

Fair Use in the Rag Trade: In Defense of the Fashion Industry's Casual Appropriation of Artwork

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INTRODUCTION

Throughout history, the concept of appropriation has been understood as an act by which an interloper takes the work of another without consent and uses it for a different, typically self-serving, purpose. This concept, however, has become increasingly misapplied by courts in the context of art, and is particularly flawed when applied to fashion art. Recent federal case law purporting to clarify the appropriation

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doctrine for the art world has only served to muddle it further, as judges have struggled to make determinations on issues of artistry. As such, the existing rules are not only muddy, but also specious, when related to fashion. This Article analyzes the weaknesses in the current judicial framework governing art appropriation and demonstrates why the existing framework should not apply to fashion as a unique and transformative form of art.

When France and parts of Italy banned Marithé+François Girbaud's appropriation of Leonardo da Vinci's "Last Supper" in its advertising campaign (Figure 1), it was not because of any ostensible copyright violation. Rather, the advertisements were banned because they made offensive use of religious symbolism.¹ While Marithé+François Girbaud argued that the female version of the fresco showed "the place of women in society today, which is a reflection of our changing values," a French judge ruled that it presented "a gratuitous and aggressive act of intrusion of people's innermost beliefs."² Apparently everyone forgot that the advertisement was based on a painting, and not the Bible. No one seemed to care about whether the advertisement was a transgression against da Vinci. In fact, one might recognize the piece as an extraordinary transformation of his work.



Figure 1. Marithé+François Girbaud advertisement, 2005.³

In the same vein, there were no concerns about copyright infringement when Yves St. Laurent appropriated Piet Mondrian in creating his iconic Mondrian dress (Figure 2). This is because art appropriation is recognized as a valid, and valuable, artistic endeavor itself. Respected appropriation artists such as Andy Warhol, Sherrie Levine,

1. Irene Peroni, *Milan Bans 'Blasphemous' Poster*, BBC NEWS (Feb. 4, 2005, 17:37 GMT), <http://news.bbc.co.uk/2/hi/europe/4236499.stm> [<https://perma.cc/KP8L-VVGC>] [<https://web.archive.org/web/20221102123105/http://news.bbc.co.uk/2/hi/europe/4236499.stm>]; *Holy Unethical*, VOGUE UK (Mar. 16, 2005), <https://www.vogue.co.uk/article/holy-unethical> [<https://perma.cc/UE7L-8YFU>] [<https://web.archive.org/web/20221014231250/https://www.vogue.co.uk/article/holy-unethical>]. Given its age, the "Last Supper" is now in the public domain, with no copyright protections.

2. *Id.*

3. Marithé+François Girbaud Advertisement (photograph), in Jenna Sauers, *A History of Fashion's Appropriation of Art [NSFW]*, JEZEBEL (June 22, 2011), <https://jezebel.com/a-history-of-fashions-appropriation-of-art-nsfw-5814196> [<https://perma.cc/83U3-HM2G>] [<https://web.archive.org/web/20221102124600/https://jezebel.com/a-history-of-fashions-appropriation-of-art-nsfw-5814196>].

and Richard Prince have created famously provocative works of art by using the work of others.⁴ Many in the fashion industry likewise embrace art appropriation in their own works, as well as in the advertising of them (Figure 3).



Figure 2. Piet Mondrian, *Composition with Red, Yellow and Blue*, 1921, and Yves St. Laurent's *Mondrian Dress*, 1965.⁵



Figure 3. Georges de la Tour, *La Madeleine à la veilleuse*, 1640, and Christian Louboutin's Fall 2011 Lookbook.⁶

Mary Magdalene is no longer contemplating death;
rather, she is contemplating shoes.

4. Of course, Salvador Dalí famously said, "Those who do not want to imitate anything, produce nothing." *Les Chants de Maldoror*, FLA. STATE UNIV. MUSEUM OF FINE ARTS, <https://mofa.fsu.edu/wp-content/uploads/sites/3/2018/08/Salvidor-Dali-final.pdf> [<https://perma.cc/B5WL-A4YF>] [<https://web.archive.org/web/20220302101059/https://mofa.fsu.edu/wp-content/uploads/sites/3/2018/08/Salvidor-Dali-final.pdf>] (last visited Nov. 30, 2022).

5. Piet Mondrian, *Composition with Red, Yellow and Blue* (painting), and Yves St. Laurent, *Mondrian Dress* (photograph), in *Vintage Inspiration: YSL's Mondrian Dress*, JOUR À NUIT (Mar. 18, 2015), <http://alwayslatee.blogspot.com/2016/04/friday-inspiration-mondrian-art-in.html> [<https://perma.cc/5ANM-YWTB>] [<https://web.archive.org/web/20230317071945/https://journaluit.wordpress.com/2015/03/18/vintage-inspiration-ysls-mondrian-dress>].

6. Georges de la Tour, *La Madeleine à la veilleuse* (painting), and Christian Louboutin, Fall 2011 Lookbook (photograph), in Sauers, *supra* note 3.

As discussed more thoroughly in Part I of this Article, fashion itself is art, and fashion artists have created truly remarkable pieces by appropriating others' artworks. Take, for example, L'Wren Scott's transformation of Gustav Klimt's *Hygieia* (Figure 4). Scott appropriated the original work from a fragment of Klimt's painting, *Medicine*, which is one of a series of paintings on the ceiling of University of Vienna's Great Hall.⁷ The splendor of this artistic appropriation is undeniable.



Figure 4. A fragment of Gustav Klimt's *Medicine*, 1901, and L'Wren Scott, *Hygieia* gown, Autumn/Winter 2013.⁸

Lately, however, United States federal courts have sought to limit art appropriation. Recent rulings from within the United States Court of Appeals for the Second Circuit ("Second Circuit") have prohibited artists such as Richard Prince and the foundation representing Andy Warhol from using the fair use defense to claims of appropriation, or more specifically, copyright infringement.⁹ By rendering artists' works indefensible as such, courts threaten to stifle artistic creation, including beautifully inspired fashion works like those created by L'Wren Scott. These rulings may create a chilling effect on the fashion industry and would deny the world the benefit of some of the most superb works of art that fashion artists create.

7. Dulcie Horn, *Art as Fashion—L'Wren Scott & Aquilano Rimondi Do Gustav Klimt*, LA DULCIE VITA (Oct. 17, 2013), <http://www.dulciedulcie.com/2013/10/art-as-fashion-lwren-scott-aquilano.html> [https://web.archive.org/web/20220701142515/http://www.dulciedulcie.com/2013/10/art-as-fashion-lwren-scott-aquilano.html].

8. Gustav Klimt, *Medicine*, and Photograph of L'Wren Scott's *Hygieia* gown in the Autumn/Winter 2013 collection (photograph), in *id.*

9. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 117 (2d Cir. 2021) (citation omitted) [hereinafter *Warhol*] and *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

In this Article, I will argue that the existing legal framework governing art appropriation is overly restrictive and should be relaxed, particularly as applied to the fashion industry. The increasingly prohibitive common law governing the fair use doctrine is contrary to public policy intended to support the continuing inspiration of artists in our society, as specifically charged by the United States Constitution. Accordingly, Part I of this Article demonstrates that fashion is art, both culturally and legally. In the same vein, Part II illustrates how fashion has historically made uniquely transformative creations when borrowing from other works of art which, as explained in Part III, must be supported. In Part III, I examine the legal framework surrounding copyright law and the right artists have to use others' works fairly. I conclude with a discussion of the fair use doctrine as applied to fashion in Part IV and entreat courts to recognize the inherently transformative nature of appropriative fashion. Courts should interpret the fashion industry's right to fair use liberally, so as to follow, rather than thwart, the directive of the United States Constitution to "promote the Progress of . . . Art[.]"¹⁰

I. FASHION IS ART

"Art," as defined by the Oxford English Dictionary, is the "expression or application of creative skill and imagination," that is typically in visual form and produced "to be appreciated primarily for [its] beauty or emotional power."¹¹ Certainly then, L'Wren Scott's *Hygieia* gown is "art." Scott's gown is a visual expression of creative skill and imagination that is appreciated for its beauty and emotional evocation of the goddess of health, which fits squarely within the definition of art. The piece is like a sculpture for the human body.

Gallerist Georges Berges writes that "fashion is one of the purest expressions of art because it is *art lived* on a daily basis."¹² Berges likens fashion as performance art incarnated by a model.¹³ Art critic Richard Martin explains that the criteria for great fashion designers are the same for other great visual artists: "the great designers like Balenciaga really let the cloth speak—in the same way that Morris Louis lets the paint speak."¹⁴ The artistic process is the same as the process for making fashion.¹⁵

The ubiquitous fashion exhibits displayed in prominent museums confirm that fashion is art.¹⁶ One cannot deny that fashion is art after seeing the native Tlingit hair

10. U.S. CONST. art I, § 8, cl. 8.

11. Art, OXFORD EN. DICTIONARY ONLINE, <https://www.oed.com/view/Entry/11125> [<https://perma.cc/HF24-UAKU>] [<https://web.archive.org/web/20221209172156/https://www.oed.com/start%3Bjsessionid%3D1C9FCE8732C228E6911855D9879DAF12?authRejection=true&url=%2Fview%2FEntry%2F11125>] (last visited Dec. 9, 2022).

