

5-1-2015

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### Recommended Citation

Brockenbrough A. Lamb, *Richard Prince, Author of The Catcher In The Rye: Transforming Fair Use Analysis*, 49 U. Rich. L. Rev. 1293 (2015).

Available at: <https://scholarship.richmond.edu/lawreview/vol49/iss4/11>

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## RICHARD PRINCE, AUTHOR OF *THE CATCHER IN THE RYE*: TRANSFORMING FAIR USE ANALYSIS

### INTRODUCTION

One day in the fall of 2011, a man unrolled a blanket on a sidewalk by Central Park, laid out multiple copies of a book, and started selling them for forty dollars apiece.<sup>1</sup> The man was the notorious appropriation artist Richard Prince, and the books for sale were near-duplicates of an early edition of *The Catcher in the Rye* by J.D. Salinger.<sup>2</sup> They were “near-duplicates” for one very obvious reason: on the dustcover, title page, and copyright page, Prince’s name appeared in place of Salinger’s.<sup>3</sup> As it turns out, these books were part of Prince’s latest art project—500 meticulously constructed copies of *The Catcher in the Rye* using thick, high quality paper meant to mimic the 1951 original, the same cover art as the original, and most astonishingly, the same text as the original (in its entirety).<sup>4</sup>

Prince’s appropriation of *The Catcher in the Rye* was—especially at that time—a daring artistic choice.<sup>5</sup> He had just lost

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1. See Kenneth Goldsmith, *Richard Prince’s Latest Act of Appropriation: The Catcher in the Rye*, POETRY FOUND. (Apr. 19, 2012), <http://www.poetryfoundation.org/harriet/2012/04/richard-princes-latest-act-of-appropriation-the-catcher-in-the-rye/>.

2. Several articles have referred to the Richard Prince versions as duplicates of the first edition (and not only an early edition) of *The Catcher in the Rye* by J. D. Salinger. See, e.g., *id.*; Thomas Hawk, *Richard Prince on Appropriating “The Catcher in the Rye”*, THOMAS HAWK’S DIGITAL CONNECTION (June 17, 2013, 12:59 PM), <http://thomashawk.com/2013/06/richard-prince-on-appropriating-the-catcher-in-the-rye.html>. For a variety of bibliographic reasons this is incorrect. For instance, true first editions of *The Catcher in the Rye* had a photograph of J.D. Salinger on the rear panel of the dust jacket. *First Edition Criteria and Points to Identify The Catcher in the Rye by J.D. Salinger*, FEDPO.COM, <http://www.fedpo.com/BookDetail.php?bk=213> (last visited Apr. 3, 2015). In later printings this feature was dropped. Michael Lieberman, *Richard Prince: Book Pirate?*, BOOK PATROL (Apr. 23, 2012), <http://bookpatrol.net/richard-prince-book-pirate/>. The Prince copies have a blank rear panel. See *id.* (noting that Prince’s version used the second issue dust jacket which lacks J.D. Salinger’s photo).

3. Goldsmith, *supra* note 1.

4. See Hawk, *supra* note 2.

5. See Goldsmith, *supra* note 1.

a copyright case several months earlier in front of a federal district court.<sup>6</sup> He had been found guilty of misappropriating for his visual art series, *Canal Zone*, multiple photographs of Rastafarians published by Patrick Cariou, a relatively unknown photographer.<sup>7</sup> However, with his *The Catcher in the Rye* project, Prince was appropriating the work of an author who was far from unknown. Indeed, few twentieth century novels are better known than *The Catcher in the Rye*, and few authors have more fiercely defended their copyrighted works than J.D. Salinger.<sup>8</sup> Salinger successfully sued to enjoin the publication of a derivative work of fiction that used characters and plot lines from *The Catcher in the Rye* and a critical biography that quoted liberally from unpublished letters he had written.<sup>9</sup> At first blush, Richard Prince's appropriation appears so egregious by comparison to these two infringers that Prince seems to be "practically begging the estate of Salinger to sue him" (though, as of this writing the estate has yet to do so).<sup>10</sup>

It is striking that in both of his copyright infringement victories, Salinger won after overcoming the "credible fair use defenses" of the accused infringers.<sup>11</sup> The fair use doctrine protects certain copying of original expression by allowing "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."<sup>12</sup> And yet, what constitutes the fair use of copyrighted material has never been strictly defined either by the courts or by the

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6. *Cariou v. Prince*, 784 F. Supp. 2d 337, 342–43 (S.D.N.Y. 2011).

7. Patrick Cariou had published *Yes Rasta*, a book of photographs, in 2000. *See id.* at 343, 355. The decision of the Southern District Court of New York would later be reversed in part, vacated in part, and remanded in part by the United States Court of Appeals for the Second Circuit. *Cariou v. Prince*, 714 F.3d 694, 695 (2d Cir. 2013); *see infra* Part II.B.

8. *See* Kate O'Neill, *Copyright Law and the Management of J.D. Salinger's Literary Estate*, 31 *CARDOZO ARTS & ENT. L.J.* 19, 21–22 (2012).

9. *See* *Salinger v. Colting*, 607 F.3d 68, 71–72, 83–84 (2d Cir. 2010) (holding that Frederick Colting had infringed on Salinger's copyrighted material in *The Catcher in the Rye* with his derivative work, *60 Years Later: Coming Through the Rye*, which features Holden Caulfield as an old man); *Salinger v. Random House, Inc.*, 811 F.2d 90, 92 (2d Cir. 1987) (holding that biographer, Ian Hamilton, had infringed Salinger's copyright in certain unpublished letters by quoting them extensively).

10. Goldsmith, *supra* note 1.

11. O'Neill, *supra* note 8, at 20–21.

12. *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

Copyright Act of 1976.<sup>13</sup> The statute does, however, list four factors courts must consider when presented with fair use as a defense to copyright infringement: (1) the purpose of the use; (2) the nature of the source; (3) the amount and substantiality of the source that is used; and (4) the potential impact of the use on the market for the source.<sup>14</sup> This list is non-exclusive and seemingly designed to give judges broad leeway to determine fair use on a case-by-case basis.<sup>15</sup>

The Copyright Act's lack of direction on fair use has led to haphazard application by the courts, which tend to overemphasize one or the other of the factors while ignoring or marginalizing the others.<sup>16</sup> A framework for applying the factors consistent with the concept behind fair use is necessary to ensure that the goal of copyright protection, to promote "the Progress of Science and useful Arts," is met rather than frustrated.<sup>17</sup> At the heart of fair use rests the concept of transformative use; that is, in order for creative expression to be copied and used fairly, it must somehow be transformed.<sup>18</sup> That is all well and good, but determining what degree of transformation is necessary to rise to the level of fair use has not proven such an easy task for the courts.

When they have considered transformation at all, courts have read the first of the four fair use factors—the purpose of the use—as the factor determining whether the copying of the source's creative expression has been transformative.<sup>19</sup> This is reductive. Rather than considering it as a single factor, courts should fully integrate the concept of transformative use into the analysis of fair

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13. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A] (Matthew Bender rev. ed., 2014).

14. 17 U.S.C. § 107 (2012).

