in songs was the single word ‘dog’ coupled with panting.”¹¹⁰ “The Ninth Circuit has rejected specialized observers for music, concluding that any person untrained in music can understand the differences in note structure.”¹¹¹

Furthermore, the D.C. Circuit has questioned, though not resolved, whether an elevated standard of “observers” should apply in a suit regarding architecture infringement in the United Arab Emirates.¹¹² In *Sturdza*, the court remanded the question of who constitutes the “reasonable observer” because the court was uncomfortable defining the “reasonable observer.” The court noted the issues of who the “reasonable observer” is are “virtually unbriefed,” specifically relating to architecture.¹¹³ Because of this current indeterminacy in copyright, the D.C. Circuit preferred that “the parties develop [the reasonable observer] under the capable direction of the district court.”¹¹⁴ This preference hints at the court’s uneasy application and formulation of the “reasonable observer” standard in that it *requested* that the parties develop their own ideal reasonable observer, leaving absolutely no court-defined rule as to how construct the “reasonable observer” for future cases.¹¹⁵

In addressing this issue, the Second Circuit has distinguished a “‘more discerning’ ordinary observer test.”¹¹⁶ In *Boissan v. Banian*, the issue before the court was a copyright infringement case against two registered quilts. The court stated that if the “reasonable observer” standard is tailored to reflect the target audience of the work, the ordinary observer might not be able to distinguish between the protectable and non-protectable elements of a work in assessing infringement.¹¹⁷ In analyzing whether the allegedly infringing work was substantially similar to the copyrighted work, the court articulated a need for an ordinary observer to be “more discerning,” when the background for fabric from a public domain document “contributed nothing, not even a trivial variation” to the secondary quilt.¹¹⁸ Because the “ordinary” observer would be

110. Lemley, *supra* note 11, at 730–31.

111. *Id.* at 731.

112. *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1300-1 (D.C. Cir. 2002).

113. *Id.*

114. *Id.*

115. *See id.*

116. *Boisson v. Banian Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001).

117. *Id.* at 272.

118. *Id.* (quoting *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 765 (2d. Cir.

inclined to view the entire work – consisting of protectable and unprotectable elements – as one whole, “the observer’s inspection must be more discerning.”¹¹⁹ Shortly after *Folio Impressions* was decided, the Second Circuit required a “more refined analysis” when a “plaintiff’s work [was] not ‘wholly original,’ but rather incorporate[d] elements from the public domain.”¹²⁰

More recently, courts have relied on expert witnesses to determine “substantial similarity.” Especially in the realm of computers, expert testimony is permitted, because “such testimony is needed due to ‘the complexity and unfamiliarity [of computer programs] to most members of the public.’”¹²¹ Further supporting this evidentiary standard is Federal Rules of Evidence 702, stating that expert evidence is admissible when “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”¹²² Thus, the “reasonable observer” is replaced when the subject matter at issue is technically complex, but not when the subject matter is philosophically or conceptually difficult to discern on the surface of the works. In questioning who defines infringement, the “reasonable observer” would fail to discern facially undifferentiated distinctions in appropriation art, which ignores the conceptual underpinning of appropriation art’s commentary.

III. INCLUDE THE BROADER ART COMMUNITY TO DETERMINE “TRANSFORMATIVENESS”

The *Cariou* conclusion on what is a “transformative” secondary work confuses and provides inconsistent feedback to the art community. By remanding five of Prince’s prints because the court could not determine whether these images were *transformative enough*, this holding sets a very unclear precedent on the definition of “transformativeness.”¹²³ Furthermore, both Prince and Cariou utilized quite different definitions of “transformativeness” in their follow-up briefs on the issues with the five remanded photographs. These briefs demonstrate how “transformativeness” still has no consistent legal definition for artists to know and understand their

1991)).

119. *Id.* (quoting *Folio Impressions, Inc.*, 937 F.2d at 765–66).

120. *Id.* (quoting *Key Publ’ns, Inc. v. Chinatown Today Publ’g Enters., Inc.*, 945 F.2d 509, 514 (2d Cir.1991)).

121. *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1300 (D.C. Cir. 2002) (quoting *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232 (3d Cir. 1986)).

122. FED. R. EVID. 702(a).

123. *See Cariou v. Prince*, 714 F. 3d 694, 710 (2d Cir. 2013).

rights and highlights the necessity of evidentiary support by the broader art community to supplement this definition.

Cariou's focus on "transformativeness" was cosmetic. He argued that his own photographs constitute the overwhelming expression of the remanded photographs, while Prince's additions only constitute "minimal alterations."¹²⁴ By focusing on the material and facial differences, Cariou excluded the fact that that Prince's conceptual alterations were insufficient to transform the meaning and message of Cariou's photographs.

