APPROPRIATION IN THE FINE ARTS: FAIR USE, FAIR DEALING AND COPYRIGHT LAW

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I Introduction

In the 20th century, comprehensive and far-reaching theoretical shifts occurred in the Fine Arts, with Post-Modernism re-conceptualising the discipline and challenging its formal and philosophical boundaries. Artists sought to disassociate art from the notions of hierarchy and genius intrinsic to 17-19th century art[1] and Modernism,[2] with works characterised by the questioning of the role of the artist through, for example, techniques of appropriation. Through so doing, post-modern artists aimed to overthrow artistic convention and challenge the established capitalist, patriarchal and colonial narratives of Modernism, as well as its emphasis on 'high' and 'low' art. We see such practices in

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[1] Throughout the 17th – 19th centuries, art maintained a hierarchy of genres and focussed on narrowly defined conceptions of beauty, with artists "using [a] perfect, seamless technique to execute very well-established subject-matter." Megan Gambino "Ask an Expert: What is the Difference between Modern and Post-Modern Art?" Smithsonian.com <http://www.smithsonianmag.com/arts-culture/ask-an-expert-what-is-the-difference-between-modern-and-postmodern-art-87883230/?no-ist>

[2] A movement starting around 1860 in response to the art of the 17th-19th centuries, Modernism incorporated "personal expression… [putting] emphasis on the value of being original and doing something innovative." Gambino, Above.

the collages of Dada artists;[3] the Pop art appropriations of Andy Warhol and Robert Rauschenberg;[4] in the work of Neo-pop artists such as Jeff Koons, Keith Haring, Kenny Scharf and Rodney Allan Greenblat; [5] and in Richard Prince's 2008 'Canal Zone' series.[6] In New Zealand this approach is evidenced in the work of Michael Parekowhai who, in appropriating imagery from New Zealand modernist painters Colin McCahon[7] and Gordon Walters,[8] has engaged heavily with post-modern strategies.[9]

Appropriation such as this is important, as it enables artists and the viewing public to critique individual artists, art movements and artworks through appropriating and transforming their imagery. Such appropriation can also verge on the political, as we see in politically

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[3] Such as Hannah Hoch, Raoul Hausmann and John Heartfield.

[4] "Pop artists like Robert Rauschenberg, Claes Oldenburg, Andy Warhol, Tom Wesselman, and Roy Lichtenstein reproduced, juxtaposed, or repeated mundane, everyday images from popular culture—both absorbing and acting as a mirror for the ideas, interactions, needs, desires, and cultural elements of the times." "Pop Art" Museum of Modern Art Learning <http://www.moma.org/learn/moma_learning/themes/pop-art/appropriation>.

[5] Who "appropriated commercial images from comics and media along with collage and an effluvia of found materials" Margot Lovejoy *Digital Currents: Art in the Electronic Age* (3rd ed Routledge, New York: 2004) at 76.

[6] Which engendered the litigation in *Cariou v Prince* 714 F 3d 694 (2d Cir 2013).

[7] Compare Colin McCahon's *I Am,* 1954, 36.1 x 55.5 cm, available at <http://www.mccahon.co.nz/cm000828> with Michael Parekowhai, *The Indefinite Article*, 1990, 248.9 x 609.6 x 35.6 cm, available at <http://www.aucklandartgallery.com/the-collection/browse-artwork/16389/the-indefinite-article>.

[8] Compare Gordon Walters, *Kahukura*, 1968, 113.8 x 152.3 cm available at <http://apt5journal.blogspot.co.nz/> with Michael Parekowhai, *Kiss the Baby Goodbye*, 1994, 360 x 460 cm, available at <http://www.studyblue.com/notes/note/n/contemporary-art-final/deck/9174121>.

[9] Joanna McFarlane "Kiss the Baby Goodbye: Appropriation in New Zealand Art" ARTH2061 The Post-Modern Sublime Presentation Paper, Australian National University, May 2013).

oriented remixes regarding politicians such as Stephen Harper,[10] or the 2008 US election.[11] As evidenced in these examples, "transformative works often involve authorial creativity and social critique… values at the core of freedom of expression."[12]

That copyright could then limit this, that it could say an artist's work is their *property*, seems anathema to these trends and to the fundamental value of freedom of expression which is made manifest in the Fine Arts. On the other hand, copyright is not strictly in opposition to creativity and expression. In the United States this system of private property was actually established amid beliefs that it would facilitate freedom of expression through providing incentives to create.[13] Similarly, art is not an area entirely distinct from economics. In some

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[10] Graham Reynolds "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Irwin Law, Toronto, 2010) at 399-400.

[11] "[H]igh-profile mashups during the 2008 elections included hip-hop star will.i.am's "Yes We Can" video (a remix of Obama's New Hampshire primary concession speech in February 2008), the eponymous Obama Girl's "Crush on Obama" video, satirist Paul Shanklin's "Barack the Magic Negro" song (a remix of an *Los Angeles Times* column and the song "Puff the Magic Dragon") and Comedy Central's late night host Stephen Colbert's "John McCain's Green Screen Challenge" (a mashup contest centering around a speech given by Republican presidential candidate John McCain). Each of these mashups in turn encouraged or stimulated other users to create their own video mashups, such as the numerous user-generated videos on BarelyPolitical.com that remix video footage of Obama Girl, or users who submitted their own mashup creations into Colbert's remix challenge." Richard L. Edwards and Chuck Tryon, "Political video mashups as allegories of citizen empowerment" (2009) 14 First Monday 10, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2617/2305#p4>.

[12] David Fewer "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 Fac.L.Rev., U.Toronto175 at 201.

[13] "Thus, private property and liberty were viewed as complementary and not opposing forces." William Patry, *The Fair Use Privilege in Copyright Law* (2nd ed, BNA Books, Washington D.C., 1985, 1995), at 575.

cases artists can make millions of dollars from pieces which are based on overt appropriation and parodies are often created as a result of purely commercial motivations.[14] The most extreme example of this can be seen in Jeff Koons, whose work has been described as "the archetype of money-driven art production". [15] Employing 128 people, [16] Koons' studio is more akin to a factory than the traditional artist's studio. This reality suggests that art should not be deemed wholly distinct from copyright and that *some* line should be drawn as to when appropriation will and will not be legitimate. This line is found in fair use and fair dealing.

Fair use (in the United States) and fair dealing (in the United Kingdom, Australia, Canada and New Zealand) are legal exceptions to copyright. The exceptions permit the use of copyrighted work for purposes such as criticism and review, research and private study, news reporting, and in some cases parody, satire and education. All the jurisdictions appear to maintain a level of flexibility, treating the exceptions as highly qualitative analyses and fair use/fair dealing as a relatively open concept. Fair use is particularly flexible, being structurally much less specific than its fair dealing counterparts, with the provisions using the terms 'such as' and 'include'. The four part test from 17 United States Code § 107 is as follows:[17]

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[14] "… as opposed to being done purely for the purposes of criticism." Susy Frankel, *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 354.

[15] "Staff Picks: Beard-Burdened and Beer-Branded" (5 September 2014) The Paris Review <http://www.theparisreview.org/blog/2014/09/05/staff-picks-beard-burdened-and-beer-branded/>.

[16] Sixty-four employees in painting and forty-four in sculpture, Jed Perl "The Cult of Jeff Koons" (25 September 2014) The New York Review of Books <http://www.nybooks.com/articles/archives/2014/sep/25/cult-jeff-koons/?insrc=hpss>.

[17] Copyright Act 17 USC § 107.

