

Ethical Concerns in the Electronic Age: The Appropriated Image

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Issues of copyright are something with which visual artists are highly engaged. Not only does concern arise for the protection of authorship and the artist's creations, but at times, artists incorporate images appropriated from another source into new artwork. The appropriation artist enters an ethical arena governed by copyright law while challenging ideas of originality and authorship.

The history of appropriation art places emphasis upon the utilization of borrowed imagery as commentary, parody or at times, collaboration. Many utilize images that already exist in order to creatively apply a new context while still paying homage to the original. Original images act as symbols or signifiers upon which new meaning is built.

Marcel Duchamp, with his introduction of the readymade, is considered a pioneer of appropriation art. His repurposing of an object such as a bottle drying rack or a urinal to create fine art was groundbreaking. One of Duchamp's pieces consisted of a postcard of DaVinci's *Mona Lisa* whereupon he drew a beard and mustache and added text in the margin under the image [Judovitz, 2010]. Duchamp harnessed the painting's global recognition, deriving meaning and context from *Mona Lisa* into his new artwork. By using a commodification of *Mona Lisa*, the new meaning explores the difference between high and low art, between what Clement Greenberg would later coin as 'kitsch' [Harrison et al, 2002] and the longstanding art historical canon of the master artist. Duchamp further develops sophomoric reference to hedonistic values and language puns by writing the letters: L.H.O.O.Q. at the bottom. Reading the letters aloud, the letters sound like French words that roughly translate: "She has a hot ass." Not only did Duchamp visually challenge standards of art and promote Dadaist ideals, but he forced analysis of everyday objects' design, purpose and context [Judovitz, 2010].

Some of the more renowned art historical movements that incorporated appropriated imagery include but are not limited to the Cubists, the Dadaists, Pop Artists and Postmodernists. A long list of contemporary visual artists influenced by Postmodernism and Poststructuralism borrows images from a variety of sources: other artists, mass media, the internet, etc.

In our computerized era, the internet has become a major resource: an information superhighway with ease of accessibility. Intellectual property and original works of art are now at the behest of a few simple keyboard strokes. The digital proliferation and dissemination of information makes concerns for the ethical use of intellectual products more substantial. Some view the "internet as a potentially open system and

archive of reproducible data [that] invites or allows for instant recontextualization of any information” [Lovejoy et al, 2011].

A manifesto as written by the five curators of the *From Here On* exhibition at the 2011 international photography festival Les Rencontres d’Arles [Chéroux et al, 2011] epitomizes a current attitude regarding image proliferation and exploitation on the internet:

“Across-the-board appropriation on the one hand plus hyper-accessibility of images on the other: a pairing that would prove particularly fertile and stimulating for the art field. Beginning with the first years of the new millennium—Google Images launched in 2001, Google Maps in 2004 and Flickr the same year—artists jumped at the new technologies, and since then more and more of them have been taking advantage of the wealth of opportunities offered by the Internet. Gleefully appropriating their online finds, they edit, adapt, displace, add and subtract. What artists used to look for in nature, in urban flâneries, in leafing through magazines and rummaging in flea markets, they now find on the Internet, that new wellspring of the vernacular and inexhaustible fount of ideas and wonders” [Chéroux et al, 2011].

Our electronic age is fostering global interaction and connectivity. More and more people are using the internet, with Asia outweighing the rest of the world in internet activity due largely to population [IWS 2012]. As of May 2012, over ten percent of internet usage worldwide is done on a mobile device [Russell, 2012]. Technology continues to advance as does our visual acuity. From touch phones to assembly instructions, visuals are replacing text, removing barriers of language, class and culture.

Although copyright laws vary from country to country, the Berne Convention for the Protection of Literary and Artistic Works states that an artist’s creations will be protected regardless of their country of origin. All works are copyrighted for 50 years after the artist’s death, except for photography and cinematography. The protection of copyright for a photograph is 25 years from when it was created. For cinematography, it is 50 years from when it is first shown, or 50 years from its creation if it was not shown within those 50 years. The agreement permits individual nations to allow for the conditions of fair use of copyrighted material.

Specific applications of the Berne Convention vary from country to country. Some countries have adopted the ‘rule of the shorter term,’ respecting the country of origin’s provisions for a longer term than that provided by the Berne Convention [WIPO, 2012]. The World Intellectual Property Organization Treaty of 1996 provides additional protections not addressed in the Berne Convention due to issues surrounding advancements in information technology and the internet [WIPO, 2012].