Prince argued he transformed Cariou's photographs beyond a mere facial comparison and used Cariou's imagery in order to provoke perceptive and conceptual motifs. Prince's repetition of figures in one remanded photograph, *Charlie Company*, was used "to create a visual cadence across the canvas."¹²⁵ Prince claimed that his focus on perception of the viewer, including the crude, jarring, hectic qualities of his photographs, led the Second Circuit to conclude that the twenty-five (non-remanding) photographs manifested an entirely different aesthetic from Cariou's photographs.¹²⁶ Furthermore, Prince emphasized the *physical action* of his transformation. Prince argued that the tearing out of images from *Yes, Rasta*, gluing, cropping, tinting, reassembling, and dying Cariou's photographs also are sufficiently transformative actions.¹²⁷ Prince uses art history as evidence of his transformative content – as he "incorporate[d] meanings from art history that [were] absent in Cariou's photograph."¹²⁸ Another focus of Prince's argument is how his work is transformative because it is a commentary on American Society. He claims his work suggests that the "commercial appeal of the Rastafarian images lies not in the inherent nobility of the figures but in their illicit connotations in a morally decadent, sexualized culture."¹²⁹ "This simultaneous embrace and critique of mass culture... is at the core of Prince's art."¹³⁰ Thus, these briefs emphasize that these inadequacies in the fair use doctrine are pressing and pertinent. In order to achieve a more consistent and effectual fair use doctrine, the broader art community should be able to testify about how appropriation art has been historically

124. Brief for Petitioner at 2, *Cariou v. Prince*, No. 08 Civ. 11327 (S.D.N.Y. August 1, 2013), 2013 WL 6627301.

125. Brief for Respondent at 12, *Cariou v. Prince*, No. 08 Civ. 11327 (S.D.N.Y. October 15, 2013), 2013 WL 6627590.

126. *Id.* at 10.

127. *Id.* at 11 (citing *Prince Aff.* at 36, May, 2013).

128. *Id.* at 12.

129. *Id.* at 13.

130. *Id.*

understood and perceived.

In lieu of the fact that authorship and originality are challenging traditional notions of copyright and fair use, the evidentiary standard of the reasonable observer test also must be challenged.¹³¹ Fair use “does not require that meaning be understood or valued unanimously.”¹³² But the test for transformative use must be *more than a side-by-side test*. Because the nature of appropriation art demonstrates a changing world of “raw material,” additional analysis is necessary to go “beyond a purely visible, or ‘side by side,’ comparison of Prince and Cariou’s works to determine whether they are entitled to the protection of the fair use doctrine.”¹³³ Authorship is not in the choice of light sources, lenses, camera, or decisions of the creator, but in the “actual effects on the visual image—the ‘effects achieved.’”¹³⁴ Appropriation art “carries a meaning or message—whether facially apparent or not—that is sufficiently distinct from the first work to be entitled to the First Amendment safeguard embodied by the fair use doctrine.”¹³⁵ Therefore, a facial determination is insufficient and inappropriate.

By placing two pieces of art works side-by-side in order to find “transformativeness,” the current fair use analysis diminishes the creative scope and application of modern art—precisely what the Constitutional framework was meant to avoid. This isolated test fails to adequately cover the creative expression of artists who use existing copyrighted materials as raw material in their own works. Framing the test of fair use by placing two works side-by-side for the “reasonable observer” will preclude a whole realm of creative work from just and proper protection.¹³⁶

As discussed earlier, if a central tenant of modern appropriation art is to critique the reasonable observer, appropriation art necessitates a different standard of evidentiary review for a fair use defense. The reasonable observer might be insufficient and must be

131. In patent law, the requirement of non-obviousness under 35 U.S.C. § 103 is satisfied if a “Phosita”, or person having ordinary skill in the art, would not have found the patented invention obvious. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007). The Phosita under patent law is a person “with ordinary creativity, not an automaton.” *Id.*

132. Brief for the Andy Warhol Found. for the Visual Arts, Inc. and the Robert Rauschenberg Found. as Amici Curiae in Support of Further Evidentiary Proceedings for Purposes of Determining Fair Use on Remand at 7, *Cariou v. Prince*, No. 08 Civ. 11327 (S.D.N.Y. October 22, 2013), available at http://warholfoundation.org/pdf/FILED_102213_Cariou_v_Prince_Amici_Brief.

133. *Id.* at 4-5.

