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# COMMENT

## POSTMODERN PIRACY: HOW COPYRIGHT LAW CONSTRAINS CONTEMPORARY ART

*"If I was greedy, I would have copied a Picasso."*<sup>1</sup>

### I. INTRODUCTION

For many styles of contemporary art, United States copyright law does not provide adequate protection. Rather, the Copyright Act of 1976, coupled with judicial interpretations of that statute, has inadvertently created an atmosphere in which several forms of contemporary art are endangered. In 1992, the Second Circuit decided *Rogers v. Koons*,<sup>2</sup> in which sculptor Jeff Koons was held to have infringed a photograph copyrighted by Art Rogers. This opinion, the first to consider the art of appropriation, may serve as the blueprint from which a significant movement of postmodern art is destroyed.

Jeff Koons has been called everything from a "kitsch artist"<sup>3</sup> to a "master of schlock."<sup>4</sup> His unique position in the contemporary art marketplace draws both praise and criticism: "His supporters depict him as a Wunderkind whose stark postmodernism descends from the best in American and European art. His critics call him market-driven, among other things."<sup>5</sup> Koons, a former commodities broker on Wall Street,<sup>6</sup> creates works of art that are driven by financial motives. He charges outlandish prices for his works and easily sells them to willing collectors.<sup>7</sup>

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1. Jeff Koons, quoted in Ronald Sullivan, *Appeals Court Rules Artist Pirated Picture of Puppies*, N.Y. TIMES, Apr. 3, 1992, at B3.

2. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), cert. denied sub. nom. *Koons v. Rogers*, 113 S.Ct. 365 (1992).

3. Jeff Bater, *People*, UNITED PRESS INTERNATIONAL, Apr. 3, 1992.

4. Adrian Dannat, *Art / The 'Mine' Field*, THE INDEPENDENT, Mar. 23, 1992, at 20.

5. Constance L. Hays, *A Picture, a Sculpture and a Lawsuit*, N.Y. TIMES, Sept. 19, 1991, at B2.

6. Gail Appleson, *U.S. Court Calls Sculptor Koons a Pirate, Upholds Copyright Case*, THE REUTER LIBRARY REPORT, Apr. 2, 1992.

7. *Id.*

Arguably a descendant of the postmodern aesthetic developed by Marcel Duchamp,<sup>8</sup> Koons finds the practice of "appropriating" other works to be artistically valid.<sup>9</sup> Although Jeff Koons is a significant figure in the art world and his works are representative of a prominent form of artistic expression,<sup>10</sup> in copyright terms, Koons is an infringer.

This Article will examine how Koons' art exemplifies the tension between a prevalent artistic tradition and fundamental principles of copyright law. Part II briefly traces the development of postmodernism.<sup>11</sup> Part III analyzes the range of copyright protection extended to artistic works.<sup>12</sup> Part IV discusses the impact of *Rogers v. Koons* on postmodern expression,<sup>13</sup> with special emphasis on the fair use defense<sup>14</sup> and available remedies.<sup>15</sup> Part V looks to the future and examines some fronts on which artists may encounter restrictive copyright laws.<sup>16</sup>

## II. THE RISE OF POSTMODERN ART

Postmodern art has taken many forms in its rise to prominence, replacing the Modernist art of the early twentieth century. Postmodernism originally derived from the use of "found objects."<sup>17</sup> These objects, which could be man-made or natural, were altered minimally or left untouched by the artist and then offered as works of art.<sup>18</sup> Artists such as Jasper Johns and Andy Warhol used commercial items and institutional symbols in their paintings.<sup>19</sup> Minimalist sculptors use construction materials, usually wood, wire, or metal, and exhibit works with minor or no modifications.<sup>20</sup> Conceptual artists use language and popular phraseology in their installa-

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8. See *infra* notes 57-64 and accompanying text.

9. See *infra* notes 114-17 and accompanying text.

10. "[C]ritics say his work follows such artists as Marcel Duchamp and Andy Warhol, who took common, everyday objects and transformed them into art." Sullivan, *supra* note 1, at B3. As the Second Circuit noted, "[h]e is a controversial artist hailed by some as a 'modern Michelangelo' . . . ." *Rogers v. Koons*, 960 F.2d at 304.

11. See *infra* notes 17-117 and accompanying text.

12. See *infra* notes 118-34 and accompanying text.

13. See *infra* notes 135-287 and accompanying text.

14. See *infra* notes 213-63 and accompanying text.

15. See *infra* notes 264-87 and accompanying text.

16. See *infra* notes 288-343 and accompanying text.

17. See *infra* notes 27-64 and accompanying text.

18. See *infra* notes 27-64 and accompanying text.

19. See *infra* notes 46-64 and accompanying text.

20. See *infra* notes 65-66 and accompanying text.

tions.<sup>21</sup> "Earthworks" artists create works of art in nature, either by displacing a natural landscape or installing sculptural material in an outdoor context.<sup>22</sup> Performance artists combine elements of theater with more conventional forms of visual art to produce a hybrid of theater, choreography, and sculpture.<sup>23</sup> In New York, artists like Mark Kostabi<sup>24</sup> and Jeff Koons practice art as an outlet of capitalist society, where the monetary value of an artwork defines its aesthetic validity.<sup>25</sup> By incorporating financial values into art, Koons and his peers follow the postmodernist style. Ever since the time of Duchamp, postmodern artists have stressed the idea behind the art as the primary motivation for its creation, rather than championing the work itself.<sup>26</sup>

### A. *The Roots of Postmodernism*

Pablo Picasso is generally credited with opening the door to abstraction with his experiments in Cubism and his rejection of traditional figuration.<sup>27</sup> His paintings in the first two decades of the Twentieth Century were transitional works that defined the Modernist aesthetic while inadvertently setting the stage for an even bolder artistic message.<sup>28</sup>

Freed from the tyranny of *trompe l'oeil*<sup>29</sup> by Picasso's example, French artist Marcel Duchamp formulated a radical philosophy of art.<sup>30</sup> Duchamp's guiding principle was that art was whatever an artist proclaimed it to be.<sup>31</sup> By 1914, Duchamp had become "constantly obsessed with the question of what it is that 'makes' a work of art."<sup>32</sup> To this end, he produced his first "readymade" work, "Bottle Rack," which consisted of an

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21. See *infra* notes 65-70 and accompanying text.

22. See H.W. JANSON, *HISTORY OF ART* 742-43 (3d ed. 1986); *infra* notes 71-87 and accompanying text.

23. See *infra* notes 88-113 and accompanying text.

24. See Cathy Curtis, *O.C. Art; Kostabi Works on View in Fullerton; The Artist's Notoriety is Based Largely on Kostabi World, the Assembly Line Enterprise He Founded*, L.A. TIMES, Nov. 19, 1990, at F1.

25. See *infra* notes 114-17 and accompanying text.

26. Clement Greenberg, *Avant-Garde and Kitsch*, in POLLOCK AND AFTER: THE CRITICAL DEBATE 21 (Francis Frascina ed., 1985); see *infra* notes 27-56 and accompanying text.

27. JANSON, *supra* note 22, at 681.

28. JANSON, *supra* note 22, at 681.

29. "[A] style of painting in which objects are depicted with photographically realistic detail." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1265 (1990).

30. ROSALIND E. KRAUSS, *PASSAGES IN MODERN SCULPTURE* 72 (1989).

31. JANSON, *supra* note 22, at 693.

32. KRAUSS, *supra* note 30, at 72.

industrial bottle rack signed by Duchamp.<sup>33</sup> "The signed bottle rack . . . was transferred from the realm of ordinary objects into the realm of art by the mere fact of its having been inscribed by the artist."<sup>34</sup> Duchamp had created an original work of art by taking an object manufactured entirely by someone else and placing it into an artistic context.<sup>35</sup>

Duchamp's most influential work, "The Fountain" (1917), is a urinal turned sideways and signed "R. Mutt."<sup>36</sup> The urinal is a "found object"<sup>37</sup> appropriated by Duchamp and turned into art. "The Fountain" perhaps best exemplifies the roots of postmodernism: "The viewer has to realize that an act of transfer has occurred—an act in which the object has been transplanted from the ordinary world into the realm of art."<sup>38</sup> The main thrust of this art lies in the process of appropriation rather than in the creation of the work by the artist.<sup>39</sup> It is not necessary for the artist to have produced, from raw materials, the work presented as "art." Rather, any object can become a work of art by being incorporated into an artistic context.<sup>40</sup>

In 1939, the eminent art historian Clement Greenberg published an article that, for the first time, effectively defined the ideological underpinnings of the aesthetic conceived by Duchamp.<sup>41</sup> Greenberg's article legitimized the burgeoning movement away from the prevailing Modernist aesthetic, which took hold despite the best efforts of Duchamp to champion "readymade" works.<sup>42</sup> In Greenberg's analysis, a "found object," once incorporated into a work of art, is inseparable from the idea that motivated

33. KRAUSS, *supra* note 30, at 72.

34. KRAUSS, *supra* note 30, at 72.

35. KRAUSS, *supra* note 30, at 72.

36. KRAUSS, *supra* note 30, at 76.

37. A "found object" is any item an artist takes from a non-artistic context and incorporates into a "readymade" work of art. Examples include blocks of wood, wire, soup cans, and sheets of corrugated metal.

38. KRAUSS, *supra* note 30, at 77.

39. See JANSON, *supra* note 22, at 693.

40. KRAUSS, *supra* note 30, at 80.

41. Greenberg, *supra* note 26, at 23 (emphasis in original).

42. Greenberg argued:

It has been in search of the absolute that the avant-garde has arrived at 'abstract' or 'non-objective' art—and poetry, too. The avant-garde poet or artist tries in effect to imitate God by creating something valid solely on its own terms in the way nature itself is valid . . . something *given*, increate, independent of meanings, similars, or originals. Content is to be dissolved so completely into form that the work of art or literature cannot be reduced in whole or in part to anything not itself.

Greenberg, *supra* note 26, at 23 (emphasis in original).

the artist.<sup>43</sup> Therefore, any object, not just something created specifically as art, can have artistic value. Greenberg argued that a natural occurrence, such as a sunset, is "aesthetically valid," and can be captured by an artist who wishes to exploit its inherent artistic qualities.<sup>44</sup> As Duchamp showed, even a urinal has the same potential to become art; it only takes the artist's idea to transform the object into art.<sup>45</sup>

Although Picasso and his Modernist peers dominated artistic thought throughout the 1950s,<sup>46</sup> each new generation of artists experimented with postmodern styles.<sup>47</sup> In 1954, Jasper Johns<sup>48</sup> painted the first of a series of American flags.<sup>49</sup> Several of the paintings consisted solely of a single, complete flag.<sup>50</sup> Johns challenged the viewer to make a choice: is this thing a painting of a flag or is this thing itself a flag?<sup>51</sup> The subject matter, in effect, became part of the form of the art, and the idea that sparked the expression was inextricably linked to the look of the painting. Although works like "Flag" are indisputably artistic, the message of the artist lies in the idea behind the painting, rather than in the painting itself. Unlike Duchamp, Johns created this series of paintings without using "readymade" materials.<sup>52</sup> His symbolism, however, is appropriated from traditional notions of the American flag. The very idea of this art is "found" by the artist, and Johns' social critique is strengthened by his use of the very symbols he is criticizing.

Eventually, the use of "found objects" and the redefinition of art as a philosophical statement became a driving force within the art world. Many artists, such as Claes Oldenburg, Roy Lichtenstein, and James Rosenquist,<sup>53</sup> began to experiment with commercial methods of expression. They copied styles used in advertisements, comic books, and other aspects of popular culture to create works whose ideological underpinnings

43. Greenberg, *supra* note 26, at 23.

44. Greenberg, *supra* note 26, at 23.

45. "[Duchamp's] point was that anything in the world is art if an artist makes a decision that it is . . . ." Amei Wallach, *Jenny Holzer's Sign Language*, *NEWSDAY*, Dec. 10, 1989, at 10.

46. See JANSON, *supra* note 22, at 681-89.

47. LUCY R. LIPPARD, *POP ART 9-11* (3rd ed. 1988).

48. Johns has been hailed as "perhaps the most important" pioneer of Pop Art. JANSON, *supra* note 22, at 718.

49. JANSON, *supra* note 22, at 718.

50. LIPPARD, *supra* note 47, at 70.

51. JANSON, *supra* note 22, at 718.

52. LIPPARD, *supra* note 47, at 70.

53. LIPPARD, *supra* note 47, at 69.

overwhelmed aesthetic concerns.<sup>54</sup> This style became known as Pop Art,<sup>55</sup> and Jasper Johns was hailed as the progenitor of the movement.<sup>56</sup>

### B. Warhol and Pop Art

Once the Pop Art philosophy took hold of the art world, several styles emerged to take advantage of the new freedom enjoyed by artists. The most celebrated practitioner of Pop Art was Andy Warhol, who became famous for his fetishistic portraits of Jackie Onassis, Elvis Presley, and Marilyn Monroe.<sup>57</sup> Early in his career, Warhol painted exact reproductions of Coca-Cola bottles and Campbell's Soup cans.<sup>58</sup> Museum exhibitions have been devoted to these works, and they have been cited as a significant portion of his oeuvre.<sup>59</sup> Warhol also used other people's photographs in his works; sometimes they were painted over or used as part of a collage with other items.<sup>60</sup> Occasionally, though, Warhol would mount such a photograph largely untouched and use it as his own art.<sup>61</sup> In 1965, Warhol exactly reproduced the second-place photograph in an amateur photography contest.<sup>62</sup> The photographer, a "housewife,"<sup>63</sup> threatened legal action for copyright infringement, but Warhol settled by giving her two original paintings.<sup>64</sup>

54. JANSON, *supra* note 22, at 717.

55. JANSON, *supra* note 22, at 717.

56. "Once it was realized that the question 'Is it a flag or is it a painting?' had no answer—was not important—the way was wide open to Pop Art." LIPPARD, *supra* note 47, at 70.