Several countries extend moral rights to the artist, offering additional copyright protection. Moral rights include the right to attribution, the right to the integrity of the work and the right to publish anonymously or pseudonymously. The Visual Artists Rights Act of 1990 is part of Title 17 of the US Copyright Code and recognizes moral rights of artists.

In Section 107 of the Copyright Law of the United States, fair use of copyrighted materials limits exclusive rights and allows for the use of a particular copyrighted piece under specific considerations. There are four criteria by which fair use of the original is determined:

1. The character and purpose of the use of the image. This includes if the use is commercial or educational.
2. The nature of the original.
3. The amount and substantiality of the part used of the original.
4. How the use will impact the market or value of the copyrighted work.

Copyright protection is extended in the United States to the form in which authors/artists have expressed themselves, not in the ideas, systems or facts communicated by the copyrighted work. Citing the source of copyrighted work is no replacement for permission [Title 17, US code].

Section 107 of U.S. Copyright Law also cites examples of fair use of copyrighted material that include: scholarship, research, teaching, commentary, criticism and news reporting [Title 17, US code]. There are, however, no additional clarifications or distinctions, and the fair use of a copyrighted image can be vague, to be determined only in court relying upon the specificity of each case.

“The distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission.” [Title 17, US code].

In the 1990s, internationally renowned photographer Annie Liebovitz produced a photograph of actress Demi Moore for the cover of the magazine *Vanity Fair*. At the time, the cover caused controversy and public discourse because Demi Moore was nude and eight months pregnant. Nearly two years later, a mock version of the same photograph was produced by Paramount Pictures as promotion for the new film *Naked Gun 33 1/3: The Final Insult* [Leibovitz v. Paramount Pictures Corporation, 1996]. Actor Leslie Nielsen’s face was overlaid onto the body of a nude pregnant woman photographed in the same pose with similar lighting as that of Liebovitz’s photograph [Ibid]. Liebovitz sued unsuccessfully. According to the summary judgment of the US District Court, Southern District of New York, “To establish a claim for copyright infringement of a protected work, a plaintiff must show both ownership of a valid copyright and that defendant copied the protected work without authorization” [Ibid]. Paramount admitted copying Liebovitz’s work and would have been liable for copyright infringement if there had been no fair use defense [Ibid]. However, the judge found that the Paramount advertisement was a parody and demonstrated fair use of the Liebovitz photograph [Ibid]. Upon appeal, the verdict was upheld. [Leibovitz v. Paramount Pictures Corporation, 1998]

Renowned appropriation artist Jeff Koons has found himself involved as a defendant in copyright infringement lawsuits more than once. The most noteworthy was initially filed in 1989 by artist/photographer Art Rogers against Jeff Koons and Sonnabend Gallery. [Rogers v. Koons, 1990] Rogers registered his photograph *Puppies* through the US Copyright Office in 1989, having first published the image of Mr. and Mrs. Scanlon with their litter of eight shepherd puppies in 1980 [Ibid]. Koons purchased

Museum Graphics notecards of *Puppies* and later used the image as source material [Ibid]. Koons ordered a 42"x62"x37" wooden sculpture be fabricated by Demetz Arts Studio in Italy that copied Rogers' black and white photograph as closely as possible [Ibid]. Koons directed Demetz to add color: the values of which were to mimic the tonal range of Rogers' photograph [Ibid]. Koons oversaw the creation of an edition of four of the sculptures that he entitled *String of Puppies* [Ibid]. On display for the *Banality* exhibition at Sonnabend Gallery in December 1988, three out of the edition sold [Ibid]. Although there were modifications from the original, the court decided that the edition was a copy of the photograph in its entirety [Ibid]. His work, although creative, was established to be commercial in nature [Ibid]. Koons' argument that the sculpture was satirical social commentary was not satisfactory to the judge who interpreted that "commentary" and "criticism" of Section 107 of US Copyright Law should be reflective upon the copyrighted work [Ibid]. Previous case law made fair use more likely if the source is factual, not fiction [Ibid]. The court identified Rogers' photograph to be creative and not solely fact-based [Ibid]. The court also affirmed that art rendering (the production of a photograph in another medium) is the privilege of the copyright owner for which there is a recognizable market [Ibid]. Koons' appropriation was decided to violate fair use of copyrighted material [Ibid]. In early 1991, the district court found that Koons and Sonnabend Gallery were liable for infringing on profits, and a permanent injunction was entered to prevent either party from exhibiting, creating, loaning or selling any derivative versions of *Puppies* and to provide all infringing materials, including the fourth sculpture to Rogers. [Rogers v. Koons, 1992]