12. Georges Berges, *In Defense of Fashion as a True Art Form*, OBSERVER (June 20, 2017, 7:00 AM), <https://observer.com/2017/06/fashion-true-art-form> [<https://perma.cc/DK9D-EEYH>] [<https://web.archive.org/web/20221014232608/https://observer.com/2017/06/fashion-true-art-form>].

13. *Id.*

14. Sung Bok Kim, *Is Fashion Art?*, 2 FASHION THEORY: J. OF DRESS, BODY & CULTURE 51, 57 (1998) (brackets and citation omitted).

15. *See id.*

16. *See, e.g., Roberto Capucci: Art Into Fashion*, PHILA. MUSEUM OF ART, <https://philamuseum.org/calendar/exhibition/roberto-capucci-art-into-fashion> [<https://perma.cc/8XZQ-3TJE>] [<https://web>].

ornament displayed at the American Museum of National History (Figure 5),¹⁷ or the famous *Lobster Dress* designed by Salvador Dali and Elsa Schiaparelli (Figure 6).¹⁸ It is not only historic fashion that is displayed in museums. Current fashion is, of course, also art.¹⁹



Figure 5. Tlingit hair ornament.²⁰



Figure 6. Salvador Dali, *Lobster Dress*, 1937.²¹

archive.org/web/20221115165948/https://philamuseum.org/calendar/exhibition/roberto-capucci-art-into-fashion] (last visited Nov. 15, 2022).

17. *Tlingit Collection*, AM. MUSEUM OF NAT'L HIST., <https://www.amnh.org/exhibitions/permanent/northwest-coast/tlingit> [https://perma.cc/DL2R-9KKB] [https://web.archive.org/web/20221014233652/https://www.amnh.org/exhibitions/permanent/northwest-coast/Tlingit] (last visited Nov. 1, 2022). See generally *Woven by the Grandmothers: Nineteenth-Century Navajo Textiles from the National Museum of the American Indian*, SMITHSONIAN: NAT'L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/explore/exhibitions/item?id=303> [https://perma.cc/D8E5-4VFP] [https://web.archive.org/web/20221014234342/https://americanindian.si.edu/explore/exhibitions/item?id=303] (last visited Nov. 1, 2022).

18. Elsa Schiaparelli and Salvador Dalí, *Woman's Dinner Dress*, PHILA. MUSEUM OF ART, <https://philamuseum.org/collection/object/65327> [https://perma.cc/5XMB-2SPE] [https://web.archive.org/web/20221014234441/https://philamuseum.org/collection/object/65327] (last visited Nov. 1, 2022).

19. See, e.g., Press Release, Metropolitan Museum of Art, Major Retrospective of Designs of Yves Saint Laurent To Open in Metropolitan Museum's Costume Institute, <https://libmma.contentdm.oclc.org/digital/collection/p16028coll12/id/7644> [https://web.archive.org/web/20221102135917/https://libmma.contentdm.oclc.org/digital/collection/p16028coll12/id/7644]. This exhibition marked the first time the museum displayed the work of a living fashion designer. Nina Hyde, YSL, WASH. POST (Dec. 5, 1983), <https://www.washingtonpost.com/archive/lifestyle/1983/12/06/ysl/0952dbbf-dee8-479e-8019-5da58b852276> [https://perma.cc/6MCM-6GG6] [https://web.archive.org/web/20221014234758/https://www.washingtonpost.com/archive/lifestyle/1983/12/06/ysl/0952dbbf-dee8-479e-8019-5da58b852276].

20. Photograph of Tlingit Hair Ornament, in *Tlingit Collection*, *supra* note 17.

21. Photograph of Woman's Dinner Dress, in PHILA. MUSEUM OF ART, *supra* note 16. Dalí created this dress for American actress Wallis Simpson's infamous prenuptials in anticipation of her marriage to King Edward VIII. The marriage led to King Edward abdicating the British throne. Dalí designed the lobster to be placed between Wallis's legs with its tail fanning toward her *mons pubis*, and its claws directed towards her calves. See *id.*

Many outside of the art world also agree. Poets, sociologists, lawyers, and other diverse perspectives confirm that fashion is art. Charles Baudelaire validated that fashion is art in his celebrated poetry.²² Sociologist Elizabeth Wilson explained that fashion is “a form of visual art, a creation of images with the visible self as its medium.”²³ Where others have opined that fashion is not art,²⁴ or that fashion has simply a conjugal relationship with art,²⁵ George B. Sproles, the renowned behavioral scientist, admonished this as a “serious oversight.”²⁶ The utility and commodification of fashion may prevent such antagonists from appreciating the art.

For purposes of understanding the legal implications of appropriation, however, it is only the opinion of the United States Supreme Court that is relevant. Helpfully, the United States Supreme Court has recently resolved this inquiry, at least for copyright purposes, upon determining that fashion is a work of art when it has pictorial, graphic, or sculptural features that can be perceived separately from its usefulness.²⁷ It is now undisputed that fashion, even though it is “useful,” can be art.

II. THE FASHION INDUSTRY’S HISTORIC APPROPRIATION OF ART

Since its conception, fashion has borrowed from the work of other artists. The concept of “fashion” arguably emerged in the mid-fourteenth century, at least in Europe.²⁸ While there is little information about art appropriation by fashion designers of the Late Middle Ages, it is evident that Renaissance designers incorporated into their fashion the artistic works of ancient Greek and Roman artists as well as works made by then-contemporary artists.²⁹ In fact, Renaissance fashion frequently included ornaments, designs, and embroideries that appropriated the work of other artists throughout Europe during this period. Below, for example, is an “enseigne” or hat pin that men wore in their caps during the Renaissance period, in which the fashion maker clearly copied Lelio Orsi’s painting, “Saint George and the Dragon” (Figure 7).

22. Kim, *supra* note 12, at 53 (internal citation omitted).

23. *Id.* at 52 (citing ELISABETH WILSON, *ADORNED IN DREAMS* 9 (1987)).

24. *See id.* at 53–56.

25. *See* DON THOMPSON, *THE ORANGE BALLOON DOG: BUBBLES, TURMOIL AND AVARICE IN THE CONTEMPORARY ART MARKET* 129–36 (2017). As seen throughout this paper, they procreate beautifully.

26. *See* Kim, *supra* note 14, at 52.

27. *See* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405 (2017) (finding cheerleading uniform with unique arrangement of colors, shapes, stripes, and chevrons is work of art).

28. *See* JAMES LAVER, *COSTUME AND FASHION: A CONCISE HISTORY* 62 (4th ed. 2002).

29. *Cf.* Abigail Westover, *Influence of the Tudors*, *HIST. OF COSTUME: EUROPEAN FASHION THROUGH THE AGES* (Mar. 9, 2012), <https://historyofeuropeanfashion.wordpress.com/2012/03/09/influence-of-the-tudors> [<https://perma.cc/HA29-7YK2>] [<https://web.archive.org/web/20221020182603/https://historyofeuropeanfashion.wordpress.com/2012/03/09/influence-of-the-tudors>].



Figure 7. Lelio Orsi, *Saint George and the Dragon*, 1550,³⁰
and “Hat Ornament” from the 16th century.³¹

It is clear that art appropriation is not simply a postmodern concept. Fashion designers from the early modern period and the modern era borrowed liberally from the work of others, both past and contemporary. And, of course, current fashion designers routinely appropriate artwork from all ages.

By way of further illustration, in the early twentieth century, Madeline Vionnet beautifully appropriated the *Winged Victory of Samothrace* from the second century BCE (Figure 8). Balenciaga’s appropriation of Deigo Velázquez’s portrait of the *Infanta’s* dress is delightful (Figure 9). When absorbing these works of art, it is easy to see how historical fashion appropriation is an important manifestation of human expression in the context of its own time as well as with respect to the present time.

30. Photograph of *Saint George and the Dragon*, in *Google Arts & Culture*, MUSEO E REAL BOSCO DI CAPODIMONTE (2021), <https://artsandculture.google.com/asset/st-george-and-the-dragon-lelio-orsi/ZQH5VlbTTRUxg?hl=en> [https://perma.cc/BY5Q-7QCG] [https://web.archive.org/web/20221020182833/https://artsandculture.google.com/asset/st-george-and-the-dragon-lelio-orsi/ZQH5VlbTTRUxg?hl=en].

31. Photograph of Hat Ornament, in *Museum Number WB.172*, THE BRIT. MUSEUM (2021), https://www.britishmuseum.org/collection/object/H_WB-172 [https://perma.cc/L68A-5LD5] [https://web.archive.org/web/20221020183044/https://www.britishmuseum.org/collection/object/H_WB-172].



