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Law, Art, and the Killing Jar[†]

Louise Harmon*

Most people think of the law as serious business: the business of keeping the peace, protecting property, regulating commerce, allocating risks, and creating families.¹ The principal movers and shakers of the law work from dawn to dusk, although they often have agents who work at night.² Their business is about the outer world and how we treat each other during the day. Sometimes the law worries about our inner life when determining whether a contract was made³ or what might have prompted a murder,⁴ but usually the emphasis in the law is on our external conduct and how we wheel and deal with each other. The law turns away from the self; it does not engage in the business of introspection or revelation.

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1. Here is a rather traditional list of some of the law's more important functions: 1) To help promote health, including a healthful environment; 2) To help reinforce the family and protect private life; 3) To help keep order in the community; 4) To help secure individual freedoms; 5) To help minimize unjust inequalities of opportunity; 6) To help enhance the reliability of exchange relations and to provide redress when they go wrong; 7) To help recognize and order private ownership. Robert S. Summers, *Law: Its Nature, Functions, and Limits* 16 (2d ed. 1972).

2. It is not infrequent in large urban criminal court systems for arraignment to occur in "night court." In Baltimore, for example, arraignments often occur at night, in district courtrooms, before a district court commissioner (who might not be an attorney), a few hours after the defendant's arrest. The ritual consists of reading the defendant his rights, checking to see if counsel is needed, and setting a date for the preliminary hearing. Because the arraignments are usually at night with no public witnesses, they may be informal and last no longer than two minutes. James S. Eisenstein & Herbert Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* 195 (1977). While the television show, "Night Court," portrayed a lovable bunch of court officers having good clean fun on the job, in reality, for the defendant who has just been arrested, arraignments are often experienced as "degradation ceremonies." *Id.*

Sometimes the day shift deliberates in a special court session after hours. See Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 *Yale L.J.* 225, 229 (1992) (describing the Ninth Circuit's nocturnal *en banc* reconsideration of procedures involving a prisoner's scheduled execution).

3. In its older formulation, we used to call it "meeting of the minds," or something like this: "The word 'agreement,' in its popular and usual signification, means no more than concord; the union of two or more minds; or a concurrence of views and intention." *Sage v. Wilcox*, 6 Conn. 81, 85 (1826), *quoted in* 1 Arthur L. Corbin, *Corbin on Contracts* § 9, at 20 n.14 (1963).

4. In criminal law, the requisite mental attitude a defendant must possess is known as "mens rea." In the early period of the English common law, conduct could be criminal even if the defendant did not have any criminal intent. However, since about 1600, most judges required not only an act (or omission), but also a certain "prescribed bad state of mind." The Latin maxim, *actus non facit reum nisi mens sit rea* (an act does not make one guilty unless the mind is guilty), expressed the basis for criminal liability. Wayne R. LaFare & Austin S. Scott, *Criminal Law* § 3.4, at 212 (2d ed. 1986).

Art is another kind of business: the business of expression, of songs sung to no one but the empty night. Art emerges from darkness, when the planet has turned its back on solar light. Art worries little about how we deal with each other during the day, whether we keep the peace, or whether we establish order. Rather, its order is artificial.⁵ It houses shadows who breathe no air and fill no space, whose names do not refer. The leaves on the tree are not really there; the sea is an illusion; the black winter sky is a diamond-studded dream. But while there are no truth conditions in art, there is truth: about falling in and out of a body—and in and out of love—about the sheer terror of being here, about the pressure of life's unrelenting beauty, about still waters and the pain and joy of their reflection. Indeed, like the law, art is serious business. That much they have in common.

We pretend that law and art have nothing to do with one another. It is true; between their respective spheres—the outer world and the inner world—there is little intersection. Artists, however, generate objects: paintings, sculptures, manuscripts, pulp from trees with symbols on them. And in our legal tradition, we have endowed these objects with the magical qualities of property,⁶ on the reasoning that to do so will reward the artist and promote the generation of additional objects.⁷ These art objects are the

5. One of the characteristics of art is that it is highly structured. As Stanislavski wrote about acting:

It is fair to say that this technique bears the same relation to subconscious creative nature as grammar does to poetry. It is unfortunate when grammatical considerations overwhelm the poetic. That happens too often in the theatre, yet we cannot do without grammar. It should be used to help arrange subconscious, creative material because it is only when it has been organized that it can take on an artistic form.

Constantin Stanislavski, *An Actor Prepares* 266 (Elizabeth Reynolds Hapgood trans., 1936).

6. The Federal Copyright Revision Act of 1976 expressly makes art objects the subject of property protection. 17 U.S.C. § 102 (1988) [hereinafter Copyright Act]. Congress finds its authority and mandate to enact a copyright law from the U.S. Constitution. The relevant portion reads: "The Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

England enacted the first copyright statute in 1709. The Statute of Anne was entitled, "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned." 1709, 8 Anne, ch. 21 (Eng.). It provided for a fourteen-year period of protection and a renewal period for a second fourteen years. The statute was primarily designed to protect British publishers. The royal monopoly granted in the preceding century to the stationers had lapsed, and piracy from both inside and outside England threatened established publishers. The legislation was thus first enacted not to protect the author, but to protect the proprietor or owner of the copyright; in most cases the publisher, not the author, was the owner of the copyright. Although the preamble mentions "authors," a series of references to authors' rights in early drafts of the bill were "removed in committee, almost certainly under pressure from the trade." John Feather, *A History of British Publishing* 74-75 (1988).

7. It is good that authors be remunerated; and the least exceptional way of remunerating them is by monopoly. Yet monopoly is evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

Thomas Babington Macaulay, *Speech Delivered in the House of Commons* (Feb. 5, 1841), in *Thomas Babington Macaulay, Prose and Poetry* 731, 733-37 (G. M. Young ed., 1967), *quoted*

subjects of possession, transfer, and appropriation. Thus, while art may be the business of the soul, the objects which physically bear the weight of that business have become the business of the law. The law regulates their sale;⁸ the law prosecutes those who steal them;⁹ the law taxes their transfer;¹⁰ and on rare occasions, under strict scrutiny, the law even sets limits on the kinds of symbolic expression the culture will endure.¹¹

Aside from the rare occasions of direct censorship, however, the law has little business with art, except standing guard at the boundaries of art objects, keeping others off the grass, and greasing the wheels of commerce. The law interferes only when there is an assault on the art object's status as property or when there is a transfer of title or possession. In either case, the interference is always exterior, on the outside of the object. What goes on inside the frame, within the confines of a sculpture or the edges of a poem, is not the business of the law. At least that is what we pretend.