57. See LIPPARD, *supra* note 47, at 70.

58. LIPPARD, *supra* note 47, at 70.

59. LIPPARD, *supra* note 47, at 92. Warhol later created a series of soup cans using many different color schemes, thus abandoning the "natural" colors of the cans. "Warhol's early soup cans, for which he was initially notorious, were the 'natural' red-and-white colours . . . ." LIPPARD, *supra* note 47, at 92.

60. Martin Gayford, *The Arts: What's Yours is Mine*, SUNDAY TELEGRAPH (London), July 26, 1992, at 113.

61. Gayford, *supra* note 60.

62. Gayford, *supra* note 60.

63. Gayford, *supra* note 60.

64. Gayford, *supra* note 60. By preempting litigation, Warhol avoided the distinction of becoming the first postmodern infringer. That position remained vacant for 25 more years, until Jeff Koons was sued by Art Rogers. See *supra* note 2 and accompanying text.

### C. Conceptual Art

Several new styles of art and media have been incorporated into the postmodernist arsenal during the past thirty years. Conceptual art is a form where "the leap of imagination, not the execution, is art."<sup>65</sup> Minimalist sculpture has been characterized by Richard Wollheim as generating meaning "not from the artist but from a non-artistic source, like nature or the factory."<sup>66</sup> In each case, the materials were taken directly from the manufacturer and altered minimally or not at all; as in all other postmodern works, the transforming principle was that these objects were declared to be "art."

Conceptual art may use photographs of people, places, and other works of art as social criticism;<sup>67</sup> the aesthetic element of this art is secondary to the message. Hans Haacke uses traditional artistic settings to present a critique of contemporary society.<sup>68</sup> Barbara Kruger has created a series of jarring works in which purposefully trite sayings are superimposed over seemingly innocuous photographs.<sup>69</sup> In a similar vein, Jenny Holzer inscribes sayings on benches, billboards, and T-shirts, and emblazons them on electronic signs and scoreboards.<sup>70</sup> The defining element of

65. JANSON, *supra* note 22, at 722.

66. KRAUSS, *supra* note 30, at 198. Practitioners of minimalist sculpture have included Donald Judd and Robert Morris, who took pieces of plywood and exhibited them as sculpture, KRAUSS, *supra* note 30, at 244-49, 266-67, and Dan Flavin, who cast exact replicas of other sculptures using fluorescent light tubes. KRAUSS, *supra* note 30, at 245.

67. See Cathy Curtis, *Barbara Kruger: Snap, Crackle and Pop; Session at UC Irvine Showcases Artist's Flashes of Wit and Social, Political Commentary*, L.A. TIMES, Feb. 7, 1992, at F25; Christopher Knight, *Art; Commentary: A Monumental Burden; Chris Burden's Memorial, Etched With the Names of Real and Made-up Vietnamese Dead, Is an Unsentimental Reminder of the War*, L.A. TIMES, June 28, 1992, at F8; Wallach, *supra* note 45, at 10.

68. The Museum of Modern Art in New York hosted a Hans Haacke installation in 1970:

[A] stir was created by German expatriate artist Hans Haacke, whose contribution was a notorious site-specific piece called 'MOMA Poll.' Visitors to the show—a survey of new Conceptual art, titled 'Information'—were invited to cast ballots on the question: 'Would the fact that [New York] Governor [Nelson] Rockefeller had not denounced President Nixon's Indochina policy be a reason for you not to vote for him in November?'

Two to one, visitors answered 'yes'—even though the Rockefeller name [and money] had been synonymous with the Manhattan museum from the start.

Knight, *supra* note 67 (alterations in original).

69. Examples of Kruger's work includes a photograph of Howdy Doody, on which is written, "When I hear the word culture I take out my checkbook;" on a photograph of a little girl feeling a boy's biceps, "We don't need another hero;" and on a photograph of a child's toy frog, "Buy me. I'll change your life." Curtis, *supra* note 67.

70. Wallach, *supra* note 45, at 10.



conceptual art is its use of language as a visual tool; words and phrases are taken from their everyday context and placed into the world of visual art.

#### D. "Earthworks"

Conversely, some artists move their art into the natural world rather than transferring the world into an artistic space. In 1991, the artist Christo installed 3,100 umbrellas on hillsides in the Tejon Pass outside Los Angeles and in a river valley in Ibaraki, Japan.<sup>71</sup> In the past, Christo has wrapped islands off the coast of Florida in pink plastic<sup>72</sup> and erected a 25-mile fence extending from the Pacific Ocean through Marin County in Northern California.<sup>73</sup> Such exhibits, termed "Earthworks,"<sup>74</sup> have been a common form of artistic expression for thirty years.<sup>75</sup> For instance, in 1970, Robert Smithson moved his art outside;<sup>76</sup> his "Spiral Jetty" was "a heaped runway of basalt rock and dirt, fifteen feet wide, which corkscrews fifteen hundred feet" into the Great Salt Lake in Utah.<sup>77</sup> Earthworks artists often use public lands to stage their exhibitions, and the works are necessarily transitory, since the component dirt, rocks, and trees are thereafter left to suffer their natural fates. As in other modes of postmodern expression, the idea of creating art from nature transcends any claim over the physical work itself.

Extending copyright to "Earthworks" presents a unique set of problems that has yet to be examined by any court. In *Feist Publications, Inc. v. Rural Tel. Serv. Co.*,<sup>78</sup> the Supreme Court reiterated the basic principle that "copyright protection may extend only to those components

71. *Christo Umbrella Crushes Woman*, N.Y. TIMES, Oct. 28, 1991, at A14. Christo is Christo Javacheff, a conceptual artist "who specializes in wrapping things . . ." JANSON, *supra* note 22, at 743.

72. JANSON, *supra* note 22, at 743.

73. *Wrap Artist Christo Hopes to Cloak Reichstag*, CHI. TRIB., Jan. 7, 1993, at 4. Christo's current project, pending the permission of the German government, is to wrap the Reichstag, the German parliament building, "in a million square feet of silver-colored fabric." *Id.*

74. "Earthworks" is defined as a "genre of landscape sculpture" that uses natural objects, such as rocks and dirt, to create works of art that are blended into a natural landscape. Knight, *supra* note 75.

75. See JANSON, *supra* note 22, at 742; Christopher Knight, *Art Review; Bracing Look from Artist's Eye; Robert Smithson's 'Photo Works' at LACMA Assembles Objects Using Photos or Camera-Based Imagery. It's a View Firmly Fixed on Culture*, L.A. TIMES, Sept. 11, 1993, at F1.

76. KRAUSS, *supra* note 30, at 280-81.

77. KRAUSS, *supra* note 30, at 281.

78. 499 U.S. 340 (1991).

of a work that are original to the author."<sup>79</sup> Clearly, the dirt used by Robert Smithson,<sup>80</sup> that he collects from the sites on which he stages his art, cannot be protected under any intellectual property doctrines. Christo cannot stake an artistic claim over islands in Florida or a stretch of land in Marin County.<sup>81</sup> These elements are intrinsic to their art. Earthworks, by definition, incorporate natural space into art. Since the Copyright Act prohibits protection for "any idea, procedure, process . . . or discovery,"<sup>82</sup> other artists are clearly not prevented from wrapping islands elsewhere in pink plastic or dumping dirt down hillsides in other locales.

This is not to say that Earthworks are unprotectable per se. If an artist were to reproduce exactly Christo's ambitious project, "The Umbrellas," using the same land in California and Japan, several copyright issues would be implicated. Christo placed several thousand umbrellas on these two sites, using exclusively yellow umbrellas in California and blue umbrellas in Japan.<sup>83</sup> Most courts would hold that the work as a whole can be protected, concluding that "if the selection and arrangement are original, these elements of the work are eligible for copyright protection."<sup>84</sup> Therefore, another artist would be precluded from staging an exact replica of "The Umbrellas." The terrain used by Christo, though public land licensed for this use, is part of the protectable "selection and arrangement" cited by courts in *Burrow-Giles Lithographic Co. v. Sarony*.<sup>85</sup> Although Christo cannot now claim that land as his personal artistic space and prevent others from staging a sufficiently dissimilar work, Christo can be assured that "The Umbrellas" will be the only legal work of its kind presented in that exact manner.<sup>86</sup> The protection of Christo's

79. *Feist Publications*, 499 U.S. at 348.

80. Robert Smithson, who produced several of the most widely known Earthworks, including "Spiral Jetty," has been credited as one of the pioneers of this movement. Knight, *supra* note 75.

81. "Among [Christo's] most celebrated projects are 'Running Fence,' a 24-mile fabric curtain erected in California in 1976, and 'Surrounded Islands,' pink polypropylene fabric around islands in Biscayne Bay off Miami in 1983." *Wrap Artist Christo Hopes to Cloak Reichstag*, *supra* note 73. See also JANSON, *supra* note 22, at 743.

82. 17 U.S.C. § 102(b) (1988).

83. *Christo Umbrella Crushes Woman*, *supra* note 71.

84. *Feist Publications*, 499 U.S. at 349.

85. 111 U.S. 53 (1884).

86. This example was chosen because of the high-profile nature of Christo's 1991 installation. Realistically, it is doubtful that any artist would have sufficient motivation to reproduce what has become one of the most notorious works of art in modern history. In a driving rainstorm on Oct. 25, 1991, one of the 485-pound umbrellas toppled over onto a spectator, Lori Rae Keevil-Mathews, fatally crushing her. A wrongful death lawsuit was brought against Christo, who reached a settlement agreement on Sept. 3, 1992. Terms were not disclosed, but Christo's attorney indicated that "[i]t has been settled to the satisfaction of everyone involved." David

expression is limited, however, since "[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected."<sup>87</sup>

### *E. Performance Art*

A similarly ambiguous area of expression is performance art, which is one of the most prevalent and controversial forms of postmodernism. Yves Klein is often credited as being among the first performance artists.<sup>88</sup> In the "Anthropometries" series, Klein would dip nude female models into blue paint and drag them over a canvas to create blotchy paintings.<sup>89</sup> In the United States, the tradition of Klein was followed by Chris Burden. Burden once covered himself in fake blood and wedged himself under the wheel of a car on a busy street in Los Angeles to mimic an auto accident.<sup>90</sup> This early attempt must not be judged a success, since Burden was subsequently arrested.<sup>91</sup> Burden has also had an accomplice shoot him with a .22-caliber bullet in the arm in the name of art,<sup>92</sup> was crucified on a Volkswagen, inserted high-tension wires into his chest and "threaten[ed] to slit somebody's throat as a video piece . . . ."<sup>93</sup>

More recently, performance art has partially merged into theater, with more artists staging exhibitions that closely resemble one-person plays.<sup>94</sup> Karen Finley, the most notorious of contemporary performance artists, performs in front of standing-room only audiences in theaters in New York and Los Angeles.<sup>95</sup> Other artists, such as Holly Hughes, Tim Miller, and

Colker, *Settlement Reached in Death at Christo Project*, L.A. TIMES, Sept. 4, 1992, at B1.

87. *Feist Publications*, 499 U.S. at 348.

88. Theodore F. Wolff, *Yves Klein and the art of blue—plus a fresh look at Grandma Moses*, CHRISTIAN SCI. MONITOR, Dec. 7, 1982, at 13.

89. See Curtis, *supra* note 24, at F6; Iain Gale, *Art / Hands-on Experience*, THE INDEPENDENT, July 17, 1992, at 15. Yves Klein was a mercurial French artist who specialized in creating controversy: "Klein's career was short but very influential . . . . During that period, his theories and art pointed the way toward Minimalism and Conceptualism and influenced the development of environmental, space-light, and body art." Wolff, *supra* note 88, at 13.

90. William Wilson, *Chris Burden—A Daredevil's New Expressions; Realism Makes His Works Tick . . .*, L.A. TIMES, Apr. 24, 1988, at F93.

91. "Burden was later tried in Beverly Hills for causing a false emergency to be reported. Charges were dismissed when a jury was unable to reach a verdict." *Id.*

92. Allan Jalon, *Chris Burden—A Daredevil's New Expressions; . . . And Inquiry Is His Guiding Principle*, L.A. TIMES, Apr. 24, 1988, at F93.

93. Wilson, *supra* note 90.

94. See Jalon, *supra* note 92.

95. Paula Span & Carla Hall, *REJECTED! Portraits of the Performers the NEA Refused to Fund*, WASH. POST, July 8, 1990, at G1.

John Fleck, have taken controversial aspects of homoeroticism and made them more palatable to the conventional theatergoing public.<sup>96</sup> Although performance art is gradually losing its status as a medium shunned by traditional forms of culture, it remains a vital outlet for new artists to explore themes that were once confined to painting and sculpture.

