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Abstract: Copyright law employs terms and concepts, such as "originality" and "authorship," which the Romantic movement developed. Post-structuralism and Post-modernism, influential intellectual and artistic trends, have attacked the "author" concept by undermining its philosophical foundations. But when Postmodern artists act in accordance with their anti-author beliefs, they expose themselves to liability for copyright infringement. Recent copyright cases illustrate the courts' not entirely satisfactory response to the artistic appropriation of previous works. This Comment suggests that the courts read a pastiche exception, broader than the current exception for parody, into the fair use defense for copyright infringement.

"[T]here is nothing new under the sun." [1]

Ecclesiastes

"The sun shone, having no alternative, on the nothing new." [2]

Samuel Beckett

The "author effect" is a concept in the academic discussion of copyright law, and it refers to the effect that the Romantic conception of the author-as-genius has had upon that body of law. To Peter Jaszi and James Boyle, two of the developers of the author-effect idea, this Romantic conception, although outdated and outmoded, still has an influence on copyright law.[3] Romantic notions such as originality still persist in the field even though in many cases corporations and other collective entities are doing the creating.[4] To Boyle and Jaszi, keeping the notion of the author-as-genius allows too much intellectual property protection.[5]

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1. *Ecclesiastes* 1:9.

2. Samuel Beckett, *Murphy*, in *The Collected Works of Samuel Beckett* 1, 1 (1970).

3. *See* James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* x–xiii (1996); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *The Construction of Authorship: Textual Appropriation in Law and Literature* 29, 29–31 (Martha Woodmansee & Peter Jaszi eds., 1994).

4. *See* Jaszi, *supra* note 3, at 50–51.

5. *See* Boyle, *supra* note 3, at x; *cf.* Jaszi, *supra* note 3, at 29–31 (finding that notion of "authorship" in American copyright law persists, and that "authorship" concept hinders change in copyright law to accommodate collaborative creative practices).

The recognition that the "author" is a socially constructed concept and that prior ages have not regarded originality as a condition of authorship is due in large part to the influence of French post-structuralism. Although other attempts to diminish the legal importance of originality were current during the 1960s and 1970s, the French post-structuralism movement, with its detailed theoretical apparatus and methodology, proved to be more successful in providing a comprehensive anti-author ideology. Post-structuralism pronounces the "death of the author"; our age must do without the concept of the author.

Whereas the legal commentary drawing on post-structuralism's post-author ideas deals primarily with a historical consideration of the author concept, the post-structuralist perspective is actually both historical and philosophical. The historical claim that the author ideology was the product of a particular epoch leads to the general philosophical point that authors as originators do not exist now and indeed never existed. Only in our time have we recognized that the "author" has died, and we must come to terms with this development.

The other major movement of our time that has discarded the concept of authorship is Postmodernism. Postmodern artists, to some extent influenced by the post-structuralists, have accepted the death of the author as a basic tenet; when they act upon that belief, through the technique of appropriating the work of others, they run afoul of copyright law.[6]

Although the practice of appropriation—imitating, copying, and incorporating previous works of art—took place both before and after the Romantic Period,[7] the advent of copyright has made copying hazardous. Richard Posner, no Postmodern radical, concedes that Shakespeare would have been guilty of infringement had there been copyright during his time.[8] Posner speculates that if the Romantic conception of the author is ever superseded, the current copyright regime will inhibit the creativity of the new movement: "So if the theory of literary creativity ever swings back toward creative imitation, the copyright law, which in its present form reflects the Romantic conception of creativity, will inhibit the swing. The law would have to be changed before the new theory of creativity could be fully applied."[9] Such new theory, the post-

6. *See infra* text accompanying notes 97–100.

7. In English literature, the Romantic Period occurred between approximately 1798 and 1832. *See* M.H. Abrams, *A Glossary of Literary Terms* 153 (6th ed. 1993).

8. Richard A. Posner, *Law and Literature: A Misunderstood Relation* 348 (1988).

9. *Id.* at 351.

structuralist/Postmodernist notion of the death of the author, had already arrived, and this ideology conflicts with the current legal regime, just as Posner said it would.

The goal of copyright is to "promote the progress of Science" through the granting of limited monopolies to authors.[10] For Postmodern artists, the means of copyright law—the granting of exclusive rights to authors—have become destructive of the end—the progress of the arts. The fear of copyright infringement suits has had a chilling effect on Postmodern artistic expression. A scheme intended to foster and encourage artistic progress instead retards it by inhibiting some of the arts' most daring and innovative practitioners.

Postmodern artists as well as post-structuralists, who believe that copyright law has no philosophical justification, would probably like to do without copyright altogether. Yet despite the fact that art and literature flourished just as well before the institution of copyright as after, the legal framework in this area is too deeply entrenched for its complete removal to be seriously contemplated. Therefore, a more modest change is in order: an adjustment of the fair-use defense could help remove the liability that the current copyright regime imposes upon Postmodern artists who borrow from copyrighted art.

This Comment explores the implications of post-structuralism and Postmodernism for copyright law. The first section is an exposition of the "author effect" and a discussion of a Supreme Court case illustrating the continuing vitality of the author concept. The second section sets forth various anti- and post-author movements in literary theory, philosophy, and art. A traversal of this background material demonstrates how thoroughly the concept of the author and the subject[11] has fallen into disfavor. This Comment then analyzes two copyright cases dealing with Postmodern art in order to illustrate the conflict between Postmodern artistic practice and the law and to discern whether this conflict has been resolved by these cases. Finally, this Comment suggests a means of accommodating current artistic practice while keeping the language of the current copyright statute. The proposed solution is a judicially created category of fair use for pastiche along the lines of the present allowance for parody.[12]

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10. U.S. Const. art. I, § 8, cl. 8.

11. In Continental philosophy, "subject" is a term for the individual, self, or person.

12. Because this Comment concentrates on "backward-looking" justifications for copyright—those which involve protecting the rights of authors—little is said about "forward-looking," utilitarian, or economic justifications. However, even proponents of the economic analysis of

I. THE AUTHOR EFFECT

A. The Romantic Conception of the Author

The author effect[13] results from the Romantic conception of the author.[14] The following statement of this belief is unexceptionable because so widely held: "[A]n author is an individual who is solely responsible—and therefore exclusively deserving of credit—for the production of a unique work."[15] These Romantic notions have caused the unwarranted inflation of the importance of the author in copyright law and the negative effects resulting from this distortion:

> [W]e are driven to confer property rights in information on those who come closest to the image of the romantic author, those whose contributions to information production are most easily seen as original and transformative. I argue that this is a bad thing for reasons of both efficiency and justice; it leads us to have *too many* intellectual property rights. . . . If I am right, this unconscious use of the author paradigm has wide-ranging negative effects, with costs in areas ranging from biodiversity and the production of new drugs to the shape of the international economy . . . .[16]

The ideology of the author developed in England during the Eighteenth Century as the product of several developments: Locke's notions about individualism, the rise of copyright laws, and English Romanticism.[17] The Statute of Anne of 1710, the first copyright law,

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copyright law arrive at conclusions similar to those expressed here. *See supra* text accompanying notes 8–9. Posner acknowledges the negative impact that copyright laws have on the practice of literary borrowing and proposes a narrowing of the scope of the laws to lessen the problem: "The more extensive copyright protection is, the more inhibited is the literary imagination. This is not a good reason for abolishing copyright altogether . . . but it is a reason possibly for narrowing it, and more clearly for not broadening it." Posner, *supra* note 8, at 348. As does this Comment, Posner would focus on expanding the fair use defense. *Id.* at 351. A more thorough discussion of the utilitarian analysis of the topics presented here would have to cover the thorny issue of the relationship between aesthetic value and commercial value. This issue is difficult because neither post-structuralists nor Postmodernists believe in aesthetic value in theory, but in practice they cannot seem to do without it. Market analysis is also ill-equipped to deal with aesthetic value because of the difficulties in quantifying the value.

13. *See* Jaszi, *supra* note 3, at 29.

14. *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 41 Duke L.J. 455, 456 (1991).

15. Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 Eighteenth-Century Studies 425, 426 (1984).