Art object as beetle. Metaphors are born of distraction. In this instance, I was browsing in a book about beetles when my mind was really on art and its relationship to the law.

Something about the beetle's morphology captured my imagination. It seems that all beetles have a chitinous anterior pair of wings, the elytra, "stiffened to form a protecting sheath for the membranous hind wings that

in Paul Goldstein, *Copyright, Patent, Trademark and Related State Doctrines: Cases and Materials on the Law of Intellectual Property* 2 (1990).

For an examination of some of the underlying assumptions for copyright and an argument that artists are not necessarily "motivated by profit or other quantifiable factors," see Jennifer T. Olsson, *Rights in Fine Art Photography: Through a Lens Darkly*, 70 *Tex. L. Rev.* 1489, 1501 (1992). See also Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 *Duke L.J.* 1532, 1536-37.

8. The Uniform Commercial Code applies to the transfer of artwork since they are movable chattel. U.C.C. § 2-105 (1993). For an example of a decision in which a court applied both the U.C.C. and property law in the transfer of a painting, see *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980). A secret body of customs also exists which regulates art auctions and, more generally, the business of art trading. For a wonderful, illustrated introduction to this hidden set of rules, see Franklin Feldman, *Commodities and Art: A Delicate Relationship*, 10 *Colum.-VLA J.L. & Arts* 197 (1986).

9. See, e.g., Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 *Suffolk Transnat'l L.J.* 609 (1992).

10. For a decision discussing the tax implications of making a testamentary disposition of a painting, see *Gruen v. Gruen*, 496 N.E.2d 869 (N.Y. 1986).

11. *Miller v. California*, 413 U.S. 15, 24 (1973), articulated the test for obscenity. *Miller* involved a prosecution for obscenity against a defendant who had mailed brochures that advertised sexually explicit books. *Id.* at 16. The test for determining whether a work merits the label "obscene" has three parts:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted). If the work fails the *Miller* test, it is not shielded by the First Amendment. *Id.* at 36. This lack of protection may lead to censorship of obscene materials. *Id.*

are folded beneath them.”¹² Fragile, diaphanous things, those inside wings, which carry the beetle body far and wide, spreading the word of beetle to parts unknown. Art objects, too, need that armor, a protecting sheath. The dichotomy of the business of law and the business of art provides that armor.¹³ We do not let the law penetrate the elytra and threaten the integrity of the inner beetle—its life force and the secret magic of its flight.

In the beetle book, much is made of these sclerotic outer wings and their powers of protection, of how either coarse teeth or tubercles line some elytra, and how some armored beetles can fold their legs beneath them and drop safely to the ground.¹⁴ But before getting to the wonders of these outer wings, before getting to any beetle wonders at all, the authors tell the collector how to capture, kill, and preserve a specimen.

“Killing jars are absolutely essential and may be manufactured in various ways.”¹⁵ The authors advise placing potassium cyanide in a jar, and taking care “to leave the insects in the killing jar long enough for them to be completely killed; overnight is best.”¹⁶ Thoroughness in killing is essential because some specimens may come alive again; their ability to store air under their elytra enables them to “play dead” for some time.¹⁷ Once death is no longer a matter of play, the collector may pin the beetle and label it. “Labeling it” seems to be an entomological obsession, as far I can tell.

12. 1 Elizabeth S. Dillon & Lawrence S. Dillon, *A Manual of Common Beetles of Eastern North America* 23 (1972).

13. The most famous articulation of the dichotomy between the business of law and the business of art is Justice Holmes's dictum in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903). At issue in *Bleistein* was whether certain chromolithographic circus posters fell within the protection of copyright law. In a sweeping democratization of the concept of art, the Court held that the posters were protected and that judges should not get involved in making aesthetic judgments:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Id. at 251-52. Here is a more philosophical formulation of the same idea:

What is immediately striking here is that the courts claim to avoid any direct confrontation with aesthetics. The law seems to recognize the specificity of aesthetic judgments and keeps a “hands off” policy. It is not for judges to decide the aesthetic quality of the sculpture. Affirming the Kantian division, the faculty of practical reason studiously withstands the temptation to pass judgment on a form it is incapable of understanding and which, in its subjectivism, appears to be law's antithesis.

Costas Douzina, et al., *Postmodern Jurisprudence: The Law of Text in the Text of Law* 167 (1991).

14. Dillon & Dillon, *supra* note 12, at 29-31.

15. Id. at 5.

16. Id. at 7.

17. Id.

In a glass house scented with the perfume of potassium cyanide, an armor of chitin is worthless. If the seal is tight, those dress rehearsals of the dying scene inevitably culminate in beetle death. So too, the dichotomy of the business of law and the business of art cannot always protect the art object's avigability or its life. The law has its own killing jars.

How does the killing jar work? Let me tell you a story about people and puppies.¹⁸

One day in 1980, Jim Scanlon commissioned a California photographer named Art Rogers to take a picture of his dog's litter of eight German shepherd puppies. Like all young mammals, the puppies were wiggly and wobbly. Instead of trying to pose the dogs by themselves, Rogers asked Scanlon and his wife, Mary, to sit on a bench and hold all eight of them. Then he took the picture.¹⁹



©1980 Art Rogers—Point Reyes

18. This Essay focuses on the decisions in *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990), and *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) *cert. denied*, 113 S. Ct. 365 (1992).