> … the fair use of a copyrighted work…for purposes **such as** criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall **include** -
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The language of this section permits the courts to apply the exception to uses outside of what is specified in the provision, and to consider factors other than the four which it outlines. In comparison, the fair dealing provisions reference specific uses (research or study, criticism or review, reporting news and, in some cases, parody, satire and education generally) outside of which the courts are not allowed to go. However, fair dealing jurisdictions consider a variety of factors similar to fair use, including the impact of the use on the market of the original, the amount and substantiality of the taking, the nature of the copyrighted work, alternatives to the taking and the purpose of the secondary work.[18] Similarly, fair dealing is not absolute and does allow

[18] Canada considers "the purpose of the dealing, the nature of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work." *CHH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [60]. These factors are also applied under Copyright Act (NZ), s 43 ' research and private study', although practically the same considerations will be applied to s 42 'criticism, review and news reporting', as has occurred in previous case law such as *Television New Zealand Ltd v*

room for interpretation and adaptation in how the specified uses are analysed. As Lord Denning states in the United Kingdom case of *Hubbard v Vosper,* "It is impossible to define what is 'fair dealing'. It must be a question of degree."[19] In New Zealand Blanchard J has described fair dealing in similar terms as a "reasonable use".[20] This is especially the case in Canada, which has recently broadened the scope of fair dealing significantly, in *CCH Canadian Ltd v Law Society of Upper Canada*,[21] where the court held that fair dealing in regards to research must be given a "large and liberal interpretation in order to ensure that 'users' rights' are not unduly constrained."[22] *CCH* had a distinctly pro-user bent and has been affirmed in subsequent cases, having an impact on fair dealing generally.[23] It also stated that using all of a work may be fair in some instances as, for example, "there might be no other way to criticize or review certain types of works such as photographs".[24]

Fair use in the United States also applies the criterion of 'transformative use' under § 107(1), which allows for the use of elements of a copyrighted work when the secondary work is sufficiently different from its antecedent to be classed a new work. In this way the focus has shifted from § 107(3) and the 'amount and substantiality' of taking, to transformative use under § 107(1) – which makes sense, given the reality that visual images cannot be summarised or quoted from in the same way that other creative works can be. Thus, emphasis must

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Newsmonitor Services Ltd [1994] 2 NZLR 91. The same is true of fair dealing in Australia.

[19] *Hubbard v Vosper* [1972] 2 QB 84 at 94.

[20] *Television New Zealand Ltd v Newsmonitor Services Ltd,* above n 18, at 44.

[21] *CCH Canadian Ltd v Law Society of Upper Canada*, above n 18.

[22] *CCH Canadian Ltd v Law Society of Upper Canada*, above n 18, at [51].

[23] For example, we see *CCH* affirmed in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2010] FCA 139 and *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [2012] 2 SCR 345.

[24] *CCH Canadian Ltd v Law Society of Upper Canada,* above n 18, at [56].

instead be placed on determining the purpose and character of the use under § 107(1).[25]

In this way fair use and fair dealing recognise that a) in some circumstances a secondary work has modified a copyrighted original so significantly that it can be considered an entirely new, non-infringing work, and/or b) the secondary work should be permitted as it fulfils the important social uses of parody or satire. In recognising these uses, the exceptions are also a valuable starting point for analysing our system of copyright generally, as they have inherently to do with its fundamental purpose of maximising creativity and knowledge. Copyright achieves this in two ways – firstly, through facilitating economic incentives for artists to create through establishing a monopoly on the use of their works. Secondly, through allowing for new creative works to be spawned through restraining this monopoly via limited copyright durations and fair use and fair dealing. Copyright is oriented around a balancing of these two practices and conceptualised as a legal dynamic that, through this balance, "must work for the public good".[26]

However, it has been argued that throughout the last century copyright has increasingly focussed on copyright holders, rather than users. This can be seen in the extension of copyright durations, the strengthening of enforcement measures and the emergence of a 'permission' culture where permission via license is required to use any copyrighted work and where anxiety and caution characterise the use of copyrighted work generally. All of this has been said to have disrupted the copyright balance, resulting in fewer works being available for appropriation, and thus less creative works and criticism from which we as a society benefit. Fair use and fair dealing can serve to bolster this space and

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[25] As averred by Stephen E. Weil "Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood" (2001) 62 Ohio St.L.J. 835 at 840.
[26] Susan Ballard and Pamela McKinley, "Art at Risk: Copyright, Fair Dealings and Art in the Digital Age" (Otago Polytechnic, Dunedin, 2011) at 17.

facilitate a more flexible system of copyright. Simultaneously, their application also recognises that the Fine Arts shouldn't be removed from the sphere of copyright entirely as it also helps to facilitate their production.[27]

This essay will examine the relationship between the Fine Arts and copyright, and how fair use and fair dealing enable us to navigate this territory. Part two will examine the tensions between copyright law and the arts in greater depth, as well as the expansion of copyright generally, which fair use and fair dealing play an important role in both questioning and curtailing. Part three will consider transformative use as a valuable mechanism for conceptualising artistic practice and as a potential addition to current fair dealing practices. Finally, part four will consider the possibility of New Zealand expanding the categories to which fair dealing applies, given that it is lagging behind its counterparts in the United Kingdom, Australia and Canada in having no provision for parody or satire. This is especially pertinent given that New Zealand will soon be reviewing its copyright legislation.[28]

II The Tension between Art and Law in Copyright

An integral aspect of what makes a work capable of copyright is found in the distinction made between an idea and its expression. As stated in *Rogers v Koons*: [29]

> We recognise that ideas, concepts and the like found in the common domain are the inheritance of everyone. What is

[27] "Without such protection, artists would lack the ability to control the reproduction and public display of their work and, by extension, to justly benefit from their original creative work." *Friedman v Guetta* US Dist LEXIS 66532 (CD Cal 2011) at 19-20.
[28] Cabinet Paper "Delayed Review of the Copyright Act 1994" (15 July 2013).
[29] *Rogers v Koons* 960 F 2d 301 (2nd Cir 1992) at 308.

> protected is the original or unique way that an author expresses those ideas, concepts, principles or processes.

An example to demonstrate this can be found in the case of *Leibovitz v Paramount*[30] where the photographer's image of a pregnant and naked Demi Moore was imitated,[31] but replaced with the head of the actor Leslie Nielsen.[32] The 'idea' inherent in Leibovitz's work is that of photographing a naked, pregnant woman in the classical 'Venus Pudica' pose. Leibowitz does not have a monopoly on this idea. However, her expression of this idea in her choice of lighting, background, angle and choice of camera is capable of copyright protection.

The idea/expression dichotomy in this way acts as a justification for the particular way in which copyright limits freedom of expression, as ideas are still able to be accessed and used in creative works – it is only their expression which is curtailed. We see this approach in the United States,[33] Australia,[34] the United Kingdom,[35] New Zealand[36] and Canada.[37]

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[30] *Leibovitz v Paramount Pictures Corp.* 137 F 3d 109 (2nd Cir NY 1998).
[31] Annie Leibovitz, *Demi Moore*, 1991, available at <http://www.pinterest.com/pin/406168460113329794/>.
[32] Promotional poster for the film *Naked Gun 33 1/3: The Final Insult*, 1993, 68.6 x 104.1 cm, available at <http://en.wikipedia.org/wiki/Leibovitz_v._Paramount_Pictures_Corp>.
[33] E.g in cases such as *Sid & Mary Krofft Television v. McDonald's* 562 F 2d 1157 (1977) at 1170, *Schnapper v Foley* 471 F Supp 426 (1979) at 428, *Eldred v Reno* 239 F 3d 372 (2001) at 376 and finally in the Supreme Court case of *Harper & Row, Publrs. v Nation Enters.* 471 US 539 (1985) at 556: "The Second Circuit noted, correctly, that copyright's idea/expression dichotomy 'strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression" as cited in Robert Burrell and Allison Coleman *Copyright Exceptions: the digital impact* (Cambridge University Press, Cambridge, 2005) at 20, n 12.
[34] As in *Skybase Nominees v Fortuity* (1996) 36 IPR 529 at 531: "the fact that another work deals with the same ideas or discusses the same fact also raised in the work in respect of which copyright is said to subsist will not, of itself, constitute an infringement. Were it otherwise the copyright laws would be an

However, the work of appropriation artists is dependent on the overt use of another artist's expression. Post-Modern artistic practices in this way challenge central tenets of copyright, such as the idea/expression dichotomy, as well as 'originality'. While copyright generally aims to obviate the convoluted question of artistic merit, defining artistic works as such "irrespective of artistic quality",[38] works still need to be 'original'.[39] But what if the artist's very intention is for the two works to be similar, so as to question the concept of originality itself? Post-Modernism, for example, is "[a]ggressively and self-consciously derivative in its ideology."[40] Be it Ready-mades,[41] Found Objects, Object Art, or Collage, post-modern artists have appropriated visual elements from their environment prolifically. Fundamental to these practices is a questioning of the ideas of originality and authorship.

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impediment to free speech, rather than an encouragement of original expression". At 21, n 13.

35 As in *Ashdown v Telegraph Group Ltd* [2001] 4 All ER 666 at [12].

36 "The statutory monopoly is not granted in respect of information itself. It does not prevent the taking and reuse of knowledge itself. Copyright protects not ideas but the form in which they are expressed. Ideas can be appropriated so long as they are not expressed simply by copying the words of the author." *Television New Zealand Ltd v Newsmonitor Services Ltd*, above n 18, at 19.