Figure 8. The Winged Victory of Samothrace, 2nd century BCE,³² and Madeleine Vionnet, *Bas-relief Frieze Dress*, 1931.³³



Figure 9. Diego Velázquez, *Infanta Margarita*, 1654–55, and Balenciaga *Infanta dress*, 1939.³⁴

32. Photograph of *The Winged Victory of Samothrace*, in Stella Polyzoidou, *9 Times the History of Art Inspired Fashion Designers*, THE COLLECTOR (Apr. 18, 2021), <https://www.thecollector.com/9-art-history-inspired-fashion-designers> [https://perma.cc/UN98-4KC8] [https://web.archive.org/web/20221020183240/https://www.thecollector.com/9-art-history-inspired-fashion-designers] (citing LOUVRE MUSEUM).

33. Photograph of *Bas-relief Frieze Dress* by George Hoyningen-Huene for French Vogue, in *id.* (citing via Condé Nast).

34. Diego Velázquez, *Infanta Margarita* (painting) and Balenciaga, *Infanta Dress* (photograph), in Sofia Killion, *Wearing Art History: Fashion as an Art 9* (May 2018) (Senior Thesis, Dominican University of California) (citing LOUVRE MUSEUM and THE METROPOLITAN MUSEUM OF ART, respectively).

More recently, Nicholas Kirkwood transformed Keith Haring's work into his own exquisite fashion pieces, including the shoes in Figure 10. Contemporary era fashion appropriation is just as compelling, as evidenced by the several fashion artists who have been inspired by Hieronymus Bosch (Figure 11). Like their predecessors, contemporary fashion artists often pay homage to artists and art forms. For example, Italian Fashion Designer Maria Grazia Chiuri emulated the earthy simplicity of Georgia O'Keefe in her recent inaugural fashion show for Christian Dior (Figure 12). In the same spirit, the Metropolitan Museum of Art (the "Met") hosts an annual "Met Gala," which is the premier charity event in the art and fashion world. The Met conceives themes for the gala such as "Cubism and Fashion," and "Goddess: The Classical Mode"³⁵ that reveal the ultimate application of human skill and creativity in appropriative fashion. It is no surprise that during the current chaotic times, at least one fashion artist has borrowed from, and dedicated his line to, Pablo Picasso, the master of making chaos beautiful (Figure 13).

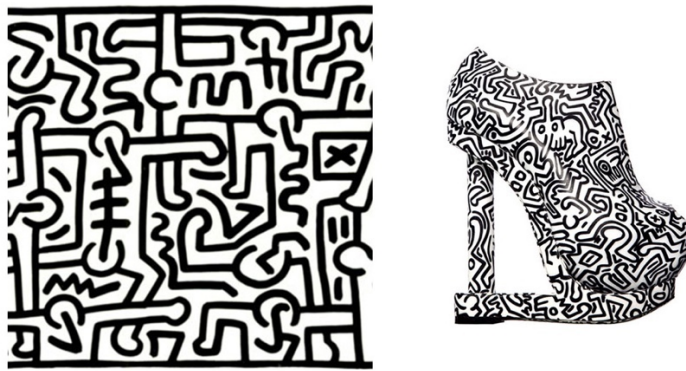


Figure 10. Keith Haring, *Untitled*, 1988, and Nicholas Kirkwood shoes, 2011.³⁶

35. *Met Gala Themes Over the Years: A Look Back at Many First Mondays in May*, VOGUE FR., (Apr. 22, 2022), <https://www.vogue.fr/fashion/article/met-gala-themes-over-the-years> [<https://perma.cc/NLK6-Z3RZ>] [<https://web/20221020183743/https://www.vogue.fr/fashion/article/met-gala-themes-over-the-years>].

36. Keith Haring, *Untitled* (illustration) and Nicholas Kirkwood shoes (photograph), in Lilah Ramzi, *Shop Art*, PART NOUVEAU (Mar. 7, 2013), <http://partnouveau.com/2013/03/shop-art> [<https://perma.cc/HDR8-3XHC>] [<https://web.archive.org/web/20221020183406/http://partnouveau.com/2013/03/shop-art>].



Figure 11. Hieronymus Bosch, *The Garden of Earthly Delights*, 1480–1501 (top);
 Alexander McQueen, *Armadillo shoes*, SS 2010 (middle);
 and the horrid king figure excerpted from the bottom right panel of the triptych (bottom).
 The wine jugs on the king's feet resemble the McQueen shoes.³⁷

37. Hieronymus Bosch, *The Garden of Earthly Delights* (illustration) and Alexander McQueen, *Armadillo Shoes* (photograph), in Sauers, *supra* note 3.



Figure 12. Ansel Adams, *Georgia O'Keeffe at Yosemite* 1938, and Christian Dior Cruise 2018.³⁸



Figure 13. Pablo Picasso, *Les Femmes d'Alger (O Version O)*, (1907), and Moschino Spring/Summer 2020.³⁹

38. Photograph in Hannah Militano, *The everlasting marriage of high fashion and fine art*, CR FASHION BOOK (No. 30, 2020) [<https://www.crfashionbook.com/fashion/a34198850/everlasting-marriage-high-fashion-fine-art>] [<https://perma.cc/5PTP-A4W9>] [Wayback Machine URL is unavailable].

39. Photograph in Militano, *supra* note 38.

When fashion appropriates art, it creates some truly remarkable pieces that contribute significantly to the culture of society. Appropriative fashion reflects—and reflects upon—society. Like all art, fashion comments and criticizes. Fashion is art that is worn upon the human body, and perhaps because of this characteristic, it is a necessary and important part of human culture. As seen in the works herein, fashion is an expression of intimate creativity and carries emotional power.

Because fashion is art, the legal framework governing art appropriation applies to the fashion industry in the same way. Fortunately, the constitutional directive and policy supporting the legal framework are designed to encourage such creations. Yet currently, there is a misguided trend whereby some courts have made exceedingly broad interpretations of appropriation so as to sweep indiscriminately many artworks into the prohibitions of copyright infringement. As discussed below, such judicial decisions, which are challenged by the inherent difficulties judges have in making determinations about artistry, may stifle creative expression and deny the world some extraordinary works of fashion art.

III. THE LEGAL FRAMEWORK OF COPYRIGHT INFRINGEMENT AS APPLIED TO ART APPROPRIATION

The concept of protecting works of art from misappropriation is embodied in Article I of the Constitution, which empowers Congress to enact copyright laws “[t]o promote the Progress of Science and useful Arts.”⁴⁰ Congress exercised its authority to promote creative works by enacting the Copyright Act of 1790,⁴¹ with revisions through the Copyright Act of 1976, and subsequent amendments.⁴² In essence, copyright law endows creators of original works of art that are fixed in a tangible medium of expression with a limited monopoly over the dissemination of their works. Among other things, the Copyright Act prevents the unauthorized copying of an original work of art⁴³ and protects artists’ works from misappropriation for a limited period of time,⁴⁴ after which it is considered to be within the public domain and available for use, including copying, without restriction.

A. THE RIGHT OF FAIR USE

Copyright protection does not provide “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 art for the intellectual enrichment of the public.”⁴⁵ The doctrine of “fair use” is “necessary to fulfill that very purpose” to promote art.⁴⁶ Recognizing that “excessively broad protection would stifle, rather than advance, the

40. U.S. CONST. art I, § 8, cl. 8.

41. Copyright Act of 1790, 1 Stat. 124 (1790).

42. Copyright Act of 1976, 17 U.S.C. §§ 101–1401 (2021).

43. *Id.* §§ 101–205.

44. Copyright protections typically extend for the life of the work’s creator plus seventy years after the creator’s death. *Id.* § 302.

45. *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (citation omitted).

46. *Id.* (citation omitted).

law's objective,"⁴⁷ the fair 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—or ourselves by reference to the works of others, which must be protected up to a point."⁴⁸ As such, the purpose of the fair use doctrine is to limit the original artist's rights.

The fair use doctrine was codified in the Copyright Act of 1976 as a defense to copyright infringement.⁴⁹ The statute provides that, "the fair use of a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment, news, reporting, teaching, . . . scholarship, or research, is not an infringement of copyright."⁵⁰ The law, however, "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 . . . criticism, comment, news reporting, teaching, scholarship, and research."⁵¹ A fair use determination necessitates "an open-ended and context-sensitive inquiry"⁵² that incorporates four non-exclusive factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵³

When determining whether an artist made fair use of another's work, a court will explore and weigh together all four statutory factors in light of the purposes of copyright.⁵⁴ The "ultimate test of fair use . . . is whether the copyright law's goal of 'promoting the Progress of Science and useful Arts' . . . would be better served by allowing the use than by preventing it."⁵⁵ Traditionally, fair use has been treated as an affirmative defense for artists who have appropriated others' work,⁵⁶ but more recently it has been better viewed as a right granted by the Copyright Act of 1976.⁵⁷ The recent interpretation makes more sense, as copyright is a privilege that is granted through legislative act,⁵⁸ rather than a right.

47. *Id.*

48. *Id.* (brackets and citation omitted).

49. 17 U.S.C. § 107.

50. *Id.*

51. *Cariou*, 714 F.3d at 706 (citation omitted).

52. *Id.* at 705 (citations omitted).

53. 17 U.S.C. § 107.

54. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (citation omitted).

55. *Cariou*, 714 F.3d at 705 (citation omitted).

56. *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1542 (11th Cir. 1996).

57. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001).