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

The black and white photograph, which came to be known as *Puppies*, became part of Art Rogers's portfolio. Rogers exhibited the photograph at the San Francisco Museum of Modern Art in 1982, along with some of his other work. He later licensed it to a company called Museum Graphics, which produces and sells notecards with reproductions of work by American photographers. *Puppies* eventually graced the front of a notecard, and almost ten thousand people wished someone a happy birthday, gave thanks for good times or good things, banished illness, or just said hello on the cardboard that bore the picture of the Scanlons and their puppies.²⁰

About seven years after the Scanlons and their puppies were frozen in time, an artist named Jeff Koons was collecting materials for new artwork. He was preparing for an exhibition due to open at the Sonnabend Gallery in New York the following year. The name of the exhibition was the "Banality Show."²¹

Jeff Koons is a man much interested in banality. He likes to take ubiquitous cultural images, like the Pink Panther and Garfield's frenetic friend, Odie,²² from their familiar contexts of everyday life—the cool blue glow of Saturday morning TV and the cacophony of cereal boxes—and move them into sculptures that end up in museums. He had been thinking a lot about people holding animals and had collected a file of pictures of men and women, boys and girls, with cats and dogs, and dogs and cats. He was seeking workable sources of art: the typical, the commonplace, and the familiar. And so it was banality that Koons was cruising for on that day when he entered a "very commercial, tourist-like card shop."²³ His hand lit upon a certain notecard. It featured a man, a woman, and eight German shepherd puppies, and Koons bought two of them.

I would not be surprised to learn that he left the envelope in the rack. Koons did not want to buy a notecard; he wanted to buy the image on the front. For Koons, that image was a part of mass culture; it rested "in the collective subconsciousness of people regardless of whether the card had actually even been seen by such people."²⁴ And that image bore the copyright notice of the man who had arranged those puppies and people on the bench; who had made technical judgments about such things as lenses, film speed, and proper exposure; who had opened the shutter; and

20. *Id.*

21. *Id.* at 304-05.

22. Jeff Koons is also involved in litigation over his use of the familiar cartoon canine, Odie. *See United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

Koons has also appropriated the image of the Pink Panther in a porcelain sculpture which features a sad version of the pink feline in an intimate embrace with a blonde woman-mermaid. About this sculpture Koons states: "Pink Panther is about masturbation. I don't know what she would be doing with the Pink Panther other than taking it home to masturbate with." Jeff Koons, *The Jeff Koons Handbook* 104 (1992). For a survey of the legal protection available to such fictional characters as Odie and the Pink Panther, see Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 Wis. L. Rev. 429. *See also Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993), holding that Koons's use of an image on a note card entitled "Boys with Pig" constituted copyright infringement.

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

24. *Id.*

who had labored long in a dark room to bring the photograph known as *Puppies* to light. That man was Art Rogers.

Here is what Jeff Koons did: He tore off the back of the notecard which bore Art Rogers's copyright notice²⁵ and several months later sent the image to an art studio in Italy under contract to craft his work. He instructed the studio to make a polychromed wood sculpture version "just like" the photograph. When it came to painting the sculpture, Koons gave the studio an enlarged photocopy of *Puppies* and noted painting directions in the margin with arrows drawn to various areas of the photograph. The puppies were to be painted in shades of purplish blue with "variation of light-to-dark as per photo."²⁶ Their large, round, lovely, wet noses were made navy with shiny purple on the ends, and their collars were striped with purple and blue. The man's hair was to be white with shades of gray. The people were dressed in orange, except for the man's pants, which were the same beige as the couple's skin. The bench was gray, and there were three daisies on the sculpture, two in the woman's ears and one resting lyrically on the man's head. The daisies were the only objects added to the configuration of the photograph.²⁷

Koons called the work *String of Puppies*. It is a big, wooden, painted sculpture, larger than life, measuring forty-two inches by sixty-two inches by thirty-seven inches, not including the base, which is thirty-two inches by sixty-seven inches by thirty-one inches. Koons's studio made three editions for the "Banality Show" at the Sonnabend Gallery; the first two sold for \$125,000 each, and the third for \$117,000. Koons retained the artist's proof

25. In its recitation of facts, the district court made it sound as if Jeff Koons picked up the note card, and immediately (and diabolically) ripped off the copyright notice before sending the picture off to the Italian studio. In his deposition, however, Koons reported that he often carried multiple copies of cards, tearing off the backs because they are "too thick for the publication and there is no reason." Deposition of Jeff Koons at Joint Appendix A 224, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) (No. 91-7396), *cert. denied*, 113 S. Ct. 365 (1992). He was not even certain which card he sent to the studio. *Id.* at Joint Appendix A 223. The card was picked up in late 1987 or early 1988, and it was not until late 1988 that Koons sent the picture to Italy. *Id.* at Joint Appendix A 227-28.

It has been settled law for some time that copyright protection extends to photographs. In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the Court found the photographer of a portrait of Oscar Wilde to be an "author" for purposes of the copyright law. Finding the photograph to be a representative of "original mental conception[s]" of the author, the Court focused on such activities as, "posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photographs, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression." *Id.* at 54-55.

Jane Gaines has a fascinating chapter on *Burrow-Giles* in her book that discusses, in particular, how the photographic subject's claim to authorship was suppressed by the Court's emphasis on artistic, painterly like efforts of the photographer. Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law* 42-83 (1991). Oscar Wilde himself "encouraged the production of the literary figure as celebrity in his remarks about the requests for autographs and locks of his hair, and his dedication to 'assuming a pose' tells us that he constructed himself as a 'work.'" *Id.* at 81. Our copyright law does not recognize Wilde's "work;" it recognizes only the work of the man who produced his image, Sarony, the photographer. *Id.*

26. *Koons*, 960 F.2d at 305 (emphasis deleted).

27. *Id.* at 308.



Jeff Koons, "String of Puppies", 1988, Polychromed wood, 42 x 62 x 37".

of *String of Puppies* at his storage facility.²⁸

String of Puppies was on exhibit at the Los Angeles Museum of Art, and a photograph of the sculpture appeared on the front page of the calendar section of the Sunday Los Angeles Times. A friend of Scanlon's called to tell him that he had seen a colorized version of the photograph *Puppies*. When Scanlon got the paper, he quickly realized that it was not a tinted version of Rogers's photograph. He notified Art Rogers, and about six months later, Rogers initiated a lawsuit.²⁹

Rogers filed suit in the Southern District of New York against defendants Koons and the Sonnabend Gallery alleging copyright infringement,³⁰ Lanham Act violations, and unfair competition under the laws of New York and California. Some of the facts were never in dispute: Koons had not informed Rogers of his intended use of the photograph, and Rogers had no knowledge of that use until he heard the news from Scanlon.