16. Boyle, *supra* note 3, at x–xi.

17. *See* Jaszi, *supra* note 14, at 466–71.

deployed the vocabulary of "authorship" in order to protect the interests of booksellers.[18] Authorship conveniently fit in with beliefs of that time in individualism and natural rights. John Locke, for example, argued that persons own their bodies, the labor produced by their bodies, and the fruits of their labor.[19] It is natural to conclude that authors should reap the benefits of their labors. When this ideology of individualism was combined later in the century with the Romantic conception of the author-as-genius—as the source of creativity, originality, and inspiration—an entrenched ideology of the author resulted.[20]

Romanticism, the literary movement associated with English poets such as Wordsworth, Coleridge, Byron, and Shelley, did not appear until the last decade of the Eighteenth Century, but the ideology of originality has its sources earlier in that century.[21] The essay *On Lyric Poetry*, from 1728, expressed the belief that "[o]riginals only have true life, and differ as much from the best imitations as men from the most animated pictures of them."[22] The influential essay *Conjectures on Original Composition,* which appeared in 1759, promoted originality instead of the dominant emphasis on mastering the conventions of classical literature and located the source of originality in the poet's own genius.[23] These eighteenth-century essays propounded two major assertions: inspiration, not craftsmanship, was the source of literary invention, and that source was internalized.[24] "Inspiration" became identified with "original genius," and the work of literature became the product of the author.[25] For Wordsworth, English Romanticism's leading figure, a genius does something utterly new and produces something that never existed before.[26] This conception remains with us today.

Copyright law seems to depend upon this Romantic conception. The Constitution gives Congress the power "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive right to their . . . Writings . . . ."[27] Copyright is a grant of limited

18. *Id.* at 468.

19. *See* Marshall Leaffer, *Understanding Copyright Law* § 1.7 (2d ed. 1995).

20. Jaszi, *supra* note 14, at 471.

21. Mark Rose, *Authors and Owners: The Invention of Copyright* 6 (1993).

22. *Id.* (quoting Edward Young, *On Lyric Poetry* 414 (1728)).

23. Woodmansee, *supra* note 15, at 430 (construing Edward Young, *Conjectures on Original Composition* (1759)).

24. *Id.* at 427.

25. *Id.*

26. *Id.* at 430.

27. U.S. Const. art. I, § 8, cl. 8.

monopoly to authors for the expression of ideas and thus provides an economic incentive to create. Section 102 of the Copyright Act of 1976 deals in general with the subject matter of copyright: what it is that copyright protects.[28] Section 102(a) states that copyright protection subsists in original works of authorship fixed in any tangible medium of expression.[29] Thus, the statute makes originality a requirement for protection and imbues authorship with the ideology of Romanticism. The next section discusses how originality became not merely a statutory, but also a constitutional requirement.

B. The Author Effect in Feist v. Rural Telephone

The Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*[30] reaffirmed the continuing influence of the Romantic conception of the author on copyright law. *Feist* represents the high water mark for the author ideology in American case law: "[F]rom first to last, [*Feist*'s] rhetoric proceeds from unreconstructed faith in the gospel of Romantic 'authorship.'"[31] In *Feist* a unanimous Court affirmed originality as a constitutional requirement for copyright protection.[32]

In *Feist* the issue before the Court was whether copyright protection was available to telephone directory white pages.[33] Rural Telephone Service Company provided telephone service to portions of northwest Kansas and published a telephone directory with white and yellow pages.[34] Feist Publications was a company that put out area-wide telephone directories. Because Feist did not have independent access to subscriber information, it had to apply to the telephone companies for licenses to use their white pages listings.[35] When Rural refused to grant a license, Feist published Rural's listings without its consent. Rural sued for copyright infringement.[36]

The Court held that because Rural's white pages lacked the requisite amount of originality, Feist's use of Rural's material could not constitute

28. 17 U.S.C. § 102 (1994).
29. 17 U.S.C. § 102(a).
30. 499 U.S. 340 (1991).
31. Jaszi, *supra* note 3, at 38.
32. *Feist*, 499 U.S. at 361.
33. *Id.* at 342.
34. *Id.*
35. *Id.* at 343.
36. *Id.* at 343–44.

copyright infringement.[37] Justice O'Connor, writing for a unanimous Court, found that "[o]riginality is a constitutional requirement."[38] The Court strongly suggested that it is beyond the power of Congress to extend copyright protection to anything lacking the *sine qua non* of originality: "As a constitutional matter, copyright protects only those elements of a work that possess more than a *de minimis* quantum of creativity."[39] This quantum is a "minimal creative spark"[40] or "some creative spark, 'no matter how crude, humble, or obvious . . . .'"[41] The work at issue in this case was entirely lacking in originality, and the Court concluded, "were we to hold that Rural's white pages passed muster, it is hard to believe that any collection of facts could fail."[42]

The unanimous *Feist* Court affirmed in the strongest possible manner the continuing importance of originality as a necessary condition of copyright. The Lockean labor theory alone is insufficient to explain the requirements of the law in this area.[43] Notions such as creativity and originality only make sense within the intellectual framework of the Romantic conception of the author, a framework which gives content to these notions. The opinion in *Feist* cannot be explained in economic terms as a concession to publishers and distributors because it runs counter to their interest in protecting their investment in gathering information.[44] There is no indication that the Court weighed the social benefits of making information more generally available against the private costs of denying it protection.[45] Instead, the opinion is dominated by the vocabulary and rhetoric of Romanticism.

Thus copyright law, as expressed in *Feist,* is thoroughly grounded in the Romantic conception of the author. In the next section this Comment explores the chief intellectual and artistic alternative to this orthodoxy. When this alternative belief in the death of the author concept is actually put into practice, the theoretical conflict between alternative conceptions

37. *Id.* at 364.

38. *Id.* at 346.

39. *Id.* at 363.

40. *Id.* at 345.

41. *Id.* at 345 (quoting 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.08[C][1] (1990)).

42. *Id.* at 364.

43. The Court explicitly rejected the "sweat of the brow" doctrine, which had been observed by some lower courts. The Court said copyright could not be granted solely as a reward for the hard work that went into compiling facts. *Id.* at 352–53.

44. Jaszi, *supra* note 3, at 37.

45. *Id.*

of the author can become a legal conflict in which the law proscribes work which does not conform to the Romantic ideology.

II. THE DEATH OF THE AUTHOR

Copyright law's reliance on the author conception becomes increasingly problematic if one considers the artistic and intellectual trends that view the "author" as a social construct. This attack on the "author" and challenge to the Romantic conception has been effected in large part by three anti-author movements: Anglo-American literary theory, which developed after New Criticism and preceded the importation of Continental theory; post-structuralism, especially the work of Michel Foucault, Roland Barthes, and Jacques Derrida; and the trend in twentieth-century art called Postmodernism. A full consideration of these ideas will reveal just how far the author and subject have fallen into disfavor. This Comment will discuss these three trends in the chronological order in which they became important within the American academy.

A. Anglo-American Literary Theory

The New Criticism dominated American literary studies in the 1950s and 1960s. The New Critics concentrated on the interpretation of single works of art, showing how the formal structure of the work mirrored the work's theme and how the work was a self-contained unity. Opposition to the New Critics' emphasis on the individual work arose in the criticism of influential literary theorists such as Northrop Frye and Harold Bloom, both of whom viewed literature as intertextual. For Frye and Bloom, one could best understand a given work of literature by understanding literature as a whole.

1. Northrop Frye

For Frye, poetic creation does not typically occur when a suitably talented person sits down with pen and paper and produces a poem *ex nihilo*.[46] On the contrary, literature is so highly conventional that no creation is possible without extensive borrowing: "[p]oetry can only be made out of other poems; novels out of other novels."[47] Only the

46. *See* Northrop Frye, *Anatomy of Criticism: Four Essays* 97 (1957).

47. *Id.*

dominant belief in authors as "onlie begetters"[48] leads us to assess the author's appropriation negatively:

> Most of us tend to think of a poet's real achievement as distinct from, or even contrasted with, the achievement present in what he stole .... But any serious study of literature soon shows that the real difference between the original and the imitative poet is simply that the former is more profoundly imitative.[49]

"Stealing" in art and literature is actually a virtue, a point Frye supports by citing T.S. Eliot's observation that a good poet is more likely to steal than to imitate.[50] With respect to the law, Frye laments that copyright has made it "difficult for a modern novelist to steal anything except his title from the rest of literature ...."[51]

2. *Harold Bloom*

Bloom's view represents the flip side of Frye's. For Bloom every poet in the tradition of English and American literature since Milton appropriates from precursor poets, but that appropriation is accompanied by guilt and the anxiety of influence.[52] Every poem is a reading or rather a *misreading* of a previous poem: "Influence, as I conceive it, means that there are *no* texts, but only relationships *between* texts. These relationships depend upon a critical act, a misreading or misprision, that one poet performs upon another ...."[53] The act of writing a poem is a misreading of a previous poem, and "[a]s literary history lengthens, all poetry necessarily becomes verse-criticism ...."[54] Common to both Bloom and Frye is the notion that literature borrows or misappropriates its material from previous works.