In 2004, the photographer for a Gucci sandal advertisement, Andrea Blanch filed legal action against Jeff Koons for his appropriation of her image from Allure magazine for a painting entitled *Niagara* commissioned by Deutsche Bank [Blanch v. Koons, 2005]. Also named as defendants were Deutsche Bank and the Solomon R. Guggenheim Foundation, both having exhibited the painting [Ibid]. Blanch's photograph in the magazine depicted a woman's crossed legs from the calves to painted toenails wearing a pair of Gucci sandals on a cushion in an interior setting. Koons used the legs as photographed but discarded background information, shifted the orientation and added other elements to his painting. The judge identified Koons' piece as a transformative reference back to the photograph and not competitive in the same market with Blanch's photograph, thus in fair use of copyright [Ibid]. Summary judgment was granted in favor of the defendants, and the case was dismissed [Ibid].

Richard Prince, Gagosian Gallery, and Lawrence Gagosian were found liable for copyright infringement in March 2011 and not entitled to a fair use defense for Prince's inclusion of Patrick Cariou's photographs in paintings, their subsequent exhibition and publication. [Cariou v. Prince, 2011] Richard Prince is an established appropriation artist, securing his reputation in the 1980s by altering Marlboro advertisements as an investigation of societal constructs and gender roles. Patrick Cariou published a book of photographs in 2000 entitled Yes, Rasta featuring Rastafarian portraits and Jamaican landscapes shot over a period of six years [Ibid]. Richard Prince admittedly used forty-one of Cariou's photographs in twenty-nine pieces comprising his *Canal Zone* series [Ibid]. Prince modified the images by cropping, painting on them and adding other components [Ibid]. Gagosian Gallery displayed twenty-two of the *Canal Zone* series in late 2008, and a catalog of the exhibition was published and sold. [m] Cariou was in communication with another

gallery to exhibit images of Yes, Rasta at the time of the Gagosian show [Ibid]. Prince's art was identified as largely commercial and adversely impacting the market for Cariou's photographs [Ibid]. The court found Prince's work to be derivative overall, not transformative as defined by commentary on the copyrighted photographs [Ibid]. The court gave relevance to the conduct of the defendants: Prince and the Gagosian defendants were found to be acting in bad faith. Prince made no attempt to receive permission from Cariou for the use of the photographs, and the gallery was aware that Prince utilized copyrighted material and had a history of appropriating imagery without permission [Ibid]. With the court finding in favor of Cariou, a permanent injunction was ordered to restrain any further infringement by the defendants, for all infringing materials be delivered to Cariou and forbidding any infringing pieces from ever being displayed publicly [Ibid]. The appeal was filed in late 2011 [Walker, 2012]. Interestingly, artist Steve Miller produced an appropriation of Cariou's books Yes, Rasta in 2011 entitled Gold Rasta where Miller printed with gold silkscreen painting on each page of the book, the binding and jacket. The limited, unique edition is available at Harper's Books [Harper's, 2012].

Although questions of copyright infringement have become more ubiquitous in our technological environment, the internet seems a difficult arena to police. There is an increasing attitude that information gathered from an online source is public domain and can be used as such. Bloggers and social media users often post other people's images without permission, and people across the globe upload photographs daily.

In April 2011, a motion was filed alleging that Thierry Guetta (aka Mr. Brainwash) infringed upon Glen Friedman's copyright of a photograph that he had created in 1985 of the hip-hop music group Run-DMC [Friedman v. Guetta, 2011]. Acquiring Friedman's photographic portrait of three men standing abreast wearing black cowboy hats from the internet, Guetta claimed that there was no evident copyright and that he was unaware it was published in Friedman's book Fuck You Heroes (1994) [Ibid]. Guetta included aspects of the photograph into four various pieces that were displayed publicly, three of which sold [Ibid]. After considering the accessibility of the original and the extrinsic and intrinsic similarity between each artist's works, then the court determined whether the use of the Friedman photograph was fair under the fair use doctrine [Ibid]. The court determined that, "although the statements made by those respective artworks and the mediums by which those respective statements were made differ, the use itself is not so distinct as to render Defendant's use a transformation of Plaintiff's copyright," because both Friedman and Guetta used the imagery in "visual art for public display" [Ibid]. Due to lack of transformative use, the significance of the portion used and the infringing works' direct market competition, the court granted summary judgment in favor of Friedman [Ibid].