28. *Rogers v. Koons*, 751 F. Supp. 474, 476 (S.D.N.Y. 1990).

29. *Id.* The law suit was, of course, preceded by the usual "cease and desist" letter. In it Mr. Rogers's attorneys stated, "[w]e believe that Mr. Rogers is entitled to the full amount of \$375,000, or whatever the total sales price will be for the three works, plus any other profits derived by Mr. Koons or the Gallery as a result of the infringement." Cease and Desist Letter at 2, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) (No. 91-7396), *cert. denied*, 113 S. Ct. 365 (1992).

30. Once a work has qualified for copyright protection, the law grants an author a number of exclusive rights: the right to reproduce the work; the right to prepare derivative works; the right to distribute copies of the work; the right to perform the work; and the right to display the work publicly. 17 U.S.C. § 106 (1988).

Rogers moved first for summary judgment on the copyright infringement claim, and Koons cross-moved for summary judgment on all counts.³¹

The district court, in an opinion written by Judge Haight, first addressed whether Koons's conduct constituted an infringement of Rogers's copyright. Koons made two arguments. First, he argued that he had only used a noncopyrightable element of the photograph: factual information that was in the public domain, not some "protectable original act of expression."³² Presumably Koons was referring to the "fact" of two human beings sitting on a bench, bearing four armloads of puppies. The copyrightable element was the photograph *qua* photograph, and it was permissible for any sculptor to take the raw material of the photograph—its subject matter—and "use" it in a sculpture.³³ Judge Haight did not accept the argument, characterizing Koons's sculpture as a derivative work, "based upon one or more preexisting works, such as [an] . . . art reproduction . . . or any other form in which a work may be recast, transformed, or adapted."³⁴ Relying on a litany of case law about derivative works, the court analogized to other instances in which a court found infringement because an artist had copied three-dimensional toys from a two-dimensional cartoon.³⁵

Judge Haight also did not accept Koons's argument that Rogers could not prove substantial similarity between the photograph and the sculpture. He found that any lay observer would recognize that the sculpture *String of Puppies* had been appropriated from the photograph *Puppies*.³⁶ Questions

31. *Koons*, 751 F. Supp. at 476.

32. *Id.* at 477.

33. *Id.*

34. *Id.* Here the court was referring to the statutory language of § 101 of the Copyright Act, which provides:

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

17 U.S.C. § 101 (1988).

35. *Koons*, 751 F. Supp. at 478.

36. *Id.* Alan Latman pointed out that there is considerable confusion about the use of the term "substantial similarity." Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 Colum. L. Rev. 1187 (1990). Evidence of a similarity between two works, which may or may not be substantial, can be used to prove copying. The term is sometimes also used, however, to determine whether the taking of the protected material went so far as to constitute an infringement. *See also* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (articulating these two prongs of infringement as copying and "improper appropriation") *Id.* at 468. In *Koons*, there was no question that Koons had directly copied Rogers's photograph. Indeed, this would be the case in any artwork which used the strategy of appropriation; the strategy itself consists of creating a substantial similarity by copying the appropriated work. Whether this copying was an improper appropriation, however, is a different question. Latman encouraged the use of Judge Learned Hand's test in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960). In determining whether the appropriation was improper, Hand suggested this standard: "[T]he ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and

of "size and color aside,"³⁷ Judge Haight determined that the sculpture was an exact copy of the photograph.

These seem odd attributes to shrug off—"size and color"—when considering the task at hand: the comparison of two works of visual art. Our eyebrows would go up if the task were the comparison of two apple pies and the judge casually cast aside the attributes of taste and consistency. In Judge Haight's defense, we must remember that he was never in the presence of Koons's sculpture. His experience of it was through a photograph, and its size and color were two-dimensional and abstract. He did not walk around it, or wince at its colors, or wonder at those puppies in purple and blue 3-D.

Having lost so resoundingly on the issue of infringement, Koons had to wade into the murky waters of the fair use exception. Judge Haight found that none of the statutory examples of fair use applied. Koons had made a "faint suggestion" that the sculpture, together with the other works in the "Banality Show,"³⁸ was intended to comment satirically upon contemporary values.³⁹ However, Judge Haight construed the statute's use

regard their aesthetic appeal as the same." *Id.* at 498. By applying the aesthetic appeal standard in determining improper appropriation, the trier of fact would not duplicate the substantial similarity inquiry that occurs in determining whether copying took place. With appropriative art, copying always took place, but the aesthetic appeal of the two works can, and almost always will, be quite different.

37. *Koons*, 751 F. Supp. at 478. Apparently Koons "vigorously contested the proposition that a District Court could determine whether the Rogers photograph and the Koons sculpture are substantially similar without viewing the sculpture." Petition for Rehearing by Appellant at 5, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) (No. 91-7396), *cert. denied*, 113 S. Ct. 365 (1992). Koons argued to the Second Circuit that the district court was not free to decide the issue of substantial similarity as a matter of law, pointing out that Judge Haight had not even viewed the sculpture. To make a decision based on two photographs was "a particularly egregious error in the face of Koons's evidence that the disturbing quality and message of the sculpture became apparent upon viewing it." Brief for Appellant at 30, *Koons*, (No. 91-7396). (Koons's attorney must have assumed that the issue of substantial similarity was going to be determined at trial by a jury; thus there was no need to bring the heavy sculpture in at the summary judgment level.) In Appellee's Brief to the Second Circuit, Rogers blamed Koons for not introducing the sculpture itself at the district court's hearing on the summary judgment motions. Citing Federal Rule of Civil Procedure 65(e), Rogers argued that Koons had the burden of presenting evidence that there was a genuine issue for trial. Brief for Appellee at 20-21.

38. *Koons*, 751 F. Supp. at 479.

39.