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48. This is a phrase from Shakespeare's dedication to his *Sonnets*. William Shakespeare, *Shakespeare's Sonnets* 3 (Stephen Booth ed., Yale Univ. Press, 3d prtg. 1980) (1609).

49. Frye, *supra* note 46, at 96–97.

50. *Id.* at 98.

51. *Id.* Since Frye's examples, such as *The Sound and the Fury* and *For Whom the Bell Tolls*, are works in the public domain, his point is more profitably taken in a psychological rather than a legal sense. The current copyright regime inhibits "stealing" from previous work even if the appropriation were perfectly legal.

52. *See* Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* 5–11 (1973).

53. Harold Bloom, *A Map of Misreading* 3 (1975).

54. *Id.*

B. Post-structuralism

Post-structuralism, particularly the work of French philosopher Jacques Derrida, provides the most extensive and fully articulated rationale for dispensing with the author concept. In sum, the post-structuralists argue that language, not a solitary author, writes texts. Their views, though seemingly radical, cannot be dismissed easily because of their substantial influence within the American academy in general and also specifically within the legal academy through the critical legal studies movement.[55]

The attack on the author function has its roots in the prior work of structuralism, the French intellectual movement that applied structural linguistics to the study of human culture. Structuralism de-emphasized the roles of human consciousness and individuals in understanding the meaning of cultural phenomena. In fields such as psychoanalysis, anthropology, and literary criticism, structuralists applied a method, borrowed from the structural linguistics of Ferdinand de Saussure,[56] in order to extract meaning from texts or events. The structuralist method could reveal what was really going on beneath the misleading surface.[57]

Post-structuralism took the next logical step. It concurred in the "death of the subject," but without the comforting assurance that a method could provide us with an interpretive key to self-understanding. To post-structuralists, the idea that a method could give us the real meaning of a text simply repeats the similar mistake of finding out what a text means by asking its author. The post-structuralist attack on the author is part of a more sweeping criticism of the concepts of a subject, an individual, a

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55. Post-structuralist ideas in general are influential in humanities departments and in social science departments such as political science and history. Within the academic study of law, the critical legal studies movement is heavily indebted to post-structuralist theory. *See* J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 Yale L.J. 743 (1987) (discussing post-structuralism from critical legal studies perspective); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685 (1985); Thomas C. Heller, *Structuralism and Critique*, 36 Stan. L. Rev. 127 (1984); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. Rev. 429 (1987).

56. Swiss linguist, 1857–1913.

57. A well-known example of the structuralist method at work is Claude Lévi-Strauss's analysis of the Oedipus myth. *See* Claude Lévi-Strauss, *The Structural Study of Myth*, in *Structural Anthropology* 206 (Claire Jacobson & Brooke Grundfest Schoepf trans., 1963). If you want to understand what this myth means, Lévi-Strauss says, you must read it in terms of its variants and related narratives. If you map out the elements of these variants on a grid, patterns will emerge. In this case, the Oedipus myth is about the conflict between believing that human beings had their origin in the ground like plants and believing that human beings are products of men and women. *Id.* at 216. The method is supposed to reveal the real meaning of the narrative, irrespective of what the commonly accepted or authorial meaning might be. *Id.* at 210–11.

consciousness, a method, and a meaning. Each of these concepts is a philosophical fiction that has its uses, but that post-structuralists see as having no existence prior to its social construction. Each post-structuralist has a different way of dealing with or discarding these now-discredited concepts.

1. Michel Foucault

Despite the substantial number of literary and critical voices that have been raised against the concept of the author, opposition to it only became fully visible as a viable intellectual position after the appearance of Michel Foucault's *What Is an Author?* in 1969.[58] His essay does not argue for the death or disposal of the author; it assumes it. The article arises out of an intellectual milieu in which "criticism and philosophy took note of the disappearance—or death—of the author some time ago."[59] The essay presents a general description of how various historical developments, including the creation of an ownership system for texts during the late Eighteenth Century, have shaped the modern conception of the author.[60] To Foucault, authors do not exist in nature, they are socially constructed.[61]

The legal commentary[62] on *What Is an Author?* focuses on the argument concerning the social construction of the author, while downplaying the essay's more radical claim: we can and should do without the concept of the author.[63] Foucault argues that although the removal of the author can only be gradual, it would be desirable because authors today serve to constrict, not create, meaning.[64]

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58. Michel Foucault, *What Is an Author?*, in *Textual Strategies: Perspectives in Post-Structuralist Criticism* 141 (Josué V. Harari ed., 1979). For another anti-author work from the same period, see Benjamin Kaplan, *An Unhurried View of Copyright* (1967). While not a work critical of authors, Stephen Breyer's article, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970), argues for limiting copyright protection and dates from the same era.

59. Foucault, *supra* note 58, at 143.

60. *Id.* at 148.

61. *See id.* at 153.

62. *See* Jaszi, *supra* note 3, at 29–30; James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 Am. U. L. Rev. 625, 635 (1988).

63. Foucault, *supra* note 58, at 159–60.

64. *Id.* at 159.

2. *Roland Barthes*

Roland Barthes's "The Death of the Author"[65] shows how post-structuralism replaces authors with texts or language itself. The age of the author ended around the time of the poet Stephane Mallarme.[66] Writers or scriptors have replaced authors, and texts have replaced works: "In France, Mallarme was doubtless the first to see and to foresee in its full extent the necessity to substitute language itself for the person who until then had been supposed to be its owner. For him, for us too, it is language that speaks, not the author."[67] We are now living in the age of the text. The dominant metaphor returns to the etymological roots of the word; a text is like a textile or piece of cloth, something to be disentangled, not deciphered.[68] The text is only a flat surface; there is no meaning beneath or inside: "the structure can be followed, 'run' (like a thread of a stocking) at every point and at every level, but there is nothing beneath."[69] With respect to the now-outmoded conception of the "work," the author was regarded as the "father and owner of the work.... The Text, on the other hand, is read without the father's signature."[70] According to Barthes, the figure of the author no longer serves to limit or control the meaning and function of his own text.

3. *Jacques Derrida*

Derrida's work, sometimes referred to as "deconstruction" or "deconstructionism," provides the most thorough and sweeping philosophical justification for undermining the concept of the author, individual, or consciousness. He tries to show that the tradition of Western thought since Plato depends upon such concepts as truth, presence, substance, subject, "consciousness, God, man, and so forth."[71] "Deconstruction" is the name of the project to undermine these concepts. Deconstruction does not mean destroying the structure of Western thought. That may indeed be the eventual goal, but it cannot be achieved

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65. Roland Barthes, *The Death of the Author*, in *Image—Music—Text* 142 (Stephen Heath trans., 1977).

66. French Symbolist poet, 1842–1898.

67. Barthes, *supra* note 65, at 143.

68. *Id.* at 147.

69. *Id.*

70. Roland Barthes, *From Work to Text*, in *Textual Strategies: Perspectives in Post-Structuralist Criticism*, *supra* note 58, at 73, 78.

71. Jacques Derrida, *Writing and Difference* 279–80 (Alan Bass trans., 1978).

all at once. Instead, deconstruction seeks to weaken the structure by employing the tools of Western thinking against itself: "the passage beyond philosophy does not consist in turning the page of philosophy . . . but in continuing to read philosophers *in a certain way*."[72]

Derrida's anti-author arguments are similar to Barthes's.[73] The act of writing does not entail having authors on one side and the words they produce on the other. Since authors are in some way already made up of words, there is nothing beneath or behind language. Derrida explains that symbols, signs, and language produce themselves and are not produced by something outside them: "the genetic root-system refers from sign to sign. No ground of non-signification—understood as insignificance or an intuition of a present truth—stretches out to give it foundation under the play and the coming into being of signs."[74] The way to make sense of this is to see human intelligence as a language-producing machine. What we call consciousness is already composed of signs, not something separate from them: "From the moment that there is meaning there are nothing but signs. We *think only in signs*."[75]

Another major aspect of deconstruction relevant to this discussion is its reversal of the traditional priority of speech over writing; by putting writing over speech, deconstruction does away with the author. The traditional view of speech can be found in Plato's *Phaedrus*.[76] In that dialogue Socrates denigrates writing as an inferior copy of spoken discourse.[77] A written argument cannot defend itself: "when it is ill-treated and unfairly abused it always needs its parent to come to its help, being unable to defend or help itself."[78] Writing is dead; speech is living. Writing is merely a copy, an imitation, an image of the original spoken discourse.[79]

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72. *Id.* at 288.