15. See NIMMER, *supra* note 13. Though the list is non-exclusive, courts have not come up with any other factors to include.

16. See *infra* notes 67–68 and accompanying text.

17. See U.S. CONST. art. I, § 8, cl. 8; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

18. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) (finding that the first factor "raises the question of justification . . . . This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's *cas*e . . . . I believe the answer to the question of justification turns primarily on whether, and to what extent the challenged use is *transformative*").

19. See, e.g., *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013) (finding that when the purpose of the use—the first factor of 17 U.S.C. § 106—is found to be transformative, the remaining three factors of 17 U.S.C. § 106 are less significant to the overall fair use analysis).

use by using the four factors to determine the following: (1) the extent to which the given use is transformative and (2) whether the given use is transformative enough in the given case to qualify as fair use.

In order to present a fair use defense, the defendant must have copied the creative expression of a work with a valid copyright.<sup>20</sup> Only then does the court consider whether the copied material has been used fairly, in a transformative manner. As both copying and transformation occur at the same time with fair use, it is little wonder that the doctrine is misunderstood. Perhaps the most confusing aspect of transformative use is that a source work may be copied textually and yet transformed contextually. This sort of transformation is the bailiwick of appropriation artists like Richard Prince. Such an extreme example of copying as Prince's *The Catcher in the Rye* helps to reveal the nature of transformative use, which in turn clarifies the fair use doctrine as a whole.

This comment argues that fair use analysis should be reorganized from a disjointed four-factor morass into a straightforward two-part analysis that incorporates and clarifies the purpose of each of the four factors. Such a structure recognizes the role transformative use plays within the fair use doctrine as a whole. This comment then applies this process to a potential fair use defense for Richard Prince's *The Catcher in the Rye*.<sup>21</sup> Part I provides background information on the relationship between the author, reader, and text as outlined by Roland Barthes, general copyright law, Richard Prince, and the fabulist Jorge Luis Borges. Part II analyzes current thinking on the relationship between transformative use and fair use by focusing on the United States Court of Appeals for the Second Circuit's 2013 decision in *Cariou v. Prince*<sup>22</sup> and its subsequent criticism by the Seventh Circuit in *Kienitz v. Sconnie Nation LLC*.<sup>23</sup> Part III lays out a new two-part method for analyzing fair use based on transformative use and

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20. William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 698 (1992); see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985) (finding that a magazine's use of "verbatim excerpts from [an] unpublished manuscript was not a fair use").

21. At the time of this writing, no suit has been initiated over Richard Prince's appropriation of J.D. Salinger's *The Catcher in the Rye*. See *supra* note 10 and accompanying text.

22. 714 F.3d 694.

23. 766 F.3d 756, 758 (7th Cir. 2014).

incorporating the four factors, and then applies that method to Richard Prince's appropriation of J.D. Salinger's *The Catcher in the Rye*. This comment concludes by noting that even the total appropriation of highly creative expression may be a fair use in a given circumstance if what is copied is contextually transformed.

### I. TOWARDS AN UNDERSTANDING OF THE AUTHOR, THE READER, AND THE TEXT

Copyright law rewards authors<sup>24</sup> for their originality by granting them limited control over the creation and distribution of copies of their original expression.<sup>25</sup> However, the very notion of copyright protection recognizes that the progression of science and the arts is dependent upon dissemination of creative expression to the public.<sup>26</sup> Creative expression, like so many human endeavors, is essentially cumulative.<sup>27</sup> Every text is context, every author a copyist. These truths concerning the text and the author have remained at the margins of copyright law even as the artistic community has embraced them. For the arts, if not for the law, the reader has replaced the author as the focal point for determining textual meaning. In order to understand fair use, we must first parse the relationship of author, reader, and text. This relationship underlies fair use as it exists today<sup>28</sup> and cries out for a new method of fair use analysis that acknowledges and explains

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24. This comment uses the terms "author," "reader," and "text" with the understanding that "author" could refer to any maker of artistic expression (i.e., painters, sculptors, musicians), "reader" any consumer of artistic expression (i.e., viewers of paintings and movies), and "text" any artistic expression (i.e., songs, plays, dances).

25. See Gary S. Lutzker, *Dat's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 147 (1992).

26. See *id.*

27. See Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207, 265 (2007) ("There is no vacuum around the creative process, and no wall surrounding the author and her expression. With her original expression the creative author is entering a cultural conversation that has been going on long before she appeared, and one that will continue long after she leaves. Whatever she adds will therefore incorporate and respond to that which has already been said; and she must trust that her contribution will inform what others say after her. In other words, the dialogic nature of authorship reveals the cumulative nature of cultural creativity.")

28. See *infra* Part II.

how, given the right context, a reader may transform an author's text.<sup>29</sup>

A. *The Author Is Dead. Long Live the Author!*

In 1968 French linguist and philosopher, Roland Barthes, famously declared the author—as the creative genius who gives life and purpose to the artistic work—dead.<sup>30</sup> This declaration was not meant to suggest that the author-person is no longer necessary, but rather that the notion of the author as the authority, the explicator, of his own work is outmoded.<sup>31</sup> Every text is copied, an amalgamation of other texts, such that “it is language which speaks, not the author.”<sup>32</sup>

It has been argued that while the concept of the death of the author as promulgated by Barthes and others has had a profound impact on the study of literature, philosophy, and linguistics,<sup>33</sup> it has failed to have any noticeable impact on the legal understanding of copyright.<sup>34</sup> Whether post-structuralist theory has had any direct impact on copyright law, the observations made by Barthes and others still ring true. The author is not dead because a few French theorists and their students think it so, but rather because the notion of the author as authority over the text makes little sense. The text is understood by the reader, who becomes the authority of the text in the act of reading.<sup>35</sup> It is in the reader where meaning must reside.<sup>36</sup> Whether courts realize it or not, the

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29. See *infra* Part III.

30. ROLAND BARTHES, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142, 148 (Stephen Heath trans., 1977); see Craig, *supra* note 27, at 216.

31. See Elton Fukumoto, Comment, *The Author Effect after the “Death of the Author”*: Copyright in a Postmodern Age, 72 WASH. L. REV. 903, 914 (1997) (discussing how authors have been replaced with text and how text is no longer limited by the figure of the author).

32. BARTHES, *supra* note 30, at 143.

33. See, e.g., Lionel Bently, Review, *Copyright and the Death of the Author in Literature and Law*, 57 MOD. L. REV. 973, 974, 977 (1994); Michel Foucault, *What Is an Author?*, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141–42 (Josué V. Harari ed., 1979).

34. See Bently, *supra* note 33, at 977.

35. See BARTHES, *supra* note 30, at 148.

36. See *id.* (“Thus is revealed the total existence of writing: a text is made up of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author. . . . [A] text’s unity lies not in its origin but in its destination.”).

concept of the death of the author meshes with copyright law remarkably well precisely because the goal of promoting progress in science and the arts recognizes the ascendancy of the text and the reader over the author.

