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## Mining Raw Materials: Copyright, Contemporary Art, and False Dichotomies

Katherine de Vos Devine

We are a society obsessed with access—open access, freedom of information, unrestricted resources, and interconnectivity. We are also obsessed with independence—individualism, self-reliance, and the sanctity of personal expression. Copyright infringement lawsuits concerning visual artworks, such as [Andy Warhol Foundation v. Goldsmith](#) (2022), [Cariou v. Prince](#) (2013), and [Blanch v. Koons](#) (2006), are emblematic of broader social tensions between access and independence. Disputes over the right balance between public access and private property have directed expansions of "fair use"—a legal doctrine often described as copyright's "safety valve" for free speech—which judges use in order to balance the competing interests of the public and individual copyright holders.

As demonstrated in the cases listed above, expansions in fair-use rights for visual artists have been driven by the improbable union of utilitarian logic and postmodern theory. The foundations of fair use are frequently ascribed to utilitarianism, a consequentialist moral theory that aims to maximize the overall good. On its face, consequentialist philosophy seems like an odd pairing for postmodern theories of authorship, but both posit adversarial relationships between copyright holders and creative reusers. For instance, the utilitarian theory of copyright posits an adversarial relationship between the economic needs of creators and consumers. Similarly, postmodern theories of authorship posit an oppositional relationship between artists and viewers as makers of meaning. Harmonizing the needs of opposing camps is the espoused aim of fair use, so the oppositionality common to these approaches makes them a natural pair for the interdisciplinary analysis of a legal balancing test between opposing parties.

Following the lead of art historians and critics, legal writing on copyright and fair use has repeatedly invoked the language of postmodernism in appeals to poststructuralist thought. This emphasis has often been its own aim, intended to question and expand the idea of the legal subject. However, postmodernism has also been used as a justification for artistic appropriation in specious legal arguments that misrepresent a constellation of competing art-critical theories as a monolithic position.

Art-critical discourse has often responded to the self-reflective tenets of postmodernism with a negation of the self and, by extension, authorship, in art. For many years, art historians have helped us find and negotiate meaning in signs recombined through

displaced context, montage, juxtaposition, and other forms of visual critique and aesthetic exploration. At the theoretical level, this has been proposed as a questioning of authority, a repudiation of master narratives, and a fragmentation of universal truth.

A compressed version of these ideas has too often been treated as the only standard by which a contemporary work may be classified or not classified as a transformative fair use of another artist's copyrighted work. Legal scholars and attorneys have often ignored progressive expansions of art-critical discourse. The legal profession's seeming lack of curiosity in a broader interpretive aperture has impaired judicial understanding of the ever-shifting role of appropriation in contemporary art. When artists employing appropriation have appeared in court, lawyers informed exclusively by postmodern theories of art interpretation have made poor advisors. The practical quotidian effect has been a dehumanization of artists.

For example, in smooth and elegant appeals for creative freedom, lawyers have bent the aegis of fair use to protect the rights of rich and influential artists who seize from any source. As applied in *Blanch*, *Cariou*, and even *Warhol*, the doctrine of "transformation" explains that a genius, when granted access to copyrighted works, transforms "raw material" into "fine art." Legal theories that describe contemporary artists as "curators" of "raw material" are deployed uncritically by judges to enable plaintiffs, including Jeff Koons, Richard Prince, and the Andy Warhol Foundation, to claim "genius" as a defense to otherwise unlawful takings. This conceptual framework necessarily divides artists into a handful of geniuses and a mass of raw material. As such, cases like *Warhol*, *Cariou*, and *Blanch* are not instructive for the vast majority of American artists unless these artists wish to see themselves as producers of "raw material" for the overculture.

However, these cases are instructive for another class of "curators": tech companies. Leaders in the creation of generative artificial intelligence (AI) art are acting with a firm belief that their activities are shielded by the espoused goals of fair use, namely, the necessity of access to copyright-protected work to promote freedom of expression and cultural progress. Fair use is now poised to enable the rapid proliferation of the most sterile and least human form of creativity in American history.

Moreover, when we empower some legal subjects as genius "curators" and divest other legal subjects as mere producers of "raw material," our justifications are transparently exploitative. If we strip these arguments of academic jargon and civil veneer, it is readily apparent that the "curators" we lionize are overwhelmingly white, male, and wealthy, while the producers of "raw material" are often female, people of color, and comparatively poor.

Over time, the misuse of postmodernism gave fair use scholarship and jurisprudence an unexpected blind spot, a daemon, a shadow. Fair-use jurisprudence now sets the rules of artistic engagement and tips the balance in favor of the most powerful artists and art institutions, preserving dominance by enshrining the cultural norms of the blue-chip art market as expected and universally appropriate norms in all American creative subcultures. In its misuse of art-critical theory, the legal profession has consciously disclaimed colonial ideology but simultaneously affirmed cultural hegemony. Transformative use has become a proxy for what we otherwise call subjugation, in which

a superior group cleaves to the belief that a select few know the highest uses for raw materials.

Scholarship and jurisprudence have presented us with false dichotomies, but we do not have to choose between progress and people. We can honor it all, because we are capable of thinking beyond competition, binaries, and linear outcomes. As an art historian, I can appreciate the merit of artistic transgression, the expertise required to understand complex and challenging artworks, and the primacy of creative freedom. Yet, as a practicing lawyer, I am constantly reminded of the human element missing from academic debates. Raw materials do not reach out to me for help—artists do. They have names, identities, faces, and feelings.

When we move past false dichotomies, we see the unintended consequences that flow from broadly impactful positions based on market outliers—Koons, Prince, Warhol—and narrowly drawn theories. To shift how reuses and reproductions are treated under the law requires a shift toward something more expansive and relational than mere economic incentives. Instead of obsessing over the value of appropriation and the diameter of fair use, we must focus on building healthy and generous cultures of collaboration. Rather than reaching for fair use as a blanket excuse, we can embrace a collaborative mindset, establish a vast spectrum of customs, and facilitate diverse extralegal paths to resolution.

What is our path forward?

Instead of revisiting our dog-eared tomes of utilitarian theory and postmodern aesthetics, we might inquire into theories of intersectionality, horizontality, and multiplicity. As historians of American art, we can encourage legal scholars, lawyers, and judges to embrace the array of art-critical literature that uses more flexible forms of interpretation, such as feminist and postcolonial theory, to assess art that uses appropriation in terms that allow for multivalent and ambivalent interpretations. We might consider Michel Foucault's work on dominant knowledge instead of constantly revisiting his thoughts about authorship. We can read *The Theory of Moral Sentiments* alongside *The Wealth of Nations*. We can discuss Charles Eisenstein instead of William Landes and Richard Posner. We may consult adrienne maree brown, Kimberlé Crenshaw, Lewis Hyde, and Silvia Federici.

We can bend copyright back into shape by avoiding overreliance on any particular branch of doctrine, including transformative fair use. In the past, diversions away from the humanity of artists have foreclosed discussions of the ethics of appropriation, prevented the development of extralegal customs, and ruled out opportunities for mutually beneficial resolutions. If scholars and practitioners can stop arguing about the balance of public access and individual rights and truly understand these as interdependent social needs, we can make room for forms of advocacy and remedial practices that create more inclusive legal systems.

*Katherine de Vos Devine is the founder and CEO of Implement Legal.*