73. Foucault, Derrida, and the later Barthes are all considered post-structuralists. However, they did not set out to form such a "school" or movement. Derrida and Foucault in particular have major disagreements: Foucault is certainly not a deconstructionist like Derrida, and Derrida would find Foucault's concern with power to be retrograde. They would agree in their anti-humanism—in the death of the author or subject—and in the related notion that all human activity and thinking takes place within a discourse or language.

74. Jacques Derrida, *Of Grammatology* 48 (Gayatri Chakravorty Spivak trans., Johns Hopkins 1974) (1967).

75. *Id.* at 50.

76. Plato, *Phaedrus*, in *The Collected Dialogues of Plato* 475 (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., 5th prtg. 1969).

77. *Id.* at 520–21.

78. *Id.* at 521.

79. *Id.*

On the other hand, to Derrida language is writing, not speech (even though historically writing developed after speech) because language is an articulated, non-living machine capable of being written down: "That a speech supposedly alive can lend itself to spacing in its own writing is what relates it originarily to its own death."[80] Writing functions beyond and survives the death of its author:

> To write is to produce a mark that will constitute a sort of machine which is productive in turn, and which my future disappearance will not, in principle, hinder in its functioning . . . . I ought to be able to say my disappearance, pure and simple, my nonpresence in general, for instance the nonpresence of my intention of saying something meaningful . . . .[81]

The repeatable character of writing allows it to be "cut off from all absolute responsibility, from *consciousness* as the ultimate authority, orphaned and separated at birth from the assistance of its father"[82] which is what Plato condemned in the *Phaedrus*.[83] But, lest this paternity metaphor mislead us, Derrida would say that the father was not even present at the moment of conception; there never was an originary consciousness that produced the text. There never was any such consciousness that was not always already written. In sum, Derrida attacks the notion of authorial originality through his sweeping denial that human consciousness, as a non-linguistic, non-material entity, produces language.[84]

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80. Derrida, *supra* note 74, at 39.

81. Jacques Derrida, *Signature Event Context*, in *Limited Inc* 1, 8 (Gerald Graff ed., 1988).

82. *Id.*

83. Plato, *supra* note 76, at 511–521.

84. One might expect that a person such as Derrida would not have very much respect for copyright laws. Indeed, he intentionally abused the fair use exception when he quoted nearly all of an article he was commenting on. In the essay *Limited Inc a b c . . .*, Derrida responded to an essay by philosopher John Searle called *Reiterating the Differences: A Reply to Derrida*. Derrida's essay, nearly one hundred pages long, incorporated almost all of Searle's essay, including the copyright mark: "I have quoted a paragraph *in extenso*. Adding up all the quotes, I believe that I will have cited the *Reply* from beginning to end, or almost. Did I have the right(s)?" Jacques Derrida, *Limited Inc a b c . . .*, in *Limited Inc*, *supra* note 81, at 29, 101. Derrida muses that if he were hauled into court for copyright infringement, he would get "to explain to the court all the implications (psychoanalytic, political, juridical, censorial [*policières*], economic, etc.) of this debate . . . ." *Id.* Although Derrida never considers copyright, that is, never treats it in detail as a topic, his views on the matter seem clear from his more general claim that language operates without fathers.

C. *Nineteenth-Century Precursors of the Death of the Author Ideology*

1. *Ralph Waldo Emerson*

As post-structuralist ideas began to filter into the United States in the 1970s, scholars took a second look at American intellectual traditions to see if similar notions had previously surfaced. One rediscovery was the essay *Quotation and Originality* by the central figure of American Romanticism, Ralph Waldo Emerson.[85] This essay shows that Emerson's Romanticism was tempered by a recognition of the huge indebtedness each author bears to past work: "Our debt to tradition through reading and conversation is so massive, our protest or private addition so rare and insignificant,—and this commonly on the ground of other reading or hearing,—that, in a large sense, one would say there is no pure originality. All minds quote."[86] This condition is not limited to current authors; even the earlier "original" authors could not avoid quoting: "None escapes it. The originals are not original."[87]

2. *Justice Joseph Story*

Emerson's anti-author sentiments are echoed in the legal opinions of his older contemporary Justice Joseph Story, a member of the Supreme Court from 1811 to 1845 and one of the most important figures in the common law of copyright. In an 1845 opinion, Story wrote:

> 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. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.[88]

What are the implications of such a view for copyright law? Story does not seem too concerned. If a work had to be fully original in order to be copyrighted, no work would ever be eligible:

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85. *Quotation and Originality* appeared in 1868. *See* Albert J. von Frank, *An Emerson Chronology* 442 (1994).

86. 8 Ralph Waldo Emerson, *The Complete Works of Ralph Waldo Emerson* 178 (1904).

87. *Id.* at 180.

88. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436); *cf.* Kaplan, *supra* note 58, at 2 ("Education, after all, proceeds from a kind of mimicry, and 'progress,' if it is not entirely an illusion, depends on generous indulgence of copying.").

> The 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. If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times . . . .[89]

Yet for Story, the mere fact that most works are predominantly unoriginal is not a bar to copyright. It is the unique arrangement of pre-existing materials which is copyrightable: "In truth, every author of a book has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating his subject, if it be new and original in its substance."[90] The questions that remain unanswered and that will be explored further in this Comment are these: what happens when the copyright holders of the "elements" or "materials" complain about infringement? Does a response by infringers that borrowing is inescapable save them from liability? The next section discusses an entire artistic movement that borrows freely from previous works and thus brings into sharp relief the conflict between Romantic and post-structuralist conceptions of the author.

D. Postmodernism

The last source of the attack on the author ideology is Postmodernism. It is the dominant artistic movement of the second half of the twentieth century and is characterized by playfulness, self-consciousness, and liberal borrowing from previous art. Whereas post-structuralist discussion of the death of the author has a theoretical and abstract character, Postmodernism's concern with these issues is far more practical because the current copyright laws are at odds with the central Postmodern practice of appropriation, the borrowing from or incorporation of elements of previous works.

Postmodernism grows out of Modernism, the artistic movement dominant in the first half of this century, and represents both a continuation of and a passing beyond Modernism. That earlier movement emphasized the formal elements of art, and this emphasis on form over content made Modernist works difficult and inaccessible to the general public. Modernism promoted this separation from popular success; there was high art, which to Modernists was real art, and popular art, which

89. *Emerson*, 8 F. Cas. at 619.

90. *Id.*

was not. While sharing many of the same aesthetic concerns of Modernism, Postmodernist artists consciously aim their appeal at a wider audience, and it is this effacement of the distinction between high and popular art which most clearly differentiates the two movements.

The characteristic feature of Postmodernist art that has the greatest legal significance, appropriation, actually has its roots in Modernism: for example, in the poetry of Eliot and Pound and in the music of Charles Ives. Aesthetic terms for appropriation include quotation,[91] collage,[92] and pastiche.[93] The basic idea of this technique is to incorporate material from previous works of art, and by rearranging them or changing their context, comment upon this pre-existing material. A humorous early example is Marcel Duchamp's "L.H.O.O.Q.," which is a copy of Leonardo's "Mona Lisa" with a mustache painted on.[94] Even funnier is Duchamp's further twist, called "Shaved/LHOOQ," which is a postcard of the Mona Lisa without the mustache.[95] The point of this unapologetic borrowing of existing artistic material is to call originality into question.[96]

"Pastiche" is a term for Postmodern appropriation, and it is a "well-nigh universal practice."[97] One can define "pastiche" by distinguishing it from "parody": "Both pastiche and parody involve the imitation or, better still, the mimicry of other styles and particularly of the

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91. E. Kenly Ames, Note, *Beyond* Rogers v. Koons: *A Fair Use Standard for Appropriation*, 93 Colum. L. Rev. 1473, 1478 (1993) ("Postmodernists are distinguished by their frequent quotation of previously existing works and styles, often taken from popular culture, in their search to uncover meaning in the processes by which contemporary society functions.").