37 As in *Ce G nrale des Etablissements Michelin -Michelin & C" v. CAWCanad* (1996) 71 CPR (3d) 348 (FCTD) at [112] where the court found defendants had "a multitude of other means for expressing their views."

38 In New Zealand, for example, an artistic work is defined as "a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality" per Copyright Act 1994 (NZ), s 2. The same is true of the United Kingdom per Copyright, Designs and Patents Act 1988 (UK), s 4(1)(a) and Australia Copyright Act 1968 (Aus), Part II

39 'Copyright in Original Works' Copyright Act 1994 (NZ), s 14; 'Works in which Copyright May Subsist' Copyright Act RSC C 1985 C-42, s 5; 'Nature of Copyright in Original Works' Australia Copyright Act 1968 (Aus), s 31; 'Copyright and Copyright Works' Copyright, Designs and Patents Act 1988 (UK), s 1; 17 USC §102

40 Lynne A. Greenberg "The Art of Appropriation: Puppies, Piracy and Post-Modernism" (1992) 11 Cardozo Arts & Ent.L.J. 1, at 1.

41 "A commonplace artefact (such as a comb or bicycle rack) selected and shown as a work of art", Ballard and McKinley, above n 26, at 45.

Examples include simulationist photographers such as Sherrie Levine[42] and Richard Prince[43] (who re-photograph photographs), and simulationist painters such as Mike Bidlo[44] who re-paint original works. Through producing such works these artists aim to problematise the distinction between copy and original, and the market value that is attached to an original and to art generally.[45] Collage, a technique used by many of the artists mentioned here and fundamental to movements such as Dada and Pop Art, is similarly characterised by the appropriation of other images into a new work. Through this process artists may comment on the work of other artists or use "images fundamental to a culture… to make a point about that culture".[46]

These practices are *fundamental* to much contemporary art, which "depends upon direct appropriation as an instrument of critical expression."[47] Post-modern artists aim to challenge powerful, entrenched, often highly unfair norms, and the most effective way for them to do this is to utilise and subvert the imagery of established systems. For example, Barbara Kruger appropriates commercial

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[42] Levine's most famous work is likely her appropriation in 'After Walker Evans' where she re-photographed Evans' photographs from his series 'First and Last'. AfterSherrieLevine.com <http://www.aftersherrielevine.com/>

[43] For example, "Prince's 'Spiritual America' is an appropriation of Garry Gross's lascivious photo of a nude, ten-year-old Brooke Shields." Richard Biles "Richard Prince: 'Spiritual America' (1983)" 21 October 2011 freq.uenci.es <http://freq.uenci.es/2011/10/21/richard-prince-spiritual-america-1983/>

[44] Who "has created an entire exhibition of Bidlo Picassos including *Guernica*, the Gertrude Stein portrait, and *Les Demoiselles d'Avignon*." Lovejoy, above n 5, at 74.

[45] These artists "challenge concepts such as authenticity of the original, the primacy of the creative act… the mastery or genius of the artist… [and] the market system." At 74.

[46] Karen Lowe "Shushing the New Aesthetic Vocabulary: Appropriation Art under the Canadian Copyright Regime" (2008) 17 Dalhousie J. Legal Stud. 99 at 101.

[47] David Lange and Jennifer Lange-Anderson, "Copyright, Fair Use and Transformative Critical Appropriation", <http://law.duke.edu/pd/papers/langeand.pdf> at 132.

imagery in her feminist collages with the aim of problematising capitalism as well as the male-dominated voice in both Modernism and society generally.[4849] Such critiques are important and necessary and it is simply impossible to communicate them in the same way if artists are not allowed to use appropriation techniques. At its very core appropriation art also questions the notion of authorship and the market system in relation to artworks. This is of course problematic when we consider that copyright is ultimately a system of property ownership.

An example of this in New Zealand can be seen in the case of CK Stead, who was required to obtain permission from Janet Frame's estate to be able to quote from her in his memoir. Although Stead believed he was able to publish the work without permission, he publically apologised to the estate in order to avoid litigation. Stead believed he could use the fair dealing defence for the purposes of criticism or review and that the Trust was simply using copyright as a weapon against his book which they disliked.[50] The Trust challenged this, asserting that the defence "could not be used when commenting on an author or when quoting from unpublished material."[51] Thus creators are aware of the defence, but there is still uncertainty as to whether and how it would be applied. This uncertainty leads to artists either not using copyrighted material or having to acquire permission to do so – but even then there are problems. Take the National government's use

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[48] See Barbara Kruger, *Untitled (Your Body is a Battelground)*, 1989, available at <http://imageobjecttext.com/2012/03/22/selling-a-message/> and Barbara Kruger, *Untitled (Pro-Life for the Unborn/Pro-death for the born)*, 2000 available at <http://imageobjecttext.com/2012/03/22/selling-a-message/>.

[49] Kruger places text over appropriated commercial images in a "deconstruction of Modernism… aimed at destroying a certain order of representation; the domination of the 'original which up to now has largely been male-identified." Lovejoy, above n 5, at 74.

[50] "CK Stead settles dispute with Frame's trust" *The New Zealand Herald* (online ed, Otago, 25 June 2010).

[51] Above.

of a riff from Eminem's 'Lose Yourself' song in their latest advertising campaign. The owners of the song have filed proceedings against the National Party, despite the fact that the licensor told National they could use it, the latter had paid the licensing fee and the track had been used in the past.[52] A similar incident occurred in regards to the Coldplay song 'Clocks' in 2008.[53]

Fair use and fair dealing are in this respect crucial to maintaining the copyright balance, as they act to moderate its application through allowing the use of "expression itself for limited purposes."[54] We see this, for example, in the explicit recognition of appropriation art practices in fair use's transformative use and in the inclusion of parody and satire provisions in fair use and some of the fair dealing jurisdictions. In order to authentically and freely practice, artists need a fair use and fair dealing doctrine which is relaxed and which takes their aesthetic and philosophical characteristics into account. This is especially the case in fair dealing which is currently a much narrower defence than fair use. The time is particularly ripe for discussing such issues in New Zealand as a review of the Copyright Act 1994 will soon be taking place – although only after the Trans-Pacific Partnership Agreement has been concluded. [55]

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[52] Hamish Rutherford "Eminem sues National over election ad" *Stuff.co.nz* (online ed, New Zealand, 16 September 2014).
[53] "National forced to recall DVD promoting Key" *The New Zealand Herald* (online ed, New Zealand, 3 December 2007).
[54] *Eldred v Ashcroft* 537 US 186 (2003).
[55] "Review of the Copyright Act 1994" (15 July 2013) Ministry of Business, Innovation and Employment <http://www.med.govt.nz/business/intellectual-property/copyright/review-of-the-copyright-act-1994>.

III Transformative Use

One of the main mechanisms the United States has developed to navigate the territory of fair use is the concept of transformative use under § 107(1). The concept originates from the case of *Folsom v March*[56] which applied to takings from a literary work. Although not articulated as transformative use the case considered whether the secondary work creates "an original and new work."[57] This reasoning was taken up much later in *Campbell v Acuff-Rose* which dealt with a rap group's parody of Roy Orbison's 'Pretty Woman' and is applied under §107(1) which examines the purpose and nature of the use. In adopting *Folsom* this case considered whether the secondary work:[58]

> … adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . , in other words, whether and to what extent the new work is 'transformative'.

As such, originality is a significant factor under transformative use - merely changing the content of a work from one form to another, for example, will not suffice.[59] Integral to these analyses is a consideration of the work's formal aspects, and how the meaning or "expressive content"[60] of the work is distinct from that of the original.

Notably, transformative use is distinguishable from parody and satire – the work need not comment upon, criticise or parody the original. It need only "alter the original with 'new expression, meaning or

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[56] *Folsom v March* 9 F Cas 342 (CCD Mass. 1841).
[57] At 347.
[58] *Campbell v Acuff-Rose Music* 510 US 569 (1994) at 579.
[59] E.g. as in *Castle Rock Entertainment v Carol Publ'g Group* 150 F 3d 132 (2d Cir 1998), where a book with trivia questions about the TV show *Seinfeld* was not considered fair use.
[60] *Seltzer v Green Day, Inc US Dist LEXIS 92393 (C.D. Cal. 2011)* at 1177.

message'."[61] In this way transformative use also accounts for the fact that the line between parody and satire is so fine (see Part IV), avoiding the uncertainty inherent in a parody/satire analysis by focussing instead on whether the work is transformative, with satirical works able to come under this head.[62] However, it is also more liberal than satire – the use of an original needn't engage in any criticism at all.[63] A work may also amount to transformative use if it serves a purpose other than those outlined in the preamble to § 107. The criterion is thus quite expansive.