The growing discipline of performance art presents a complicated set of copyright issues, since its elements are a hybrid of performance and more traditional visual arts.<sup>97</sup> Depending on the specific exhibition, works of performance art can be classified throughout the spectrum between pure dramatic performance and pure sculpture, both of which are protected by the Copyright Act as "musical works, including any accompanying words; dramatic works, including any accompanying music; [and] pantomimes and choreographic works."<sup>98</sup> Some works of performance art, though, defy conventional categorization and may not be protectable under copyright law.

The shows presented by Yves Klein, in which an audience was invited and a script was followed,<sup>99</sup> and Karen Finley,<sup>100</sup> in which similar performances are given over a period of several nights in front of invited audiences in a theater,<sup>101</sup> are protected as dramatic works, like any other play or stage performance. In both instances, scripts are used as signposts, and the artists "act" according to a preconceived plan. In Finley's case, the end of the performance marks the end of the expression; short of a videotape or a transcript, there is nothing tangible remaining beyond the performance. Klein's shows, though, result in paintings, which were created as part of the performance. These paintings are protectable as "pictorial" works.<sup>102</sup>

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96. *Id.*

97. See Allan Jalon, *Losing Their Edge; Some Performance Artists Are Getting Out, Others Seem to be Giving In*, L.A. TIMES, Mar. 19, 1989, at F59A.

98. 17 U.S.C. § 102(a)(2)-(a)(4) (1988).

99. Klein's most infamous work was his "Anthropometries" series: "In those famous studio happenings of the late 1950s, nude women covered with blue paint served as human brushes painting blank canvases with their bodies, to the erotic amusement of the audience." Cathy Curtis, *Art Review; Essence Proves To Be Only Skin Deep; The Work of Rachel Lachowicz, an Artist for the Age of Madonna, Is At The Newport Harbor Art Museum Through Sunday*, L.A. TIMES, Nov. 24, 1992, at F6.

100. Karen Finley is a well-known performance artist who was drawn into the national spotlight by Senator Jesse Helms' attempts to abolish the National Endowment for the Arts. Span & Hall, *supra* note 95.

101. Span & Hall, *supra* note 95.

102. 17 U.S.C. § 102(a)(5) (1988).

For Yves Klein, though, the act of creation should be protected as well. By staging his painting process as expression in itself,<sup>103</sup> Klein unwittingly created a loophole in the Copyright Act, which was not written until more than a decade after Klein's death.<sup>104</sup> Under conventional circumstances, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>105</sup> When the process is part of the performance, however, a direct conflict is generated between competing sections of the Copyright Act. Classifying Klein's performance as either a "dramatic work" or a "choreographic work" would give protection to an element that is clearly not copyrightable.<sup>106</sup> The process itself, in this instance the creation of paintings by physically dragging models across a canvas, is not copyrightable. Any other artist can produce works by the same method without fear of infringement. Should another artist wish to create these paintings under the same "performance" conditions as Klein, copyright law ought to prevent him or her from doing so.

Other works of performance art in which a product is ultimately created may not be protected because the process becomes the performance and cannot be differentiated. Vito Acconci's "Following Piece," in which Acconci followed people at random through the streets of New York, is a prime example of a result-oriented performance that should not be protected.<sup>107</sup> The process of following random pedestrians is not protectable, especially without an audience or any other way to "fix" the expression.<sup>108</sup>

Acconci has also produced a series of randomly generated photographs that are created in a performance context.<sup>109</sup> As with "Following

103. See Curtis, *supra* note 24.

104. Klein died in 1962, at the age of 34. Wolff, *supra* note 88.

105. 17 U.S.C. § 102(b) (1988).

106. See 17 U.S.C. § 102(b) (1988).

107. "In 1969 [Acconci] undertook a work he called *Following Piece*, in which he would simply follow, unnoticed, a pedestrian he chose at random until the person disappeared behind a closed door. 'Nobody saw it when it was done,' he says. 'I was the audience.'" Michael Small, *Vito Acconci: Put Him On Exhibit, But Don't Say, 'Don't Touch'*, PEOPLE, Oct. 31, 1988, at 78.

108. See 17 U.S.C. § 102(a) (1988).

109. Acconci's works have included a "series of 12 [photographs] made each time he blinked walking down a New York street," Hilliard Harper, *Photo Review: 2 Ways of Viewing La Jolla Exhibit of Monsen Collection*, L.A. TIMES, Feb. 17, 1989, at F6, and "Twelve Pictures," which were "taken while he stepped across a stage and shot the audience—including a photographer who

Piece," the process of creation here cannot be protected. The random nature of his movements and the non-expressive quality of Acconci's actions might disqualify this work from any category of protected expression.<sup>110</sup> Acconci, however, would argue that "Following Piece" cannot be bifurcated into a data-collection stage and a recording stage. The work encompassed both the photographs and the act of following strangers. Acconci would not exhibit the photographs by themselves, without an explanation of how they were generated, because for purposes of performance art the act of creation is the essential component of the work. In this uncertain area there is a clear distinction between the postmodern definition of "art"<sup>111</sup> and the Copyright Act's limited categorization of eight protectable types of expression.<sup>112</sup> Since the statutory framework makes classification of a work crucial to the rights that are reserved to the copyright owner, it is important for the postmodern artist to know where a work is located in the protective scheme.

In many cases, though, classification as a protectable work does not end the copyright analysis. If the work in question infringes upon a previously copyrighted work, copyright protection will not be extended to the infringing work. The district court in *Rogers v. Koons* held that Jeff Koons' sculpture constituted this type of infringing work.<sup>113</sup>

### F. Koons: Art as Capitalism

Another aspect of postmodern expression that has merged into popular culture is exemplified by Jeff Koons' work. Koons champions the

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was photographing Acconci." Suzanne Muchnic, *Art Review; LACMA Surveys 150 Years of Photography*, L.A. TIMES, Dec. 21, 1989, at F2.

110. Walking behind a selected person on the streets of Manhattan, without an audience or even a plan on how exactly to follow this person, would not meet any common-law or statutory definition of either a dramatic or a choreographed work.

111. See *supra* notes 17-56 and accompanying text, especially notes 38-45 and accompanying text.

112. The statute extends protection exclusively to:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

17 U.S.C. § 102(a) (1988).

113. *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990).

financial aspects of art, and he sells his works at wildly inflated prices to willing collectors.<sup>114</sup> Part of Koons' expression is in the prices he charges for sculptures such as a row of vacuum cleaners encased in Plexiglas or "stainless-steel replicas of inflatable rabbits."<sup>115</sup> Koons has also produced exact sculptural representations of photographs he finds in museums and gift shops. These sculptures sell for Koons' typically outrageous prices, and thus Koons reaps significant financial rewards for his appropriation.<sup>116</sup> Koons maintains that his sculptures add "spirituality" and "animation" to what is otherwise "only a postcard photo."<sup>117</sup> This practice, along with every other type of appropriation in the name of postmodern art, had gone unchecked since Andy Warhol's time. This changed when Art Rogers discovered that his photograph, "Puppies," had been appropriated by Jeff Koons. Rogers sued Koons for infringement, inadvertently challenging the foundations of postmodern expression.

### III. ARTISTIC WORKS PROTECTED BY COPYRIGHT

Postmodernism, by placing the idea above the expression, collides with both common law and statutory constructions of copyright law. The Copyright Act of 1976 protects eight types of expression, including photographs, paintings, sculpture, and conventional forms of theater.<sup>118</sup> Broadened protection was given to visual works, more specifically "pictorial, graphic, and sculptural works,"<sup>119</sup> which are defined to include "applied art, photographs, prints and reproductions"<sup>120</sup> in either two or three dimensions.<sup>121</sup>

Principles of common law have long held that photographs were intended to be protected under the aegis of the Copyright Clause of the

114. Appleton, *supra* note 6. Koons' "Vacuum Cleaner," purchased for \$1,200 in 1980, is now estimated to be worth \$150,000. Dalya Allberge, *Contemporary Art Market: Enthusiasts in the Grip of a Grand Passion*, THE INDEPENDENT, Dec. 30, 1991, at 4. In 1991, a Koons collection of vacuum cleaners sold for \$137,500 at a Sotheby's auction in New York. Judd Tully, *Sotheby's Respectable Showing*, WASH. POST, May 1, 1991, at B1.

115. Hays, *supra* note 5, at B2.

116. Hays, *supra* note 5.

117. Sullivan, *supra* note 1, at B3.

118. See 17 U.S.C. § 102(a) (1988).

119. 17 U.S.C. § 102(a)(5) (1988).

120. 17 U.S.C. § 101 (1988).

121. The full definition is as follows: "Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans." 17 U.S.C. § 101 (1988).

United States Constitution. Congress is expressly authorized to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ."<sup>122</sup> In *Burrow-Giles Lithographic Co. v. Sarony*,<sup>123</sup> the Supreme Court broadened the constitutional definition of "authorship" by stating that "[a]n author in that sense is 'he to whom anything owes its origin; originator; maker . . . .'"<sup>124</sup> The Court concluded that the act of photography incorporated enough expressive elements to qualify for copyright protection: "We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author."<sup>125</sup> The Court introduced a comprehensive list of expressive choices made by the author in producing a protectable photograph. The factors include "posing . . . , selecting and arranging the costume, draperies, and other various accessories . . . , arranging the subject . . . [and] arranging and disposing the light and shade . . . ."<sup>126</sup> The *Burrow-Giles* test is still often cited as the source of protection for photographs:<sup>127</sup> "The originality requirement articulated in . . . *Burrow-Giles* remains the touchstone of copyright protection today."<sup>128</sup>

Conventional forms of sculpture fit readily into the statutory framework of the Copyright Act of 1976, but some ambiguity arises when the sculpture contains objects that have uses outside of an artistic context. No problems are presented in protecting traditional bronze or plaster cast sculpture of people or animals, since the work originates completely from the sculptor. Copyright protection, however, does not extend to "mechanical or utilitarian aspects" of a pictorial, graphic, or sculptural work.<sup>129</sup> Under the "useful article"<sup>130</sup> exception, objects like soup cans or pop bottles, as depicted in Andy Warhol's paintings,<sup>131</sup> are not protectable elements of a visual work. The useful article exception prevents anyone,

122. U.S. CONST. art. I, § 8, cl. 8.

123. 111 U.S. 53 (1884).

124. *Id.* at 57-58.

125. *Id.* at 58.

126. *Id.* at 60.

127. *See, e.g.,* *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

128. *Feist Publications*, 499 U.S. at 347.

129. 17 U.S.C. § 101 (1988).

130. "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'" 17 U.S.C. § 101 (1988).

131. *See supra* notes 58-59 and accompanying text.



including the manufacturer, from claiming a copyright to the basic design of a can or bottle.<sup>132</sup> This policy seeks to prevent monopolies in objects that have extensive commercial value.

For example, the basic design of an upright vacuum cleaner does not qualify for copyright protection. If the design met the statutory definition of a sculptural work, the first manufacturer of such a vacuum could maintain a commercial monopoly over a household appliance. On the other hand, a photograph of a vacuum cleaner which meets the *Burrow-Giles* test can be copyrighted, since a photograph does not have an inherent utilitarian function.<sup>133</sup> Moreover, a work that contains a useful article can be protected in limited circumstances:

[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.<sup>134</sup>

#### IV. THE REACH OF *ROGERS V. KOONS*

##### A. *Statement of Facts*

In 1980, photographer Art Rogers snapped a portrait of a friend's litter of eight German Shepherd puppies.<sup>135</sup> The resulting photograph, "Puppies," which included the owners of the puppies seated on a bench, was published in a local newspaper and was exhibited for a short time at the San Francisco Museum of Modern Art.<sup>136</sup> In 1984, Rogers licensed the reproduction rights for "Puppies" to a company that produces notecards and postcards.<sup>137</sup> Rogers reserved his right to use the photograph, which he later exercised by including "Puppies" in an anthology of canine photography.<sup>138</sup>

132. See 17 U.S.C. § 102(b) (1988).

133. This is not to say that another photographer is barred from executing a photo of the same vacuum cleaner. Only the expression inherent in the first photograph is protected, not the idea of taking a picture of a vacuum cleaner. See 17 U.S.C. § 102(b) (1988); *supra* notes 86-87 and accompanying text.

134. 17 U.S.C. § 101 (1988).

135. *Rogers v. Koons*, 751 F. Supp. 474, 475 (S.D.N.Y. 1990).

136. *Id.*

137. *Id.*

138. *Id.*

Sometime in early 1988, sculptor Jeff Koons purchased at least one "Puppies" notecard.<sup>139</sup> The card contained a notice of copyright in Rogers' name, but Koons removed the notice and sent the notecard to a studio in Italy.<sup>140</sup> Koons commissioned the studio to create a sculpture using the photograph, with explicit instructions for the work to "be just like [the] photo."<sup>141</sup>

At the end of 1987 or in 1988 Koons purchased at least two Museum Graphics notecards displaying Rogers' "Puppies" photograph . . . Koons decided to use the photograph for one of the sculptures to be exhibited in the Banality Show. He tore off that portion of the notecard showing the copyright notice and sent the photograph to the Demetz Arts Studio in Italy, with instructions to make a polychromed wood sculptural version of the photograph, a work that Koons instructed Demetz "*must be just like photo.*" Koons continued to communicate with Demetz, reiterating that the features of the humans and the puppies be reproduced "*as per photo.*" As to the painting of the sculpture, Koons gave Demetz a chart with an enlarged photocopy of "Puppies" in the center, and on which he noted painting directions in the margin with arrows drawn to various areas of the photograph. Koons instructed Demetz to paint the puppies in shades of "blue," with "variation of light-to-dark *as per photo.*" The man's hair was to be "*white with shades of grey as per black and white photo.*"<sup>142</sup>

Four sculptures were eventually created for Koons, and after making corrections to conform them more closely to the photograph, Koons christened them "String of Puppies."<sup>143</sup>

The Sonnabend Gallery in New York, which has long been Koons' agent, sold three of the sculptures to collectors for a combined \$367,000.<sup>144</sup> The fourth sculpture was retained by Koons. Rogers first learned of the existence of Koons' sculptures when he saw "String of Puppies" pictured in the *Los Angeles Times*.<sup>145</sup> Rogers sued for copyright infringement, and an injunction was granted which prevented Koons from

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139. Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992).