92. John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 Colum.-VLA J.L. & Arts 103, 106 (1988). Carlin writes:

> By mid-century this method [direct incorporation of source material from other texts and from popular culture] had become pervasive, with many of the most influential artists . . . making collage-like appropriation central to their work. Over the past few years there have been increasing signs that this tendency has become part of mainstream cultural expression, and not just an avant-garde art. Music video, music mastermixes, popular film and television, and even mainstream advertising currently manipulate source material by direct copying rather than by transforming and re-using original themes.

Id.

93. *See* Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* 16 (1991) [hereinafter Jameson, *Cultural Logic*]; Fredric Jameson, *Postmodernism and Consumer Society*, in *The Anti-Aesthetic: Essays on Postmodern Culture* 111, 113 (Hal Foster ed., 1983) [hereinafter Jameson, *Consumer Society*].

94. Carlin, *supra* note 92, at 109.

95. *Id.*

96. *See* Ames, *supra* note 91, at 1478.

97. Jameson, *Cultural Logic*, *supra* note 93, at 16.

mannerisms and stylistic twitches of other styles."[98] Parody mocks an original work, and it depends upon a linguistic or artistic norm in contrast to which the parodied version can be seen as ridiculous. What would happen, however, if no one believed any longer in artistic or linguistic norms?

> That is the moment at which pastiche appears and parody has become impossible. Pastiche is, like parody, the imitation of a peculiar or unique style, the wearing of a stylistic mask, speech in a dead language: but it is a neutral practice of such mimicry, without that still latent feeling that there exists something *normal* compared to which what is being imitated is rather comic. Pastiche is blank parody, parody that has lost its sense of humor . . . .[99]

As Jameson sees it, this lack of a personal style differentiates Postmodernism from Modernism, and recognition of this lack is due in part to the rise of post-structuralism and its announcement of the "'death of the subject' or, to say it in more conventional language, the end of individualism as such."[100] Although the early Postmodernists predated post-structuralism, at a certain point their concerns began to intersect, no more clearly than on this issue. The "death of the subject" proponents divide into two camps, which correspond roughly to historical and post-structuralist views.[101]

The post-structuralist position is the more radical of the two: "[N]ot only is the bourgeois individual subject a thing of the past, it is also a myth; it *never* really existed in the first place; there have never been autonomous subjects of that type."[102] Once the belief in a unique self and personal style, which was part of the Modernist and Romantic ideologies, is gone, what is left for artists to do? Only pastiche:

> Hence, once again, pastiche: in a world in which stylistic innovation is no longer possible, all that is left is to imitate dead styles. . . . But this means that contemporary or Postmodernist art is going to be about art itself in a new kind of way; even more, it

98. Jameson, *Consumer Society*, *supra* note 93, at 113.

99. *Id.* at 114.

100. *Id.*

101. According to this Comment's alignment, Woodmansee, Rose, Barthes, and Jaszi are on the historical side, and only Derrida and perhaps Foucault are on the post-structuralist side. Although Emerson and Frye are not post-structuralists, they would more easily fall in the Derridean camp because they do not limit their skepticism about style and originality to a particular historical development. *See* Frye, *supra* note 46 and accompanying text; Emerson, *supra* Part II.C.1.

102. Jameson, *Consumer Society*, *supra* note 93, at 115.

> means that one of its essential messages will involve the necessary failure of art and the aesthetic, the failure of the new, the imprisonment in the past.[103]

In sum, Postmodernism put into practice the death-of-the-author principles fully developed by post-structuralists. The Postmodern practice that embodies post-structuralist beliefs is called pastiche or appropriation: the creation of art through the incorporation of pre-existing artistic material. But when an artist borrows or incorporates material from a copyrighted work of art, she exposes herself to liability for infringement. The next section explores the law's response to this situation.

III. COPYRIGHT LAW'S RESPONSE TO THE DEATH-OF-THE-AUTHOR BELIEFS AND POSTMODERN ARTISTIC PRACTICE: TWO CASES

This Comment now examines two relatively recent copyright cases in light of the philosophical and artistic developments outlined in the previous section: *Rogers v. Koons*[104] and *Campbell v. Acuff-Rose Music, Inc.*[105] In the first case, the Second Circuit displayed a highly unsympathetic attitude toward Postmodern artistic practices based upon death-of-the-author beliefs. In the second, the Supreme Court moved toward a more flexible stance concerning the same artistic practices. Nevertheless, the Supreme Court did not go far enough to remove entirely the threat of infringement liability for artistic appropriation.

These cases show that there is a conflict between the law and Postmodern beliefs and practices. The present law has not reached a satisfactory accommodation with these novel artistic techniques. In order to allow for the freer development and progress of innovative forms of art, a more expansive interpretation of the fair use defense is needed.

Because the fair use defense was raised in both cases, at this point a brief exposition of the fair use doctrine may prove helpful. The Copyright Act of 1976 grants to copyright owners exclusive rights in their works, rights subject to enumerated limitations.[106] Perhaps the most important of these limitations, fair use, is described in section 107.[107] Fair

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103. *Id.* at 115–16.

104. 960 F.2d 301 (2d Cir. 1992).

105. 510 U.S. 569 (1994).

106. 17 U.S.C. § 106 (1994).

107. 17 U.S.C. § 107 (1994).

use is a defense in copyright infringement suits. Even if a plaintiff has made out a prima facie case for infringement, a defendant is not liable if the use was fair.[108] Examples of fair use include quotations from works in book reviews or scholarly articles. Fair use is allowed because its prohibition "would inhibit subsequent writers from attempting to improve upon prior works" and thus frustrate the progress of science.[109] Of course, the fair use protection applies to other categories of works, such as art and music, beyond literature.[110]

A. Rogers v. Koons

Postmodern aesthetic beliefs collided with the reality of the current copyright regime in *Rogers* v. *Koons*.[111] The Second Circuit found sculptor Jeff Koons liable for copyright infringement when he put Postmodernist beliefs into practice by appropriating the work of a photographer. Koons produced a piece of sculpture closely based upon Rogers's photograph of a couple holding a number of small dogs.[112] The outcome of the case intensifies the conflict between art and the law over the issue of appropriation. The decision against Koons means that unless the fair use statute or its interpretation changes, Postmodern artists will be forced to abandon central beliefs and practices for fear of exposure to infringement claims. For reasons which this Comment explores in greater detail in the next section, the Court's decision in *Acuff-Rose*, while moving in the right direction, still falls short of saving Koons and Postmodern artists like him.

Even before *Koons* there was a general recognition in the art world that the Postmodern practice of appropriating material from previous artists and popular culture presented legal difficulties. Prominent artists such as Robert Rauschenberg, Andy Warhol, Larry Rivers, and David Salle settled infringement suits out of court.[113] Also, commentators, writing before the lawsuit in *Koons* had been filed, noted the chilling

108. 17 U.S.C. § 107.

109. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549 (1985) (quoting H. Ball, *Law of Copyright and Literary Property* 260 (1944)).

110. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (extending fair use protection to public's use of videotape recorders to record television broadcasts).

111. 960 F.2d 301 (2d Cir. 1992).

112. *Id.* at 304–05.

113. Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, 60 October 83, 100–01 (1992) (discussing Rauschenberg, Warhol, and Salle); Patricia A. Krieg, Note, *Copyright, Free Speech, and the Visual Arts*, 93 Yale L.J. 1565, 1568 (1984) (mentioning Warhol, Rauschenberg, and Rivers).

effect of the current law and all but predicted the outcome of *Koons*, which set a precedent in the area of artistic appropriation.[114] One art critic lumped Richard Prince and Sherrie Levine[115] in with Koons as "flagrant appropriators" who could easily run afoul of the law.[116] The point is that Koons is not the first, the last, or the worst postmodernist appropriator. His legal problems are symptomatic of a large-scale clash of artistic and legal cultures. The present copyright law has the unfortunate effect of inhibiting the work of some of the most important artists of our time; in so doing it has become an obstacle to progress in the arts.