Campbell also averred that transformative use, although not a pre-requisite for fair use, is central to its application: [64]

> … the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such transformative works thus lie at the heart of the fair use doctrine's guarantee of breathing space.

In this way decisions which reach an unequivocal finding of transformative use almost always also find fair use.[65] Thus, even if not

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[61] *Campbell v Acuff-Rose Music*, above n 58, at 579.
[62] Satire is not treated "differently from any other transformative use". *Cariou v Prince*, above n 6, at 707.
[63] This would allow, for example, transformative tributes such as Danger Mouse's *Grey Album*, a mashup of Jay-Z's *Black Album* and the Beatles' *White Album* which has been described as a "sincere, sophisticated homage to two acclaimed works and the musical celebrities who created them." Johanna Blakley, "The *Grey Album,* Celebrity Homage and Transformative Appropriation" (paper presented to the Norman Lear Center, University of Southern California, February, 2005) as cited in Reynolds, above n 10, at 406.
[64] *Campbell v Acuff-Rose Music*, above n 58, at 579.
[65] For example, "[t]he success rate of defendants claiming fair use went from 22.73% between 1995 and 2000, to 40.91% between 2001 and 2005, to 58.33% between 2006 and 2010. In other words there was a close correlation between the ascendancy of the transformativeness analysis and decisions favouring fair

recognising more extreme forms of appropriation, transformative use appears to be giving more weight to the creative process and increasingly allowing artists to utilise antecedent works. Recognition of transformative use also accounts for the reality that transformative works will hardly ever compete with the original in the market place.[66]

Conversely, the concept also recognises that it would be unfair if an artist were not able to dispute appropriation of their work where the secondary artist inordinately profits from the appropriation of a work where they have in no way re-contextualised, re-imaged or commented on it through their use. Practically, however, this is rarely the case – almost always appropriating artists will comment on the original or re-contextualise or transform it, to at least some extent. Where the line should be drawn on this is highly ambiguous and problematic, as the case law will show.

Under this principle we see a qualitative interpretation of artworks and a comparative analysis of works. For example, in the case of *Prince*, where appropriation artist Richard Prince utilised photographs taken by Patrick Cariou of Rastafarian culture. The judges in this case compared the aesthetics of the two artists. Cariou's series consisted of black and white, classical portrait and landscape photographs, where Prince's images were colourful, chaotic, cut-and-paste assemblages – fundamentally different from the originals in terms of "composition, presentation, scale, colour palette, and media."[67][68]Although elements of

use." Neil Weinstock Netanel, *Making Sense of Fair Use,* (2011) 15 Lewis & Clark L. Rev. 715 at 752.

[66] For example, "Individuals looking to buy one of the games in the Halo series to play will not, instead, purchase DVDs… set in the Halo world. Someone who wants to read the original Harry Potter books will not be satisfied with one of the myriad Harry Potter fan fiction creations." Reynolds, above n 10, at 409.

[67] *Campbell v Acuff-Rose Music*, above n 58, at 706.

[68] We can see this in a comparison of the images in David Cariou, images from *Yes Rasta*, 2000, 32.3 x 25.7 cm, available at <http://www.patrickcariou.com/rasbook.html> and Richard Prince, *James*

the images from *Yes Rasta* have been used in Prince's work (e.g. the style of hair in the second and fourth figures), the two images are clearly distinct, with the former virtually unidentifiable in the latter. All of Prince's paintings are also massive in size, compared to Cariou's photographs included in his book *Yes Rasta*.

In *Prince* the Court of Appeal also conducted a formal analysis regarding the meaning of the work, as opposed to investigating the theory of Post-Modernism or artistic intention. This is perhaps because Prince made no claim to having any kind of intention stating that he doesn't "really have a message."[69] Though the lower court considered the artist's lack of concern for the 'message' or 'intent' in his work to be indicative of a lack of transformative use, the Court of Appeal overruled this, stating:[70]

> The fact that Prince did not provide those sorts of explanations in his deposition… is not dispositive. What is critical is how the work in question appears to the reasonable observer.

This seems coherent given that Prince's lack of intention is ostensibly in keeping with the way in which "contemporary artists often prefer to let the audience debate the multiplicity of meanings that may be attributed to a particular work of art that has recoded an earlier work."[71]

Brown Disco Ball, 2008, 255.3 x 392.4 cm, available at <http://www.gagosian.com/exhibitions/richard-prince--may-08-2014/exhibition-images>.

[69] *Cariou v Prince*, above n 6, at 707.

[70] *Cariou v Prince*, above n 6, at 707.

[71] David Tan "The Transformative Use Doctrine and Fair Dealing in Singapore" (2012) 24 *SAcLJ* 832 at [40].

However, under 17 U.S. Code § 107(1) (purpose and character of the use), artistic intention has been relevant in the past.[72] Dissenting judge Wallace J in *Prince*[73] also saw no reason to exclude the artist's intention from an analysis of transformative use. The defendant's lack of coherent intention in the recent case of *Morris*[74] was also considered under § 107(1). Although artistic intention may help to assist in the Court's analysis, the majority in *Prince* were correct in finding that the focus should be on the reasonable observer, as this is consistent with practices in contemporary art. One of the definitive facets of Post-Modernism has been the abandonment of the artist's monopoly on meaning, perhaps epitomised by Roland Barthes' 1967 essay *Death of the Author*, which contested the idea that "the author or artist is the arbiter of a work's meaning."[75] One of the best known examples of this approach is Andy Warhol – an artist notorious for refusing to posit the meaning of his works.

The courts should also consider the lineage of appropriation art, for example, through the paradigm of Post-Modernism. Because they refuse to do this, cases of overt appropriation will still not be sanctioned and thus copyright continues to conflict with the philosophy behind appropriation art. We see this in *Prince* where five of the secondary artist's images did not constitute transformative use. The judges acknowledged that there were significant differences between certain artworks, for example in *Graduation*:[76]

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[72] For example in *Blanch v Koons* 467 F 3d 244 (2nd Cir NY 2006) at 247.
[73] *Cariou v Prince*, above n 6, at 713.
[74] *Morris v Young* 925 F Supp 2d 1078 (CD Cal 2013).
[75] "So far as meaning is concerned… the author "dies" when the work is released to the public" Roland Barthes *The Death of the Author* 1967 as cited in Darren Hudson Hick "Appropriation and Transformation" (2013) 23 Fordham Intell. Prop. Media & Ent. L.J. 1155 at 1157.
[76] Richard Prince, *Graduation*, 2008, 185 x 133 cm (not fair use), available at <http://www.gagosian.com/exhibitions/richard-prince--may-08-2014/exhibition-images>.

> … [*Graduation*] is tinted blue, and the jungle background is in softer focus than in Cariou's original. Lozenges painted over the subject's eyes and mouth… make the subject appear anonymous, rather than as the strong individual who appears in the original. Along with the enlarged hands and electric guitar that Prince pasted onto his canvas, those alterations create the impression that the subject is not quite human. Cariou's photograph, on the other hand, presents a human being in his natural habitat, looking intently ahead. Where the photograph presents someone comfortably at home in nature, *Graduation* combines divergent elements to create a sense of discomfort.[77]

However, the judges could "not say with certainty at this point"[78] whether *Graduation* did amount to transformative use – as such, it was deemed not to be fair use.[79] This lack of certainty one way or another suggests a lack of clarity in this area of the law as a whole, also evidenced in the fact that there seems to be a very thin line between when a work is and is not transformative. Compare *Tales of Brave Ulysses* which was fair use[80] with *Graduation*[81] which was not, or *Back to the Garden*[82] which was fair use with *Charlie Company*[83] which was not – there does not appear to be a clear demarcation between them.

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[77] *Cariou v Prince*, above n 6, at 711.
[78] *Cariou v Prince*, above n 6, at 711.
[79] As the secondary user bears the onus of persuasion - fair use is an affirmative defence and the defendant has the burden of demonstrating it. This is established, for example, in *Campbell v Acuff-Rose Music*, above n 58, at 591
[80] See Richard Prince, *Tales of Brave Ulysses,* 2008, 335.3 x 213.4 cm, available at <http://artwelove.com/insights/archives/2009/02/11/news-roundup/>.
[81] Fn 76, above.
[82] Richard Prince, *Back to the Garden,* 2008, 203.2 x 304.8 cm, available at <http://www.gagosian.com/exhibitions/richard-prince--may-08-2014/exhibition-images>.
[83] Richard Prince, *Charlie Company*, 2008, 332.7 x 254cm, available at <http://blog.tcrobinsonlaw.com/wp-content/uploads/2014/02/charlie-company-2008.jpg>.