58. See John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, 38 U.C. DAVIS L. REV. 465, 493 (2005).

1. The Purpose and Character of the Use

The Second Circuit explains that the “purpose and character”⁵⁹ of the secondary use is the most significant consideration when determining fair use. Thus, the “transformativeness” element of this first statutory factor is at the “heart of the fair use inquiry.”⁶⁰ To determine whether a secondary work makes fair use of an original work, the court considers

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[,] . . . in other words, whether and to what extent the new work is transformative.⁶¹

When, according to a reasonable observer, “the secondary use adds value to the original—if copyrightable expression in the original work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—[it] is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”⁶² A transformative work, therefore, is entitled to a fair use defense against a copyright claim. Or, more properly explained, artists have the right to fair use of the work of others when they transform it. Significantly, “transformativeness” must “guide, rather than follow” the fair use analysis.⁶³

The first fair use factor, the purpose and character of the use, also considers whether the appropriated work has a commercial or nonprofit educational purpose. Courts are concerned with 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.”⁶⁴ The commercialism factor, however, is applied cautiously because Congress did not intend a rule that commercial uses are presumptively unfair.⁶⁵ In fact, if a work is transformative, then a court will consider its commercial nature much less significant.⁶⁶

2. The Nature of the Copyrighted Work

When determining whether an appropriation is fair use of an original work, courts also consider the nature of the appropriated work. Specifically, this factor involves analysis of “(1) whether the work is expressive or creative . . . with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving

59. 17 U.S.C. § 107(1).

60. *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).

61. *Cariou*, 714 F.3d at 705–06 (citations omitted).

62. 4 NIMMER ON COPYRIGHT § 13.05 (2021).

63. *Cariou*, 714 F.3d at 706.

64. *Id.* at 708 (citation omitted).

65. *Id.* (citation omitted).

66. *Id.* (citation omitted).

unpublished works being considerably narrower.”⁶⁷ The factor “has rarely played a significant role in the determination of a fair use dispute.”⁶⁸ As with the commercial character factor, moreover, this factor “may be of limited usefulness where [] the creative work of art is being used for a transformative purpose.”⁶⁹

3. The Amount and Substantiality of the Portion of Work Used

The third factor of the fair use inquiry is “whether the quantity and value of the materials used are reasonable in relation to the purpose of the copying.”⁷⁰ Essentially, courts consider “the proportion of the original work used, and not how much of the secondary work comprises the original.”⁷¹ The “extent of permissible copying varies with the purpose and character of the use,” and “the law does not require that the secondary artist may take no more than is necessary.”⁷² Courts even recognize “copying the entirety of a work is sometimes necessary to make a fair use of the image.”⁷³ A court, therefore, will assess the secondary artist’s quantitative and qualitative borrowing of the original work, and find against fair use on this factor only if “the essence” of the original work was appropriated.⁷⁴

4. The Effect on the Potential Market for the Copyrighted Work

The final consideration when determining whether an appropriation is fair use requires analysis of the market for the appropriated work. This factor asks “whether, if the challenged use becomes widespread, it will adversely affect the potential market for the copyrighted work.”⁷⁵ The market for the original work includes “only those [markets] that creators of original works would in general develop or license others to develop.”⁷⁶ To this end, courts are not concerned “whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives.”⁷⁷ Rather, they are concerned whether “the secondary use *usurps* the market of the original work,”⁷⁸ and if so, this factor will weigh against a finding of fair use. An appropriation is generally considered to have usurped the market for copyrighted

67. *Warhol*, 992 F.3d 99, 117 (2d Cir. 2021) (citation omitted); *see generally* 17 U.S.C. § 107(2).

68. *Warhol*, 992 F.3d at 117 (citation omitted).

69. *Id.* (citations omitted).

70. 17 U.S.C. § 107(3).

71. *Cariou*, 714 F.3d at 710.

72. *Id.* (citation omitted).

73. *Id.* (citation omitted).

74. *See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 119 (citation omitted).

75. *Id.* at 120 (citation omitted).

76. *Cariou*, 714 F.3d at 709–10 (citation omitted).

77. *Id.* at 708 (citations omitted). Under the current Copyright Act, “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adopted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” 17 U.S.C. § 101.

78. *Id.* (citations omitted).

works when its target audience and the nature of the appropriated content is the same as the original.⁷⁹ This factor weighs in favor of fair use when an appropriation “does not substitute for the original and serves a different market function.”⁸⁰

The Second Circuit explains that this factor requires a balancing “between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner’s expectation of gain, the less public benefit need be shown to justify the use.”⁸¹ In general, a secondary artist has a right to fair use when their work does not diminish the potential sales of the original artist’s works, interfere with the marketability of the original work, or otherwise fulfill the demand for the original work.⁸²

Nimmer, in his Copyright law treatise, warns that there is a “danger of circularity” when considering the potential market for the original, and more convincingly, derivative works.⁸³ A work of appropriation implies that there was a potential market for the original work, no matter how unlikely. In fair use cases, therefore, courts must discern whether the secondary artist filled a market niche that the original artist had no interest occupying.⁸⁴ The original artist must show by a preponderance of the evidence that there is a meaningful likelihood of future harm resulting from the secondary work.⁸⁵ Courts should not engage in speculative inquiry into nonexistent derivative markets here,⁸⁶ and ought to ground their examination of the derivative market with evidence, such as whether the original artist engaged in actual marketing in a potential derivative market.⁸⁷

The Seventh Circuit Court of Appeals (“Seventh Circuit”) considers this last factor as “usually” the most important.⁸⁸ According to the Second Circuit, however, “the more transformative the secondary use, the less likelihood that the secondary use substitutes for the original, even though the fair use, being transformative, might well harm, or even destroy, the market for the original.”⁸⁹ It seems, then, that “transformativeness” may tip the balance of this fair use factor as well.

79. *Id.*

80. Melissa Eckhause, *Digital Sampling v. Appropriation Art: Why Is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling*, 84 MO. L. REV. 371, 392 (2019) (citation omitted).

81. MCA, Inc. v. Wilson, 677 F.2d 180, 183 (1981).

82. See, e.g., Hustler Mag., Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1156 (9th Cir. 1986).

83. NIMMER, *supra* note 62, § 13.05.

84. See *id.*

85. Ass’n of Am. Medical Coll. v. Cuomo, 928 F.2d 519, 525 (2d Cir. 1991).

86. NIMMER, *supra* note 62, § 13.05.

87. *Id.*, citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 599 (1994). Some scholars contend that the very existence of derivative rights may stifle artistic progress and is contrary to the constitutional directive to promote art. See Tehranian, *supra* note 58, at 489–490.

88. Kienitz v. Sconnie Nation, LLC, 766 F.3d 756, 758 (7th Cir. 2014).

89. Cariou v. Prince, 714 F.3d 694, 709 (2d Cir. 2013) (citation omitted).

B. FAIR USE OF APPROPRIATED ART

Several courts have recently advanced the application of the fair use doctrine to art appropriation, and the line of defense appears to have been drawn directly through artist Richard Prince's *Canal Zone* series. In that series, Richard Prince incorporated into his pieces several of photographer Patrick Cariou's classical portraits of Rastafarians living in Jamaica. Cariou filed a corresponding claim against Prince for copyright infringement, and a split three-member panel of the Second Circuit Court of Appeals ultimately ruled that twenty-five of Prince's pieces made fair use of Cariou's work and were entitled to that defense as a matter of law against the copyright complaint.⁹⁰ The Second Circuit remanded the case for determination on whether the remaining five works in the series were also fair use.⁹¹

In making its decision, the court gave great weight to the transformative element of the first factor of the right to fair use. The court found that the twenty-five pieces defensible under the fair use doctrine were transformative as a matter of law because of the aesthetic differences between the original and secondary works. Prince altered the "composition, presentation, scale, color palette, and media" of the appropriated photographs.⁹²

With respect to the commercial element of the first fair use factor, the court held that "[a]lthough there is no question that Prince's artworks are commercial, we do not place much significance on that fact due to the transformative nature of the work."⁹³ The court also found that the transformative nature of Prince's work supplanted the second and third factors of the fair use inquiry as well. Specifically, the third "factor may be of limited usefulness where, as here, the creative work of art is being used for a transformative purpose."⁹⁴ Transformativeness similarly controlled the analysis of the fourth factor of the fair use analysis, as the court identified that Prince "transformed those photographs into something new and different and, as a result, this [fourth] factor weighs heavily in Prince's favor."⁹⁵ Prince's work so transformed the original work that Prince's audience was ultimately different from Cariou's audience, and therefore "Prince's work [n]ever touched—much less usurped—either the primary or derivative for Cariou's work."⁹⁶

One of the Prince pieces that the court found to be fair use was *Back to the Garden* which twice appropriated an entire Cariou photograph of a man on a *burro*. The first instance of appropriation shows a Cariou photo that is ostensibly unaltered in the Price collage other than that it appears as if it has been folded or torn (Figure 14).

90. *Id.*

91. *Id.*

92. *Id.* at 706 (citation omitted).

93. *Id.* at 708.

94. *Id.* at 710 (citation omitted).

95. *Id.*

96. *Id.* at 709.