Postmodern artist and sculptor Jeffrey Koons exhibited twenty sculptures at what he called the "Banality Show" at New York's Sonnabend Gallery in 1988.[117] The exhibition resulted in four lawsuits, all based on misappropriation.[118] The theme of the show was the relationship between art and money, and the pieces displayed were what Koons called "Commodity art."[119] The art/money theme is central to Postmodernism; in this particular case, the interrelationships between the two are convoluted and ironic. Unlike a more typical artist, Koons had been a commodities broker, a fact important enough to be mentioned in the *Koons* opinion,[120] and "[h]is five years' experience on Wall Street fueled the resentment" against him in the art community.[121] The show, on the other hand, purported to be a criticism of the shallowness, the banality, of a commercialized, commodified society. The court's opinion paraphrased Koons's assertion that:

> [H]e belongs to the school of American artists who believe the mass production of commodities and media images has caused a

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114. *See* Carlin, *supra* note 92, at 111 ("Regardless of its cultural or artistic value, the appropriation of imagery validly protected by copyright or trademark currently would give rise to substantial liability for infringement under Chapter 5 of the Copyright Act and Subchapter III of the Trademark Act of 1946 (the 'Lanham Act')."); Krieg, *supra* note 113, at 1568 ("The absence of a definite legal standard for appropriation of visual images results in a chilling of freedom of speech interests. Artists will hesitate to experiment with creative modes if such experimentation may result in liability for copyright infringement.").

115. Prince and Levine are Postmodern photographers who rephotograph famous photos. Prince appropriates images, such as the Marlboro man, wholesale from the mass media. *See* Johanna Drucker, *Theorizing Modernism: Visual Art and the Critical Tradition* 137–40 (1994). Levine specializes in rephotographing "masterworks." *Id.* at 137.

116. Carlin, *supra* note 92, at 113.

117. Rogers v. Koons, 960 F.2d 301, 304 (1992).

118. Martha Buskirk, *Appropriation Under the Gun*, Art in Am., June 1992, at 37, 41.

119. *See* Anthony Haden-Guest, *True Colors: The Real Life of the Art World* 151 (1996).

120. *Koons*, 960 F.2d at 304.

121. Haden-Guest, *supra* note 119, at 151.

> deterioration in the quality of society, and this artistic tradition of which he is a member proposes through incorporating these images into works of art to comment critically both on the incorporated object and the political and economic system that created it.[122]

Despite his anti-commercial stance, Koons made out quite handsomely, his share of proceeds from the show amounting to three million dollars by one account.[123] It is unlikely that he would have presented such a tempting target or been punished so severely if he had done substantially less well.[124] But this irony or even paradox is typical of Postmodernism, which aspires to popular success while making the shallowness of contemporary culture its theme.[125]

The object of controversy in *Koons* was the sculpture called "String of Puppies," depicting a man and a woman on a bench holding a row of eight puppies. Although some differences exist, the sculpture reproduces much of the photograph "Puppies," which inspired it.[126] "Puppies" was the work of Art Rogers, who created it in 1980 and marketed it in notecard form beginning in 1984.[127] In 1987 Koons purchased a copy, tore off the copyright insignia, and sent the photo to an Italian foundry which would execute Koons' instructions in constructing the sculpture.[128] Koons chose the photograph because it was "seminally banal,"[129] and one art critic declared that Koons "was able to turn it into a piece that could

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122. *Koons*, 960 F.2d at 309.

123. Haden-Guest, *supra* note 119, at 150–51.

124. *Cf.* Lynn A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 Cardozo Arts & Ent. L.J. 1, 32 (1992).

125. A similar irony infects the Romantic conception of the author. At the same time that an ideology developed that viewed artists and authors as inspired creators writing for the ages and not for money, economic conditions, including copyright, made it more feasible for writers and musicians to earn their own living free of patronage. Samuel Johnson, the great 18th century critic and essayist, illustrates this contradiction. On the one hand, he wrote the *Lives of the Poets*, which Woodmansee says "contributed decisively to the differentiation of 'authoring' from ordinary literary labor by establishing a pantheon of great authors whose 'works' differ qualitatively from the sea of mere writing." Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in *The Construction of Authorship* 15, 18 (Martha Woodmansee & Peter Jaszi eds., 1994). On the other hand, Johnson penned this dismissive, deflationary epigram about his profession: "No man but a blockhead ever wrote, except for money." *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1993) (quoting 3 *Boswell's Life of Johnson* 19 (G. Hill ed., 1934)).

126. Ames, *supra* note 91, at 1473 n.1.

127. *Koons*, 960 F.2d at 304.

128. *Id.* at 305.

129. *See* Haden-Guest, *supra* note 119, at 151.

both exhilarate you and make your hair prickle."[130] When Rogers found out about Koons's unauthorized use, he sued for infringement.[131]

The district court granted partial summary judgment to the plaintiff on the issue of liability for infringement, and the Second Circuit affirmed, remanding the case back to the lower court to determine the amount of the award against the defendants.[132] The appeals court found that "Puppies" met the originality requirement set out in *Feist*: "[T]he quantity of originality that need be shown is modest—only a dash of it will do."[133] The court also agreed that Koons's copying was so "blatantly apparent as not to require a trial"[134] and that Koons had used the "identical expression of the idea that Rogers created."[135] Koons's assertion of a fair use defense did not evoke a sympathetic response. In section three of its opinion, the court went through the four factors considered in determining fair use and found against him on each one.[136] It did not accept his assertion that his work was a parody or satire.[137] Finally, the Second Circuit speculated that on remand for the determination of damages, Koons "may be a good candidate for enhanced statutory damages pursuant to 17 U.S.C. section 504(c)(2)" in light of "Koons' willful and egregious behavior."[138] Eventually, Koons settled out of court; the terms of the settlement remain confidential.[139]

The published reaction to the Second Circuit's opinion was overwhelmingly negative.[140] The focus of concern was the implications

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130. *Id.*

131. *Koons*, 960 F.2d at 305.

132. *Id.* at 305–06, 313. The other defendant in the case was Sonnabend Gallery. *Id.* at 301.

133. *Id.* at 307.

134. *Id.*

135. *Id.* at 308.

136. The four factors, found in § 107 of the Copyright Act of 1976, are as follows: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used relative to the copyrighted work as a whole; and the effect of the use upon the potential market for the copyrighted work. 17 U.S.C. § 107 (1994).

137. The first paragraph of § 107 allows for fair use for the purposes of, among other things, criticism and comment. 17 U.S.C. § 107. Satire and parody are artistic genres that fall within those categories. This aspect of fair use was the focus in *Acuff-Rose*.

138. *Koons*, 960 F.2d at 313.

139. *See* Martha Buskirk, *Koons Lawsuits Settled*, Art in Am., Dec. 1993, at 118, 118. Koons has also settled the three other cases that arose out of the Banality exhibition. *Id.* In one of those three other cases, the district court found against Koons. *See* United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993).

140. *See, e.g.*, Patricia L. Baade, *Photographer's Rights: Case for Sufficient Originality Test in Copyright Law*, 30 J. Marshall L. Rev. 149, 173 n.164 (1996) (listing five essays critical of *Rogers v. Koons* and none in support).

the case had for Postmodern artistic strategies in general. One art critic found the decision "rife with ominous implications for the practice of artistic appropriation," a practice "central to postmodern art,"[141] and a legal commentator criticized the appellate court as being "remarkable for its hostility toward Koons and to appropriation strategies in post-modernist art in general."[142] The art critic of *The New Yorker*, while ambivalent toward Koons's work, worried that the Second Circuit's decision had made life difficult for a broader range of artists: "Even classic Pop art would be impossible to make now. The Campbell Soup Company—not to mention the cartoonists whom Roy Lichtenstein lifted from—would probably sue."[143]

From the post-structuralist/Postmodernist perspective, neither the outcome nor the reasoning of *Koons* was satisfactory. First, the concept of originality hurt Koons twice: the court found Rogers's work sufficiently original and Koons's work to be unoriginal to the extent that it copied Rogers's.[144] The irony is that Koons says he chose the photograph because he found it "seminally banal,"[145] in other words, trite or unoriginal. Moreover, as we have seen, Postmodernism as a movement criticizes the notion of originality.[146] With respect to the relationships between life, the photograph, and the sculpture, one can easily claim that Koons's work is far more different from the photograph than the photograph is from the sculpture: "[N]ot only the placement of the figures, but also the lighting and expression of Koons's sculpture, are radically different from Rogers's underlying photograph . . . . Gone is the 'charming' and cuddly warmth of Rogers's photograph, and in its place

141. Buskirk, *supra* note 118, at 37.

142. Greenberg, *supra* note 124, at 26. Even Rogers's lawyer was surprised by the opinion and its tone: "'It was a pretty strong opinion from the court—surprising even to me,' says Rogers's lawyer L. Donald Pruzman. 'I think they are truly offended not only by what Jeff did but by the arrogant way he tried to defend himself.'" Robin Cembalest, *The Case of the Purloined Puppy Photo*, ARTnews, May 1992, at 35, 35. For other negative reaction to the *Koons* decision, see Ames, *supra* note 91, at 1485: "If one recognizes the value of the critical function performed by even the most extreme appropriationist art, the need for a standard to prevent the quite predictable chilling effect of the *Koons* decision on artists' free choice of source material is clear." *See also* Louise Harmon, *Law, Art, and the Killing Jar*, 79 Iowa L. Rev. 367 (1994) (finding much to mourn in Koons's defeat).