This could be ameliorated through considering the particular lineage of which the work is a part and how, given this lineage, it does re-contextualise and transform the original. For example, regarding *Prince* one could argue that Prince challenges the inherent colonialism in Cariou's work through his appropriation. Cariou, a white artist, has photographed in classical black and white format the culture of Rastafarianism. These images, as photographs, are authoritative and relate a narrative about the figures as 'natives', close to the earth, uncorrupted. However, in reality we do not know this culture and it is presumptuous for us to gaze upon it in this way, to presume that it is 'innocent'. Prince disrupts the narrative Cariou presents by corrupting these images, for example by including technological objects and thus challenging the culture/nature dichotomy that Cariou has implicitly set up. Questioning the kind of narratives that artists such as Cariou present in their work is a fundamental practice of Post-Modernism, which the courts no-where recognise in their judgments.

Despite the fact that courts do not consider appropriation art within its theoretical and historical contexts, and that the line between transformative and non-transformative works can be very fine, transformative use generally is expansive. The cases reveal that appropriation will only amount to infringement where the original imagery is *overtly* identifiable in the work. We see this in *Prince* as well as the case of *Friedman* where artist Thierry Guetta appropriated Glen Friedman's photograph of the band Run DMC[84] in four of his works. Two works ostensibly involved overt appropriation with little transformation – the banner[85] "which was made by hand-painting a projected altered reproduction [of] the photograph onto canvas"[86] and a stencil which was used to spray-paint the image on three canvases

[84] Glen E. Friedman, Photograph of Run DMC, 1985, available at <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.
[85] Thierry Guetta, "Banner Work", 2008, available at <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.
[86] *Friedman v Guetta*, above n 27, at 4.

with different backgrounds.[87] However, two of the images did involve at least some degree of transformation – the 'Old Photo' work[88] which combined the image with a scanned old-fashioned photograph of a 19th century couple, and 'Broken Records'[89] where the artist constructed the image through the use of broken vinyl records. While the judge's rejection of these works under the transformative use criterion appears problematic, the judge's decision was largely due to the fact that the figures from the original photograph were immediately recognisable in the appropriating works, with the figures making the same pose, wearing the same clothing and sporting the same facial expressions as in the original. Similarly, the commercial purposes of the work were also considered under § 107(1) - the photograph by Friedman is a pop culture image, and Guetta is an artist known for exploiting such images for commercial gain, rather than critical purposes.[90]

Thus, if there appears to be a patent lack of criticality in works, accompanied by a blatant exploitation of appropriated imagery, fair use is unlikely. Other cases which demonstrate that overtly identifiable imagery will likely amount to non-transformative use are *Morris* (regarding *Sex Pistols in Red*[91] where again the original subject-matter in

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87 *Friedman v Guetta*, above n 27, at 4.

88 Thierry Guetta, *Old Photo*, 2008, available at <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.

89 Thierry Guetta, *Broken Records*, 2008, available at <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.

90 This much is made clear in the film 'Exit Through the Gift Shop' by the artist Banksy, which documented Guetta's rise to fame. Guetta became successful largely as a result of his association with Banksy, who states "Warhol repeated iconic images until they became meaningless, but there was still something iconic about them. Thierry really makes them meaningless." Similarly, "I don't think Thierry played by the rules in some ways. But then, there aren't supposed to be any rules." Banksy "Exit Through the Gift Shop" (10 May 2013) Youtube <https://www.youtube.com/watch?v=K9rnyCyLFtE>.

91 Russell Young, *Sex Pistols in Red*, c.2005, available at <http://expresswrittendissent.com/2013/01/29/sid-johnny/>.

Sex Pistols at the Marquee Club[92] was too readily identifiable) and *Gaylord*. In the latter case, the Court of Federal Claims found that the work (a postage stamp, see below[93]) was transformative as it was made aesthetically distinct from the original sculpture[94] first by Alli's photograph[95] and then via further editing by the United States government.[96] However, the Court of Appeal disputed this. In their view, the postage stamp represented the clearly identifiable imagery of Gaylord's sculpture and did not reflect any new message or meaning, as "both the stamp and [the sculpture] share a common purpose: to honor veterans of the Korean War."[97] This reality was at least in part a reflection of the fact that the United States government were using the

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[92] Dennis Morris, *Sex Pistols at the Marquee Club*, 1977, available at <http://bureauofartsandculturesantabarbara.blogspot.co.nz/2014/03/the-beatnick-diaries-volume-one-by.html>.

[93] United States Postage Stamp featuring an image of Frank Gaylord's *The Column*, 2002, retrieved from *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010).

[94] Frank Gaylord, *The Column*, 1990, retrieved from *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010).

[95] John Alli, photograph of *The Column*, 1996, retrieved from *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010) .

[96] "Mr. Alli, through his photographic talents, transformed this expression and message, creating a surrealistic environment with snow and subdued lighting where the viewer is left unsure whether he is viewing a photograph of statues or actual human … The viewer experiences a feeling of stepping into the photograph, being in Korea with the soldiers, under the freezing conditions that many veterans experienced…. Mr Alli took hundreds of pictures of "The Column" before he achieved this expression, experimenting with angles, exposures, focal lengths, lighting conditions, as well as the time of year and day… Mr. Alli's efforts resulted in a work that has a new and different character than "The Column" and is thus a transformative work... The Postal Service further altered the expression of Mr. Gaylord's statues by making the color in the "Real Life" photo even grayer, creating a nearly monochromatic image. This adjustment enhanced the surrealistic expression ultimately seen in the Stamp by making it colder. Thus, the Postal Service further transformed the character and expression of "The Column" when creating the Stamp." *Gaylord v United States* 85 Fed Cl 59 (2008).

[97] *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010) at 1368.

postage stamp for a purely commercial purpose as compared to the criticism and commentary usually inherent in the work of artists.[98]

Thus, the second work must not only be formally distinct but must develop some further meaning than the original, with criticality and commentary rather than commerciality being inherent at its core. We see this, for example, in the work 'White Riot + Sex Pistols'[99] which was considered transformative in *Morris*. It was found that the distortion of the image through the inclusion of graffiti and the Union Pacific logo meant that it incorporated "images beyond the band itself and [arranged] them such that the composition may convey a new message, meaning or purpose beyond that of the [original]."[100]

In this way it appears that courts are trying to apply copyright in only the narrowest of cases and to avoid acting as the arbiters of the value of such works. However, although originality and artistic creativity are not explicitly requirements for fair use and fair dealing, in cases of artistic appropriation they will be integral to them in practice. Thus, in coming to these decisions, judges are determining the 'worth' of such works insomuch as they deem them to be transformative and thus new and original. Greater consideration of the lineage of appropriation art and Post-Modernism would again serve to ameliorate this.

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[98] "Works that make fair use of copyrighted material often transform the purpose or character of the work by incorporating it into a larger commentary or criticism. For example, in Blanch v. Koons, an artist incorporated a copyrighted photograph of a woman's feet adorned with glittery Gucci sandals into a collage "commenting on the 'commercial images . . . in our consumer culture.'"… Such transformation of a copyrighted work into a larger commentary or criticism fall squarely within the definition of fair use." At 1373, citing *Blanch v Koons*, above n 72, at 248.

[99] Russell Young, *White Riot + Sex Pistols*, c.2005, available at <http://expresswrittendissent.com/2013/01/29/sid-johnny/>.

[100] *Morris v Young,* above n 74, at 1088.

A Adopting 'Transformative Use' in Fair Dealing

Given that transformative use works so well in recognising the creative process and accounting for the more subtle forms of appropriation, it would make sense to adopt it within the fair dealing context – especially as many of the jurisdictions include a 'purpose' provision similar to § 107(1) in their respective legislation. That Australia considered adopting fair use, and Australia, Canada and (soon) the United Kingdom have extended fair dealing, suggests that these jurisdictions could be open to considering the transformative use approach. Various parties in Australia have already expressed their support for such a provision as they believe it would "encourage cultural production… [and] legitimise current artistic practices",[101] without unduly prejudicing the interests of copyright holders.