140. *Id.*

141. *Id.* at 305.

142. Rogers v. Koons, 751 F. Supp. at 476 (citations omitted) (emphasis added).

143. *Id.*

144. *Id.*

145. See William Wilson, *Comments on Our Life and Times; Polite Agit-Pop Exhibit in 'A Forest of Signs,'* L.A. TIMES, May 7, 1989, at F6.

exploiting his own sculptures.<sup>146</sup> The Court of Appeals for the Second Circuit affirmed,<sup>147</sup> and the United States Supreme Court denied a writ of certiorari on the issue of fair use.<sup>148</sup>

### *B. Derivative Works*

The initial inquiry in the district court's analysis was to determine whether Koons' work was a derivative work of Rogers' photograph. A "derivative work" is defined as "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 adapted."<sup>149</sup> The holder of a copyright can control the extent to which the protected work serves as the source for a closely associated work by asserting the exclusive right "to prepare derivative works based upon the copyrighted work."<sup>150</sup>

The district court noted that a sculpture can be a derivative work of a photograph.<sup>151</sup> "Under the plain wording of the statute, Koons' sculpture is a derivative work based upon Rogers' photograph; and Rogers as copyright owner had the exclusive right to authorize [a] derivative work."<sup>152</sup> Koons attempted to circumvent the derivative work prohibition by arguing that protection for a photograph extends only to other photographs. The court, however, was unmoved: "In copyright law the medium is not the message, and a change in medium does not preclude infringement."<sup>153</sup>

Case law has consistently held over the last century that a work in one medium can be a derivative work from an original in a different medium. In *Falk v. T.P. Howell & Co.*,<sup>154</sup> infringement was found when a chair manufacturer stamped a raised copy of a pre-existing photograph on the backs of its chairs. The court held that "[d]ifferences which relate merely to size and material are not important."<sup>155</sup> In *King Features*

146. *Rogers v. Koons*, 751 F. Supp. at 475-76.

147. *Rogers v. Koons*, 960 F.2d at 314.

148. *Koons v. Rogers*, 113 S. Ct. 365 (1992).

149. *Id.*

150. 17 U.S.C. § 106(2) (1988).

151. *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990).

152. *Id.* at 477.

153. *Id.*

154. 36 F. 202 (C.C.S.D.N.Y. 1888).

155. *Id.*

*Syndicate v. Fleischer*,<sup>156</sup> a cartoon character was copied for use as a toy doll. The court offered the following policy rationale for denying defendant's different medium argument:

We do not think it avoids the infringement of the copyright to take the substance or idea, and produce it through a different medium, and picturing in shape and details in sufficient imitation to make it a true copy of the character thought of by the appellant's employee. Doing this is omitting the work of the artisan, but appropriating the genius of the artist . . . . A piece of statuary may be infringed by the picture of the statuary for the Copyright Act secured to the author the original and natural rights, and it is the intendment [sic] of the law of copyrights that they shall have a liberal construction in order to give effect to what may be considered as an inherent right of the author in his work.<sup>157</sup>

The district court thus held that if a sculpture can be infringed by a photograph, a photograph can be infringed by a sculpture that is derived from it. The district court concluded that "[t]he fact that a work in one medium has been copied from a work in another medium does not render it any less a 'copy.'"<sup>158</sup>

This holding may severely restrict the potential subject matter of postmodern artists. Artists like Jeff Koons will no longer be able to appropriate photographs and transform them. Sherrie Levine, who has built a career out of "re-photographed famous photographs and redrawn Matisse drawings,"<sup>159</sup> will be exposed to liability for infringement for her entire oeuvre, since virtually every work she has created is a derivative work under the *Rogers* definition.<sup>160</sup> For owners of preexisting works, *Rogers* is a powerful piece of ammunition in protecting their rights. By affirming that the different medium argument is still invalid today, the *Rogers* court

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156. 299 F. 533 (2d Cir. 1924).

157. *Id.* at 535-36.

158. *Rogers v. Koons*, 751 F. Supp. at 478 (quoting 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08(E) at 2-123 to 2-124 (1989)).

159. Dannat, *supra* note 4.

160. Artists such as Levine must still be concerned about copyrights for deceased artists, since copyrights are transferred, along with other property rights, according to laws of succession. For example, Henri Matisse died in 1954. Under the Copyright Act of 1909, which was in effect at the time Matisse's works were created, the artist is entitled to a copyright which can extend for 75 years after creation. These rights transferred to Matisse's heirs upon his death. Therefore, at the time this Article is published, there may still be a valid copyright on any Matisse work created after 1919.

has said that a photographer such as Art Rogers can protect his expression from being copied in any medium. The pose that Rogers selected for his eight puppies and two humans is protected throughout the entire range of artistic media. As long as the copyright endures,<sup>161</sup> the arrangement of the subject matter of "Puppies" is the exclusive property of the copyright owner.

### C. Infringement

The district court next employed the Second Circuit's test for copyright infringement. When any of a copyright owner's exclusive rights are violated, an action for infringement can be brought.<sup>162</sup> Although the wording used by courts differs considerably,<sup>163</sup> the essential elements can be identified as "(1) derivation (i.e., that defendant's work was copied from plaintiff's); and (2) excessive appropriation of protectable material (i.e., substantial similarity)."<sup>164</sup> Before a plaintiff can reach the elements of infringement, it must be shown that the portions of the work allegedly infringed were protected under the Copyright Act.

#### 1. Validity of Copyright

The ownership of a copyright is a question of fact that begins with the evidentiary presumption that "[i]n any judicial proceedings the certificate of a registration . . . shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate."<sup>165</sup> Registration of a copyright with the United States Copyright Office is not a prerequisite for copyright protection.<sup>166</sup> In order to institute an action

161. The Copyright Act of 1976 provides: "Copyright in a work created on or after January 1, 1978, subsists from its creation and . . . endures for a term consisting of the life of the author and fifty years after the author's death." 17 U.S.C. § 302 (1988).

162. "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright." 17 U.S.C. § 501(a) (1988).

163. *Compare* Weissman v. Freeman, 868 F.2d 1313, 1320 (2d Cir. 1989) ("To establish a claim of copyright infringement, plaintiff must prove ownership of a valid copyright and copying by the defendant.") with Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977) ("[I]nfringement would be established upon proof of ownership, access, and substantial similarity.").

164. LIONEL SOBEL, MATERIALS ON AMERICAN AND INTERNATIONAL COPYRIGHT LAW 8.2.1 (1992) (on file with Loyola of Los Angeles Entertainment Law Journal).

165. 17 U.S.C. § 410(c) (1988).

166. 17 U.S.C. § 408(a) (1988).

for infringement, however, a copyright must be registered with the Copyright Office.<sup>167</sup>

As the Second Circuit noted in *Rogers v. Koons*, the presumption of ownership may be rebutted<sup>168</sup> to overcome prima facie evidence of validity of copyright.<sup>169</sup> The registration requirement is a vestige of common law notice requirements, which invalidated the copyright for any work that failed to include a copyright notice.<sup>170</sup> The central purpose of registration today is to identify the owner of the allegedly infringed work. In cases where ownership of the copyright is disputed, registration can serve as a powerful tool to assert one's rights.

In postmodern works of art, however, ownership is rarely a disputed issue. "Found objects" commonly are not defaced or altered so as to obscure their origins; to do so would be to defeat the referential purpose of using appropriated items. Jeff Koons did not deny to the trial court that the photograph he used was taken by Art Rogers. Since Koons' main defense is one of fair use because his sculptures have parody value,<sup>171</sup> he could not claim ownership of the photograph. The other requirements for a valid copyright were contested by Koons, though, and the opinions in the *Rogers* line are illustrative of the convincing case that can be asserted against a postmodern artist.

## 2. Originality

To qualify for copyright protection, a work, regardless of classification, must satisfy two general statutory requirements: "Copyright protection

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167. 17 U.S.C. § 411(a) (1988). Registration is not required under any circumstances for works protected under the auspices of the Convention for the Protection of Literary and Artistic Works [the Berne Convention]. This includes any non-United States work whose country of origin is a member of the Berne Convention. The effect of international copyright law on postmodern art is beyond the scope of this Article, which focuses only on the laws of the United States. Since Berne Convention works are protected in the United States under the Copyright Act, though, it is possible for much of this analysis to be applied to works of international artists. *Id.*

168. *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992).

169. This presumption is a form of judicial bootstrapping that weighs heavily in favor of the plaintiff in copyright cases. Since registration of a work with the U.S. Copyright Office is required prior to filing an infringement action by 17 U.S.C. § 411(a), every plaintiff will enjoy the benefits of this presumption. The purpose behind this practice is to shift the burden of proof to the defendant to show that the allegedly infringed work was not copyrightable.

170. Works published before Jan. 1, 1978, when the current Copyright Act went into effect, were subject to § 10 of the 1909 Act, which required that copyright be secured by notice of copyright, "affixed to each copy thereof published." A work published without notice irrevocably entered the public domain.

171. See *infra* notes 229-39 and accompanying text.

subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ."<sup>172</sup> For purposes of copyright analysis, the Act requires that a work be sufficiently original, and fixed in a tangible form. Despite the level of effort or talent apparent in an artistic work, if it does not meet the current definition of originality, it cannot be protected by a copyright. The common law interpretation of the originality requirement, though, allows maximum latitude to the creator of the work.

The Second Circuit began its infringement analysis in *Rogers* by noting that "the cornerstone of [copyright] law is that the work protected must be original."<sup>173</sup> Only a "modest" showing of originality, however, will satisfy the requirement.<sup>174</sup> The *Feist* Court noted that "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."<sup>175</sup>

Originality does not mean "novelty"<sup>176</sup> or even a spark of creative inspiration. In general, a work will be found to be original if an author "contributed something more than a 'merely trivial' variation, something recognizably 'his own.'"<sup>177</sup>

In most cases, a court does not have to rely on generalized statutory interpretations to reach a finding of originality. The district court ruled as a matter of law that the underlying photograph fulfilled the originality requirement: "It is well settled that a photographer's originality in photographic expression is entitled to full copyright protection."<sup>178</sup> The court of appeals agreed:

*Rogers'* inventive efforts in posing the group for the photograph, taking the picture, and printing 'Puppies' suffices to meet the original work of art criteria. Thus, in terms of his unique expression of the subject matter captured in the

172. 17 U.S.C. § 102(a) (1988).

173. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (citing *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

174. *Rogers v. Koons*, 960 F.2d at 307.

175. *Feist Publications*, 499 U.S. at 345 (citing 1 NIMMER & NIMMER, *supra* note 158, at 2.01 [A], [B] (1990)).

176. See *Feist Publications*, 499 U.S. at 345-46.

177. *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (citing *Alfred Bell & Co. v. Catala Fine Arts, Inc.*, 191 F.2d 99, 103 (1951)).

178. *Rogers v. Koons*, 751 F. Supp. 474, 477 (S.D.N.Y. 1990). See also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 55 (1884); *supra* notes 118-134 and accompanying text.

photograph, plaintiff has established valid ownership of a copyright in an original work of art.<sup>179</sup>

Under this standard, almost any photograph can be copyrighted. It does not matter whether the photographer is a professional or an amateur, since any photographer necessarily makes the artistic choices listed in *Burrow-Giles* and reiterated in *Rogers*. Therefore, postmodern artists need to be aware that appropriated photographs carry with them sufficient originality to warrant protection. Use of another's photograph in an installation or a multi-media work does not negate originality in the underlying work. Since pure artistic merit is not an element of originality, there is no hierarchy that can be asserted to deny originality. Koons, in attempting to circumvent the court's reasoning, complained that "[i]t was only a postcard photo and I gave it spirituality, animation and took it to another vocabulary."<sup>180</sup> In the eyes of the Second Circuit, focused by one hundred years of common law, this argument was without merit.

### 3. Copying

Once a court establishes that a valid copyright exists in the allegedly infringed work, the next line of analysis seeks to determine whether the defendant copied enough of the plaintiff's work to justify a finding of infringement.<sup>181</sup> Where the underlying work is a photograph that has been directly appropriated by an artist, the presumption of infringement is quite strong. Furthermore, courts construe copying to include more than identical reproduction of the underlying work; assertion of a "change in medium" defense is not persuasive. The district court noted that "[i]n copyright law the medium is not the message, and a change in medium

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179. *Rogers v. Koons*, 960 F.2d at 307.