Limitations on exclusive rights: Fair use

Notwithstanding the provisions of [17 U.S.C. §] 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

17 U.S.C. § 107 (1988).

of "criticism" quite narrowly, to refer only to "such usage specifically addressed to the copyrighted work."⁴⁰ In short, the judge found "Koons[s] sculpture [did] not criticize or comment upon Rogers[s] photograph. It simply appropriate[d] it."⁴¹

After some procedural machinations,⁴² the district court permanently enjoined Jeff Koons and the Sonnabend Gallery from making, selling, or lending *String of Puppies* or displaying any copies of, or derivative works based upon, Rogers's photograph. It also ordered Koons and the gallery to deliver the sculptures to Rogers within twenty days, including his artist's proof. This Koons and the gallery failed to do, and Rogers moved to hold Koons in contempt. At the hearing on the contempt motion, Rogers produced evidence that nine days after the district court issued the injunction, Koons had loaned his artist's proof of *String of Puppies* to a museum in Germany and had arranged for its shipment.⁴³ The district court held Koons in contempt and directed him to do whatever was necessary to ensure the sculpture's return from Germany. Failure to comply would result in a daily fine to commence eight days later.⁴⁴ Following a series of motions and appeals, the matter landed in the lap of the Second Circuit. Koons lost there too. With respect to Koons's argument that he used noncopyrightable elements of Rogers's photograph, Judge Cardamone instead focused on the idea-expression dichotomy. It is a tenet of copyright law that the expression of the idea, not the idea itself, receives copyright protection.⁴⁵ Thus, Judge Cardamone wrote:

40. *Koons*, 751 F. Supp. at 479.

41. *Id.*

42. *Id.* at 480.

43. In an affidavit, Koons claimed that he did not have actual notice of the court's order because he was in Europe when the order was issued on March 27, 1991 and his attorney had not informed him. Affidavit of Jeff Koons at 1, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) (No. 91-7396), *cert. denied*, 113 S. Ct. 365 (1992). At the hearing on whether to find Koons in contempt, his attorney argued that the court's order requiring Koons to turn over articles that "infringed plaintiff's copyright," including any editions of "String of Puppies," was ambiguous. Koons's attorney argued that the ambiguity arose from whether the fourth copy, the artist's proof, was an infringing copy, since it had been crafted in a foreign country and never used in this country, and since it had always been stored in a warehouse. Transcript of Oral Argument at 5, *Koons*, (No. 91-7396). It must have been an embarrassing argument to make. When pressed by the court about whether he harbored any doubts that the fourth copy of the statue was subject to the order, Koons's attorney admitted that "I have to, in all good faith, answer yes. I'm sure that was the subject of what was being debated." *Id.* at 7. Koons lost, the court finding him on constructive notice of the order through his attorney. *Id.* at 37.

44. *Koons*, 960 F.2d at 306.

45. Under the Copyright Act, an author may sue for copyright infringement if someone copies his work without authorization. (The available remedies include damages, injunctive relief, and attorney's fees. See 17 U.S.C. §§ 503-05 (1982).) The idea-expression dichotomy "regulates the kind and degree of similarity required to support a claim of copyright infringement." Alfred Yen, *First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 Emory L.J. 393, 398 (1989). A copyright plaintiff must prove: "1) that she owns the copyright in the work, and 2) that the defendant copied the plaintiff's work." *Id.* at 399; see also Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01 (1992).

Usually it is not difficult to prove the first element. With respect to the second, there are two avenues of proof. *Id.* at § 13.01(B). Under the first method, the plaintiff may introduce direct

Hence, in looking at these two works of art to determine whether they are substantially similar, focus must be on the similarity of the *expression* of an idea or fact, not on the similarity of the facts, ideas or concepts themselves. It is not therefore the idea of a couple with eight small puppies seated on a bench that is protected, but rather Rogers'[s] *expression* of this idea—as caught in the placement, in the particular light, and in the expressions of the subjects—that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable.⁴⁶

Judge Cardamone also agreed with the district court that Koons's sculpture was not a form of criticism, or as he chose to characterize it, a "parody,"⁴⁷ because the sculpture failed to parody the photograph itself, but rather sought more generally to create "a satirical critique of our materialistic society."⁴⁸ Artists like Koons could always argue that they intended their infringement to "make a statement on some aspect of society at large,"⁴⁹ without ensuring that the public was aware of the original work. Thus, there would be no "practicable boundary" to the fair use exception if every artist could justify his copyright infringement by relying on "a higher or different artistic use."⁵⁰ Judge Cardamone had more to say in the Second Circuit opinion, but suffice it to say that Jeff Koons lost every step of the way, and now that the United States Supreme Court has denied certiorari,⁵¹ Jeff Koons has been stopped dead in his tracks.

"Good riddance to bad rubbish," one of my colleagues in the law school said one day. Another expert in copyright law told me that Koons was a "blatant rip-off artist" who got what he deserved. None of my colleagues in the legal community could find anything to mourn about in Jeff Koons's defeat.⁵² Everyone seemed certain that the court had decided

evidence of copying. The plaintiff may accomplish this goal by demonstrating similarities between the two works and by offering direct evidence, such as eyewitness testimony, which proves the defendant actually copied those similarities from the plaintiff. *Id.* at 13-10.1, 13-10.2. If no such evidence is available, the plaintiff can pursue the second avenue to prove copying—circumstantial evidence. Here the plaintiff proves that the defendant had access to his work, and that the defendant's work is substantially similar to the plaintiff's work. *Id.* at 13-10.1. If the defendant's work is found to be so similar, there is a presumption that the defendant copied the plaintiff's work. *Id.* at 13-7. However, even if the plaintiff proves the defendant copied his work, he does not necessarily win. "If the defendant's borrowing is restricted to the ideas behind the plaintiff's work, then the idea/expression dichotomy excuses the copying." *Yen, supra*, at 400.

46. *Koons*, 960 F.2d at 308 (citations omitted).

47. *Id.* at 310.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Koons v. Rogers*, 113 S. Ct. 365 (1992).

52. I have to acknowledge the sole exception—my friend, Beryl R. Jones—who finds a lot of Jeff Koons's work worthy of thought and possibly of contemplation, and who, too, regretted the removal of *String of Puppies* from our presence. See also Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 *Brook. L. Rev.* 373 (1993).

the case correctly. The law was all on Art Rogers's side. The good guy won because he was right, and the bad guy lost because he was dead wrong.