134. Hughes, *supra* note 63, at 397 (emphasis added).

135. Brief for the Andy Warhol Found., *supra* note 132, at 5 (emphasis added).

136. See *Cariou v. Prince*, 714 F. 3d 694, 708-9 (2d Cir. 2013) (articulating the side-by-side “reasonable observer” test).

supplemented if the court is to determine whether a reasonable observer would find the secondary work to be transformative.¹³⁷ The reasonable observer for the purposes of appropriation ought to be supplemented by context, meaning, and message of the work at issue, which can only be exhibited through the support of the specific and general art community. If this evidentiary supplementation were to occur, the district court could have the opportunity on remand to evaluate the five remaining paintings under a “clarified legal standard and with the benefit of additional evidence that will go to the question of transformativeness.”¹³⁸

As recommended by the art community, first and foremost, the court should supplement a fair use analysis by including the broader art community in the nature and scope of evidentiary submissions.¹³⁹ The Andy Warhol Foundation for the Visual Arts and the Robert Rauschenberg Foundation became so concerned with the decision in *Cariou* that they filed an amicus brief to assure a legal framework that properly balances copyright protections with free expression. The *Cariou* case “pits two artists against one another in a way that both tests and threatens the stability of that framework”; the amici attempts to “assist the court in the task of maintaining that balance.”¹⁴⁰ This community has an especially strong interest in assuring that copyright law provides sufficient protection for original works of authorship, while also preserving the artistic freedom to use those works to create new art and expression. Inclusion of the art community will provide important and much-needed guidance to artists, educators, museums, and future courts facing similar issues.¹⁴¹

Furthermore, by providing a clarified legal standard for the determination of fair use, the broader art community can help refine the legal analysis for fair use. Declarations from professionals with long experience in the field of contemporary art, “statements that represent the kind of critically-informed visual analysis and . . . knowledge of art history and context in contemporary art practice,” will be relevant both on remand for the *Cariou* case, as well as for future fair use doctrine.¹⁴² By supplementing the court with an

137. See Brief for the Andy Warhol Found., *supra* note 132, at 4.

138. *Id.* at 4.

139. *Id.* at 3.

140. *Id.* at 1.

141. See Victoria Elman, *From the Runway to the Courtroom: How Substantial Similarity is Unfit for Fashion*, 30 CARDOZO L. REV. 683, 687 (2008) for comparisons to the fashion industry (arguing that if Congress adopts copyright-like protection for fashion, it should tailor the substantial similarity test to that industry).

142. Brief for the Andy Warhol Found., *supra* note 132, at 4.

analysis of “transformativeness” that goes beyond the mere side-by-side test, the “reasonable observer” will be able to make the accurate determination of proper fair use. Supplementary evidentiary material will allow protection even where transformative meanings found in secondary works “arise less out of visible differences than on differences in context.”¹⁴³ As the Warhol Foundation’s amici supports, “within the context of art history, the ‘purely’ visual has never been the measure of how meaning is created.”¹⁴⁴ Like the work of Sherry Levine, this is true even where the primary and secondary work appear virtually indistinguishable. Assessing transformative nature in the visual arts cannot therefore be easily reducible to mere image matching.

Even if a secondary work’s transformation of meaning is less apparent or visible, this supplemental evidentiary review can safeguard the fair use doctrine by incorporating a context of meaning which might arise from historical precedent, cultural context, or an artistic vocabulary that the “reasonable observer” might not discern.

CONCLUSION

Modern art pushes the boundaries that define our current concepts of art. By altering traditional notions of authorship and originality, modern art requires a new legal framework to determine “transformativeness.” Furthermore, by bestowing the “reasonable observer” with the task to define what art is sufficiently “transformative” for a finding of fair use, the law does not reflect an understanding of what constitutes modern appropriation art. The “reasonable observer” standard is not an appropriate standard for deciding fair use because a finding of “transformativeness” demands a thorough comparison, beyond a mere side-by-side or facial comparison of two works. The decision about whether a piece of appropriation art is sufficiently transformative cannot be left up to the “reasonable observer,” who may not understand how these types of works are historically and fundamentally *avant-garde*. Fair use analysis should shadow the modern trend of relying on either a “more discerning expert” or “expert” in copyright infringement for technical mediums like software and architecture. Courts need to supplement their fair use analysis conception of “transformativeness” with evidentiary analysis by the broader art

143. *Id.* at 5.

144. *Id.* at 7.

2015]

A CRITIQUE OF THE REASONABLE OBSERVER

467

community. Because assessing the transformative nature in the visual arts cannot be easily reduced to mere image matching, evidentiary support from the broader art community can ensure more consistency and security for artists by bringing into the courtroom a historical and critical understanding of appropriation art.