The Gowers Report in the United Kingdom supported adoption of this methodology in 2006.[102] Indeed, transformative use was once a part of the relatively liberal approach taken to fair dealing in the United Kingdom before the 1960s. In cases such as *Glyn v Weston Feature*[103] and *Joy Music v Sunday Pictorial Newspapers*,[104] emphasis was placed on the

[101] Those in favour of a transformative use exception included Internet Industry Association, *Submission 253*; Pirate Party Australia, *Submission 223*; ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*; NSW Young Lawyers, *Submission 195*; R Wright, *Submission 167*; N Suzor, *Submission 172*; M Rimmer, *Submission 143*; K Bowrey, *Submission 94*" as cited in Australian Law Reform Commission "Copyright and the Digital Economy Discussion Paper" (DP 79, 2013) at fn 34 [10.32].

[102] "At present it would not be possible to create a copyright exception for transformative use (but see the discussion of parody below) as it is not one of the exceptions set out as permitted in the Information Society Directive [Article 5 of Directive 2001/29/EC]. However, the Review recommends that the Government seeks to amend the Directive to permit an exception along such lines to be adopted in the [United Kingdom]." Andrew Gowers, *Gowers Review of Intellectual Property* (HM Treasury, London, 2006) at [4.88].

[103] *Glyn v Weston Feature Film Company* 1915] 1 Ch 261.

[104] *Joy Music v Sunday Pictorial Newspapers (1920) Ltd* [1960] 2QB 60.

transformative nature of the use and whether the secondary artist had "bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result."[105] This approach was narrowed in the 1960s[106] where it was found that "[t]he sole test is whether the defendant's work has reproduced a substantial part of the plaintiff's copyright work." [107]

The expansion of fair dealing to allow for parody and satire means that, to some extent, appropriation art is already sanctioned. However, transformative use should also be recognised as it more adequately takes into account the theoretical underpinnings of creativity.

In regards to visual works, the Copyright Council of New Zealand offers guidelines as to how much a secondary artist can appropriate, stating:[108]

> Where an artist does not own copyright in an artistic work… they may still copy the work in making another artistic work, without infringing copyright, as long as the main design of the earlier work is not repeated or imitated. However, the artist is not permitted to commercialise the work.

These guidelines suggest that any appropriation art for commercial purposes is disallowed, which is highly restrictive in light of the appropriation cases in the United States litigation. One recent case

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105 *Glyn v Weston Feature Film Company,* above n 103, at [268].
106 E.g. in cases *Twentieth Century Fox Film Corp v Anglo-Amalgamated Film Distributors* [1965] 109 SJ 107 and the cases which followed it - *Schweppes Ltd v Wellingtons Ltd, Williamson Music Ltd v Pearson Partnership* [1984] FSR 210 (Ch) and *Williamson Music Ltd v Pearson Partnership Ltd* [1987] FSR 97(Ch).
107 *Schweppes Ltd v Wellingtons Ltd, Williamson Music Ltd v Pearson Partnership*, above n 106, at [212].
108 "Information Sheet Visual Artists and Copyright" (May 2007) Copyright Council of New Zealand <http://www.copyright.org.nz/viewInfosheet.php?sheet=341> at 3.

highlighting this is that of Wanganui artist Mark Rayner's 'Black Widow'.[109] This work was based on a photograph of Helen Milner in court during her trial for the murder of Phil Nisbet.[110] The artwork was entered in the Wallace Art Awards and came 49 of 524 works but is now potentially the subject of copyright infringement and could even be destroyed as a result.[111] Some parties considered this "a clear-cut case of copyright infringement."[112] Such sentiments were echoed by the New Zealand Herald which asserted that artists using its photographs must "ask for permission and consult on what they intended to use the work for."[113]

However, other parties disagreed, asserting the work was a legitimate "reinterpretation, and that is what art and artists do. If every artist was sued for re-interpretation, artists by the score would be found to be in breach of copyright."[114] Interestingly, the artist also noted the transformative nature of the work, averring that:[115]

> … the work was not trying to be an outright copy of a photograph but a reinterpretation of a well-circulated media image. "[I]t has been changed to such a degree that it makes it a completely new artwork in its own right. The original source

[109] Martin Hunter of the New Zealand Herald, photograph of Helen Milner, 2013, available at <http://www.stuff.co.nz/national/crime/9537684/Mother-saw-Milner-as-spawn-of-Satan>.
[110] Mark Rayner, *Black Widow*, 2014, available at <http://www.stuff.co.nz/the-press/10490446/Black-widow-portrait-an-insult-to-victim>.
[111] Kurt Bayer "Image of killer queried by lawyer" *The Otago Daily Times* (Auckland, 13 September 2014).
[112] Above, quoting Intellectual Property litigation expert Kim McLeod.
[113] New Zealand Herald Editor-in-Chief Tim Murphy as quoted in Kurt Bayer and Anne-Marie MacDonald "Portrait Sparks Legal Wrangle" *Wanganui Chronicle* (online ed, Auckland, 17 September 2010).
[114] Above, quoting Bill Milbank, owner of WH Milbank Gallery and former director of the Sargeant Gallery.
[115] Bayer, above n 113.

> material has been manipulated, colour-changed and cropped and then reinterpreted as a large latch-hook rug.

Similarly divergent impressions were had in the case of artist Peter Vink reproducing in paint[116] a copyrighted photograph of artist Richard Sprangler.[117] One commentator asserted: [118]

> It [does] not matter what form the art took or how they were copied. If the paintings were identical or substantially similar to the photographs, Vink would be in breach of copyright if he didn't have permission from the original artist to reproduce it.

Although Sprangler believed copyright infringement did occur, he did not pursue an action "because of cost and [the fact that] at that time there didn't seem to be too many instances of copyright infringements being prosecuted successfully."[119] Conversely, other commentators believed that "Painting from photographs is acceptable practice - as soon as you paint from a photo [it] is your own interpretation therefore [there is] no copyright infringement."[120] These conflicting views suggest there is much uncertainty within New Zealand regarding visual works and copyright.

Although there are no cases in the fair dealing jurisdictions regarding copyright and appropriation art, there is still a fair deal of uncertainty as to how much material artists can use. A broadening of the defence

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116 Peter Vink, *Pohutukawa*, c.2005, available at <http://www.37south.com/stolenimage.html>.
117 Richard Spranger, *Pohutukawa Flowers*, 2005, available at <http://www.37south.com/stolenimage.html>.
118 Carmen Vietri, copyright expert from Copyright Licensing Ltd as quoted in Elizabeth Binning "Artist accused of copying photos" *The New Zealand Herald* (online ed, Auckland, 25 May 2005)
119 Email from Peter Vink to the author regarding the artist Peter Vink's appropriation of Sprangler's work (24 September 2014).
120 Binning, above n 118.

through incorporating transformative use would be beneficial to artists in that it would diminish the chilling effect and uncertainty regarding copyright generally. Philosophically, transformative use also goes to the heart of the creative process and has been shown in the United States to permit artistic works that previously would have been deemed to be infringing. The United States could act as a guide for the fair dealing jurisdictions in future cases, especially if they chose to adopt transformative use when analysing the purpose of the dealing. As Frankel states:[121]

> [Fair use is] of both salutary and practical importance in New Zealand. It is salutary because it emphasizes that the rights of copyright owners to prevent or charge for the reproduction of their work ought sometimes to be tempered to reflect the policy underlying the granting of the right. As there is a dearth of Commonwealth case law on the various fair dealing provisions, United States cases will often be a useful starting point.

IV Parody and Satire

Parody is the art of critiquing an original work through imitating that work. The artist uses aspects of the original in order to create a new work which must explicitly comment on the original. This is comparable to satire which involves a critique of or comment on society more generally – of which that original work is a part. Parody acts as a form of criticism or comment,[122] "[providing] social benefit,

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[121] Frankel, above n 14, at 338.

[122] As recognised in cases such as *Fisher* v *Dees* 794 F 2d 432 (CA9 1986) ("When Sonny Sniffs Glue," a parody of "When Sunny Gets Blue," is fair use); *Elsmere Music, Inc v National Broadcasting Co.* 623 F 2d 252 (CA2 1980) ("I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," is fair use) and confirmed in the Supreme Court in *Campbell v Acuff-Rose Music*, above n 58.

by shedding light on an earlier work, and, in the process, creating a new one."[123] The same could be said of satire.