But copyright law sits in a stagnant body of water. On the surface, it looks like an ordinary pond, with stately lily pads and gently swaying cattails, but below the surface, it is a eutrophic mess. A doctrine with the classic elegance of the idea-expression dichotomy, for example, looks lovely from an aerial view, but from down below, where a fish would breathe if he could, there is a tangled mass of green weeds, dying from too much nutrition. Organic waste proliferates when judges try to make sense of a distinction that makes no sense. The water becomes so thick with weeds, slippery and slimy, so packed with paragraphs wrapped tightly around each other, bound together by tenacious, prehensile tendrils, that it is impossible to pull them apart, to discern where the patterns of consistency lie. Is it any wonder that Learned Hand, after thirty years of paddling around in this sluggish wetland, declared that cases which require the application of the idea-expression dichotomy must be decided on an "ad hoc basis"?⁵³

53. In *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931), Judge Hand devised what has come to be known as the "abstractions" test. Judge Hand was comparing a play, *Abies's Irish Rose*, to a movie produced by the defendant, *The Cohens and the Kellys*. In trying to determine whether the part taken from the play was substantial enough to constitute a copyright infringement, Judge Hand articulated this often quoted distinction between idea and expression:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Id. at 121. Both works in *Nichols* involved interfaith marriages, familial tensions, and the arrival of grandchildren, but Hand concluded that the material copied from the plaintiff was "too generalized an abstraction of what she wrote. It was only a part of her 'ideas.'" *Id.* at 122. Hand himself admitted in *Nichols* that the boundary between idea and expression could not be fixed: "Nobody has ever been able to fix that boundary, and nobody ever can." *Id.* at 121.

Thirty years later, Judge Hand seemed even less certain that any test could be devised to distinguish between idea and expression:

The test for infringement of copyright is of necessity vague. In the case of verbal "works" it is well settled that although the "proprietor's" monopoly extends beyond an exact reproduction of the words, there can be no copyright in the "ideas" disclosed but only in their "expression." Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." Decisions must therefore inevitably be *ad hoc*. In the case of designs, which are addressed to the aesthetic sensibilities of an observer, the test is, if possible, even more intangible.

Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). Thus, whenever the "aesthetic appeal" of the design of two fabrics was the same, Judge Hand found infringement. *Id.*

Zechariah Chafee, Jr., articulated another classic formulation of a similar rule in *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503 (1945). Considering the facts in *Nichols*, Chafee proposed his "patterns" test:

To some extent, the expression of an abstract idea should be free for use by others. No doubt, the line does lie somewhere between the author's idea and the precise "pattern" of the work. This is not a solution, but I find it helpful as an imaginative

If the courts had really wanted to hold that Jeff Koons had not infringed on Art Rogers's copyright, they could have. On the issue of the idea-expression dichotomy, the cases are both numerous and mysterious, a combination that guarantees an almost infinite capacity for manipulation. Due to the eutrophy and sequent failure of this body of law to cohere, these wetlands could yield whatever result a resourceful judge might wish and fish for.

The murkiness of *Rogers v. Koons* is characteristic. The district court and Second Circuit could not agree on what noncopyrightable element Koons claimed to have taken, and at least in the appellate opinions, Koons's argument did not articulate what fact or idea he had considered fair game. Perhaps he used the "idea" of the subject matter of the photograph: a couple sitting on a bench holding eight German shepherd puppies.⁵⁴ But Judge Cardamone of the Second Circuit declared that copyright law does not protect the "idea" of people and puppies on a bench. Instead, it is the expression of that idea, those other features of *Puppies*—the placement, the light, and the expressions of the subjects—that make the photograph "charming and unique," which Koons did not have license to use.

But looking at the "expression" of Art Rogers's photograph, or at least what I believe it to be, I do not find it particularly "charming," although I

description of what should not be imitated. For example, the idea of an Irish-Jewish marriage in a play may be borrowed. With this theme, some resemblance in characters and situations is inevitable, but the line of infringement may not yet be crossed. On the other hand, the pattern of the play—the sequence of events and the development of the interplay of the characters—must not be followed scene by scene. Such a correspondence of pattern would be an infringement although every word of the spoken dialogue is changed.

Id. at 513-14.

For another proposed test, based on Stanislavski's "spine" of a dramatic work, and a tour de force of elegant writing, see Robert Yale Libott, *Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World*, 14 UCLA L. Rev. 735, 742-43 (1967).

For an argument that the idea-expression dichotomy is conceptually grounded in classical and neoclassical views of art which are no longer in vogue, see Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 Ind. L.J. 175 (1990).

54. Some district court cases have actually been about copying the "idea" of a dog. In one decision, *Gund, Inc. v. Smile Int'l*, 691 F. Supp. 642 (E.D.N.Y. 1988), a district court compared two "floppy plush dog toys": one named "Muttsy," by Gund, and the other, allegedly copied, named "the Smile dog". *Id.* at 645. While the court found similarities between the two dogs, the features of the animals were "so generalized as not to be the subject of copyright protection." *Id.* About the generality of the idea, the court said: "The idea of a dog is certainly general. So too is the idea of a more or less realistic, non-rigid stuffed toy dog that 'flops' down on its stomach. It is a common sight to see puppies act in this way." *Id.*

The decision, *Knickerbocker Toy Co. v. Genie Toys*, 491 F. Supp. 526 (E.D. Mo. 1980), was also about stuffed dogs, or "dog dolls," as they were called. These dogs, however, were "nearly identical"; in particular, both dogs were dressed in the uniform of a locomotive engineer. "[T]he only major difference between the dolls is a handkerchief around the neck of plaintiff's doll." *Id.* at 528. The court issued plaintiff his injunction, and it was the engineer's uniform that made all the difference. "Had plaintiff marketed a dog doll by itself, no copyright might have been issued." *Id.* at 529. Thus, there is authority that using the "idea" of a dog as subject matter is not copyrightable. Once you dress the dog up and give him an occupation, however, there seems to be a property interest to protect. I note that the dogs in the Art Rogers photograph do not wear costumes; neither do they declare income.

do find it beautiful and revealing. I admire its black-and-whiteness. Rogers could have chosen to capture the Scanlons and their eight little puppies on color film. The light in the photograph has the look of a lovely day, and that would have guaranteed a splash of blue above Jim Scanlon's shoulder. They would be encircled, no doubt, in green; the wood they sit upon would probably alternate shades of blonde and brown. And those puppy coats, oh, those puppy coats, would probably be shiny black and gold, with puppy paws of soft, buffy, tawny brown, the color of wheat or Brach's caramels. Their noses would be wet black, like round, porous pieces of bituminous coal.