*B. The Author Is Subordinate to the Reader and the Text in Copyright Law*

Though the metes and bounds of copyright law are laid down in the Copyright Act of 1976,<sup>37</sup> the ultimate legal authority for American copyright law derives from the United States Constitution, which grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>38</sup> While at first glance this language seems to have the goal of promoting the rights of authors with respect to copyright and inventors with respect to patents, upon closer reading these rights must instead be understood as a means to an end, which is the promotion of “the Progress of Science and useful Arts.”<sup>39</sup> Once a work is disseminated, progress no longer depends on the author but instead on the reader, the potential future author.

Copyright law values future creation over past creation.<sup>40</sup> Authors have no natural property right in their works; instead, the government, through the Constitution and the Copyright Act, allows them certain limited rights for a certain limited time in order to promote artistic innovation at large.<sup>41</sup> The artificial rights granted to authors are meant to encourage the creation of art, or rather, more accurately, to *not* discourage its creation—the

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37. See 17 U.S.C § 106 (2012) (setting forth the rights of a copyright owner).

38. U.S. CONST. art. I, § 8, cl. 8.

39. *Id.*

40. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001) (noting that “copyright law promotes [] public access to new ideas and concepts”).

41. See *id.* at 1263 (“In a society oriented toward property ownership, it is not surprising to find many that erroneously equate the work with the copyright in the work and conclude that if one owns the copyright, they must also own the work. However, the fallacy of that understanding is exposed by the simple fact that the work continues to exist after the term of the copyright associated with the work has expired. “The copyright is not a natural right inherent in authorship. If it were, the impact on market values would be irrelevant; any unauthorized taking would be obnoxious.”) (quoting Leval, *supra* note 18, at 1724).

thought being that, without some sort of reward, much creative expression might never come into existence.<sup>42</sup>

While the rights afforded to authors have been extended and strengthened over the past few decades,<sup>43</sup> many of these changes have come within the context of the new global marketplace and the necessity of “bring[ing] U.S. copyright law into compliance with the minimum standards set forth in the Berne Convention,” the international agreement governing copyright.<sup>44</sup> Furthermore, the goal of U.S. copyright law has not changed—authors are still allowed certain limited rights for a certain period of time in order “[t]o promote the Progress of Science and useful Arts.”<sup>45</sup> The rights afforded to authors are ensured by U.S. law only in order to promote new creative expression, new texts, for consumption by readers.<sup>46</sup> In this way copyright law recognizes that all creative expression is to some degree an act of appropriation.

### C. *Richard Prince, Appropriation Artist*

Richard Prince first gained the attention of the world in the 1980s with his series of cowboy images which were in reality re-photographs of various well-known Marlboro advertisements, featuring the iconic Marlboro Man.<sup>47</sup> The difference between the original advertisements and Prince’s re-photographs were negligible other than the size and the removal of advertising copy.<sup>48</sup> The major difference was that Prince’s re-photographs were available for sale and routinely commanded hundreds of thousands of dollars

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42. See *id.* at 1262 (“[T]he Copyright Clause grants the author limited exclusive rights in order to encourage the creation of original works.”).

43. See *e.g.*, ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 433 (6th ed. 2012) (stating that since the Copyright Act was enacted in 1976, the duration of copyright protection has increased from the life of the author plus fifty years to the life of the author plus seventy years).

44. *Id.*

45. U.S. CONST. art. I, § 8, cl. 8.

46. *SunTrust Bank*, 268 F.3d at 1262.

47. Anthony R. Enriquez, *The Destructive Impulse of Fair Use After Cariou v. Prince*, 24 *DEPAUL J. ART TECH. & INTELL. PROP. L.* 1, 23–24 (2013).

48. Richard Dorment, *Richard Prince: The Coolest Artist Alive*, *TELEGRAPH* (July 15, 2008, 12:01 AM), <http://www.telegraph.co.uk/culture/art/3556477/Richard-Prince-the-coolest-artist-alive.html>.

each (and recently, even more).<sup>49</sup> In fact, many of the photographs that have sold for some of the highest prices at auctions and galleries over the past three decades have been re-photographs taken by Prince.<sup>50</sup>

Despite decades of appropriation, it was not until 2011 that Richard Prince's art became the business of the courts when photographer Patrick Cariou sued Prince after discovering that he had appropriated various photographs Cariou had published years earlier in his book *Yes Rasta*.<sup>51</sup> While Cariou's book and the photographs had gone largely unnoticed,<sup>52</sup> New York's prominent Gagosian Gallery was featuring Prince's series *Canal Zone*, into which Cariou's photographs had been incorporated, selling eight of the pieces for a total of \$10,480,000.<sup>53</sup> The district court ruled for Cariou over Prince's defense of fair use, finding that the appropriation did not qualify as fair use because the use did not comment on the original work of art (or seemingly anything as far as the court could tell).<sup>54</sup>

In 2011, while his appeal of the *Cariou* decision was still in progress, Richard Prince printed and released *The Catcher in the Rye* in an edition of 500 copies.<sup>55</sup> Prince's *The Catcher in the Rye* was arguably his boldest appropriation yet, in part because of the author whose text he had appropriated, but even more so because of the manner and scope of his appropriation.<sup>56</sup> Prince went out of his way to make plain the degree of his appropriation, taking the entire Salinger text and even using the same dust jacket art from

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49. In fact one of Prince's re-photographs of a Marlboro advertisement sold for \$3.4 million, a record for a photograph at a Sotheby's sale in November of 2007. Brian Appel, *Stealing from the Marlboro Man—Richard Prince's \$3.4M Cowboy Re-Takes Top Photography Spot at the Fall Contemporary Auctions in New York*, BRIAN APPEL ART CRITICISM/ART CONSULTING, [http://www.brianappelart.com/art\\_writing\\_richard\\_prince\\_stealing\\_from\\_the\\_marlboro\\_man.htm](http://www.brianappelart.com/art_writing_richard_prince_stealing_from_the_marlboro_man.htm) (last visited Apr. 3, 2015).

50. *See id.*

51. *See Cariou v. Prince*, 714 F.3d 694, 698 (2d Cir. 2013).

52. *Id.* at 709 (noting that Cariou earned approximately \$8000 in royalties from *Yes Rasta*).

53. *See id.* at 698, 709.

54. *See Cariou v. Prince*, 784 F. Supp. 2d 337, 348–50 (S.D.N.Y. 2011).

55. *See Hawk*, *supra* note 2.

56. *See Goldsmith*, *supra* note 1. As mentioned above, Salinger has been extremely protective of his copyright. *See supra* notes 7–11 and accompanying text; *see also O'Neill*, *supra* note 8, at 21–22.

early editions of *The Catcher in the Rye* with its iconic red carousel horse.<sup>57</sup>

Given that Prince's *The Catcher in the Rye* is so overwhelmingly similar to Salinger's, it is tempting to simply label it a pirated copy or a forgery and move on. However, this could not be farther from the truth. It is not a pirated copy because it is not trying to pass itself off as a legitimate Salinger *The Catcher in the Rye*.<sup>58</sup> And it is difficult to claim Prince's book is a forgery because of the fame of Salinger's book—that is, it is hard to imagine any reasonable person believing that Prince could have been the original author of *The Catcher in the Rye*. Prince's text, his *The Catcher in the Rye*, is not simply the words of the novel itself but the context in which those words are consumed by the reader. That context incorporates everything that the reader sees and knows about both Salinger and Prince, along with the words of the text and the materials that make up the book. For the reader, the context of Prince's *The Catcher in the Rye* overlays Salinger's novel, augmenting and transforming the meaning of the original text.