180. Sullivan, *supra* note 1.

181. Unfortunately, neither courts nor legal scholars have been able to create a test for infringement that satisfies the semantic and logical concerns of all parties. The analytical pathway followed in this Article parallels the examination performed by the Second Circuit, primarily because future postmodern art infringement cases will rely heavily on that opinion. The test found at *supra* note 164 and accompanying text divides infringement into categories of "access" and "substantial similarity." The Second Circuit has blended both elements together, and has rendered impossible the dissection of the court's reasoning into discrete portions. Normally, the result in infringement cases does not widely vary from test to test, so this dispute does not inhibit understanding of how postmodern artists may infringe copyrights. It should be noted, however, that the plethora of tests throughout the circuits and intellectual property treatises will not be recognized in this Article to avoid confusion and preserve the issue for treatment by another eager copyright scholar.



does not preclude infringement."<sup>182</sup> This rule derives from *Falk v. T.P. Howell & Co.*,<sup>183</sup> in which a chair manufacturer infringed a photograph by stamping "a raised figure, like the picture, on the leather of which the bottoms and backs of chairs are made."<sup>184</sup> The crucial language, relied upon in *Rogers*,<sup>185</sup> states:

The only question is, do the defendants infringe? That their design is copied directly from the copyrighted photograph is not denied, but it is urged that infringement is avoided, because it is larger than the photograph, and is stamped on leather, and is intended for the bottom or back of a chair. It is thought that this proposition cannot be maintained. Differences which relate merely to size and material are not important.<sup>186</sup>

Therefore, there is no legal significance to the transformation of a photograph into a sculpture. Since copyright laws are intended to protect the expression of the creator, it is immaterial what medium is used to convey the message.<sup>187</sup> The district court admonished this attempt to distinguish the works: "Doing this is omitting the work of the artisan, but appropriating the genius of the artist."<sup>188</sup> The court concluded that Koons' sculpture constituted an unauthorized derivative work that violated Rogers' copyright.<sup>189</sup>

The most commonly used construction for a finding of infringement is "substantial similarity." The difficulties encountered in applying this standard were articulated by Judge Learned Hand in *Nichols v. Universal Pictures Corp.*:<sup>190</sup>

But when the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome. . . . The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the

182. *Rogers v. Koons*, 751 F. Supp. 474, 477 (S.D.N.Y. 1990).

183. 37 F. 202 (S.D.N.Y. 1888).

184. *Id.*

185. *Rogers v. Koons*, 751 F. Supp. at 477.

186. *Falk*, 37 F. 202.

187. See 1 NIMMER & NIMMER, *supra* note 158, at 2.08[E].

188. *Rogers v. Koons*, 751 F. Supp. at 478 (citing *King Features Syndicate v. Fleisher*, 299 F. 533, 535 (2d Cir. 1924)).

189. *Rogers v. Koons*, 751 F. Supp. at 477.

190. 45 F.2d 119 (2d Cir. 1930).

playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.<sup>191</sup>

One standard test of substantial similarity, the modern derivation of Judge Hand's abstractions test, is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."<sup>192</sup> Koons advanced the discredited "substitute medium" argument in an attempt to preclude a finding of substantial similarity.<sup>193</sup> The trial court rejected it in favor of the lay observer test, holding that no lay observer could disagree: "There is no question . . . that 'an average lay observer' would recognize the sculpture . . . as 'having been appropriated from' the photograph . . . ."<sup>194</sup> The Second Circuit agreed with the lower court, pointing out that Koons not only intended to make an exact copy of the photograph but that he instructed his artisans to make corrections in favor of the original: "His instructions invariably implored that the creation must be designed 'as per photo.'"<sup>195</sup>

Although the result of *Rogers* is compatible with a standard infringement analysis, the court followed a tortured course in determining that sufficient copying existed. In the district court, Rogers asserted that substantial similarity does not need to be addressed when direct evidence of copying is available.<sup>196</sup> The facts, as contained in the trial court's opinion, unequivocally show that direct copying occurred.<sup>197</sup> Yet the court chose to ignore this line of analysis, reasoning that the direct copying rule was not properly derived from a Second Circuit case, *Durham Indus.*,

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191. *Id.* at 121 (citing *Holmes v. Hurts*, 174 U.S. 82, 86 (1899)).

192. *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966).

193. *Rogers v. Koons*, 751 F. Supp. at 478.

194. *Id.*

195. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

196. *See Illinois Bell Tel. v. Haines & Co., Inc.*, 905 F.2d 1081, 1086 (7th Cir. 1990) ("To satisfy the copying element of infringement, direct evidence of copying will suffice. Establishing substantial similarity is necessary only when direct evidence of copying is unavailable.") (citation omitted), *vacated and remanded sub. nom. Haines and Co., Inc. v. Illinois Bell Tel. Co.*, 499 U.S. 944 (1991), after the Supreme Court's decision in *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

197. *Rogers v. Koons*, 751 F. Supp. at 476.

*Inc. v. Tomy Corp.*<sup>198</sup> Instead, the court followed the lay observer test that was present in *Durham Indus.*<sup>199</sup>

The court of appeals, though it also focused on substantial similarity, detailed the evidence of direct copying.<sup>200</sup> The substantial similarity analysis is little more than dicta, since the court agreed, solely on the evidence of direct copying, that "no reasonable juror could find that copying did not occur in this case."<sup>201</sup> Substantial similarity is reached by noting that "even were such direct evidence of copying is unavailable, the district court's decision could be upheld . . . ."<sup>202</sup> By applying the substantial similarity test, both courts expanded the reach of their holdings to include less blatant forms of appropriation. This may permit future defendants to successfully limit these holdings to circumstances where evidence of direct copying is available.

The application of the substantial similarity test also allowed Koons to challenge the validity of the lay observer test. Koons argued that trial judges are not competent to reach a decision on artistic issues. The court summarily rejected that argument, holding that "the decision-maker, whether it be a judge or a jury, need not have any special skills other than to be a reasonable and average lay person."<sup>203</sup> Questions of artistic merit have never been a part of copyright law. Originality is determined without regard to aesthetic tastes, and a finding of infringement does not turn on any perceived artistic differences in the copyrighted works. Therefore, although the message behind much of Jeff Koons' appropriations is that the "found object" has been uplifted into a higher state of artistic quality,<sup>204</sup> this argument carries no weight as a matter of law.

Koons also mounted a more traditional challenge to the finding of substantial similarity by showing that there were obvious points of dissimilarity between his sculpture and the photograph.<sup>205</sup> It has long

198. 630 F.2d 905 (2d Cir. 1980). See *Rural Tel. Serv. Co. v. Feist Publications, Inc.*, 663 F. Supp. 214, 218 (D. Kan. 1987). In *Rogers*, the plaintiff relied on *Feist*, which cites *Durham*, 630 F.2d at 911-12, as a source for the direct copying exception. The district court in *Rogers* was unable to locate any support for this proposition in the *Durham* opinion. In fact, no such support exists in that case.

199. *Durham Indus.*, 630 F.2d at 911-12.

200. *Rogers v. Koons*, 960 F.2d at 305-07.

201. *Id.* at 307.

202. *Id.*

203. *Id.* at 308.

204. See *supra* note 180 and accompanying text.

205. Although this analysis may be useful to future litigants, it must be emphasized that the finding of substantial similarity was unnecessary to the affirmation of the district court's judgment.

been held, though, that "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."<sup>206</sup> The only circumstance in which dissimilarity can preclude infringement is where the similar points are "of small import quantitatively or qualitatively . . . ."<sup>207</sup> Once again noting the direct evidence of copying, the court concluded that "[t]his is not the case here. Koons' additions . . . are insufficient to raise a genuine issue of material fact with regard to copying . . . ."<sup>208</sup>

Since the finding of copying was beyond doubt, the district court granted summary judgment in favor of Rogers.<sup>209</sup> In cases hinging on substantial similarity, summary judgment is appropriate when the "similarities are so obvious that there can be no genuine issue of fact that defendant's design was copied from plaintiffs'. In short, the similarities are so great that an ordinary observer would easily detect them."<sup>210</sup> If reasonable minds can differ on a finding of substantial similarity, summary judgment is inappropriate.<sup>211</sup> The court of appeals upheld the summary judgment, holding that "[n]o genuine issue of material fact exists . . . ."<sup>212</sup> Thus, Jeff Koons found himself facially liable for infringement of Art Rogers' photograph.

There is an affirmative defense to infringement, however. Koons attempted to assert that his sculptures were a "fair use" of "Puppies." If successful, this would provide Koons with a complete defense from liability to Rogers.

#### *D. Fair Use*

The doctrine of fair use carves out an exception in an author's bundle of rights. Originally a common law principle that evolved through the courts, fair use was codified in the Copyright Act of 1976.<sup>213</sup> The factors weighed in a fair use analysis are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of

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206. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936).

207. *Rogers v. Koons*, 960 F.2d at 308.

208. *Id.*

209. *Rogers v. Koons*, 751 F. Supp. at 481.

210. *Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F. Supp. 1366, 1369 (S.D.N.Y. 1969).

211. *Rogers v. Koons*, 960 F.2d at 307. *See Twentieth-Century Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1328 (9th Cir. 1983) ("Only if no genuine issue of material fact exists will the moving party be entitled to prevail as a matter of law.").

212. *Rogers v. Koons*, 960 F.2d at 308.

213. 17 U.S.C. § 107 (1988).

the portion used; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>214</sup> If a work is found to be a fair use of a copyrighted work, there is no infringement. Although the Supreme Court refused to hear Jeff Koons' fair use arguments, contemporary artists may still consider fair use to be an effective tool to avoid infringement by appropriation.

## 1. Purpose and Character of Use

### a. Commercial Nature

The first factor "asks whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer."<sup>215</sup> The Supreme Court has held that use of a copyrighted work for profit purposes is presumptively unfair.<sup>216</sup> Therefore, any use of a protected work that has a distinct commercial purpose is labeled unfair per se. The Court, attempting to lighten this heavy burden, has explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."<sup>217</sup> By extension, the existence of a licensing scheme whereby the owner of the underlying work could profit from the derivative work might weigh in favor of fair use.

The facts of *Rogers* indicate that Jeff Koons made no attempt to contact Art Rogers or negotiate any distribution of profits to the photographer. From the facts contained in the opinion, it is clear that Koons intended to share neither the credit for nor the profit from his sculptures.<sup>218</sup> Koons sold three copies of his sculpture, "String of Puppies," for a total of \$367,000.<sup>219</sup> The Second Circuit noted at the outset of its opinion that Koons' sculptures "bettered the price of the copied work by a thousand to one."<sup>220</sup> Since Koons gained a "substantial profit from his

214. *Id.*

215. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992).

216. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

217. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

218. After purchasing the notecard containing Rogers' photograph, "[Koons] tore off that portion showing Rogers' copyright of 'Puppies.'" *Rogers*, 960 F.2d at 305.

219. *Id.*

220. *Id.* at 303.

intentionally exploitive use," the court of appeals found that the first factor presumptively militates against fair use.<sup>221</sup>

Koons, however, challenged the validity of this presumption in his writ of certiorari to the Supreme Court. Koons presented the Court with the question: "[d]oes [a] work of art that would otherwise qualify for copyright defense of 'fair use' become [a] form of actionable commercial exploitation simply because its creator was paid for that work?"<sup>222</sup> The district court had already disposed of that question, though, noting that "notwithstanding its unquestioned status as a work of art, the sculpture is not unsullied by considerations of commerce."<sup>223</sup> The district court also laid out a description of Koons' marketing techniques, emphasizing that Koons "actively markets his sculptures"<sup>224</sup> among other commercially motivated activities. No authority exists to contradict the assertion that commercial use of a work is a valid factor to be considered in fair use. To accept Koons' petition would be to question the plain language of the Copyright Act.<sup>225</sup> The Supreme Court denied certiorari.<sup>226</sup>

Koons' argument holds more weight when considered in the limited context of the contemporary art market. With the possible exception of outsider artists,<sup>227</sup> all contemporary artists use some commercial avenue in displaying their work. Artists must sell their work if they wish to make a living from their talents. It is disingenuous at best for a court to assume that works of art can be created without any commercial intent. Despite the art world's attempt to consider only aesthetics, the bare reality is that working artists must depend on the patronage of collectors and galleries to continue to produce art. Jeff Koons was castigated because he seemed to champion the commercial aspects of his art. Koons, to his detriment,

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221. *Id.* at 309.

222. *Koons v. Rogers*, *cert denied*, 113 S. Ct. 365 (1992).

223. *Rogers v. Koons*, 751 F. Supp. 474, 479 (S.D.N.Y. 1990).

224. *Id.*

225. 17 U.S.C. § 107 (1) defines the first factor as "the purpose and character of the use, including whether such use is of a *commercial nature* or is for nonprofit educational purposes" (emphasis added).

226. *Koons v. Rogers*, *cert. denied*, 113 S. Ct. 365 (1992).

227. Outsider artists are traditionally defined as artists without formal training or a relationship with the conventional art community. In fact, some of these artists have enjoyed considerable commercial and critical success. The Los Angeles County Museum of Art mounted a major exhibition of these artists in the winter of 1992 and published a companion catalog that was sold in the museum gift shop. Christopher Knight, *Art Review; Shortsighted 'Visions'; A Major Presentation at LACMA Stumbles While Tracking the Influence on Modern Art of Obsessive, Visionary Pictures Made by Untutored Laymen*, L.A. TIMES, Oct. 16, 1992, at F1.

readily admitted his fascination with the profit element of contemporary art.<sup>228</sup> In this context, the *Rogers* decisions can be seen more as a condemnation of Jeff Koons' philosophy than a blanket rejection of non-commercial art. Since *Rogers* was a case of first impression in the context of contemporary art, it remains to be seen if all works of appropriation are treated as purely commercial creatures for fair use purposes.