From a rights perspective, uses pertaining to criticism and commentary are justified in that they facilitate freedom of expression. The Canadian Supreme Court in *RJR Macdonald* stated that the principles on which the constitutional right of freedom of expression rest are "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process".[124] These principles are also inherent in the practice of creating artistic works and we should recognise and endorse the critical functions they entail. One way of doing this would be for fair dealing in New Zealand to include parody and satire, with criticality being inherent in both these practices.

A Parody and Satire in Fair Use

Fair use allows the use of works for the purposes of parody, even in cases where commercial value is to be gained[125] or even when this profit motive, as opposed to any creative purpose, is the sole motive for parodying the antecedent work.[126] In ascertaining the 'purpose and character of the use' under § 107(1), courts look at transformative use - "whether the new work merely supersedes the original work, or instead adds something new with a further purpose or of a different character".[127]

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123 *Campbell v Acuff-Rose Music*, above n 58, at 579.
124 *RJR Macdonald, Inc. v. Canada (Attorney General),* [1995] 3 SCR 199 at [72].
125 Recognised in common law cases such as *Campbell v Acuff-Rose Music*, above n 58.
126 As in *Eveready Battery Co. v Adolph Coors Co* 765 F Supp 440 (NDI11 1991) which involved a parody of the Eveready Battery 'Energizer Bunny' commercials for the purposes of a beer commercial.
127 *Brownmark Films v Comedy Partners* 682 F 3d 687 (7th Cir 2012) at [693] citing *Campbell v Acuff-Rose Music*, above n 58, at 576.

For example, when the artist Tom Forsythe created his 'Food Chain Barbie' photography series[128] depicting mutilated Barbie dolls being cooked as various dishes, Mattel were unable to succeed in copyright action against him on this ground. Barbie is a well-known symbol of American beauty, associated with glamour, wealth, and materialism generally (as evidenced by the various props and outfits that accompany the dolls). The court found that Forsythe:[129]

> … [turned] this image on its head… by displaying carefully positioned, nude and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations…. In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts. It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie's influence on gender roles and the position of women in society.

In this way Forsythe's works parodied everything that Barbie represents – he recognised the doll's associations (which the court called "ripe for social comment")[130] and these were integral to the meaning in his works.

Conversely, Jeff Koons' appropriation of Art Rogers' photograph 'Puppies'[131] in his sculpture 'String of Puppies'[132] was not considered a

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128 Tom Forsythe, *Fondue for Three*, 1997, available at <http://ec-dejavu.ru/b-2/barbie-12.html>.

129 *Mattel Inc. v Walking Mt. Prods.* 353 F 3d 792 (9th Cir 2003) at 802.

130 Above.

131 Art Rogers, *Puppies,* 1980. Available: <http://www.rifatsahiner.com/images/images/Art%20Rogers,%20Puppies,%201985.jp>

132 Jeff Koons, String of Puppies, 1998, 106.7 x 157.5 x 94 cm, retrieved from Glenwood at http://www.glenwoodnyc.com/manhattan-living/jeff-koons-whitney-musuem/.

sufficient parody as it did not explicitly comment on or critique the original. However, when placed side by side, Koons' work does seem to parody the original – a cheesy, kitsch photo made into an even cheesier sculpture through the use of colour, the insertion of daises and the blank stares of the figures. This is especially so in the context of the exhibition in which the work would feature, entitled 'Banality'. We can compare this to the facts in *Campbell* where 2 Live Crew's parody of Roy Orbison's 'Pretty Woman' "derisively demonstrates how bland and banal the Orbison song seems to them… [as] an anti-establishment rap group."[133] However, the court considered *Rogers* more of a satire of society generally than a parody. Some commentators considered this case "chilling"[134] in light of the nature of appropriation art.

In contrast parody could understandably not be found in *Steinberg*[135] where the producers of the movie 'Moscow' used an illustration by Saul Steinberg[136] in a promotional poster for the film.[137] Although such a use could potentially now come under transformative use, it was clearly not parody as the secondary work in no way engaged in a meaningful critique or comment on the original illustration – it "merely borrowed numerous elements from Steinberg to create an appealing advertisement to promote an unrelated commercial product, the movie."[138] This case is also an illustration of the way in which transformative use has changed analyses under fair use. Although the poster clearly does not parody the original, there would now be at least

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133 *Campbell v Acuff-Rose Music*, above n 58, at 582.
134 Susan Bielstein, Permissions (The University of Chicago Press, Chicago, 2006), above n 76, at 84.
135 *Steinberg v Columbia Pictures Industries, Inc.* 663 F Supp 706 (DNY 1987).
136 Saul Steinberg, *View of the World from 9th Avenue*, 1976, 22.9 x 30.5 cm available at <http://bhiscoxcmp.files.wordpress.com/2010/11/moscownewyork.jpg>.
137 Promotional poster for the film 'Moscow on the Hudson', 1984, 68.6 x 104.1 cm, available at <http://bhiscoxcmp.files.wordpress.com/2010/11/moscownewyork.jpg>.
138 At 715.

an argument for it being a transformative use, with the two using the same style but the former having changed much of the original and having included additional elements to create new meaning in the work. This new meaning was described as the "Muscovite protagonist's confusion in a new city"[139] as compared to the original which was "a humorous view of geography through the eyes of a New York city resident."[140]

Although parody may still be explicitly considered under fair use, transformative use under § 107(1) is a part of the analysis of parody and has also come to prevail in cases where the use of original material can be conceptualised more as satire or simply appropriation for creative purposes. For example, in *Blanch v Koons*. This case was the fourth one brought against Koons in regards to appropriation, involving the use of a fashion photograph taken for Gucci[141] in work by Koons.[142] The court considered Koons' use in this way:[143]

> By juxtaposing women's legs against a backdrop of food and landscape, [Koons] says, he intended to 'comment on the ways in which some of our most basic appetites -- for food, play, and sex -- are mediated by popular images'.

Thus, the use of Blanch's photograph as an image from the mass-media was an essential aspect of the work. Such purposes were distinct from those of Blanch, who sought simply to eroticise the feet in the photograph. The court in this case found that the use was

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139 At 712.
140 "Summaries of Fair Use Cases" Stanford University Libraries <http://fairuse.stanford.edu/overview/fair-use/cases/#parody_cases>
141 Andrea Blanch, *Silk Sandals by Gucci*, 2000, available at <http://hyperallergic.com/23589/judging-appropriation-art/>.
142 Jeff Koons, *Niagara*, 2000, 304.8 x 426.7 cm, available at <http://www.guggenheim.org/new-york/collections/collection-online/artwork/10734>.
143 *Blanch v Koons*, above n 72, at 247.

transformative, as the two artists' objectives were so different in their use of the image.[144]

Generally, however, it will still be easier to find fair use in cases of explicit parody as opposed to satire. Such works by their very nature need to use a larger percentage of the original as compared to other uses "because [they] must ensure that the original is fully recognizable."[145] This is ameliorated in fair use by the recognition that the quantity of the work taken is a lesser factor in comparison to § 107(4) – whether the secondary work can be considered "a substitute for the original" within the marketplace.[146] In future cases, fair dealing could take the same approach. Generally, however, analyses under both parody and satire are necessarily qualitative affairs and will experience issues with ambiguity like any of the other uses under fair use and fair dealing.

B Parody and Satire in Fair Dealing

Both Canada and Australia have instituted a parody and satire exception.[147] The United Kingdom will also be instituting a fair dealing exception for 'parody, caricature and pastiche'[148] following the 2011 Hargreaves[149] and Gowers[150] Reports, after their findings of "concern

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144 The "sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals' [confirmed] the transformative nature of the use." *Blanch v Koons*, above n 72, at 247.

145 Kim J Landsman "Does Cariou v Prince Represent the Apogee or Burn-Out of Transformative Use in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach" (2014) 24 Fordham Intell. Prop. Media & Ent. L. J. 321 at 362.

146 *Brownmark Films v Comedy Partners*, above n 127, at [693].