#### D. *Pierre Menard, Author of the Quixote*

In 1939, decades before Richard Prince, the Copyright Act, or the concept of transformative use existed, the Argentinian Jorge Luis Borges wrote the short story *Pierre Menard, Author of the Quixote*, which illustrated the relationship between author, reader, and text by focusing on the transformation that occurs through contextual reading.<sup>59</sup> The story takes the form of a fictional piece of literary criticism in which the narrator explains and extols the creative output of one Pierre Menard, a twentieth century author whom the narrator knew personally.<sup>60</sup> Menard's

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57. See Goldsmith, *supra* note 1.

58. How could it not be trying to pass itself off as a legitimate Salinger *The Catcher in the Rye*? Because it is Prince's name, not Salinger's, on the front of the cover, title page, and copyright page. See *id.*

59. Jorge Luis Borges, *Pierre Menard, Author of the Quixote*, in COLLECTED FICTIONS 88, 88 (Andrew Hurley trans., Penguin Books 1998); *Ficciones Characters*, BOOKRAGS, <http://www.bookrags.com/studyguide-ficciones/#gsc.tab=0> (Apr. 3, 2015).

60. *Ficciones Characters*, *supra* note 59. Pierre Menard never existed nor did any of his works. Notes on "Pierre Menard, Author of the Quixote," BEHOLD MY SWARTHY FACE (May 12, 2008, 12:33 AM), <http://www.beholdmyswarthyface.com/2008/05/on-pierre-menard-author-of-quixote-by.html>.

greatest ambition, it seems, was to write the *Quixote*.<sup>61</sup> That Miguel de Cervantes had already written it 250 years earlier was of no matter; Menard was determined to produce it himself word for word.<sup>62</sup> Even more astonishing than this, Menard intended to write the *Quixote*, not by copying it or by somehow channeling Cervantes, but by writing as himself, a quirky, twentieth century French author.<sup>63</sup> According to the narrator, Menard seems to have succeeded. At one point in his encomium, the narrator compares Cervantes' *Don Quixote* to Menard's and finds the latter's very different from and far superior to the former's:

Cervantes, for example, wrote the following (Part I, Chapter IX):

. . . truth, whose mother is history, rival of time, depository of deeds, witness of the past, exemplar and adviser to the present, and the future's counselor.

This catalog of attributes, written in the seventeenth century . . . is mere rhetorical praise of history. Menard, on the other hand, writes:

. . . truth, whose mother is history, rival of time, depository of deeds, witness of the past, exemplar and adviser to the present, and the future's counselor.

History, the *mother* of truth!—the idea is staggering. Menard, a contemporary of William James, defines history not as *delving into* reality but as the very *fount* of reality.<sup>64</sup>

According to the narrator, the genius of Menard's *Don Quixote* derived from its context. Though Menard writes the same words as Cervantes, by presenting them as his own, he forces the narrator to confront those words in a different context than he would Cervantes' original text.<sup>65</sup> Laid over the Cervantes' *Don Quixote*, the narrator sees and reads the world of Menard (a twentieth century world).

The reader of Borges' story may well be unable to suspend his disbelief enough to agree with the narrator. However, the student

61. Borges, *supra* note 59, at 91.

62. *Id.* ("Pierre Menard did not want to compose *another* Quixote . . . he wanted to compose *the* Quixote. Nor, surely, need one be obliged to note that his goal was never a mechanical transcription of the original; he had no intention of *copying* it. His admirable ambition was to produce a number of pages which coincided—word for word and line for line—with those of Miguel de Cervantes.").

63. *See id.* at 91–92.

64. *Id.* at 94.

65. *Id.* ("The Cervantes text and the Menard text are verbally identical, but the second is almost infinitely richer.").

of copyright should take note that, if the story is to be believed,<sup>66</sup> and if Cervantes (somehow) maintained a valid copyright at the time of Menard's composition, Menard would not have infringed on that copyright. The *Quixote* as written by Menard would be an original creation and not a copy.<sup>67</sup>

Regardless of his intent, Menard's composition would not qualify as an example of appropriation art. Despite the fact that Menard appears to be very familiar with Cervantes and *Don Quixote*, he steadfastly denied copying.<sup>68</sup> Either Menard is a liar/forger or he is an independent creator. Appropriation art is a bald-faced act; the appropriation artist openly incorporates the texts he finds into his own text without consideration of authorship claims.<sup>69</sup> Nonetheless, the Borges story does reveal the surprising relationship between author, reader, and text that appropriation artists like Richard Prince seek to expose: that authors lose authority once the texts are on the page. In fact, authors become little more than additional pieces of context for the consumer of art to interpret in the course of his reading.

## II. THE STATE OF FAIR USE

For well over one hundred years, courts have implemented the doctrine of fair use to protect a certain degree of copying in order to promote the overall purpose of copyright—"to promote the Progress of Science and useful Arts."<sup>70</sup> In keeping with the goals of copyright protection, to disseminate and to increase cultural knowledge and expression, fair use provides the courts with a way to ensure that authors who use the protected creative expressions of others may do so if their use leads to new works of expression.<sup>71</sup>

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66. That is, that Menard did not copy Cervantes' *Quixote* but independently created a literary double. See *id.* at 91.

67. See Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright Vis-à-Vis Patent and Trade-Mark*, 2008 MICH. ST. L. REV. 199, 216–17 & n.51.

68. See Borges, *supra* note 59, at 91.

69. See Rachel Isabelle Butt, *Appropriation Art and Fair Use*, 25 OHIO ST. J. ON DISP. RESOL. 1055, 1061 (2010).

70. U.S. CONST. art. I, § 8, cl. 8; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

71. *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006) ("Copyright law thus must address the inevitable tension between the property rights it establishes in creative

Since its development in the nineteenth century, the fair use doctrine has tracked the course of copyright law development, and it was codified into the Copyright Act of 1976.<sup>72</sup> The statute lists four factors that courts must use in any fair use analysis:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>73</sup>

Courts are reluctant to clarify and organize these factors out of concern that doing so would limit their discretion over fair use determinations.<sup>74</sup> This reluctance causes courts to maintain a formless mode of analysis in which the fair use factors have been applied haphazardly. What is more, in the last twenty-five years, the concept of transformative use has confused fair use analysis even further. The current state of fair use and its relationship to transformative use are quagmires that require explanations.

#### A. *Fair Use as (Mostly) Transformative Use?*

In 1990, Pierre Leval, a federal district court judge, wrote what has become a seminal article on copyright law, in which he pushed for a more standardized conception of the fair use doctrine.<sup>75</sup> Leval claimed that “Factor One is the soul of fair use,” and that in reality, factor one is really asking whether a given use is transformative.<sup>76</sup> Though Leval argued that all four of the factors are necessary to complete any fair use analysis, he also stated that the three final factors would necessarily vary in significance

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works . . . and the ability of authors, artists, and the rest of us to express them—or ourselves by reference to the works of others . . . . The fair-use doctrine mediates between these two sets of interests, determining where each set of interests ceases to control.”)