### b. Parody and Criticism

A specialized body of analysis has developed for the determination of fair use in particular circumstances. Under the first factor, the use of a copyrighted work for parody or social criticism has often been determinative of fair use. The preamble to the fair use section of the Copyright Act states that purposes such as criticism or comment may be a valid use of a work.<sup>229</sup> The language of the statute indicates, however, that all four fair use factors must still be considered.<sup>230</sup> Courts have placed consideration of parody and criticism into a broadened fair use context: "a parody entitles its creator under the fair use doctrine to more extensive use of the copied work than is ordinarily allowed under the substantial similarity test."<sup>231</sup> The rationale behind the protection of parody is found in *Warner Bros., Inc. v. ABC*.<sup>232</sup>

The "parody" branch of the "fair use" doctrine is itself a means of fostering the creativity protected by the copyright law. It also balances the public interest in the free flow of ideas with the copyright holder's interest in the exclusive use of his work. Especially in an era of mass communications, it is to be expected that phrases and other fragments of expression in a highly successful copyrighted work will become part of the language.<sup>233</sup>

The Second Circuit created an innovative definition of parody that is applicable to all forms of contemporary art. "Parody or satire, as we understand it, is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art

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228. "[Koons] has trumpeted his contempt for artists who eschewed the 'real world' of money, power and mass media." Gayford, *supra* note 60.

229. 17 U.S.C. § 107 (1988).

230. 17 U.S.C. § 107 (1988).

231. *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

232. 720 F.2d 231 (2d Cir. 1983).

233. *Id.* at 242.

work that makes ridiculous the style and expression of the original.”<sup>234</sup> A gloss on this definition, though, transformed the rule into an unworkable prohibition on postmodern expression. While noting that a work may satirize modern society in general, the court of appeals held that “the copied work must be, at least in part, an object of the parody . . . .”<sup>235</sup> The court reasoned:

We think this is a necessary rule, as were it otherwise there would be no real limitation on the copier’s use of another’s copyrighted work to make a statement on some aspect of society at large. . . . The rule’s function is to ensure that credit is given where credit is due. . . . [W]e merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist.<sup>236</sup>

Jeff Koons’ main contention in his fair use defense was that “String of Puppies” was a satire or parody of society.<sup>237</sup> Drawing on the tradition of Duchamp and Warhol, Koons argued that his style of art “proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it.”<sup>238</sup> The court accepted this definition of Koons’ style but refused to credit it as a parody, holding that “it is difficult to discern any parody of the photograph ‘Puppies’ itself.”<sup>239</sup> Therefore, “String of Puppies” was not a parody of the underlying photograph for purposes of fair use.

## 2. Nature of Work

The second factor of the fair use doctrine examines the nature of the underlying copyrighted work. The Second Circuit interpreted this factor to mean that “the scope of fair use is greater with respect to factual than non-factual works.”<sup>240</sup> The Second Circuit defined the test as “[w]hether the original is creative, imaginative, or represents an investment of time in

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234. *Rogers*, 960 F.2d at 309-10.

235. *Id.* at 310. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (“[I]f the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up.”).

236. *Rogers*, 960 F.2d at 310.

237. *Id.* at 309.

238. *Id.*

239. *Id.* at 310.

240. *New Era Publications Int’l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir. 1990).



anticipation of a financial return . . . ."<sup>241</sup> Under this test, any work of art "published"<sup>242</sup> in the copyright sense is considered creative and imaginative. For the *Rogers* court, it was determinative that Rogers was a professional photographer who hoped to gain a financial return for "Puppies."<sup>243</sup> Any photograph appropriated for a postmodern work would be considered creative under this factor. Only when an artist appropriates factual material such as "biographies and telephone directories"<sup>244</sup> can the nature of the underlying work weigh in favor of fair use.

### 3. Amount Copied

Even though the amount of the underlying work that has been copied is a factor used in a finding of infringement, it is also a statutory factor in the fair use defense. Courts have noted this redundancy but seem comfortable in repeating the analysis.<sup>245</sup> The general test does not present a bright-line rule, as noted in *Maxtone-Graham v. Burtchaell*:<sup>246</sup> "In some instances, copying a work wholesale has been held to be fair use, while in other cases taking only a tiny portion of the original work has been held unfair."<sup>247</sup> The *Rogers* court reformulated the test to rely on the qualitative degree of copying by measuring "what degree of the essence of the original is copied in relation to its whole."<sup>248</sup>

In *Rogers*, Jeff Koons' arguments were not considered in relation to the qualitative degree of copying. Bluntly noting that "Koons appropriated the entire photograph,"<sup>249</sup> the district court devoted no more space to this factor. The court of appeals, though, considered another aspect of Koons'

241. *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992) (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981)).

242. The Copyright Act states:

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of person for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. § 101 (1988).

243. *Rogers*, 960 F.2d at 310.

244. *Id.*

245. "To a large degree, this factor involves the same analysis as that used when determining if the copy is substantially similar to the original." *Id.* at 311.

246. 803 F.2d 1253 (2d Cir. 1986).

247. *Id.* at 1263 (citations omitted).

248. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

249. *Rogers v. Koons*, 751 F. Supp. 474, 480 (S.D.N.Y. 1990).

parody defense. If a work satisfies the copyright definition of a parody, "[the Second] Circuit has traditionally afforded parodists significant leeway with respect to the extent and nature of their copying."<sup>250</sup> This was not an issue to be decided by the *Rogers* court, though, since they had already determined that "'String of Puppies' is not a parody of Rogers' work."<sup>251</sup> Therefore, such a claim is not foreclosed for postmodern artists who are able to meet the Second Circuit's parody definition. From the reasoning in *Rogers*, it is apparent that a successful parodist may presumptively count two of the four factors, character of use and the amount copied, in favor of fair use.

#### 4. Effect on Market Value

The fourth fair use factor examines the effect of the infringing work on the market value of the original. In *Stewart v. Abend*,<sup>252</sup> the Supreme Court noted that market value is the "most important, and indeed, central fair use factor."<sup>253</sup> The court of appeals formulated a balancing test based on the economic underpinnings of the Copyright Act: "[A] balance must be struck between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair."<sup>254</sup> Under this analysis, the adverse impact on the owner of the original work weighs inversely with the public benefit. Therefore, if the impact on the original is slight in economic terms, less public benefit needs to be shown to justify fair use.<sup>255</sup> This analog of the Inverse Ratio Rule<sup>256</sup> contains an inherent bias against commercial use.

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250. *Rogers*, 960 F.2d at 311.

251. *Id.* at 310; see *supra* notes 229-39 and accompanying text.

252. 495 U.S. 207 (1990).

253. *Id.* at 238 (quoting 3 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT 13.05[A] (1990)); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

254. *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

255. *Id.* at 311-12.

256. The Inverse Ratio Rule is a common law doctrine that is used by many courts in an infringement analysis. According to the Rule, proof of access has an inverse relation to proof of substantial similarity. If solid evidence of access can be established, a lesser showing of similarity is required to sustain a finding of copying. Conversely, if two works are substantially similar to a great degree, proof of access is not necessary. The *Rogers* court, by creating an Inverse Ratio Rule as a fair use factor, essentially balanced the tension between the conflicting policies underlying copyright law. This test was first advanced by the Supreme Court in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

In *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>257</sup> the Supreme Court held that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . ."<sup>258</sup>

Relying on this balancing test, the Second Circuit focused on whether "Koons' work is primarily commercial in nature."<sup>259</sup> In such a case, the only showing required is that "if the unauthorized use becomes 'widespread' it would prejudice [the] potential market for [the original] work."<sup>260</sup> The owner of the underlying work does not have to prove actual harm in the marketplace; potential harm to the market for derivative works is sufficient.<sup>261</sup> Differences in medium are irrelevant, as they are elsewhere in copyright analysis, since the marketplace for the protected expression encompasses photographs, sculptures, and all other forms of reproduction. If Jeff Koons could show that the market for a photograph is not affected by a sculpture, the fair use exception would in fact swallow the intent of the Copyright Act. Only *expression* is protected by copyright law. Focusing on differences in media that do not affect the expressive quality of a work would destroy copyright law.

It may be possible for future postmodern artists to distinguish *Rogers*, based once again on Koons' blatant commercial motivation. In disposing of this factor, the court relied on the facts in evidence and may have narrowed the scope of its holding: "Here there is nothing in the record to support a view that Koons produced 'String of Puppies' for anything other than sale as high-priced art. Hence, the likelihood of future harm to Rogers' photograph is presumed, and plaintiff's market for his work has been prejudiced."<sup>262</sup> Therefore, the court concluded, prejudice will follow automatically from the presumption attached to commercial use. If the presumption can be avoided, or if the commercial motivation of the use can be tempered in evidence, this factor may not militate against fair use. Koons' use was so extreme on the commercial end of the spectrum

257. 464 U.S. 417 (1984).

258. *Id.* at 451.

259. *Rogers*, 960 F.2d at 312.

260. *Id.*; see also *Sony*, 464 U.S. at 451 (1984); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985).

261. *Rogers*, 960 F.2d at 312.

262. *Id.*

of use that *Rogers* may not serve as a benchmark for future analysis of the effect on market value.<sup>263</sup>

### *E. Remedies*

Once infringement has been established in a case involving postmodern art, the issue of damages can be especially crucial. The Copyright Act allows the copyright owner to elect to recover statutory damages in lieu of the infringer's actual profits.<sup>264</sup> This provision may seriously undercut the ability of artists to produce works for fear that it may have severe financial consequences. Furthermore, courts are empowered to fashion equitable relief as necessary, up to and including the destruction of the infringing works.<sup>265</sup> This type of relief potentially has serious effects on the postmodern artist, who, despite an infringement, has made a purposeful commentary on the appropriated work. In other words, the remedy can result in the destruction of this type of art.<sup>266</sup>

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263. Any plaintiff in an analogous infringement action would assert that the art market is necessarily commercial and all artists must harbor some commercial motivation. This argument holds some merit, especially in light of the economic justifications for the Copyright Act. The failure of *Rogers*, however, may be that no quantum of commercial interest was identified that would separate fair from unfair use. Defendants are not prevented by this decision from arguing that their motives were not sufficiently commercial to invoke the presumption of prejudice. If their position can be distinguished from that of Jeff Koons, the line of reasoning followed in the market-effect cases may need to be abandoned.

264. 17 U.S.C. § 504(c) (1988). The copyright owner would only elect statutory damages if they would exceed the infringer's actual profits; if the infringer's profits exceeded the statutory maximum of \$100,000 for willful infringement, statutory damages are obviously a less attractive option for the copyright owner to pursue. 17 U.S.C. § 504(c)(2) (1988); see also *infra* notes 267-84 and accompanying text.

265. 17 U.S.C. § 503 (1988).

266. Liability in *Rogers* potentially could be extended to Sonnabend Gallery, which was named as a co-defendant. Under the doctrine of contributory infringement, "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). If the gallery knew that Koons had infringed Rogers' copyright, Rogers would be able to recover from the gallery as well. In *Rogers*, the evidence did not show that Sonnabend had any knowledge of the source for "String of Puppies." *Rogers v. Koons*, 751 F. Supp. 474, 481 (S.D.N.Y. 1990). In the future, galleries may need to closely scrutinize works which they suspect may contain appropriated elements to determine the extent of their exposure to an infringement claim.

## 1. Statutory Damages

A successful plaintiff in an infringement action may elect to recover statutory damages. Recovery is limited to amounts between \$500 and \$20,000 "as the court considers just."<sup>267</sup> This award can be increased to \$100,000 if the court finds proof of willful infringement.<sup>268</sup> Attempting to recover for willful infringement is a risky proposition, however, since the court has the discretion to reduce the award to \$200 if willfulness is not shown.<sup>269</sup> In cases where a less commercially successful artist infringes, electing statutory damages permits a greater award than would probably be calculated from actual damages.

Since Jeff Koons sold each sculpture for more than the upper limit on statutory damages,<sup>270</sup> there was no incentive for Art Rogers to elect this option. The purpose of this provision is to allow recovery even where the infringer has not realized a financial gain. Had Koons been unable or unwilling to sell "String of Puppies," Rogers would still have a measure of recovery. In cases that may arise from infringement by appropriation, statutory damages will be the likely method of recovery. Few contemporary artists command Koons' prices, but the deterrent effect of fixed penalties will reach all strata of the art world. Artists should consider the extent of their liability in terms of statutory damages; it is not sufficient to dismiss potential infringements because the resulting work is not commercially viable.

## 2. Actual Damages

Where the infringer has benefitted financially from the infringement, the successful plaintiff will often elect to recover actual damages. This method of recovery calculates the actual damages as well as the net profits gained from the infringement:<sup>271</sup> "In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible

267. 17 U.S.C. § 504(c)(1) (1988).

268. 17 U.S.C. § 504(c)(2) (1988).

269. *Id.*

270. Koons sold three sculptures for a total of \$367,000. *Rogers v. Koons*, 960 F.2d 301, 305 (2d Cir. 1992). This exceeds the statutory limit of \$100,000. 17 U.S.C. § 504(c)(2) (1988).