147 Via the Copyright Modernization Act SC 2012 c 20 and Copyright Amendment Act 2006 (Aus), respectively.

148 Rights in Performances (Quotation and Parody) Regulations 2014 (UK), reg 5.

149 "Implementing the Hargreaves Review" United Kingdom Intellectual Property Office.

that, at present, the [United Kingdom] exceptions, are too narrow and that this is stunting new creators from producing work and generating new value." [151]

Although there are no cases as of yet where we can see how these provisions would play out in these jurisdictions, their inclusion would likely allow for uses that were previously deemed infringement. Take the Canadian case of *Michelin* where a trade union parodied the logo of its employer – showing the Michelin cartoon logo crushing a worker underfoot. The case justified its finding of infringement on the basis of the idea/expression dichotomy and on the desire to protect private property. Regarding this latter point, the court refused to acknowledge the intangible nature of copyright and to treat it differently from other types of private property, despite the fact that the property in copyright is not a 'thing' but expression itself. Such findings undoubtedly hinder democratic speech - as the United Kingdom government has recognised in expanding its fair dealing, parodying a company's logo, slogan or brand is one of the most effective ways to "highlight questionable business practice."[152] However, the expansion of fair dealing to include parody likely means that such practices would now be allowed. Similarly, none of these jurisdictions define parody and satire, thus the United States case law will likely be helpful on both accounts in navigating these provisions into the future.

The inclusion of satire alongside parody in Australia and Canada also recognises that the line between the two is very fine. For example, in *Campbell*, the artists argued that their work was a parody of Roy Orbison's song 'Pretty Woman', as their version "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones

<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/types/hargreaves.htm >.
[150] Gowers, above n 102, at [4.90].
[151] Gowers, above n 102, at [4.68].
[152] (29 July 2014) GPBD HL 1556.

[to show] how bland and banal the Orbison song [is]".[153] However, it is at least arguable that the secondary work engaged in a broader criticism, specifically of "American values in a song that presented the reality of street life in urban America".[154] The same can be said of *Rogers v Koons* where it was again at least feasible that Koons' work could have been considered a parody, although the court considered it satire.

Prior to the inception of transformative use, the courts in the United States had found that the appropriated work "must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."[155] However, the use of an original in a secondary work can also be integral in making it effective satire. It is this very 'conjuring up of the original' which enables a work to comment effectively on society generally. We see this logic play out in *Blanch v Koons*, with Koons' work 'Niagara' which the courts found "may be better characterized… as satire – its message appears to target the genre of which 'Silk Sandals' is typical, rather than the individual photograph itself."[156] Australia and Canada account for this reality in including satire in their exceptions; the United Kingdom and New Zealand do not.

In New Zealand we have the standard fair dealing provisions in our Copyright Act: however, we have yet to include a provision relating to parody or satire, even though public support for such a provision has been as high as 87%.[157] Such a provision is supported by the Creative

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153 *Campbell v Acuff-Rose Music*, above n 58, at 573.
154 Frankel, above n 14, at 355.
155 *Rogers v Koons,* above n 29, at 310.
156 *Blanch v Koons*, above n 72, at 247.
157 Louisa Hearn, "The Downfall of Hitler's YouTube parody," *Stuff* (online ed, accessed 10 August 2011). As cited in Bronwyn Holloway-Smith "Illegal Art: Considering our Culture of Copying" (2012) 15 Junctures 19, at 22.

Freedom Foundation in New Zealand[158] and there are cases where it could have been applied in the past, had the plaintiffs not dropped the case so as to avoid any more negative publicity. For example, in the Telecon parody of 2006, where a video on Youtube was released parodying a Telecom commercial in response to a CEO's comments that they use "confusion as their chief marketing strategy".[159] Secondly, in 2009, Should-A.com created a poster using imagery from the Election Office in New Zealand to parody the referendum question released that year, regarding smacking.[160] Of course, both parties could simply have represented their concerns and criticism via other means, e.g. the written word. However, in the case of Should-A.com, for example, this visual appropriation of "the official referendum graphics made for a more successful and effective artwork that empowered the public to comment on the referendum in a clear and easy to understand manner."[161]

Alternatively, there is the potential for New Zealand and the United Kingdom to bring parody under the general fair dealing exception for purposes of 'criticism, review and reporting'. Sumpter asserts that "[t]here is no reason in principle why, if the tests under s 42 are satisfied, a work of parody could not qualify for the defence."[162] However, such application would undoubtedly be very narrow, as in the Australian case of *Network Ten v. Channel Nine*[163] where it was found that the parody had to involve a *de minimis* taking. So too, it would likely only apply to parodies that are critical of the original, and not to satire generally.

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158 "Parody and Satire" Creative Freedom NZ <http://creativefreedom.org.nz/goals/parody-and-satire/>.
159 Holloway-Smith, above n 155, at 19.
160 Holloway-Smith, above n 155, at 20-21.
161 Holloway-Smith, above n 155, at 20.
162 Paul Sumpter, *Intellectual Property Law: Principles in Practice* (2nd ed, CCH, Auckland, 2013), at 120.
163 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] 108 FCR 235 at 288-289.

V Conclusion

The Fine Arts are a crucial source of creativity and criticality in our society. Their scope and direction have changed dramatically over the last century, necessitating the overt appropriation of original works in a questioning of established colonial, patriarchal and capitalist frameworks, as well as concepts such as 'originality' and the market value attached to art generally. Not being able to overtly appropriate source material would for many in the art world be anathema to the creativity and criticality inherent in art. This has naturally led to a clash with copyright, a system ostensibly concerned with property ownership. The fair dealing and fair use provisions help us to navigate the interaction between these two fields, particularly as they pertain to values fundamental to both, such as creativity and freedom of expression. They also recognise and reinforce the fact that copyright is not concerned with exclusive possession but is rather a limited monopoly on works so as to incentivise their production. This is especially important in an increasingly expansive system of copyright.

Both fair use and fair dealing face difficulties when it comes to navigating the terrain of art, particularly in cases of overt appropriation. As evidenced by the fair use cases, as long as visual art works are considered within the paradigm of copyright there will remain a tension between the two – especially given that copyright law fails to consider the specific lineage of appropriation art. Nonetheless, courts in the United States have become much more liberal in their application of the doctrine. This is evidenced, for example, in the adoption of 'transformative use' which explicitly recognises the nature of the creative process. Similarly, the courts should continue not to prioritise the intention of the artist (as in *Prince*) and should also consider examining works and their meanings via the lens of Post-Modernism. If the courts are considering not only change in form but the change in *meaning* of secondary works, such considerations seem highly applicable to their analyses.

However, overall the courts seem to be applying copyright to the Fine Arts in only the most obvious or borderline of cases – where imagery is overtly identifiable and the artist is appropriating it for highly commercial purposes. This case law and its application of the fair use factors – which are very similar to those under fair dealing – may serve to be very helpful if the fair dealing jurisdictions encounter cases pertaining to artistic works in the future.

Despite the fact that there is little to no common law in the various fair dealing jurisdictions pertaining to artistic works, expansive copyright laws do impact on artistic practice. Thus, liberal fair dealing provisions which recognise transformative use, and uses such as parody and satire should be adopted, as this would send a signal to artists and copyright holders that at least some degree of appropriation is legitimate in artistic works. As a result of expanding the uses to which it can apply and the manner in which it is conceptualised, the ambit of fair dealing has already widened over the past decade, particularly in Canada with its emphasis on users' rights and liberal interpretation of the doctrine. This already suggests a shift away from or at least a reconsideration of an entrenched system of copyright. New Zealand, however, is the exception to this development - yet it is clear such provisions *are* necessary given the uncertainty which attends the application of the fair dealing provisions to artistic works in this country. This is also evidenced by the review of our copyright legislation which will soon be taking place as a result of similar reviews in the United Kingdom and Australia, as well as "public perception that New Zealand consumers suffer from a lack of access to copyright content and flexibility to use this content how they wish in the digital environment."[164]

New Zealand should adopt both parody and satire, as this would obviate the problems associated in distinguishing between them and allow for a greater variety of critiques in artistic works, as opposed to

[164] Cabinet Paper, above n 28, at [3].

only allowing criticism in the very narrow circumstances of parody. Were New Zealand to follow the lead of countries such as Canada, Australia and the United Kingdom, fair dealing would better contribute to artists feeling able to create, uninhibited by excessive copyright restrictions. This would not only help to facilitate a culture of creativity and critical thinking, but a more meaningful copyright balance. Adopting the criterion of 'transformative use' would also assist in this – but is less likely given that the other fair dealing countries have not adopted it, and because fair dealing is generally interpreted more strictly than fair use.

In a society which values criticality, creativity, freedom of speech, the pursuit of knowledge and education generally, fair dealing has the potential to play a crucial role in maximising the public good. Although New Zealand will only be examining the Copyright Act after the Trans-Pacific Partnership Agreement, an analysis of the fair dealing provisions should be conducted and a widening of the defence implemented, especially in light of what will likely be more expansive copyright measures instituted via these international negotiations.