Figure 14. Patrick Cariou, photograph of a man on a burro, 2000 (left),⁹⁷ and Richard Prince, *Back in the Garden*, 2008 (right).⁹⁸

On the other hand, Prince's *Charlie Company*—which very similarly appropriates fourfold the same Cariou photo of the man on a *burro*—was one of the five pieces the court could not “confidently . . . make a determination [on its] transformative nature as a matter of law”⁹⁹ (Figure 15).



Figure 15. Patrick Cariou, photograph of a man on a burro, 2000 (left),¹⁰⁰ and Richard Prince, *Charlie Company*, 2008 (right two images).¹⁰¹

97. Patrick Cariou, *A Man on a Burro* (photograph), in PATRICK CARIU, *YES RASTA* 83–84 (2000).

98. Richard Prince, *Back in the Garden* (collage), in *Richard Prince: Canal Zone*, GAGOSIAN (2008), <https://gagosian.com/exhibitions/2008/richard-prince-canal-zone> [https://web.archive.org/web/20221102190633/https://gagosian.com/exhibitions/2008/richard-prince-canal-zone].

99. *Cariou v. Prince*, 714 F.3d 694, 710–11 (2d Cir. 2013).

100. CARIU, *supra* note 97.

101. GAGOSIAN, *supra* note 98.

It is unclear whether the court disliked the quadruple copy of the appropriated figure in *Charlie Company* or rather liked the extra nude in *Back to the Garden* upon making a transformativeness determination for these works for fair use purposes. Nevertheless, the court did not rule that the image in *Charlie Company* was *not* transformative, and “express[ed] no view”¹⁰² as to whether it was entitled to a fair use defense. The *Cariou* case ultimately settled, so there is no further clarity on the application of fair use to these facts. The case is considered the “*high-water mark* of [the] court’s recognition of transformative works.”¹⁰³

Indeed, a few years later, the same Richard Prince was sued by photographer Donald Graham for copyright infringement for appropriating a photograph of a Rastafarian smoking a marijuana cigarette (Figure 16).¹⁰⁴ Prince encountered Graham’s photograph as reposted on the social media site Instagram and then commented in apparent gibberish in response to the reposter’s comment. Prince took a screenshot of the photograph with both posts and arranged for the screenshot to be printed as a final piece of artwork. In the *Graham* case, the Federal District Court for the Southern District of New York denied Prince’s motion to dismiss the complaint based on fair use, finding that at that stage of the litigation, absent a full record developed through discovery, all of the fair use factors militated against Prince.



Figure 16. Donald Graham, *Rastafarian Smoking a Joint*, 1996, and Richard Prince, *Untitled*, 2014.¹⁰⁵

Specifically, the court found that because Prince has reproduced Graham’s portrait without significant aesthetic alterations, the work was not transformative as a matter of law. While the court also found that Prince’s work was made with a distinctly

102. *Cariou*, 714 F.3d at 713.

103. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 110 (2d Cir. 2021) (emphasis added) (citation omitted).

104. See *Graham v. Prince*, 265 F. Supp. 3d 366 (S.D.N.Y. 2017).

105. Donald Graham, *Rastafarian Smoking a Joint* (photograph) and Richard Prince, *Untitled* (photograph), in *Graham*, 265 F. Supp. 3d at 373.

commercial purpose; Graham's original photograph was expressive and creative in nature; Prince used nearly the entirety of Graham's photograph; and the complaint adequately alleged usurpation of the primary market at issue, it was apparent from the opinion that the issue of transformativeness, or the ostensible lack thereof, was the dominant factor in this decision as well. The Graham case also settled prior to a final disposition, so the uncertainty remains with respect to the application of the right of fair use in art appropriation. Even worse, recently another panel of the Second Circuit has further muddled its analysis in *Cariou* when it reversed a decision of the Federal District Court for the Southern District of New York that granted summary judgment to the Andy Warhol Foundation on fair use grounds in a similar copyright infringement case.¹⁰⁶ Based in part on the *Cariou* precedent, the lower court found for the Andy Warhol Foundation's summary assertion of the fair use defense for his recognizable work depicting the rockstar Prince, which he derived from a photograph taken by a third party.¹⁰⁷ The Second Circuit nevertheless reversed that determination in a surprising—and perhaps inconsistent—decision in which it directly sought to mitigate the criticism of its *Cariou* decision.¹⁰⁸

It is difficult to see how Andy Warhol's rendition of a photo of the rockstar Prince was not considered fair use (Figure 17), but Richard Prince's appropriation of the photograph in *Back to the Garden* was found to be fair use as a matter of law. Moreover, the decision against the Andy Warhol Foundation is entirely irreconcilable with the Seventh Circuit's finding that Sconnie Nation's similar silk screen appropriation of a comparable photograph of Paul Soglin (Figure 18) was fair use.¹⁰⁹

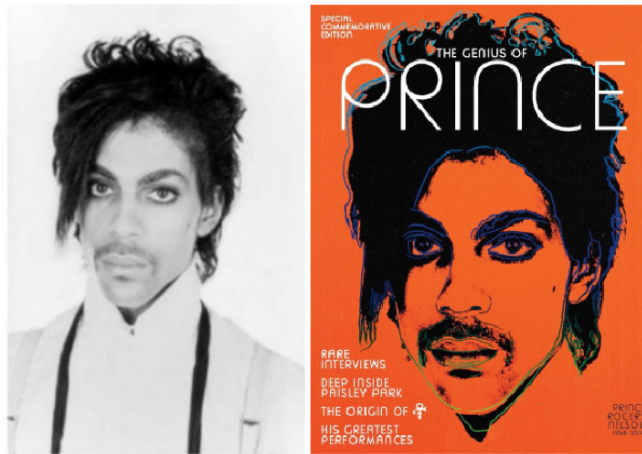


Figure 17. Lynn Goldsmith, *Prince*, 1981,
and Andy Warhol, rendition of *Prince*, 2016.¹¹⁰

106. *Warhol*, 992 F.3d at 110.

107. *Id.*

108. *Id.* at 110 (citation omitted) (see Figure 17).

109. *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 760 (7th Cir. 2014).

110. Lynn Goldsmith, Prince (photograph) and Andy Warhol, Prince (illustration), in *Warhol*, 992 F.3d at 106.

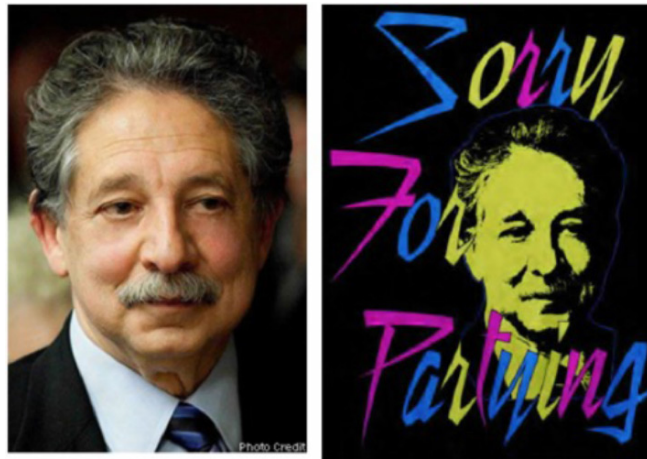


Figure 18. Michael Kienitz, mayor Paul Soglin, 2011, and Sconnie Nation, *Sorry for Partying* t-shirt, 2012.¹¹¹

Upon examining the original and appropriated images of both Prince and Soglin, it is doubtful that a “reasonable observer” would be able to discern which secondary work was more transformative; an ordinary “reasonable observer” may not even be able to discern which silk screen was a Warhol. Justice Frank Easterbrook of the Seventh Circuit explained that Sconnie Nation made fair use of its appropriated photograph, noting that its colors and shading are different, its proportion has changed, and the silk-screening changed the effect of the lighting, among other things.¹¹² And, naturally, an outline of a face is not copyrightable. Yet, notwithstanding Justice Easterbrook’s sound reasoning in support of fair use in a very similar case, and further notwithstanding its own precedent in *Cariou*, the Second Circuit overturned the lower court’s finding that Warhol had fairly used the photograph at issue.

As such, the *Andy Warhol Foundation* case added to the uncertainty of the application of fair use to art appropriation. The Second Circuit then aggravated the uncertainty even further by uncharacteristically ordering the parties in the *Andy Warhol Foundation* case to rebrief the case in light of the United States Supreme Court’s decision on fair use in *Google v. Oracle*,¹¹³ which was published within days of its *Andy Warhol Foundation* decision. In its petition for rehearing, the Andy Warhol Foundation emphasized that the Supreme Court found Google’s “line-for-line” copying of Oracle’s software code as transformative fair use when building its Android operating system,

111. Michael Kienitz, Mayor Paul Soglin (photograph) and Sconnie Nation, *Sorry for Partying* (illustration), in *From the Field: Second Circuit Fair Use Decision Sets Up Circuit Split*, MAURIEL KAPOUYTIAN WOODS (Apr. 14, 2021), <https://www.mkwllp.com/from-the-field/second-circuit-fair-use-decision-sets-up-circuit-split> [<https://web.archive.org/web/20221029063247/https://www.mkwllp.com/from-the-field/second-circuit-fair-use-decision-sets-up-circuit-split>].