72. See 17 U.S.C. § 107 (2012).

73. *Id.*

74. See *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (citations omitted); *Campbell*, 510 U.S. at 577 (citations omitted).

75. See generally Leval, *supra* note 18, at 1105 (noting “that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values,” while “[suggesting] that a cogent set of governing principles exists”).

76. *Id.* at 1116.

depending on the strength of the transformative use determined under the first factor.<sup>77</sup>

Leval's take on fair use and, particularly, the concept of transformative use under the first factor, was itself transformed into legal precedent by the Supreme Court in *Campbell v. Acuff-Rose Music* in 1994.<sup>78</sup> However, the first factor has not always been considered the most important of the four. Despite the powerful influence of Leval's article and the Supreme Court's decision in *Campbell*, some courts continue to agree with the earlier Supreme Court decision in *Harper & Row, Publishers, Inc. v. Nations*,<sup>79</sup> in which the Court stated that the "last factor is undoubtedly the single most important element of fair use."<sup>80</sup> Nonetheless, in the years since the *Campbell* decision, most courts have taken an "expansive view of transformative use" and frequently found that it can "essentially overwhelm all the [other] factors."<sup>81</sup>

#### B. *Fair Use and Transformative Use in (and After) Cariou v. Prince*

The Second Circuit's decision in *Cariou v. Prince* represents the most current distillation of the role transformation plays in fair use determinations.<sup>82</sup> In this case, the court found that Prince's use of the Cariou photographs was transformative<sup>83</sup> and therefore fair because that use added value to the original photographs by employing them for a different purpose.<sup>84</sup> Though the Second Cir-

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77. *See id.*

78. 510 U.S. 569, 579 (1994) ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of the other factors . . . that may weigh against a finding of fair use.") (internal citations omitted).

79. *See, e.g., Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) ("We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).").

80. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

81. Barry Werbin & Jessica D. Wessel, *The 'Transformation' of Fair Use After Prince v. Cariou*, MONDAQ, <http://www.mondaq.com/unitedstates/x/292912/Copyright/The+Transformation+of+Fair+Use+After+Prince+v+Cariou> (last visited Apr. 3, 2015).

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

83. The court found the use transformative in twenty-five out of thirty works. *Id.* at 706. On the remaining five works, it remanded the case to the district court for a finding consistent with its opinion. *Id.* at 712.

84. *See id.* at 705–06.

cuit's emphasis on transformative use seems a step in the right direction, it is not without its detractors. In its 2014 decision in *Kienitz v. Sconnie Nation LLC*, the Seventh Circuit criticized the *Cariou* court for replacing the four factors with the notion of transformative use.<sup>85</sup> These two cases highlight the current misunderstanding of the concept of transformative use as it relates to the four factors listed in 17 U.S.C. § 106. By considering the four factors together as indicators of transformation and not as discrete inquiries, courts could significantly reduce this confusion.

In the course of his legal defense, Richard Prince never disputed that he had appropriated and used Patrick Cariou's copyrighted work.<sup>86</sup> As an appropriation artist, he made no effort to conceal his "theft" nor felt he had any reason to do so.<sup>87</sup> Prince did, however, mount a fair use defense.<sup>88</sup> Though the district court roundly rejected Prince's fair use defense, the Second Circuit largely accepted it when it considered the case on appeal in 2013.<sup>89</sup> The Second Circuit mainly disagreed with the district court over the application of the first of the four factors in the fair use analysis. While the district court "imposed a requirement that, to qualify for a fair use defense, a secondary use must 'comment on, relate to the historical context of, or critically refer back to the original works,'" the Second Circuit disagreed.<sup>90</sup> While it acknowledged that often times fair use will come in the form of a reflexive commentary—especially when it involves satire or parody—the Second Circuit found the requirement that a use come in that form in order to qualify as transformative was incorrect.<sup>91</sup> Instead, the

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85. See 766 F.3d 756, 758 (7th Cir. 2014). This is an extreme and unfair criticism on the part of the Seventh Circuit. While the Second Circuit certainly emphasized transformative use in *Cariou*, it still only treated it under factor one of the four factor test. *Cariou*, 714 F.3d at 708–10. Though the court subordinated the other factors to factor one and transformative use, it still considered all four in its analysis. *Id.*

86. *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).

87. See Interview by Karen Rosenberg with Richard Prince, N.Y. MAG. (May 2, 2005), available at <http://nymag.com/nymetro/arts/art/11815/> (referring to images he might like to appropriate Prince remarked, "Every week, I'd see one and be like, 'Oh, *that's mine*. Thank you.") (emphasis added).

88. *Cariou*, 784 F. Supp. 2d at 342.

89. See *Cariou*, 714 F.3d at 698–99.

90. *Id.* at 706 (quoting *Cariou*, 784 F. Supp. 2d at 348).

91. *Id.*

secondary use must merely “alter the original with ‘new expression, meaning, or message’” without simply repackaging or recasting it.<sup>92</sup>

In order to determine whether a new message, meaning, or expression has been created in the secondary work, the court must first look at the original and secondary works side by side.<sup>93</sup> A simple comparison of their aesthetics might suffice to show that a different message or a different purpose is being expressed despite the use of the same materials.<sup>94</sup> In *Cariou*, the Second Circuit found that this eyeball test revealed that there were dramatic differences of aesthetics between Cariou’s originals and their Prince counterparts in twenty-five out of thirty of the pieces.<sup>95</sup> In short, the Second Circuit determined that, while criticism and commentary on the original could qualify as transformative use (and therefore fair use), they were not requirements.<sup>96</sup> Instead, all that was required was actual transformation of the meaning or message.<sup>97</sup>

In its analysis, the district court relied heavily on Prince to explain the message of his art and found that he was unable to articulate a clear purpose for his use of Cariou’s photographs.<sup>98</sup> The Second Circuit once again thought the district court missed the mark in emphasizing the role of the author in determining the meaning of his own work.<sup>99</sup> Perhaps unknowingly influenced by Barthes and other poststructuralists, the court found what was essential to determining that purpose was not the explication of the artist but rather “how the work in question appears to the reasonable observer.”<sup>100</sup> The Second Circuit interestingly shifted

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92. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

93. *See id.* at 706–08.

94. *See id.*

95. *Id.* at 706 (“Prince’s composition, presentation, scale, color palette, and media are fundamentally different and new compared to the [Cariou] photographs, as is the expressive nature of Prince’s work.”).

96. *Id.*

97. *See id.*

98. *Id.* at 707 (“[W]hat I [Prince] do is I completely try to change it into something that’s completely different . . . I’m trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene.”) (quoting Prince Dep. 338:4–339:3, Oct. 6, 2009).

99. *See id.*

100. *See id.*; cf. BARTHES, *supra* note 30, at 148 (“[A] text is made of multiple writings . . . but there is one place where this multiplicity is focused and that place is the read-

the inquiry from intention to perception and from the author to the reader. By doing so, the court made a significant change to the process of finding transformative use.