143. Adam Gopnik, *The Art World: Lust for Life*, New Yorker, May 18, 1992, at 76, 78.

144. The court said the photograph more than met the *Feist* test. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992). On the other hand, "Koons used the identical expression of the idea that Rogers created . . . no reasonable jury could have differed on the issue of substantial similarity. For this reason, the district court properly held that Koons 'copied' the original." *Id.* at 308.

145. Haden-Guest, *supra* note 119, at 151.

146. *See* Ames, *supra* note 91, at 1478 ("The postmodernists challenge the foundations of modernist theory by questioning whether art can ever be original . . . .").

is a garish, perhaps horrifying, perhaps hilarious image."[147] The striking difference in the context of each work—the notecard and postcard market versus the glamorous world of a prestigious New York art gallery—failed to impress the court. What is so arresting about this case is that from the point of view of the dominant aesthetic of our time, Postmodernism, Koons's work seems clearly better, or more significant than Rogers's, and the members of court just seem to be bad judges of art. In fact, the court dismissed Koons's concern that "a trial judge uneducated in art is not an appropriate decision-maker" because that decision-maker need only have the skills of a reasonable and average lay person.[148] This claim is not quite in line with Holmes's sense that it would be dangerous for persons trained only in the law to make aesthetic judgments.[149] The dangers are all too apparent in this case and are compounded by the reasonable inference that the Second Circuit, serving the New York area, should have more expertise in this field than does any other circuit. Judges should either be better educated in art or more open to consulting experts.

A second and related problem with the decision is that the court lost sight of the goal of copyright: "To promote the Progress of Science . . . ."[150] To the Framers, "Science" was a broad term which included the arts and sciences. As interpreted by the Court in *Twentieth Century Music Corp. v. Aiken,*[151] the ultimate goal of copyright is to promote artistic creativity by protecting an author's creative labor: "The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[152] The *Koons* court concentrated on the immediate effect of protecting Rogers by making him whole and by punishing Koons.[153] But the court neglected to consider whether it is Rogers's productions or Koons's that are more aesthetically valuable and hence more beneficial to the public. The court either does not address this question at all or considers the question automatically answered when the court applied the provisions of the

147. Greenberg, *supra* note 124, at 27.

148. *Koons*, 960 F.2d at 308.

149. *See* Bleistein v. Donaldson, 188 U.S. 239, 251 (1903).

150. U.S. Const. art. I, § 8, cl. 8.

151. 422 U.S. 151 (1975).

152. *Id.* at 156.

153. The court suggested that statutory damages would be appropriate. *Koons*, 960 F.2d at 313. There is an implicit recognition that market injury to Rogers may not amount to much. Enhanced statutory damages, on the other hand, may run up to $100,000. *See* 17 U.S.C. § 504(c)(2) (1994).

statute.[154] The suppression of an artistic movement does not serve the public good. Every decision concerning the copyright of artistic works needs to consider the aesthetic as well as economic values involved.

The final problem with *Koons* is the court's handling of the fair use doctrine, specifically the tradition of allowing parodies.[155] Section 107 of the 1976 Copyright Act states that fair use of a copyrighted work is not infringement. The statute lists "criticism" and "comment" as two of several purposes constituting fair use,[156] and courts interpret this provision to allow parodies and satires as exceptions to infringement.[157] As a Postmodernist, Koons argued that his sculpture was a satire or parody of society at large.[158] The court, however, stressed that a parody must ridicule or criticize the original work.[159] "String of Puppies" was not a parody because "the copied work must be, at least in part, an object of the parody."[160] This rule was held to be a necessary condition of the parody exception, "otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large."[161] If all an infringer had to do was to claim a "higher or different artistic use," as Koons did, "there would be no practicable boundary to the fair use defense."[162] From a post-structuralist/Postmodern point of view, although the finding of no parody is wrong, the reasoning makes sense. If use of a preexisting work simply for another artistic use were allowed, the fair use defense would hardly have any limits at all. For the Postmodern artist, whose use of prior works in pastiche is pervasive, such a condition is devoutly to be wished. A porous exception would mean not having to worry about infringement at all. It was precisely to forestall this possibility that the court rejected

154. One might argue that promoting the public good is Congress's concern and not the judiciary's. This Comment concludes that the present statute, particularly the section on fair use, 17 U.S.C. § 107 (1994), is already broad enough to accommodate a much more favorable attitude toward artistic appropriation. If the courts do not adopt the proposed interpretation of § 107, Congress will have to make statutory amendments.

155. 17 U.S.C. § 107.

156. 17 U.S.C. § 107.

157. *See, e.g.*, Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) (finding that "When Sonny Sniffs Glue" is fair use of song "When Sunny Gets Blue"); Elsmere Music, Inc. v. NBC, Inc., 482 F. Supp. 741 (S.D.N.Y.) (finding that "I Love Sodom," parodying advertising jingle "I Love New York," is fair use), *aff'd*, 623 F.2d 252 (2d Cir. 1980).

158. *Koons*, 960 F.2d at 309.

159. *Id.* at 310.

160. *Id.*

161. *Id.*

162. *Id.*

Koons's Postmodernist assertions and that artistic tradition along with it: "Koons' claim that his infringement of Rogers' work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus cannot be accepted."[163] Of this passage in the opinion, one commentator has said, "In these few words, the court has effectively discredited an entire artistic movement."[164] The *Koons* court declared that the current copyright regime cannot accommodate Postmodern appropriation. But the court's view of parody and fair use has not been the final one.

B. Campbell v. Acuff-Rose Music, Inc.

In *Campbell v. Acuff-Rose Music, Inc.*,[165] the Supreme Court found that a rap group's rendition of a well known song "Oh, Pretty Woman" was not presumptively unfair and the extent of the group's borrowing not excessive.[166] The 2 Live Crew version borrowed or incorporated elements of Roy Orbison's original.[167] Although the rap version arguably does not target or criticize the original song, the Court accommodated the rap song within an expanded parody category. The decision represents the Court's best effort to date to deal with the issue of artistic appropriation. From the post-structuralist/Postmodernist point of view, the outcome was correct, although the reasoning not yet fully satisfactory. The Court seems to be stretching or twisting the existing definition of "parody" in order to achieve the desired result. Unfortunately, the reasoning of the *Acuff-Rose* decision would still be insufficient to protect Koons. Nevertheless, the Court in *Acuff-Rose* moved decisively in the right direction when confronted by unfamiliar artistic practices. In considering this case, the Court seemed to have the *Aiken* court's aim—the stimulation of artistic creativity for the public good—firmly in mind.[168] What is needed beyond *Acuff-Rose* is the introduction of pastiche as a protected artistic genre.

Acuff-Rose involved a case of appropriation in music. Luther Campbell, a member of the rap-music group 2 Live Crew, wrote a song called "Pretty Woman," a parody of the rock ballad "Oh, Pretty

163. *Id.*

164. Greenberg, *supra* note 124, at 29.

165. 510 U.S. 569 (1994).

166. *Id.* at 594. The Court remanded the case because of a lack of evidence concerning market harm. *Id.* at 593–94.

167. *Id.* at 572.