112. *Kienitz*, 766 F.3d at 759.

113. *Google LLC v. Oracle Am., Inc.*, 576 U.S. 1071 (2021).

and further expressed a strong public policy reason for supporting innovative works.¹¹⁴ According to the Andy Warhol Foundation, the Supreme Court in *Google* even gave a “nod” to Warhol himself in its opinion with a reference to his famous Campbell’s soup can to explain how the fair use principle should apply liberally in “artistic” cases: “[a]n artistic painting [could] fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism.”¹¹⁵ In rejecting the Andy Warhol Foundation’s argument, the Second Circuit panel largely repeated its original opinion,¹¹⁶ and in another twist of uncertainty, shortly thereafter the United States Supreme Court granted the Andy Warhol Foundation’s petition for certiorari. It is unclear what the Supreme Court hopes to resolve pursuant to its grant of certiorari. Ideally, the Supreme Court will take the opportunity to add clarity to this area of law and honor the constitutional directive, and its own recent policy imperative, to promote artistic inspiration. A decision is expected by July 2023.

IV. FAIR USE AND HIGH FASHION

A. APPROPRIATIVE HIGH FASHION IS INTRINSICALLY FAIR USE

Fashion is art, and fashion artists should be entitled to the same right to fair use afforded to sculptors and graphic artists such as Richard Prince in the *Cariou* case and Jeff Koons in his own case wherein, much like a fashion artist might, he appropriated a depiction of legs, feet, and sandals from a photograph.¹¹⁷ As with any art form, fashion necessarily borrows from other artists,¹¹⁸ and when it does, the creations, as we have seen, are extraordinary. In fact, the appropriative creations of high fashion are so inherently and uniquely transformative that courts should adopt a more liberal interpretation of fashion artists’ right to fair use.

When applying the legal framework of the fair use doctrine to the fashion industry, it is evident that most appropriative high fashion works satisfy the *Cariou* “high-water mark” to sustain a copyright defense. Indeed, upon balancing the four fair use factors, most fashion creations exceed the *Cariou* standard. As courts have advised that the first and last factors of the fair use analysis are primary and have oftentimes been controlling, most works of high fashion would be able to defend against a claim of copyright infringement under this framework.

114. Petition For Panel Rehearing and Rehearing En Banc, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 110 (2d Cir. 2021) (No. 19-2420).

115. *Id.* (citing *Google*) (internal quotations omitted).

116. Perhaps foreshadowing, Judge Dennis Jacobs wrote in a concurring opinion that “a sound holding may suggest an unsound result in related contexts.”

117. See also *Blanch v. Koons*, 467 F.3d 244, 259 (2006) (affirming summary judgment in favor of artist Jeff Koons on the grounds of fair use).

118. Even the Second Circuit panel in the *Andy Warhol Foundation* case recognized that “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, and use much which was well known and used before.” *Warhol*, 992 F.3d at 109 (citation omitted).

1. Fashion Creations Are Inherently Transformative

When appropriating other works, high fashion almost always changes the composition, presentation, scale, media, character, purpose, and meaning of the original work. Fashion presents previously existing works differently, even when appropriating entire images from another artwork. The appearance, use, and media are all demonstrably different.¹¹⁹ Among other things, in textile creations, appropriated images are flattened, cut, and arranged differently or in a different context. Fashion creations “move,” as the art is placed on, and repositions with, the human body. The expression is transformed as fashion travels with the human body. When incorporated into fashion, art takes on an entirely new meaning. Its purpose and *raison d’être* are different. Even when fashion arrogates an entire artist image, it is essentially absorbed like a “Cheshire Cat, [where] only the smile remains.”¹²⁰ Fashion, therefore, is necessarily transformative.

Take, for example, a piece from Raf Simons’ Spring 2017 collection (Figure 19). Simons has distinctly appropriated Robert Mapplethorpe’s entire photograph of Alice Neel. Yet, Simons’ appropriation likely satisfies the heavily weighted transformative element of the first factor in favor of the overall right to fair use. Like most appropriative high fashion, Simons’ piece clearly transforms the original work. Simons explains that in his work, he creates a personal connection with the original works, and makes his creations in relation to how the original artist framed the subjects.¹²¹ The original photograph in Simons’ piece was taken of pioneering figurative painter Alice Neel at the age of eighty-four, just a week before she succumbed to cancer. With her eyes closed, mouth open, and a halo of white hair, the photograph has been viewed as an angelic release of a final breath.¹²²

119. *Accord Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992) (finding that copying art in a different medium is a key determinant in fair use analysis unless the new work otherwise affects the market for the original art).

120. *Kienitz*, 766 F.3d at 759.

121. *Id.*

122. *Robert Mapplethorpe: Alice Neel*, NAT’L GALLERIES SCOT., <https://www.nationalgalleries.org/art-and-artists/90868/alice-neel> [<https://perma.cc/7U36-BDSD>] [<https://web.archive.org/web/20221102201703/https://www.nationalgalleries.org/art-and-artists/90868/alice-neel>] (last visited Nov. 2, 2022).’



Figure 19. Robert Mapplethorpe, *Alice Neel*, 1984,¹²³
and Raf Simons', *Alice Neel* shirt, Spring 2017.¹²⁴

Simons' work transforms the photograph into something arguably darker. Simons puts the original work off-center on a textile canvas, where the photograph hangs on the human body on the left side just below the heart. The photograph is placed in front of stripes that have the contrasting appearance of placing the human body behind jail bars. The arms of the young man wearing the shirt are overtaken by cuffs, and the front placket reaches like a noose around the model's neck. Although at first glance one might presume Simons did a cheap cut-and-paste copy of Mapplethorpe's photograph onto a shirt, the "transformativeness" of the piece becomes clear once one views the entire canvas. As such, Simons' use of the appropriated photograph on his textile is just as much fair use as Richard Prince's appropriation of the photograph in his work *Back in the Garden*.

As with Raf Simons, most high fashion is highly transformative, and as with other more traditionally known appropriation artists' work, appropriative fashion is defensible fair use as such. By way of further example, in the first piece of Figure 20 below, Versace transformed images appropriated from the work of another appropriation artist, Andy Warhol. In the second piece in Figure 20 below, Versace appropriated images of Vogue Magazine covers in creating a luxury dress. Although Versace's transformations may not be as penetrating as Raf Simons', there is no doubt that, like all high fashion, the Versace creations transform and present a different experience than the original appropriated works. As with other examples of appropriation fashion, Versace's work transforms the composition, presentation, scale,

123. Robert Mapplethorpe, *Alice Neel* (photograph), in *id.*

124. Vogue, photograph of Alice Neel Shirt on runway, in Annuziata Santelli, *Appropriation Art in Fashion*, PETRIE, <http://www.petrieinventory.com/appropriation-of-art-in-fashion> [https://perma.cc/ZN7V-TRRV] [https://web.archive.org/web/20221102202042/http://www.petrieinventory.com/appropriation-of-art-in-fashion] (last visited Nov. 2, 2022).

purpose, and media. Both Versace creations have separate messages from the original works, and from each other.



Figure 20. Gianni Versace, *Warhol Marilyn gown*, 1991,¹²⁵ and Versace *Vogue* magazine print, Spring 2018.¹²⁶

Pursuant to the first—and most heavily weighted—factor of the fair use inquiry, it is evident that high fashion “supersedes the objects” of the original works it appropriates. This transformative character enriches society, and this outweighs any reservations associated with its commercial use under this factor. While the first fair use factor gives preference to art that is used for educational or other nonprofit purposes, the preference, nevertheless, recognizes the overall societal value of even commercialized art. The preference is therefore applied cautiously and is typically offset by a finding that a work is transformative. Fashion patently alters its appropriations by infusing new expression, meaning, and messages, and under this analysis, fairly uses the work from which it borrows.

125. Gianni Versace, *Warhol Marilyn Gown* (photograph), in Polyzoidou, *supra* note 32. Versace copied the images from Andy Warhol's 1967 work *Marilyn Monroe*. You can also see a portrait of James Dean in the dress. Donatella Versace recently transformed Gianni Versace's transformation of the Warhol art to commemorate the twentieth anniversary of Gianni's death, found in Shloka Shetty, *Donatella's Tribute to Gianni—Nostalgic or Du Jour?*, STICH (May 11, 2018), <http://www.stitchfashion.com/home//donatellas-tribute-to-gianni-nostalgic-or-du-jour> [<https://perma.cc/RSQ2-5GSV>] [<https://web.archive.org/web/20221102202356/http://www.stitchfashion.com/home//donatellas-tribute-to-gianni-nostalgic-or-du-jour>].

126. Alessandro Garofalo, *Versace Vogue Magazine Print* (photograph), in Lianna Satenstein, *VOGUE* (Nov. 16, 2017), <https://www.vogue.com/article/jlo-versace-vogue-dress-dubai> [<https://perma.cc/L7FH-FRLM>] [<https://web.archive.org/web/20221102202649/https://www.vogue.com/article/jlo-versace-vogue-dress-dubai>] (citing Indigital.tv).