In a telling move, the Second Circuit next analyzed the Prince *Canal Zone* works under the fourth fair use factor,<sup>101</sup> again finding that the district court had focused its attention in the wrong place.<sup>102</sup> The point of the fourth factor, according to the Second Circuit, was not to determine whether the secondary use suppressed or destroyed the market for the original (say by damaging the original artist's reputation), "but whether the secondary use *usurps* the market of the original work."<sup>103</sup> In order to usurp the market of the original, the court reasoned that the secondary work must hijack the likely audience of the original work by presenting that audience with the same content as that original work.<sup>104</sup>

Because Prince's market for his *Canal Zone* pieces was completely different from Cariou's market for his *Yes Rasta* photographs, the court found that there was no way that Prince could have been said to have usurped the market (even the derivative market) for Cariou's work.<sup>105</sup> The potential audience and likely consumers of Prince's *Canal Zone* were the rich, sophisticated collectors who were wined and dined at the Gagosian Gallery.<sup>106</sup> Whereas Cariou published his photographs in book form, sold a few prints to close friends, and hardly marketed his work at all, making just over \$8000, Prince sold eight of his works for a total of \$10,480,000 and the opening of his show was attended by a who's who of the rich and famous, including Jay-Z, Beyoncé, Tom Brady, Gisele Bündchen, Jonathan Franzen, Candance Bushnell, Robert DeNiro, Brad Pitt, and Angelina Jolie.<sup>107</sup> It simply does not

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er, not, as was hitherto said, the author.").

101. This is "telling" because the court is revealing what has long been the thinking of the courts—that the focus of the fair use analysis should be on either the first factor, the fourth factor, or both, and not on the middle two factors.

102. See *Cariou*, 714 F.3d at 708.

103. *Id.* (quoting *Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006)).

104. *Id.* at 709.

105. See *id.*

106. See *id.* The Gagosian Gallery is the gallery where Prince exhibited and sold his *Canal Zone* pieces. Richard Prince *Canal Zone*, GAGOSIAN GALLERY, <http://www.gagosian.com/exhibitions/richard-prince--may-08-2014> (last visited Apr. 3, 2015).

107. See *Cariou*, 714 F.3d at 709.

take much imagination to see that, forgetting the respective artistic merits of the *Yes Rasta* and *Canal Zone* pieces, the market for the relatively unknown Patrick Cariou was very different from that of the famous and notorious Richard Prince whose previous work, by the time of this show, held the record for the highest realized price of any photograph in history.<sup>108</sup> Prince's fame ensured that his work could reach a market that Cariou simply could not.

The Second Circuit rounded out its analysis with brief consideration of the second and third fair use factors—the nature of the copyrighted work (factor two) and the amount and substantiality of the work that is used (factor three).<sup>109</sup> It acknowledged that the second factor was designed to make it more difficult to find fair use when the original work was of a highly creative nature.<sup>110</sup> Although Cariou's photographs were just the sort of highly creative works that copyright law is designed to protect, the court shrugged this off, finding this factor of limited help when the secondary use has already been shown to be transformative.<sup>111</sup> The court gave the third fair use factor similar treatment, finding that however much the secondary work takes from the original, so long as the use is transformative, the factor must nonetheless weigh in favor of fair use.<sup>112</sup>

Ultimately, in determining that the use of Cariou's photographs in twenty-five out of thirty of Prince's *Canal Zone* pieces qualified as fair use, the Second Circuit focused on two issues: (1) the transformative use of the photographs (the first fair use factor) and (2) the fact that the secondary works did not usurp the market of the originals (the fourth fair use factor).<sup>113</sup> While the court considered all four of the factors demanded by the Copyright Act, in its analysis it misunderstood how the four factors relate to each other and how they all (not just the first factor) help reveal the role of transformative use in a finding of fair use.

The general confusion over fair use was again on display in a subsequent decision by the Seventh Circuit in 2014, wherein the

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108. See Appel, *supra* note 49.

109. See *Cariou*, 714 F.3d at 709–10.

110. See *id.* at 709.

111. See *id.* at 710.

112. See *id.*

113. See *id.* at 705–06, 709–10.

court criticized the Second Circuit for improperly allowing a finding of transformative use to usurp the role of the four factors in its *Cariou v. Prince* decision.<sup>114</sup> According to the Seventh Circuit, hearkening back to the Supreme Court's language in *Harper & Row*, all of the factors should be considered, with the fourth factor being the most important.<sup>115</sup> Indeed, as far as the Seventh Circuit was concerned, transformative use was "not one of the statutory factors" at all despite the significance that the Supreme Court seemed to place on it in *Campbell*.<sup>116</sup>

This circuit split highlights the current confusion as to the interrelationship of the four factors and the overall significance of transformative use. The problem is that each court is right and each court is wrong. The *Kienitz* court correctly points out that transformative use is not one of the four statutory factors which must be considered in any fair use analysis.<sup>117</sup> However, the court does not recognize that transformative use is the unifying theme behind those factors, the question that they help to resolve, and the *sine qua non* of fair use. The *Cariou* court understands that transformative use is essential but misunderstands its place in the analysis. The court considers it only under the first factor and then systematically marginalizes the other factors without realizing that they are necessary to understanding the nature and extent of the transformative use at issue. This confusion can be remedied by the two-step method for analyzing fair use described below that harmonizes the four factors and clarifies their relationship to transformative use.

### III. THE FUTURE OF FAIR USE

Though allowing the courts broad discretion to find fair use makes sense considering the rich variety of creative expression mankind is capable of, a standardized process for determining fair use is necessary in order to uphold the purpose of copyright—the progress of science and the arts. The current methods of fair

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

115. See *id.* at 758; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

116. See *Kienitz*, 766 F.3d at 758; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

117. *Kienitz*, 766 F.3d at 758.

use analysis are confusing and have led to incompatible rulings. The method itself may be standardized without undermining the courts discretion within that method. Fair use should be determined by considering the four factors as reorganized into two questions: (1) How transformative is a given use? and (2) Is that use transformative enough in a given case to be considered fair use? An analysis of Richard Prince's complete appropriation of Salinger's *The Catcher in the Rye*, a seemingly extreme example of what might be considered fair use, serves well as a template for applying this proposed method.

### A. *Transforming Fair Use*

First and foremost, all use is transformative. Copyright law has danced around this idea ever since the fair use doctrine was articulated without directly proclaiming it.<sup>118</sup> Courts have long recognized that “[t]he thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.”<sup>119</sup> Barthes' concept of the text as a web of interconnected texts, drawn from language and culture, is not new to copyright law.<sup>120</sup> To a degree, it has always been there. The fair use doctrine recognizes this by allowing authors who have incorporated copied creative expression into their works an opportunity to show that their copying is not at odds with the goal of copyright—the progress of science and art.<sup>121</sup>

Given that all use is transformative, the four factors may now be understood as signposts for determining the extent of the transformation that has occurred and, ultimately, whether that transformation has removed the secondary work from the market of the original. To that end, rather than wandering through the four factors, occasionally conflating them, overemphasizing one and disregarding another, courts should apply a standard prac-

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118. See *Emerson v. Davies*, 8 F. Cas. 615, 619 (1845) (“In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout.”).

119. *Id.*

120. See *id.* (discussing the manner in which all books borrow from elsewhere); see also BARTHES, *supra* note 30, at 148 (“[A] text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation . . .”).