271. 17 U.S.C. § 504(b) (1988).

expenses and the elements of profit attributable to factors other than the copyrighted work."<sup>272</sup>

In calculating actual damages, "the primary measure of recovery is the extent to which the market value of the copyrighted work at the time of the infringement has been injured or destroyed by the infringement."<sup>273</sup>

The legislative intent for recovery of actual damages was "to compensate the copyright owner for losses suffered as a result of the infringement, and also allowed for the award of the profits of the infringer to prevent the infringer from unfairly benefiting from its wrongful act."<sup>274</sup> Although the court of appeals remanded the calculation of damages to the district court, it suggested that "a reasonable license fee for the use of 'Puppies' best approximates the market injury sustained by Rogers as a result of Koons' misappropriation."<sup>275</sup> Other circuits have adopted similar guidelines for recovery. In *Deltak, Inc. v. Advanced Sys., Inc.*,<sup>276</sup> the Seventh Circuit Court of Appeals ruled that "[t]he value of the infringer's use is a permissible basis for estimating actual damages."<sup>277</sup> The Ninth Circuit, in *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*,<sup>278</sup> also incorporated the value of the infringer's use into the tabulation of actual damages.<sup>279</sup>

The determination of apportioned profits hinges on many factors that can decrease the award to the plaintiff. The statute expressly permits the infringer to establish elements of profit that are not attributable to the infringed work. The Second Circuit in *Rogers* listed factors such as "Koons' own notoriety and his related ability to command high prices for his work. . . . To the extent that Koons is able to prove that the profits at issue derive solely from his own position in the art world, he should be allowed to retain them."<sup>280</sup> Profit deduction in analogous circumstances has been allowed by the Ninth Circuit<sup>281</sup> and in other Second Circuit

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272. *Id.*

273. *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807 F.2d 1110, 1118 (2d Cir. 1986).

274. *Id.* (citing H.R. REP. NO. 1476, 94th Cong., 2d Sess. 161 (1976)) (emphasis deleted).

275. *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992).

276. 767 F.2d 357 (7th Cir. 1985).

277. *Id.* at 360-61.

278. 562 F.2d 1157 (9th Cir. 1977).

279. *Id.* at 1174.

280. *Rogers*, 960 F.2d at 313 (citations omitted).

281. In *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1549 (9th Cir. 1989), the court noted that "[w]here a defendant alters infringing material to suit its own unique purposes, those alterations and the creativity behind them should be taken into account in apportioning the profits of the infringing work."

cases.<sup>282</sup> Therefore, the reputation and market status of an infringing artist may greatly impact on the resulting recovery. No such determination has yet been made in *Rogers*; the case has been remanded to the district court for determination of damages.<sup>283</sup>

Thus, electing to pursue actual damages in postmodern infringement actions may not be an effective route to recovery. The market value of the infringed work may not be high, especially when compared to available statutory damages. Moreover, profits realized by the infringer may be attributed to elements independent of the infringement and may not be included in the damage calculation. Applying this reasoning, the Second Circuit hinted broadly that plaintiff Rogers should abandon his claim to actual damages: "Finally, we note that Rogers remains at liberty to elect statutory damages in lieu of an award of actual damages and apportioned profits. In fact, given Koons' willful and egregious behavior, we think Rogers may be a good candidate for enhanced statutory damages . . . ."<sup>284</sup>

### 3. Equitable Relief

Courts are not limited to fashioning monetary relief in infringement cases. The Copyright Act expressly permits courts great discretion in directing equitable relief where appropriate.<sup>285</sup> In *Rogers*, the district court ordered Koons to ship the artist's copy of "String of Puppies" to Rogers. Koons contested the order, but the court of appeals found no abuse of discretion in the trial judge's decision.<sup>286</sup> Given the wide latitude available to the trial court in such cases, artists who infringe run the risk of losing their works as part of the judgment. Instead of ordering a transfer of the work, courts may also order the destruction of any infringing work.<sup>287</sup> It would have been within the discretion of the district court to have ordered Koons to destroy "String of Puppies." Although exercise of these equitable powers is rare when works of art are at issue, the legal effect of the Copyright Act is to permit destruction of art to protect generalized economic interests. The chilling effect of such a remedy is considerable if artists are not willing to run the risk of losing their art.

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282. See, e.g., *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983).

283. *Rogers*, 960 F.2d at 313.

284. *Id.* (citation omitted).

285. 17 U.S.C. § 503 (1988).

286. *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992).

287. 17 U.S.C. § 503 (1988).

Thus, the impact of *Rogers* may be to severely restrict the growth of one of the most prominent artistic movements of the twentieth century.

## V. THE FUTURE OF POSTMODERNISM

### A. *The Second Circuit's Object Test*

The Second Circuit's new definition of parody has already wended its way into the legal consciousness, at least in the Sixth Circuit. *Acuff-Rose Music, Inc. v. Campbell*,<sup>288</sup> decided four months after *Rogers*, applied the object test to define a rap song performed by 2 Live Crew as a parody for copyright purposes.<sup>289</sup> The Court of Appeals reversed the district court's finding that the 2 Live Crew song "Pretty Woman" was a parody under the *Rogers* definition: "[E]ven accepting that 'Pretty Woman' is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song."<sup>290</sup> The court accepted the object test and expressly narrowed the parody definition in accord with *Rogers*.<sup>291</sup> This decision was appealed, however, and the Supreme Court granted a writ of certiorari to address "[w]hether petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. Section 107."<sup>292</sup>

Unless the Supreme Court reverses *Acuff-Rose* or limits the *Rogers* parody definition, the object test will present a major obstacle for postmodern artists who assert a valid fair use defense. Some parodies that use "found objects" plainly show the underlying work to be an object of the parody.<sup>293</sup> Others, like Koons' sculpture, overwhelm the underlying work to impart their message. Under the object test, purely social criticism is not a valid fair use if it uses an appropriated object, unless the criticism is clearly directed at that object. Koons asserted that his intent was to criticize the mass market for sentimentalized postcard photographs.<sup>294</sup>

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288. 972 F.2d 1429 (6th Cir. 1992).

289. *Id.*

290. *Id.* at 1436 & n.8.

291. *Id.*

292. 113 S. Ct. 1642 (1993).

293. Duchamp's "LHOOQ," for instance, consists of Leonardo Da Vinci's "Mona Lisa" with two alterations: the model is wearing a penciled-in moustache, and the picture is captioned with the letters "LHOOQ," which when pronounced in French produces an off-color pun. JANSON, *supra* note 22, at 693.

294. See *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992); but cf. *supra* note 180 and accompanying text (Koons' claim at having lifted photograph "to new vocabulary," debatably a different artistic purpose than *Rogers*'s.).



While the artistic success of his endeavor is arguable, for purposes of fair use his sculptures are an ineffective parody because they fail to point out the distinct expression in the underlying work.

### *B. Exclusive Rights of Copyright Owner*

Postmodern works classified under the protection of the Copyright Act can still infringe the exclusive rights of the owners of appropriated preexisting works. Copyright holders are granted five exclusive rights.<sup>295</sup>

Any postmodern artist who utilizes found objects or appropriates the work of others needs to be concerned about the rights to reproduction and to create derivative works. Public performance rights, which are limited to certain types of works,<sup>296</sup> may not be available to some performance artists. Therefore, the emphasis and intent of some performance art may need to be altered if the artist wishes to retain the exclusive right to public performance.<sup>297</sup>

295. The Copyright Act defines those rights as:

- (1) to reproduce the copyrighted work . . . ;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work . . . ;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1988).

296. The Copyright Act gives the exclusive right, "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly." 17 U.S.C. § 106(4) (1988).

297. The two remaining rights, the right to distribution and the right to public display, are outside the scope of this Article. Distribution rights were relevant to *Rogers v. Koons* only to the extent that defendant Koons infringed by distributing four copies of Rogers' protected work. Koons was within his rights, under the First Sale Doctrine, to send the notecard containing "Puppies" to his Italian studio. The First Sale Doctrine, a limitation on the right to distribution, states that "the owner of a particular copy [of a work] . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . ." 17 U.S.C. § 109(a) (1988). The addition to the marketplace of four sculptural versions of "Puppies," while technically a violation of Rogers' right, is *de minimis* in comparison to the effect of the infringement. Public display rights are granted for every type of protected work except for whole motion pictures. Since no aspect of postmodern art falls outside of the scope of the display right, there are no material issues for the postmodern artist. The relationship between Sonnabend Gallery and Jeff Koons, including the right to display, is relevant only to the extent of damages that can be recovered from the gallery. For the purposes of this Article, it is sufficient that the

For postmodern artists, the potential for infringement is quite high. Often, direct evidence of copying is available, since artists who use "found objects" emphasize the appropriation as part of the meaning of the work. Without proof of direct copying, a finding of substantial similarity can still lead to liability for infringement. The test for substantial similarity, which is based on the judgments of the lay observer, does not consider artistic merit or relative aesthetic differences.<sup>298</sup>

### 1. Reproduction Rights

The owner of a copyright for any type of protected work enjoys the exclusive right to reproduce the work.<sup>299</sup> The plain language of the Copyright Act prevents another artist from exploiting Art Rogers' photographs or Andy Warhol's paintings. In the case of visual works, reproduction rights allow the holder of the copyright to produce copies and prints of the original work. Since the statute limits reproductions to "copies or phonorecords,"<sup>300</sup> performance artists can only enjoy this right in terms of reproducing a script, plan or videocassette recording. If the performance results in a visual work, however, such as a painting or an installation, the artist retains the exclusive right to reproduce the resulting work. "Earth-works" artists can prevent others from reproducing their works in the same location with the same materials; it is doubtful, though, that infringement could be proved in a situation that was not nearly identical.<sup>301</sup>

### 2. Public Performance Rights

Performance artists, especially in recent years, have created their brand of art in front of paying or invited audiences in theaters that, on other occasions, present more conventional forms of dance and drama.<sup>302</sup> The Copyright Act of 1976 limits the types of works that can be protected in their public performances. Public performances of "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and

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gallery exhibited Koons' infringing sculptures with the artist's permission.

298. See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("[Whether] the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.").

299. 17 U.S.C. § 106(1) (1988).

300. *Id.*

301. See *supra* notes 71-87 and accompanying text.

302. See Jalon, *supra* note 92; Span & Hall, *supra* note 95.

other audiovisual works"<sup>303</sup> are reserved exclusively to the copyright owner. The Act specifically excludes protection in this area for pictorial and sculptural works, both of which are otherwise given basic protection.<sup>304</sup> In addition, courts have held that "nondramatic" performances of dramatic works do not fall within the exclusive right of public performance.<sup>305</sup>

It is not difficult for performance artists such as Karen Finley and Annie Sprinkle<sup>306</sup> to satisfy the statutory requirements for the public performance right. Finley's recent shows have included dramatic monologues and choreographic elements.<sup>307</sup> At the very least they can be classified as an advanced form of pantomime *cum* social commentary; at best, they are dramatic performances of a multimedia literary work that includes choreographic elements. Artists who follow in the tradition of Chris Burden or Vito Acconci, however, may not be able to reserve their rights to perform their works.<sup>308</sup> An artist who wished to duplicate or update Burden's "Shoot,"<sup>309</sup> for example, would not enjoy the right to prevent others from public performance of that work. The idea itself is not a valid subject for copyright and cannot be protected in any form.<sup>310</sup> The key issue is whether the "performance" or the resulting photographs constitute the intended work. Since most courts will probably not identify dramatic or choreographic elements in being shot in the arm, performances like these may not be protectable expression.

Similar performances may meet the same fate, even though the resulting pictorial work is indistinguishable from its creation. From a policy standpoint, the exclusion of pictorial, graphic, and sculptural works

303. 17 U.S.C. § 106(4) (1988).

304. See *supra* notes 118-34 and accompanying text.

305. See *Robert Stigwood Group Ltd. v. Sperber*, 457 F.2d 50 (2d Cir. 1972) (allowing ASCAP licensees to perform nondramatic musical works); *April Prods., Inc. v. Strand Enters., Inc.*, 221 F.2d 292 (2d Cir. 1955) (medley of songs in cabaret act nondramatic within license).

306. Annie Sprinkle is an ex-adult film star and self-described prostitute who performs sexually explicit material in performance spaces and theaters nationwide. Brian Bradley, *Annie Sprinkle: Post-post Porn Modernist*, BACK STAGE, Sept. 20, 1991, at 48.

307. "We Keep Our Victims Ready," performed in the winter of 1990 at the Walker Arts Center in Minneapolis, Minnesota, consisted of two acts. In Act One, Finley delivered a social commentary on abortion rights and religion. In Act Two, Finley removed her clothing and smeared herself with chocolate and tinsel while reciting a monologue comparing herself to a veal calf. Span & Hall, *supra* note 95. "We Keep Our Victims Ready" has since been performed in a nationwide tour by Finley and has generated considerable publicity.

308. See *supra* notes 88-113 and accompanying text.

309. Jalon, *supra* note 92, at 93.

310. See *supra* note 92 and accompanying text.

from the performance right prevents the abuse of copyright protections. If performance rights in pictorial works were protected, Jackson Pollock's demonstrations of drip paintings<sup>311</sup> could serve to foreclose public use of that technique by other artists. Since the Copyright Act excludes from protection "any idea, procedure, process, system, method of operation, concept, principle, or discovery, *regardless of the form in which it is described, explained, illustrated, or embodied in such work*,"<sup>312</sup> it would be inconsistent to extend protection to the creation of works of art that happened to be in the context of a public performance. Pollock could not expect to enjoy a copyright monopoly over his style of painting, even if he had charged admission and created drip paintings in Carnegie Hall. Likewise, any method of artistic creation is explicitly exempt from protection, even if the act of creation is itself a performance. Therefore, while the result of Chris Burden's gunshot wound qualifies as a pictorial work, no rights can be claimed over the process he used.