2. Fashion Does Not Impact the Market for Other Art

Upon consideration of the final primary factor of fair use, it is equally clear that fashion occupies a different market from the original work it appropriates. This fourth factor weighs in favor of fair use when an appropriation “does not substitute for the original and serves a different market function,”¹²⁷ and here, a Versace dress does not substitute for one or more issues of *Vogue Magazine*. The market for fashion and graphic art do not generally overlap, and certainly fashion does not overcome it. Indeed, *high* fashion and graphic art occupy exclusively different markets, and even low-brow fashion such as “a t-shirt or a tank top is no substitute for [a] photograph.”¹²⁸

It is equally humorous to believe that a fashion artist would usurp the derivative market for an original work. This is especially true for graphic art, where the argument becomes purely speculative.¹²⁹ To this end, an original graphic artist must show by a preponderance of the evidence that they had an interest in occupying a derivative market that the fashion piece usurped.¹³⁰ They must further demonstrate that the original artistry had a “meaningful likelihood” of personal gain that would be denied because of the fashion creation.¹³¹ The original artist must produce evidence to prove these arguments, such as proof that they engaged in actual marketing in the fashion market, or that the fashion creation caused the graphic artist to lose sales, interfered with its marketability, or somehow fulfilled demand for the original graphic work.¹³²

For example, even though Simons’ luxury shirt appropriates the entire Mapplethorpe image, it cannot be said to usurp, or even occupy, the market for Mapplethorpe’s photography. Namely, Simons’ target audience is purchasers of men’s shirts, which is not the same as purchasers of Robert Mapplethorpe photographs. Further, there is no “meaningful likelihood” that Mapplethorpe had an interest in occupying the market niche of men’s high fashion.¹³³ It is unlikely that Mapplethorpe had meaningfully contemplated entering the derivative fashion market in the first instance, and even less likely that he had a reasonable expectation of personal gain from entering the derivative fashion market. Simons’ luxury shirt would not divert sales from derivative images of *Alice Neel*, just like Yves St. Laurent’s dress would not divert sales from images derived from the works of Piet Mondrian. Significantly, high fashion, such as creations made by Yves St. Laurent, is so distinct that it would be unlikely to impact genuinely any derivative market for something else. Ultimately, however, regardless of the effect the fashion creation might have on the potential market for an original work, courts advise that when the appropriative art is transformative, that characteristic generally serves to outweigh all of the other elements of the fair use test, including this fourth factor, and militates in favor of the secondary fashion artist.

127. Eckhause, *supra* note 80.

128. *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 759 (7th Cir. 2014).

129. *NIMMER*, *supra* note 62, § 13.05.

130. *Id.*

131. *Assn. of Am. Medical Colleges v. Cuomo*, 928 F.2d 519, 525 (2d Cir.), *cert. dismissed*, 502 U.S. 862 (1991).

132. *Id.*

133. *See generally* *NIMMER*, *supra* note 62, § 13.05.

3. The Transformative Character of Fashion Outweighs the Other Factors of the Fair Use Analysis

Although much of the law on fair use is muddled, most courts agree that the first and last prongs of the fair use test generally control the analysis of whether an appropriation is defensible as such. There is little dispute that when a secondary work is transformative under the first prong of the fair use analysis, that characteristic outweighs the other considerations. Specifically, when appropriative work is as transformative in purpose and character as fashion, courts will likely pardon its commercial nature, which is also considered under the first prong of the fair use analysis. Much appropriation art is commercial in nature, and courts seem to routinely disregard this part of the fair use analysis.¹³⁴

In the same vein, when appropriative work is transformative, courts will find it less significant that an original work was unpublished and expressive, which would ordinarily merit more copyright protection under the second prong of the fair use analysis. In fact, the Second Circuit has rationalized that this factor “may be of limited usefulness” when a work of art has been used for a transformative purpose, as is inherent to fashion.¹³⁵

The only other fair use factor for consideration is the third prong whereby courts consider how much of the original work an appropriation artist uses. While courts will assess the secondary artist’s quantitative and qualitative borrowing of the original work, this factor melts into the transformativeness analysis. As in Prince’s *Back in the Garden*, courts have found as fair use the appropriation of entire unaltered images.¹³⁶ The extent of permissible copying varies with the purpose of the use under this analysis, and courts have liberally permitted appropriation under this factor when the use was transformative. Upon consideration of appropriative fashion, which is intrinsically transformative, it is hard to imagine that this fair use factor would control the analysis.

Thus, upon consideration of the primary factors of the fair use doctrine, appropriation by high fashion is uniquely transformative and is therefore almost always defensible. The transformativeness element of the first fair use factor usually outweighs the other factors for consideration of fair use.¹³⁷ Even where courts would give weight to the fourth fair use factor—the effect of the fashion creation on the market for the original work—the fashion industry’s appropriation will usually remain defensible fair use because it is unlikely that a fashion creation would usurp a market for another type of art. Fashion is not substitute for graphic or other forms of art. Accordingly, under the heavily-weighted first and fourth prongs of the fair use test, fashion is likely to be especially defensible against a copyright claim. It is intrinsically “the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”¹³⁸

134. See, e.g., NIMMER, *supra* note 62, § 13.05.

135. *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (citation omitted).

136. See, e.g., *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 759 (7th Cir. 2014).

137. See *Cariou*, 714 F.3d at 706.

138. NIMMER, *supra* note 62, § 13.05 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

B. TOWARD LEGAL CLARITY

The legal landscape governing appropriation art lacks perspicuity and consistency and threatens to chill some extraordinary works of art arising out of the fashion industry. While the *Cariou* case ostensibly establishes the high-water mark delimiting fair appropriation, it is difficult to discern the line the court drew to divide Richard Prince's seemingly comparable works into those that were entitled to the fair use defense as a matter of law and those works that were not entitled to the fair use defense.

Further, such recent decisions that prohibitively construe artistic fair use like the *Andy Warhol Foundation* and *Graham* cases are hard to reconcile with other recent decisions like *Cariou* and *Kienitz* that have nearly identical facts yet liberally construe fair use. Indeed, returning to the example discussed *supra*, Simons' appropriation of the entire photo of Alice Neel would probably not be considered fair use under the *Graham* decision but might be fair use according to the *Kienitz* decision. Similarly, Versace's appropriation of the Marilyn Monroe images in his famous dress would likely not be entitled to a fair use defense according to the court in the *Andy Warhol Foundation* case. This, it seems, creates a public policy paradox where Andy Warhol would disagree with the results of each such case, both as subject of the appropriation in the first instance and as the creator of the appropriation in the latter instance.¹³⁹

Richard Prince's settlement of the remainder of his legal dispute with Patrick Cariou and Donald Graham preempted any solidification of a hard boundary on art appropriation, which has been further complicated by the Supreme Court's grant of certiorari in the *Andy Warhol* case. It appears, then, that the line of defense drawn in *Cariou* is at best a faded tide line rather than a clear high-water mark of the fair use doctrine.

Nimmer is right when he explains that neither the decisions on fair use, nor the synthesis of factors set forth in Section 107 of the Copyright Act of 1976, "offer[] any firm guide as to when, from 'a consideration of all the evidence,' the defense of fair use *should* be invoked."¹⁴⁰ Courts themselves have recognized that the four factors of the doctrine "def[y] definition,"¹⁴¹ may "confuse rather than aid analysis,"¹⁴² and are a "comedy of miscommunication . . . [as] a haphazard assortment of nonfunctional fragments, [with the] core elements forgotten."¹⁴³ When taken alone, "each of the factors is defined in only the most general terms, so that courts are left with complete discretion in determining whether any given factor is present in any particular case."¹⁴⁴ According to Nimmer, the most precise guide to fair use is likely found in "the Golden Rule: 'Take not from others to such an extent and in such a manner that you would be resentful if they so took from you.'"¹⁴⁵ This position was reinforced by Judge Kevin

139. Warhol probably would have appreciated the Marilyn appropriation. Cf. Deposition of Defendant Richard Prince, 117–123 (Oct. 6, 2009) (Richard Prince testified that, as an appropriation artist himself, "it would not bother me in the slightest [sic] for someone to appropriate my work.").

140. NIMMER, *supra* note 62, § 13.05.

141. *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

142. *Educ. Testing Servs. v. Stanley H. Kaplan, Educ. Ctr., Ltd.*, 965 F. Supp. 731, 736 (D. Md. 1997).

143. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1285 (11th Cir. 2014) (citation omitted).