But Rogers chose to put a roll of black- and-white film into his camera. It revealed a different set of attributes, visible only when the distraction of color was removed: the luminescent silver white of Scanlon's hair, indistinguishable from the white in the clouds above, as if both were made of the same divine cotton candy; the elegant redundancy of those puppy paws, spilling over from the pressure of human arms, an elegance which might be missed if they were the color of wheat or Brach's caramels; the pattern of the wood which separates the living mammals in the picture from the world of nature behind; those horizontal lines of the wooden slats which repeat the horizontal line of puppies; the vertical piece of wood separating Jim Scanlon from his wife; the way he senses their distance from one another and tries to make up for it by leaning her way.

To no avail. There is an outward jauntiness and joviality in the Rogers photograph which might have been convincing in color, but when expressed in black and white speaks of sadness to me. I do not see great happiness there, behind those lovely puppies. A tense human hand betrays the smile of its owner. There seems to be an unspoken fault line in the relationship, one that she understands and he does not. Indeed, it seems to be the puppies who are holding this couple together.

Have I been describing the expression, or have I slipped silently into the idea? Perhaps the shades of black and white, the shapes and composition, the look on the Scanlons' faces—perhaps all these qualities constitute the expression. That seems to be Judge Cardamone's suggestion.⁵⁵ But those aspects of the photograph Judge Cardamone specifically mentions are all missing in Koons's life-sized, three-dimensional, colored sculpture: the black-and-whiteness, the diffused sunlight, the relationship of people and puppies to the rectangular latticework which imprisoned them, their exterior happiness and interior sorrow.

Neither does Jeff Koons's sculpture capture the spirit, or the "total concept and feel," of Art Rogers's photograph.⁵⁶ *String of Puppies* is not

55.

But here Koons used the identical expression of the idea that Rogers created; the composition, the poses, and the expressions were all incorporated into the sculpture to the extent that, under the ordinary observer test, we conclude that no reasonable jury could have differed on the issue of substantial similarity.

Rogers v. Koons, 960 F.2d 301, 308 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

56. Another formulation which triggers copyright protection, the test of "total concept and feel," derives from two Ninth Circuit cases: Roth Greeting Cards v. United Card Co., 429

charming or beautiful; it is disturbing. It is also ugly. The colors are garish. The man and the woman have goofball looks, as if they were cartoon

F.2d 1106 (9th Cir. 1970), and *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). In *Roth*, the plaintiff made greeting cards with original artwork and text such as "i wuv you," or "I miss you already . . . and You Haven't even Left . . ." *Roth*, 429 F.2d at 1110. The defendant's cards had similar artwork with identical messages. The Ninth Circuit found a copyright infringement, even though the artwork had not been copied and the words belonged to the public domain. The plaintiff's combination of uncopyrightable words and artwork constituted the copyrightable expression, and the defendant's cards infringed not because they were identical, but because "the characters depicted in the art work, the mood they portrayed, the combination of art work conveying a particular mood with a particular message, and the arrangement of the words on the greeting card are substantially the same . . ." *Id.*

In *Sid & Marty*, the plaintiff produced a Saturday morning children's television program which had costumed characters, including a boy named Jimmy who lived in a fantasy land, "Living Island," along with some talking books and moving trees. *Sid & Marty*, 562 F.2d at 1161. After some abortive negotiations to base a McDonald's advertising campaign on the TV series, McDonald's went ahead and launched "McDonald Land," a fantasy land which had many features similar to "Living Island." The court wrote that both contained "imaginary worlds inhabited by anthromorphic [sic] plants and animals and other fanciful creatures. The dominant topographical features of the locales are the same: trees, caves, a pond, a road, and a castle. Both works feature a forest with talking trees that have human faces and characteristics." *Id.* at 1167. McDonald's claimed that while it had borrowed the "idea" from the TV series—the idea of a "fantasy land filled with diverse and fanciful characters in action"—the expression of the idea was sufficiently dissimilar to warrant a finding of no infringement. *Id.* at 1165.

The Ninth Circuit in *Sid & Marty* set up a two-part test to determine whether there was a substantial similarity between the two works. First, the court would apply the "extrinsic test," which sought to determine whether the two works shared the same ideas. This part of the test involved making a list and an analysis of the characteristics of each work. Expert testimony would be appropriate at this stage. *Id.* at 1164. The second part of the test would take the ideas identified in the extrinsic part and determine whether they were substantially similar enough to constitute an infringement. The determination in the second part, called the "intrinsic test," was to be made by the "response of the ordinary reasonable person." *Id.* It should be noted that the court particularly emphasized the immaturity of the audience at whom the two works were directed. *Id.* at 1166. The Ninth Circuit also applied a test of "total concept and feel" and found an infringement. *Id.* at 1167.

When we look at these two "total concept and feel" cases and apply them to the photograph by Art Rogers and the sculpture by Jeff Koons, it is difficult to see how anyone could find their "total concept and feel" to be even remotely similar. Judge Cardamone called the scene in the photograph "a smiling husband and wife holding a litter of charming puppies." *Koons*, 960 F.2d at 303. Compare that to the following characterization of the "total concept and feel" of Koons's sculpture by Kirk Varnedoe, the curator of the Museum of Modern Art:

Koons[s] figurines were shocking because of the way they looked. They were nightmarish—devil dogs, in which the insipid language of the cartoons' over-accentuated contours and biscuit glazes were suddenly made hard and staring. The contours of each piece were as chubby as a Disney drawing, but glacially hard—like Muppets which had just seen the Medusa.

Kirk Varnedoe & Adam Gopnik, *High & Low: Modern Art and Popular Culture* 396 (1990), quoted in *Amicus Curiae Brief of the National Artists Equity Association* at 7, *Koons v. Rogers*, 113 S. Ct. 365 (1992) (No. 92-297). In *Roth*, there were two sets of sentimental greeting cards with similar artwork and identical romantic sayings. *Roth*, 429 F.2d at 1110. In *Sid & Marty*, there were two fantasy lands with similar topography, inhabitants, and appeal to the toddler. It is easy to see how these two sets of works could be said to share a "total concept and feel." *Sid & Marty*, 562 F.2d at 1167. It is not so easy, however, to see how smiling husbands and charming puppies share much in the way of "total concept and feel" with devil dogs and Muppets who have just seen the Medusa.

characters. Like store mannequins, their faces bear no pain—or much intelligence. The puppies are not really young German shepherds anymore. Their coats, oh, those puppy coats, are still lovely, but are covered with smooth fur of glistening purple and blue, their collars borrowed from the sixteenth century. There are three daisies on the sculpture, two in predictable locations at the base of feminine ears, and another resting quite whimsically on the man's veneered white head.