Case law shows that a fair use is more likely to be evident if the copyrighted work is not a creative product and more factual in nature [Rogers v. Koons, 1990]. The transformative fair use of copyrighted material has been upheld in court to mean in the visual arts that the appropriation artist creates work that derives meaning directly from the original image, its maker or its societal impact. The artist's intentions impact the legal interpretation of the transformative character of an artwork. The transformation of an image can't simply be derivative of the source, an altered form of the original for which the author/copyright owner has sole privileges. Authorship is paramount.

Contemporary appropriation artists work in a context influenced by Postmodernism. Postmodernism/poststructuralism rejects romantic notions of authorship, originality, and genius as a pure expression of autonomy without external force or influence. For example, Barthes famously claimed that the author is dead [Barthes, 1977]; Foucault reduced the author/subject to nothing but a function in a discursive system of capillary power [Foucault, 1982 & 1984]; and Derrida suggested that authors never occupy an originary place, and meaning is only and always within a system of deferral and hyperreferentiality such that the signified is always only a signifier [Derrida, 1997]. Authors' intentions are never their 'own' and the meaning of the text or image is never bound. Such beliefs can extend the creative space for artistic and cultural meaning, and undermine distinctions between high and low art, art and mass culture, and artist and non-artist. Cultural and artistic power and authority is diffuse; and cultural and artistic creation is expansive and participatory.

The same ideas are reflected in the concept of semiotic democracy (first coined by Fiske in *Television Culture*) [Fiske, 1970], a term often used to refer to the audience's inevitable and active mediation of meaning encountered through media presentation, along with the creation of artistic and cultural meaning. It is viewed as a positive and self-enhancing activity, perhaps best exemplified by appropriation art. As legal scholar Marci Hamilton notes, this type of art has the "[u]nique capacity to permit individuals to live through worlds they have not and even cannot experience in fact and thereby to view and judge their own world from a new perspective." [Hamilton, 1991]

If participatory creation and semiotic democracy are desirable outcomes to encourage, then it would seem that copyright law should encourage these desiderata. Failure to do so would restrict such creative cultural products and limit the capacities of individuals from engaging in creative participation. Restrictive copyright laws favoring authorship would hinder the abilities of others to give new meaning to cultural/artistic products, and would relegate others to the role of passive consumers. When all meaning is fluid, it would seem that appropriation art in most forms could be viewed as fair use of copyrighted material given its creative and transformative capacity. It could be argued that most any use of existing pieces is creative and transformative, as is any audience reception of those pieces.

There is, however, a problem with linking the expansion and opening of creative space with postmodernism's rejection of authorship, originality, and authenticity. It is not at all clear that postmodernism can support the semiotic democracy and cultural, artistic creative participation that seems so desirable. Such creative participation transforms the given meaning, which implies a certain originality and autonomy on the part of the audience that is itself undermined by postmodern theories.

It is not just the author of images or texts that is a mere placeholder in a discursive system, but the *subject* is also such a placeholder. The claim that the audience creates artistic and cultural meaning ensures that the audience and its choices of meaning become functions of a larger discursive system. Creative transformation is rendered highly problematic, if not impossible. [Cooklin, 2005] Copyright law, then, would seem to be unable to fulfill a purpose of protection of authorship since no such

authorship exists, or a purpose of expanding participatory creation since no such creation exists.

Interestingly, appropriation art rooted in postmodern/poststructuralist views reinscribes the primacy of the very author it claims to undermine. This is evinced in the copyright infringement cases of renowned appropriation artists who assert an originality or transformative dimension to the appropriated images. Ascribing such originality to the author, their piece, and the relationship between the two is precisely what renders coherent the defense of such pieces as fair use under copyright law.

“[M]any scholars claim that the sole purpose of copyright law is to ensure that incentives exist to encourage the maximum amount of creativity: creativity of authors and creativity of users....learning should result through the creative process itself as well as through the consumption and repurposing of creative works. Once the proper legal balance is achieved...there is nothing left for copyright to do.” [Williams, 2010]

Striking such a balance is a perennial challenge. We must negotiate apparent incongruences between the postmodern/poststructuralist rejection of authorship; appropriation artists’ use of the works of others with a claim to originality or transformation; the legal construction of authorship; and the goals of fair use and copyright law.

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