144. NIMMER, *supra* note 62, § 13.05.

145. *Id.*

Thomas Duffy's opening sentence when finding copyright infringement in *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*: "Thou shalt not steal."¹⁴⁶

It is because of this discretion, aggravated by legal ambiguity, that the current fair use test has been deployed "at a great price to progress in the arts."¹⁴⁷ The current doctrine of fair use, as recently limited by the *Andy Warhol Foundation* and *Graham* cases, would deprive society of creations made by Andy Warhol, Richard Prince, Raf Simons, Versace, and other talented artists. This deprivation is evidenced by the ruling of the United States District Court for the Southern District of New York ordering Richard Prince to "within ten days . . . deliver up [his art] for impounding, destruction, or other disposition as Plaintiff determines."¹⁴⁸ Not only was the court's order shocking, but it is also in derogation of the express purpose of Article I of the United States Constitution to "promote the Progress of Science and useful Arts."¹⁴⁹ Giving a plaintiff the choice to destroy Richard Prince's artwork is injudicious and directly contrary to the very reasoning behind the fair use doctrine's existence, which is "to stimulate activity and progress in the art for the intellectual enrichment of the public."¹⁵⁰

Even one of the Justices who found against Andy Warhol in the *Andy Warhol Foundation* case recognized this issue. In that case, Justice Dennis Jacobs expressed reservations about the chilling effect such prohibitive decisions would have on art:

The issue, however, still looms, and our holding may alarm or alert possessors of other artistic works. Warhol's works are among many pieces that incorporate, appropriate, or borrow from protected material. Risk of a copyright suit or uncertainty about an artwork's status can inhibit the creativity that is a goal of copyright.¹⁵¹

It is regrettable that such muddled and expansive judicial interpretations of copyright protections may ultimately "stifle the very creativity which that law is designed to foster."¹⁵²

As it stands, appropriative artists will rarely escape liability, barring use of only works already in the public domain or obtaining licensing for the original work's copyright.¹⁵³ It is entirely inconsistent with the United States Constitution to create this type of system whereby artists are required to prenegotiate a license to create a

146. 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (citing the Bible, the court found that the defendants also violated the Seventh Commandment). Note that Judge Leval has cautioned against examining morality in fair use cases, indicating it is a "false lead." Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1128 (1990).

147. Tehranian, *supra* note 58, at 504.

148. *Cariou v. Prince*, 784 F. Supp. 2d 337, 355 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

149. U.S. CONST. art. I, § 8, cl. 8.

150. *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (citation omitted).

151. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 127 (2d Cir. 2021) (Jacobs, J., concurring).

152. *Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Co.*, 621 F.2d 57, 60 (2d Cir. 1980).

153. Tehranian, *supra* note 58, at 499.

work of art. This system threatens to create “a class of uses that would not be possible if users always had to negotiate with copyright proprietors.”¹⁵⁴

Courts should take the present opportunity prompted by the Supreme Court’s grant of certiorari in the Andy Warhol Foundation case to clarify the boundary of fair use. In keeping with the purpose of Article I of the United States Constitution, courts should not retreat from, but rather, should advance, the “high-water mark” established in *Cariou* that recognizes that transformativeness, broadly defined, must guide the application of fair use. To this end, many courts have conceded that where a secondary work is transformative, all other fair use factors are insignificant. In fact, an empirical study on fair use opinions demonstrated that where a commercial use of a creative published work was found to be transformative, an appropriative defendant’s chance of successfully asserting a fair use defense would increase to 94.9%.¹⁵⁵ Courts, therefore, ought to abandon the pretense of relying on the other factors of fair use analysis when the secondary work is transformative.¹⁵⁶

Transformativeness is really the key to fair use. Indeed, if a work is transformed, it is a novel creation that adds new value to humanity. It is for this reason that we can see how the new creation does not belong to the original artist who ought not to have rights in it. As confirmed by Judge Pierre Leval, “the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative . . . [If] the secondary use adds value to the original . . . this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”¹⁵⁷ While Judge Leval would not abandon the fourth factor of the fair use consideration,¹⁵⁸ he did contextualize that ultimately, the goal of the fair use doctrine is to balance “the social benefit of a transformative secondary use against injury to the incentives of authorship.”¹⁵⁹ Transformativeness thus outweighs all other considerations of the right to fair use.

As the only true test of fair use, transformativeness should be interpreted liberally when applied to the fashion industry. As discussed *supra*, fashion is uniquely transformative art. Among other things, fashion art inherently transforms the

154. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014).

155. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 606 (2008) (parenthetical omitted).

156. Nimmer and others may recommend dispensation of the fair use factors altogether, but generally incorporate the idea of transformativeness into their own solutions. See NIMMER, *supra* note 62 at 4. See also Richard Dannay, *Factorless Fair Use? Was Melville Nimmer Rights?*, 60 J. COPR. SOC’Y 127 (2013). Dannay was a past president of the Copyright Society of the U.S.A. and believed that “the decision on fair use really turns on this balancing test: Mindful of the purposes of copyright law and the public interest, is there sufficient justification for the use to outweigh the copyright owner’s interests in prohibiting the use or at least in being compensated for it, if an injunction is not warranted.” *Id.* at 144.

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

158. See generally Pierre Leval, *Campbell as Fair Use Blueprint*, 90 WASH. L. REV. 597 (2015).

159. Leval, *supra* note 157, at 1105. In his concurrence in *Andy Warhol Foundation*, Judge Richard Sullivan explains that he would render transformativeness a subservient factor to the market harm caused by infringement. Notably, however, the majority did not agree with that sentiment. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 125–27 (S.D.N.Y. 2011) (Sullivan, J., concurring), *rev’d in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

presentation and purpose of the original work. Given the characteristics of appropriative fashion, its fair use is acutely defensible.

Further, as a distinctive art form, fashion demands an “industry-specific” resolution,¹⁶⁰ which necessitates an auspicious application of the right to fair use. Many industries have developed and codified their own norms of fair use with the goal of guiding judicial determinations.¹⁶¹ Fashion should adopt its own generous code of fair use, stressing its intrinsically transformative character. Otherwise, the increasingly prohibitive judicial interpretation of fair use in the arts will unduly restrain creativity in fashion.

Importantly, an extension of the boundary line of the fair use in such a way as to include the aforementioned works of Warhol, Prince, Simons, and Versace, would not leave victims of true infringement without a remedy. Even with an extended boundary, and a liberal application of transformativeness to the fashion industry, liability still remains where a secondary work is not transformative and is simply a copy of the original work. Extending the boundary would not affect the rights of artists such as Dapper Dan to protect their original work from manifest copying, yet it would still preserve Dapper Dan’s right to appropriate the art of Raphael (Figure 21). “Fashion bots” will still be infringement.¹⁶² By reconsidering the *Andy Warhol Foundation* case, such infringements would not be defensible fair use, regardless of an expansion or liberal interpretation of the doctrine.

160. See NIMMER, *supra* note 62, § 13.05.

161. See *id.* at 143, 197, 202 (referencing documentary filmmakers’ statement of best practice, and other industry-specific codes of best practice in fair use, such as for poetry, dance, and software).

162. Fashion bots are computer programs written by t-shirt creators to identify tweets of artistic images that have comments in which people indicate they would buy clothing with the image in the tweet. Proprietors of fashion bots then manufacture and sell clothing with the identical image and sentiment. *Cf.* @robschamberger, TWITTER (Dec. 1. 2019, 9:48 PM), <https://twitter.com/robschamberger/status/1201256862068494337> [https://perma.cc/X639-TRDC] [https://web.archive.org/web/20230317075400/https://twitter.com/robschamberger/status/1201256862068494337]



Figure 21. Raphael, *Portrait of Lorenzo di Medici, Duke of Urbino*, 1516,¹⁶³
and Dapper Dan jacket for Olympic Gold medalist Diane Dixon, 1989,
and Alessandro Michele's Gucci jacket, 2018.¹⁶⁴

It is hard to justify the current legal framework governing fair use where one court orders artists to destroy their own work, and another finds that a Warhol silkscreen is a substitute for a magazine photograph. Such strict and inconsistent applications of fair use will certainly hamper some of the most exquisite creations by appropriation artists, especially fashion artists who are uniquely transformative. The doctrine of fair use is intended, and necessary, “to stimulate activity and progress in the art” pursuant to the directive of the United States Constitution.¹⁶⁵ Fair use is a fundamental right of expression belonging to an appropriative artist; whereas, in contrast, copyright is a privilege granted by a legislative act granting limited protections to original creators of artworks. The current legal framework of “excessively broad protection would stifle, rather than advance, the law’s objective.”¹⁶⁶ By rendering appropriate artists’ works indefensible as such, courts will inhibit artistic creations, including extraordinarily inspired fashion works presented herein. Society would certainly “be better served by allowing the use than by preventing it,” which is the ultimate test of fair use.¹⁶⁷

163. Raphael, *Portrait of Lorenzo di Medici, Duke of Urbino* (painting), in Anna Battista, *The Fashion Renaissance That May Pose Some Legal Issues: Gucci Resort 2018*, IRENEBRINATION (June 6, 2017, 7:20 AM), https://irenebrination.typepad.com/irenebrination_notes_on_a/2017/06/gucci-resort-2018.html [https://perma.cc/AM57-L3HX] [https://web.archive.org/web/20210926114629/http://irenebrination.typepad.com:80/irenebrination_notes_on_a/2017/06/gucci-resort-2018.html].

164. Photograph of Dapper Dan’s Jacket on Diane Dixon and Alessandro Michele’s Gucci Jacket, in *id.* Dapper Dan’s jacket is fair use of Raphael’s art; Gucci’s jacket is not fair use of Dapper Dan’s art.

165. *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (internal quotation marks omitted).

166. *Id.* (internal quotation marks omitted).

167. *Id.* (internal quotation marks omitted).