121. See 17 U.S.C. § 107 (2012); *supra* Part I.B.

tice to their application. This can be accomplished by changing the stratagem for fair use analysis from a four factor pick-and-choose into a methodical two-step process. A court should first ask how transformative the use is. In answering that question, it should consider the amount and significance of the material used (factor three) and the purpose of the use (factor one).<sup>122</sup> A court should then ask whether that use is transformative enough in the work in question to qualify as fair use. In answering that question, it should consider the nature of the copyrighted work (factor two) and whether the use has allowed the secondary work to usurp the potential market of the copyrighted work (factor four).<sup>123</sup>

Additionally, when determining the purpose of the use under the first question, the courts should follow the example of the Second Circuit in *Cariou v. Prince* and not concern itself with the motivations of the author but instead with the observer's perception of the use's purpose.<sup>124</sup> However, rather than the general reasonable observer standard set forth in *Cariou*, the court should consider the purpose of the use from the perspective of a reasonable consumer of the allegedly infringing work.<sup>125</sup> In this way, the court can limit the analysis to the likely audience of the text rather than the reasonable public at large. After all, it is the consumer of any given creative expression, the reader of a text, who is actually interpreting and understanding it.<sup>126</sup>

### B. *From The Catcher in the Rye to The Catcher in the Rye*

As of this writing, the Salinger estate has taken no legal action against Richard Prince for his appropriation of *The Catcher in the Rye*.<sup>127</sup> It may never. After all, Richard Prince only produced 500

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122. See 17 U.S.C. § 107.

123. See *id.*; *Cariou v. Prince*, 714 F.3d 694, 708–09 (2d Cir. 2013) (finding that the fourth factor is really about whether the secondary use usurps the market of the original).

124. See *Cariou*, 714 F.3d at 707.

125. See *id.* (“What is critical is how the work in question appears to the reasonable observer . . .”).

126. See BARTHES, *supra* note 30, at 148.

127. See Goldsmith, *supra* note 1 (“Price [sic] is openly pirating what is arguably the most valuable literary property [in] American literature, practically begging the estate of Salinger to sue him.”).

copies.<sup>128</sup> As many of the copies have disappeared into collections and the secondary market,<sup>129</sup> an injunction would be somewhat unhelpful.<sup>130</sup> Damages or some sort of reasonable royalties might be possible, but it may not be worth it to the estate considering the retail prices of the Prince copies.<sup>131</sup> Nonetheless, an analysis of such a blatant appropriation of such a renowned creative work under the proposed two question fair use analysis described below illustrates the helpfulness of the process.

### 1. How Transformative Is Richard Prince's Use of J.D. Salinger's *The Catcher in the Rye*?

In order to understand the extent of the transformative use of *The Catcher in the Rye*, we must determine (1) the amount and significance of the portion used and (2) the purpose of the use.<sup>132</sup>

Richard Prince appropriated every word of the text of Salinger's novel in the making of his *The Catcher in the Rye*. Prince additionally used the same dust jacket art and used materials designed to mimic an early edition of Salinger's novel, hijacking the context of the book as an object.<sup>133</sup> Under the first consideration, it

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128. Michael Lieberman, *Richard Prince: Book Pirate?*, BOOK PATROL (Apr. 23, 2012), <http://bookpatrol.net/richard-prince-book-pirate/>.

129. On the popular used and rare book marketplace abebooks.com, as of this writing, unsigned copies of Prince's *The Catcher in the Rye* start at \$1500. See Results for Richard Prince and *The Catcher in the Rye*, ABEBOOKS.COM, <http://abebooks.com/servlet/SearchResults?an=richard+prince&sts=t&m=catcher+in+the+rye> (last visited Apr. 3, 2015).

130. Prince sold an unknown number of copies on the street in New York and still more at a rare book convention; the rest remain in his archive. Kelly Crow, *Artist Richard Prince's Secret Retreat*, WALL ST. J. (Dec. 2, 2014), <http://www.wsj.com/articles/artist-richard-princes-secret-retreat-1417536346>. Prince seems to have stopped selling copies and keeps the unsold copies in his archive. See *id.* An injunction could reach these unsold copies, prevent Prince from reprinting his appropriation, and discourage third party sales on the secondary market. But still, Prince's *The Catcher in the Rye* is out in the world; an injunction is unlikely to change that.

131. There is some question as to what constituted retail price for the Prince books. Prince seems to have sold some on the street for forty dollars apiece on at least one occasion. See Goldsmith, *supra* note 1. However, the price in the dust jacket was sixty-two dollars, so some may have sold for that price. See Interview by Kim Gordon with Richard Prince, INTERVIEW MAG., available at [http://www.interviewmagazine.com/art/kim-gordon-richard-prince/#\\_](http://www.interviewmagazine.com/art/kim-gordon-richard-prince/#_) (quoting Prince as saying that he thought the price on the flap was sixty-two dollars).

132. See *supra* Part III.A; cf. 17 U.S.C. § 107 (2012).

133. See Goldsmith, *supra* note 1. Though the design of the book and jacket are not Salinger's direct creative expressions, they are so heavily associated with the work that they must be considered as part of the context surrounding the text, though not ultimately as material copied from Salinger.

is hard to argue that Prince left a single creative expression alone. However, appropriating all of the creative expression of Salinger's *The Catcher in the Rye* does not weigh against Prince in determining the extent of his transformative use of the material. Instead, it lets us know where to look for transformation. Here, as Prince appropriated everything from the original, in the next step, we must look at the allegedly infringing text as a whole for transformation.

Having determined that Prince appropriated everything from Salinger's *The Catcher in the Rye*, we must next determine the purpose of that complete use. In order to determine this purpose, we do not need to focus our attention on the purported meaning ascribed to the use by Prince.<sup>134</sup> Instead, we should consider how the use would appear to a reasonable, likely observer of that use.<sup>135</sup> While it is difficult to tell "how a presumably befuddled public might have responded" to Prince's work,<sup>136</sup> those who know of Prince, and even appropriation art in general, would almost certainly recognize the use as "a new appropriation work . . . so radical and so daring."<sup>137</sup> This is largely because of the text that Prince is appropriating and the notoriety of Prince himself.

Because of the sheer fame of Salinger's work, it is doubtful that any likely consumer of either Salinger or Prince would think that Prince's *The Catcher in the Rye* is the original novel. Salinger's *The Catcher in the Rye* is one of the bestselling and most recognizable novels of all time.<sup>138</sup> The mere presence of Prince's name

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134. See *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013). As it happens, in an interview with Kim Gordon, Prince did state a purpose for appropriating *The Catcher in the Rye*:

Yeah, I just wanted to make sure, if you were going to buy my *Catcher in the Rye*, you were going to have to pay twice as much as the one Barnes and Noble was selling from J.D. Salinger. I know that sounds really kind of shallow, and maybe that's not the best way to contribute to something, but in the book collecting world you pay a premium for really collectible books.

Interview by Kim Gordon with Richard Prince, *supra* note 131. Again, the purpose as articulated by Prince is not what is important here. The purpose as interpreted by the reader is what matters.

135. *Cf. Cariou*, 714 F.3d at 707.