Performance art that is directed toward the creation of an independent pictorial, graphic, or sculptural work runs the risk of falling outside the scope of the public performance right. Such a performance can be separated into protected and unprotected elements, so that the portions of a performance that meet statutory guidelines will have the performance right attached.<sup>313</sup> If there are no separable aspects to the performance, though, the policy disfavoring protection for modes of creation will deny protection.

### *C. Difficulties in Obtaining Copyright Protection: Fixation*

For a work to be protected under the Copyright Act, it must be fixed in a tangible medium of expression.<sup>314</sup> The fixation requirement presents problems for postmodern artists only in a few disciplines. No fixation difficulties arise in the case of photographs, paintings, sculptures, or installations. The Copyright Act requires only that fixation occur "in any tangible medium of expression, now known or later developed, from which

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311. See JANSON, *supra* note 22, at 695-96. Jackson Pollock was a highly influential American abstract expressionist painter who pioneered the "drip painting" in the late 1940's, in which paint was dribbled onto a canvas in seemingly random combinations. See generally ELLEN LANDAU THAMES & HUDSON POUNDS, JACKSON POLLOCK (1990); STEVEN HAIFEH & GREGORY WHITE SMITH, JACKSON POLLOCK: AN AMERICAN SAGA (1990).

312. 17 U.S.C. § 102(b) (1988) (emphasis added).

313. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

314. 17 U.S.C. § 102(a) (1988).

[a work] can be perceived, reproduced, or otherwise communicated . . . ."<sup>315</sup> Fixation normally requires some form of mechanical recording or documentation. The fixation must be "sufficiently permanent or stable . . . for a period of more than transitory duration."<sup>316</sup>

A work consisting of sounds or images, including stage performances of all types, may be fixed in several different ways. Often, a written script, choreographic records, or sheet music can suffice as fixation for a work performed in public. The Copyright Act also allows transmissions of such works to be fixed if they are recorded or otherwise captured "simultaneously" with transmission.<sup>317</sup> For two types of postmodern art, the fixation requirement presents an obstacle that may deny protection to some artists.

Performance art, except when staged in a controlled setting, may only be fixable if other records are made of the performance. Works such as Vito Acconci's "Following Piece"<sup>318</sup> are not structured enough to satisfy the fixation requirements on their own. Acconci purposefully followed random pedestrians around New York. There was no script, no choreographed movements, and thus no tangible fixation. Acconci made written notes of his encounters, and in many cases took photographs of his subjects; these elements were combined into a final presentation. As a whole, the presentation is copyrightable, since written records and the photographs are sufficient fixation. By extension, the performance through which Acconci generated the records is fixed for copyright purposes.

Much performance art, however, is staged in a single performance and may not be sufficiently fixed. To gain protection for works performed in spaces like "d.c. space" in Washington, D.C.<sup>319</sup> and Los Angeles Contemporary Exhibitions,<sup>320</sup> artists would have to show evidence of a script that was followed or a choreographed plan. Otherwise, artists would be required to videotape their performances. Performance art, as defined by the art community, encompasses far more than the stage work of Karen

315. 17 U.S.C. § 102(a) (1988).

316. 17 U.S.C. § 101 (1988).

317. 17 U.S.C. § 101 (1988). The definition of simultaneity has been expanded to include transmissions that are not actually recorded. See *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986) (fixation of "dirty" satellite transmission accomplished by recording "clean" transmission).

318. See *supra* note 107.

319. "d.c. space" is a performance space that first opened in late 1977 as a combination restaurant, "new-music showplace, and art gallery." It is credited with revitalizing the Washington, D.C. arts scene in the late 1970's. Jo Ann Lewis, *The Arts Downtown: The Scene's Getting Busier on F Street*, WASH. POST, Jan. 7, 1978, at E1.

320. See Jalon, *supra* note 92; Span & Hall, *supra* note 95.

Finley or the shows of Tim Miller's Highways Performance Space in Santa Monica, California.<sup>321</sup> Artists perform on street corners, in small clubs, or any place where they desire to express themselves. Under copyright law, these performances are not fixed, and thus they cannot be given protection.

The settings exploited by the "Earthworks" artists presents similar fixation problems for their works. Christo's "The Umbrellas"<sup>322</sup> was planned to be transitory, and its tenure was foreshortened considerably when a spectator died on the project site.<sup>323</sup> The fixation of "The Umbrellas" is not an issue, since very precise plans were followed in the placement, arrangement, and selection of the umbrellas. Photographs, blueprints, and books fully document the planning and execution of the project.<sup>324</sup> The nature of Christo's works necessitates such rigorous planning. Wrapping islands in pink plastic or erecting miles of fence requires detailed instructions.

Likewise, Robert Smithson's "Spiral Jetty,"<sup>325</sup> an intricate spiral design of molded earth, was the result of a detailed blueprint. When Smithson dumps dirt down a hillside, though, it is not clear what documentation would suffice to fix the resulting mass of earth. The transitory nature of such work does not satisfy the "sufficiently permanent or stable"<sup>326</sup> language of the Copyright Act. Photographs are normally taken to record these events, but protection may extend only to the photographs themselves. Temporarily transforming nature may be seen by some courts to be part of the process of arranging the subject matter for a photograph and not as an artistic creation by itself. Clearly, a photograph of a natural landmark, such as Half Dome in Yosemite National Park, does not entitle the photographer to claim any rights over the mountain itself. Even if the photographer alters his subject matter by arranging rocks or dirt, another photographer cannot be prevented from capturing the scene on film. No court has as yet determined where the line can be drawn between arranging the environment to create art and creating art by arranging the environment. The difficulty to fix such a work in a tangible medium may render this distinction moot.

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321. See Jalon, *supra* note 92. Tim Miller is a Los Angeles-based performance artist who, in 1989, co-founded Highways performance space in Santa Monica. Jan Breslauer, L.A. *In Their Rear-View Mirrors*, L.A. TIMES, Jan. 16, 1994, at F7.

322. See *supra* notes 71-73, 83-87 and accompanying text.

323. See *supra* note 86.

324. Christo marketed and licensed copies of his plans and drawings to be sold as souvenirs, alongside the requisite T-shirts and miniature umbrellas. Scale models of the project have been exhibited in galleries in Southern California. Colker, *supra* note 86, at B1.

325. See *supra* note 77 and accompanying text.

326. 17 U.S.C. § 101 (1988).

Consequently, "Earthworks" artists must be quite careful to document their works if they desire copyright protection.

#### *D. Defenses Available After Rogers*

*Rogers* will adversely affect postmodern art. A solid precedent has now been established for future plaintiffs to bring infringement claims against artists.<sup>327</sup> To defend against such claims, artists still have two lines of defense that were left open in *Rogers*' wake: parody and non-commercial use. Works that satisfy the Second Circuit's object test for parody stand a good chance of asserting a successful fair use defense.<sup>328</sup> Similarly, if the purpose behind the art and the motives of the artist can be distinguished factually from the behavior of Jeff Koons, several of the fair use factors may fall into place in favor of the defendant.<sup>329</sup>

More ominously, though, the *Rogers* decisions may have a chilling effect that extends well beyond the courtroom. Many contemporary artists regularly practice forms of appropriation and utilize "found objects." It is now inadvisable for postmodern artists to create works while remaining oblivious to copyright laws. Art Rogers, in asserting his rights under the law to protect his financial interest in his expression, has broken down the barrier which separated the economic justifications of copyright law from the aesthetic traditions of postmodern art.

#### *E. Decisions Since Rogers*

For Jeff Koons, the *Rogers* decisions may spell the end of his career as a practitioner of "found" art. In two separate cases, both relating to works Koons created for the same show that featured "String of Puppies," Koons was found to have infringed underlying works.<sup>330</sup> In *Campbell v. Koons*,<sup>331</sup> Koons once again commissioned a sculpture to be made from a photograph. In this instance, Koons purchased a notecard of Barbara Campbell's "Boys with Pig" and sent it to the same Italian studio that

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327. See *Campbell v. Koons*, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. 1993); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 376 (S.D.N.Y. 1993); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

328. See *supra* notes 215-39 and accompanying text.

329. See *supra* notes 213-63 and accompanying text.

330. *Campbell v. Koons*, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. 1993); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

331. 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. 1993).

created "String of Puppies."<sup>332</sup> The district court, noting the overwhelming similarity to *Rogers*, held for Campbell as a matter of law: "This case needs little discussion, for it is substantially identical to *Rogers v. Koons* . . . ." <sup>333</sup> The court rejected Koons' fair use defenses just as quickly: "The Second Circuit's decision in *Rogers v. Koons* also forecloses, as a matter of law, Koons' asserted affirmative defenses of Fair Use and Parody . . . ." <sup>334</sup> Koons was ordered to send all copies of the infringing sculpture to Campbell, as well as "any photographs or representations thereof." <sup>335</sup>

In *United Feature Syndicate, Inc. v. Koons*,<sup>336</sup> Jeff Koons commissioned four sculptures entitled "Wild Boy and Puppy."<sup>337</sup> The "puppy" in each sculpture was a representation of "Odie," a character in the syndicated comic strip "Garfield."<sup>338</sup> Koons freely admitted that he directly copied "Odie" into his sculptures.<sup>339</sup> Unlike in *Campbell*, the district court did not find this case to be on all fours with *Rogers*, although the Second Circuit's opinion was cited as a "helpful framework."<sup>340</sup> Following a standard infringement analysis, summary judgment was granted for plaintiff United Feature Syndicate.<sup>341</sup> *Rogers* was cited extensively by the court in its rejection of Koons' fair use and parody defenses.<sup>342</sup> The court concluded by holding that "[i]n sum, drawing all reasonable inferences in defendant's favor, there is no evidence which would allow a reasonable factfinder to rule for the defendant on the issue of copyright liability in the instant case."<sup>343</sup>

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332. *Id.* at \*2. Barbara Campbell is a professional photographer with over 20 years of experience in commercial photography. *Id.* at \*5.

333. *Id.* at \*6.

334. *Id.* at \*7.

335. *Id.* at \*9.

336. 817 F. Supp. 370 (S.D.N.Y. 1993).

337. *Id.* at 371.

338. *Id.*

339. "According to Koons, he designed the sculpture by cutting out a color picture of 'Odie' (the 'Puppy') and placing it next to a cut-out image of a stuffed doll (the 'Wild Boy') to form a collage which was used as the design for the sculpture." *Id.* at 372.

340. *Id.* at 376.

341. *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370, 376 (S.D.N.Y. 1993).

342. *Id.* at 377-82.

343. *Id.* at 385.



## VI. CONCLUSION

*Rogers* was the first case to confront the tension that exists between contemporary art and copyright law.<sup>344</sup> Under a traditional copyright analysis, it would be difficult to disagree with the judgment against Jeff Koons. Koons admittedly appropriated Art Rogers' copyrighted photograph and sold the resulting work for \$367,000.<sup>345</sup> By any infringement standard, Koons infringed on Rogers' copyright. Furthermore, the fair use defense does not apply because of Koons' commercial motivation and his artistic stance, which equates the aesthetic value of art with its financial value.<sup>346</sup>

Unfortunately for postmodern artists, these decisions have created a dangerous precedent that may erode artistic freedom. While it is laudable that Jeff Koons will no longer reap the rewards of other artists' talent, many other artists may be forced to subjugate artistic inspiration to fear of infringement. With *Rogers* as a precedent, it might not have been possible for Andy Warhol to propel Pop Art into a worldwide phenomenon with his soup cans.<sup>347</sup> Marcel Duchamp's "The Fountain"<sup>348</sup> and "LHOOQ"<sup>349</sup> may not have stood up before the Second Circuit's object test for parody. The artistic philosophy of artists like Duchamp and Warhol have influenced artists in such diverse media as performance art and "Earthworks." Without pieces like "The Fountain"<sup>350</sup> and Andy Warhol's series of paintings of soup cans,<sup>351</sup> contemporary art would no doubt be vastly different today.

Thus, *Rogers* presents a serious obstacle to all practitioners of postmodernism. If given the opportunity, a court may be sympathetic to postmodern ideology and reinterpret copyright law to allow some leeway for use of "found objects" and other postmodern techniques. In *Rogers*, however, the Second Circuit refused to look past Jeff Koons' financial

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344. See *supra* notes 62-64 and accompanying text.

345. See *supra* note 144 and accompanying text.

346. See *supra* notes 213-63 and accompanying text.

347. See *supra* notes 58-59 and accompanying text.

348. See *supra* notes 36-40 and accompanying text.

349. See *supra* note 293 and accompanying text.

350. See *supra* notes 36-40 and accompanying text.

351. See *supra* notes 58-59 and accompanying text.

motives and his disregard for copyright law.<sup>352</sup> In suing Jeff Koons, Art Rogers has successfully asserted his copyright, but the basis for that decision may severely impair the development of contemporary art.

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352. See *supra* notes 215-28, 267-70 and accompanying text.

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