168. *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

Woman."[169] The earlier song's writers, Roy Orbison and William Dees, had assigned their rights to the song to Acuff-Rose Music, Inc. When 2 Live Crew applied to Acuff-Rose for permission to make use of the song for a fee, Acuff-Rose refused.[170] The rap group released its version of the song, and Acuff-Rose sued for copyright infringement.[171] The Court held that the commercial nature of 2 Live Crew's parody did not render it presumptively unfair.[172] The Court also found that the Sixth Circuit had insufficiently considered the nature of parody when it weighed the degree of copying.[173] All parties agreed that the rap group would have infringed on Acuff-Rose's rights but for a finding of fair use through parody.[174] Before going over the four non-exclusive factors in the copyright statute[175] that help to determine whether a use is fair, the Court said that both the fair use doctrine and the statute call for a case-by-case analysis.[176] Crucial with respect to the Court's consideration of each of the four factors was the finding that the rap version constituted a parody.[177]

The Court's conception of parody is broader and more flexible than a prior one, which required the critical targeting of the imitated work.[178] The Court looked for guidance at the preamble of section 107, which lists uses for the purposes of "criticism" and "comment" as examples of fair use of the copyrighted work.[179] Applying and interpreting these two exceptions, the Court asked whether the new work adds something new or is "transformative."[180] As a matter of law, the Court found that parody in general "has an obvious claim to transformative value."[181] The interesting move was this: although the Court referred to two dictionary

169. *Acuff-Rose*, 510 U.S. at 572.

170. *Id.* at 572–73.

171. *Id.* at 573.

172. *Id.* at 594.

173. *Id.* at 572.

174. *Id.* at 574.

175. *See supra* note 136.

176. *Acuff-Rose*, 510 U.S. at 577.

177. *Id.* at 578–94.

178. *See* Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992); MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981); *see also* Fisher v. Dees, 794 F.2d 432, 436 (9th Cir. 1986) (finding that parody deserves protection as fair use only if copied work is partly target of work in question).

179. *Acuff-Rose*, 510 U.S. at 578–79.

180. *Id.* at 579. This term was developed by Judge Pierre Leval. Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990).

181. *Acuff-Rose*, 510 U.S. at 579.

definitions of parody, both of which explicitly state that parodies make works, authors, or styles the objects of ridicule, the Court did not require that the parody criticize the earlier work.[182] Commentary was held sufficient: "For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."[183] If the commentary has no "critical bearing on the substance or style of the original composition," the new work's claim to fair use is weaker, and other factors, such as commerciality, become more important.[184] Nevertheless, implicit in this discussion was that failure to ridicule or criticize the prior work does not by itself prevent the new work from being a parody. Lowering the criticism requirement allowed 2 Live Crew's song to qualify as a parody because it "reasonably could be perceived as commenting on the original or criticizing it, to some degree."[185] The fair use defense is appropriate here even though the critical element is slight or weak. Moreover, in a footnote the Court says that works even less critical of originals than 2 Live Crew's song is of "Oh, Pretty Woman" may still qualify as parodies.[186] Especially when there is no danger of market substitution, "taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use."[187] One commentator finds that the dicta in this footnote may be sufficient to protect Koons and other Postmodern artists like him, although other passages in the opinion make this protection far from certain.[188]

Despite this broadening of the scope of the parody category of fair use and the quotation of death-of-the-author sentiments from Justice Story,[189] the Court does not unequivocally extend protection to works of

182. *Id.* at 580.

183. *Id.*

184. *Id.*

185. *Id.* at 583.

186. *Id.* at 580 n.14.

187. *Id.*

188. *See* A. Michael Warnecke, Note, *The Art of Applying the Fair Use Doctrine: The Postmodern-Art Challenge to the Copyright Law*, 13 Rev. Litig. 685, 746–47 (1994) ("This footnote may provide sufficient coverage to protect virtually all limited-edition, fine-art postmodern parody, as well as satire.").

189. *See supra* text accompanying note 88.

appropriationist art.[190] Just as the Second Circuit found that Koons's work did not criticize or target the original, so might that court have found that it did not comment upon the original either; hence, Koons's sculpture could still fail to qualify as a parody. The Court was doing the best it could with the available vocabulary, but the outcome in *Acuff-Rose* is not unequivocal enough to provide the desired relief. The development of new statutory language or novel readings of the current one are necessary to remove the threat of legal action and to allow Postmodern artists freely to practice their craft.

IV. PASTICHE AS FAIR USE

The fact that current copyright law inhibits artistic "creativity"[191] argues strongly in favor of limiting copyright protection for works of art. In order to demonstrate how significant an impact that inhibition can have, we only need recall that Shakespeare borrowed or appropriated extensively from previous writers: "The methods of Shakespeare suggest that copyright law even in its present modest scope—perhaps any copyright law, however narrow—inhibits literary creativity, at least of the type that his work displays."[192] Having Shakespeare suppress *Hamlet* for fear of infringing upon Thomas Kyd's earlier version would not be a desirable outcome of any legal regime. Similarly, one should not support the chilling effect of the current law upon Postmodern appropriation.

The change in the law contemplated here is to expand the fair use defense in order to allow more extensive artistic borrowing.[193] The language of the current section 107[194] is broad enough to accommodate adequate judicial expansion of fair use. Interpretation of section 107 should be expanded to include a pastiche category of fair use. Pastiche, like parody, involves imitation and mimicry, but of a neutral sort, without the mockery.[195] A standard handbook of literary terms defines "pastiche" as "[a] literary or other artistic work created by assembling

190. *See* Keith Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property*, 18 Colum.-VLA J.L. & Arts 1, 62–63 (1993); Roxana Badin, Note, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell v. Acuff-Rose Music, Inc., 60 Brook. L. Rev. 1653, 1653 (1995) (finding that *Acuff-Rose* excludes Koons and other appropriation artists from fair use protection).

191. The term is in quotation marks because "creativity" in a Postmodern sense now includes creative borrowing.

192. Posner, *supra* note 8, at 344.

193. *Id.* at 351.

194. 17 U.S.C. § 107 (1994).

195. *See supra* notes 98–99, 103 and accompanying text.

bits and pieces from other works."[196] The term covers precisely those aspects of Postmodernist art most deserving and in need of a defense.

One legal question relevant in establishing a fair use exception for pastiche is whether the preamble to section 107 applies to works which copy a prior work without targeting it for criticism or comment.[197] Courts have assumed that the infringing work must comment on or criticize the copyrighted work in order for the use to be fair. However, a reasonable reading of the preamble would show that its wording, "the fair use of a copyrighted work . . . for purposes such as criticism, comment . . . is not an infringement of copyright," does not require that the copied work itself be the object of criticism or comment. The later work may use the earlier for the purposes of criticizing or commenting on something else. If that major shift in the way the courts understand the preamble becomes standard, a pastiche fair use defense would then be possible. The artist's infringement would be judged on a case-by-case basis through a weighing of the relevant factors. The artist could explain how her use of the prior work is not "to get attention or to avoid the drudgery in working up something fresh,"[198] but instead to enrich her work through allusions to previous art. In other words, her use is transformative and adds value to the original; it is "the very type of activity that the fair use doctrine intends to protect for the enrichment of society."[199]

Whether or not the *Koons* court is right in predicting that a removal of the requirement that the criticism be of the copied work would mean the end of any limits on the fair use defense, pastiche is a legitimate and productive artistic genre which ultimately contributes to our self-understanding. The institution of a defense for pastiche will remove copyright law as an impediment to creativity in art, music, and literature.

V. CONCLUSION

The Romantic movement in art and literature had its heyday during the late eighteenth and early nineteenth centuries, yet its effect on the rhetoric and vocabulary of copyright law remain. Both before and after the Romantic period, a recognition existed that imitation, borrowing, and copying was an inevitable part of creating works of art, but only in the

196. *The Harper Handbook to Literature* 339 (Northrop Frye et al. eds., 1985).

197. One should mention that in some circumstances a finding of fair use is possible even when the infringing work does not fit any uses listed in the preamble. *See* Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417 (1984) (finding fair use defense applicable to non-productive use).

198. Campbell v. Acuff-Rose, 510 U.S. 569, 580 (1994).

199. Leval, *supra* note 180, at 1111.

post-Romantic period did such artistic appropriation constitute copyright infringement.

Post-structuralism and Postmodernism have challenged Romantic ideology and called for the death of the concept of the author. The logical extension of their beliefs to copyright law would mean the wholesale or gradual destruction of the current copyright regime. That ambitious result is not achievable in the near future, but in the meantime, the present law hurts Postmodern artists who act upon their belief that art is made out of other art. Although the *Acuff-Rose* Court tried to accommodate artistic appropriation through its expansion of the fair use defense for parodies, better protection for Postmodern artists would come through judicial recognition of a pastiche category of fair use. Such a recognition would remove a legal impediment to the progress of the arts.