136. Goldsmith, *supra* note 1.

137. *Id.*

138. The novel has sold some sixty million copies and is widely known for its inclusion on school required reading lists. Ed Grabianowski, *The 21 Best-Selling Books of All Time*, ENTERTAINMENT: HOWSTUFFWORKS, <http://entertainment.howstuffworks.com/arts/literature/21-best-sellers.htm#page=15> (last visited Apr. 3, 2015) (ranking *The Catcher in the*

on the cover, title page, and (even) the copyright page of such a renowned novel reveals the purpose to be appropriation itself. The purpose of Prince's use is to comment on the nature of the authorship and copyright restrictions by appropriating one of the most famous and subversive novels of the twentieth century, a work by an author known to be protective of his copyright.<sup>139</sup>

By replacing Salinger's name with his own, Prince has radically transformed the text from a novel about the alienation of an adolescent from the hypocritical world in which he finds himself to a visual protest against the tyranny of authorship. Written over and into Salinger's text is Prince's creation of an object which, by its very existence, encapsulates a refusal to acknowledge authority—a refusal made all the more powerful considering Holden Caulfield's rejection of adult authority in the novel.<sup>140</sup> Prince's *The Catcher in the Rye* as a piece of art reflects the rebellion exhibited in the novel back at Salinger and the public at large.

It is important to note that it is not simply Prince's notoriety as an appropriator of visual art, the novelty of his appropriation, Salinger's fame and obsession with privacy, or the novel's theme and reputation that reveals the purpose of the use here. Rather, it is the combination of all of these things. Prince's text is not simply the novel *The Catcher in the Rye* but also a sculpture (in the form of a book) which criticizes the hypocrisy of authority and copyright protectionism. It is the total appropriation of the Salinger novel which gives life to this use. As such, the use of the novel as a whole is highly transformative.

## 2. Is Prince's Use Transformative Enough in This Case to Qualify as Fair Use?

In order to determine whether Prince's use is transformative enough in this particular case to qualify as fair use we must consider: (1) the nature of the copyrighted work and (2) whether the

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*Rye* as the fifteenth bestselling book of all time).

139. See *supra* notes 8–11 and accompanying text.

140. See Louis Menand, *Holden at Fifty*, NEW YORKER (Oct. 1, 2001), available at <http://www.newyorker.com/magazine/2001/10/01/holden-at-fifty>.

use has allowed the secondary work to usurp the market of the copyrighted work.<sup>141</sup>

Salinger's *The Catcher in the Rye* is a highly creative work of expression that is exactly the sort of work copyright law was designed to encourage. However, this does not mean that use of it cannot be fair. The nature of the copyrighted work helps to determine what its market is and where it rests in the cultural world. As an extremely popular and highly original novel, its markets and derivative markets are easy enough to determine: sales of the novel itself, potential sequels, movies, facsimile editions, etc.

While the first consideration, the nature of the copyrighted work, helps to determine the market for the original, the second consideration asks us to decide whether the transformative use allows the secondary work to usurp the market of the original. Under this analysis some concerns arise—namely whether the Prince work usurps the facsimile market for the original and whether it usurps the regular book market for the original.

It is easy to dispense with the concern about the market for facsimile editions. Prince has made a near copy of an early edition; still, it is not a facsimile edition for the simple reason that a facsimile edition is a *complete* copy of a book including the words of the novel *and* the original points of issue for the book.<sup>142</sup> A facsimile edition *perfectly* copies the book as a whole, not just the text of the novel. By adding his name to the cover, title, and copyright pages (as well as changing the publishing information on the copyright page), Prince has prevented his work from usurping the *facsimile* market for the original because it is not a perfect copy of any edition of *The Catcher in the Rye*.

The second concern for market usurpation is somewhat more at issue here. After all, Prince was out on the sidewalk in New York

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141. See *supra* Part III.A.

142. *Facsimile Editions*, ABEBOOKS.COM, <http://www.abebooks.com/books/RareBooks/collection-expensive-reprint-publisher/facsimile-editions.shtml> (last visited Apr. 3, 2015). A point of issue is a bibliographic indicator of a certain edition. See *How to Establish the Value of a Book*, FEDPO.COM, [www.fedpo.com](http://www.fedpo.com) (last visited Apr. 3, 2015). For instance, very early printings of *The Catcher in the Rye* have a photograph of Salinger on the rear panel of the dust jacket. See *First Edition Criteria and Points to Identify The Catcher and the Rye by J.D. Salinger*, *supra* note 2. This was dropped in later printings and as such is a point of issue for certain early printings of the work. See *id.*

selling his copies of the work for forty dollars apiece, a price not all that different from what a new hardcover copy of Salinger's *The Catcher in the Rye* might command.<sup>143</sup> It might seem reasonable that a person wanting to read the original could just as easily purchase a Prince copy. However, this is unlikely. A typical reader, unfamiliar with appropriation art and Richard Prince, who wants to read *The Catcher in the Rye* by J.D. Salinger is unlikely to purchase a copy of *The Catcher in the Rye* by Richard Prince. Such a person would not believe two books by different authors would have the same text. The market for Prince's *The Catcher in the Rye* is not the reading public or the Salinger collector, but rather the collector of appropriation art or bibliographic oddities. Prince's work is unlikely to replace Salinger's in the novel reading market and/or its derivative markets and therefore does not usurp the market for the original work.

As the transformative use of Salinger's complete novel has removed Prince's *The Catcher in the Rye* from the market for the original, that transformative use must qualify as fair use under the analysis. Therefore, Richard Prince's *The Catcher in the Rye* does not infringe on J.D. Salinger's *The Catcher in the Rye*.

### CONCLUSION

Though courts have long had all the pieces of the fair use doctrine, the analyses have shown a remarkable degree of confusion over the years. Courts have consistently misunderstood the role of transformative use and its relationship to the four factors the Copyright Act requires for consideration in any fair use determination. If all art is cumulative and all expression is in some way copied, courts must be very careful in their determinations of what does and does not constitute fair use. It is the last line of defense against infringement; the final protection not only for the allegedly infringing work but also for all the possible works it might influence. With their uneven applications of the four fair

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143. The copy could command this price if Salinger's estate allowed it to be reprinted in hardcover. See generally *Price and Inflation Data for Selected Library Materials 2014*, STATE LIB. OF IOWA, [www.statelibraryofiowa.org/ld/a-b/books/resources/bookinflation](http://www.statelibraryofiowa.org/ld/a-b/books/resources/bookinflation) (last visited Apr. 3, 2015) (showing that the average price of a hardcover novel in 2013 was \$30.18).

use factors, the courts have endangered the progress of the science and the arts.

In order to clarify and organize the process of finding fair use, this comment suggests structuring the four factor test into a two-part analysis that asks: (1) how transformative a given use is and (2) whether that use is transformative enough to qualify as fair use in a given case. By providing a solid structure for applying the four factors and clarifying the role transformative use plays in every fair use analysis, courts can ensure that the ultimate purpose of copyright is not sacrificed on the altar of the author's rights. As seen in Richard Prince's total appropriation of J.D. Salinger's *The Catcher in the Rye*, even complete copying can be fair use if that copying transforms the original enough contextually in the minds of its readers.

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