It is incredible to me that anyone could find this large, clunky sculpture “substantially similar” to Art Rogers’s black-and-white photograph. Perhaps the problem stems from the methodology of the comparison. The judges were looking at two photographs of equal size, and from that flat format the common configuration is particularly manifest. But beyond that, there is no similarity in expression. Indeed, I find myself in wonderment that my own aesthetic response is so strong, and yet so out of sync with the judges who wrote the opinions.⁵⁷ The judges proclaimed that all reasonable people would see it their way and find the two works of art substantially similar. Not only that, they were so confident of the universality of their aesthetic response that they granted a motion for summary judgment. Jeff Koons never even got to pose the question to a jury of his peers for determination, to see if there were any other reasonable people who might see his sculpture in a different way.

57. Brenda Richardson, the Deputy Director for Art at the Baltimore Museum of Art, said more or less the same thing in her affidavit:

I do not see how anyone can say that there is a reference to a photograph in the “String of Puppies” sculpture. For me the point is so plain I can hardly say more. I am surprised it is a question in the lawsuit. Perhaps the controversy is created by reducing this large, three dimensional work to some black and white xerox copy of a photograph. Thus by misrepresenting the sculpture, one might try to recreate the photograph. But even then, for me, there still is no aesthetic connection. There is nothing photographic in the Koons sculpture. The sculpture is not alive and it is not real.

Affidavit of Brenda Richardson at Joint Appendix A 897, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) (No. 91-7396), *cert. denied*, 113 S. Ct. 365 (1992).

It may even be that the kinds of perception reasonable people might use in looking at Art Rogers’s photograph and Jeff Koons’s sculpture are radically different. The psychologist Viktor Lowenfeld distinguished two kinds of perception: haptic and visual. Haptic perception, which is used almost exclusively by infants, “arises from within and is subjective. It is in a sense an externalisation [sic] of the inner feelings and experiences of the individual, especially with respect to bodily sensations of muscular movement, all the aspects of touch and responses to vibration [Haptic perception is] charged with subjectivity and often with an emotional quality” R.W. Pickford, *Psychology and Visual Aesthetics* 48-49 (1972).

Visual perception, on the other hand, is objective and “depends primarily and directly on the structure and organisation [sic] of the environment It is a map- like scheme of the external world, representing its three dimensions in a flat visual pattern.” Id. at 49. Children start out perceiving haptically, but “visual perception becomes superimposed on it, gradually taking a dominant position for most people.” Id. With haptic perception, objects “do not take their shapes, sizes and relative positions from the map-like systems of vision, but from the exploratory activities made by the individual in his tactile and motor contacts with them.” Id. The art of children, the art of “primitive peoples,” and expressionist art use both visual and haptic modes of perception. Classic nineteenth century art and photographs tend to rely more on the visual mode of perception. Id. at 53. My guess is that we would use the visual mode to appreciate Art Rogers’s photograph, and that haptic perception is more dominant in our appreciation of Jeff Koons’s sculpture.

And what exactly is the "idea" of Art Rogers's photograph? Is it really just the subject matter?⁵⁸ If so, Koons clearly used that. Just like Rogers's photograph, his sculpture has as its subject a man and woman holding multiple puppies. But if the idea of Rogers's photograph is more than just man and womanness, and multiple puppiness, what might it be? Maybe the idea has to do with the relationship that can arise between members of our species and those of another,⁵⁹ a relationship sometimes built on human loneliness, perhaps childlessness, and the lure of lovely, little dogs to fill the vacuum, or a relationship perhaps built just on a preference for puppies over people. Maybe the idea has nothing to do with human psychology. Maybe Art Rogers was simply astounded by the mindless redundancy of

58. One case which supports the notion that the "idea" is the subject matter is *Aliotti v. R. Dakin & Co.*, 831 F.2d 898 (9th Cir. 1987). The plaintiff, a designer of soft toys, showed photographs and prototypes of six of her stuffed dinosaurs to toy manufacturer executives who were considering the sale of the company for which she had worked. Several months later, after deciding not to buy the company, Dakin developed its own line of stuffed toy dinosaurs. The district court held that the dolls derived from the same idea because "both lines of products depict the same subject matter." *Id.* at 901.

Note, however, the features making the expression of these same ideas so dissimilar as to support a finding of no infringement: "The 'Ding-A-Saur' dolls depict a sleepy eyed, 'dingy' dinosaur with exaggerated facial and other anatomical features By contrast, the Dakin 'Prehistoric Pet' dolls are more accurate depictions of dinosaurs; the dolls reflect less personality." *Id.* at 900. These differences in expression are similar to the differences found in the figures which sit on the bench in Art Rogers's photograph and the figures in Jeff Koons's sculpture, and yet no infringement was found.

A very similar case is *Eden Toys v. Marshall Field & Co.*, 675 F.2d 498 (2d Cir. 1982). Stuffed snowmen were at issue. The idea seems to have been the object created by rolling "moist snow into balls and placing them one atop the other," simulating facial features with lumps of coal. *Id.* at 500. The snowmen differed in their expression, however, because their noses had slightly different diameters, the intervals between buttons were different, their hat bands were different, and so on. *Id.* In a dissent, another judge looked at the two snowmen and found they had the same "aesthetic appeal," and pointed out that two toy buyers are not going to "carry rulers to detect that the snowmen's nose widths, lip lengths, eye spaces and button diameters different by fractions of an inch." *Id.* at 501. Here we have a case in which no infringement was found, and yet the two objects were so similar that it took a ruler to discern the differences between them.

59. Man's close relationship with the dog has a long history. Dogs were probably taken in by man during the hunting and gathering period, although their usefulness was not really with hunting but with "keeping humans warm at night, alerting them to intruders, and cleaning up garbage." Mary Randolph, *Dog Law* 3 (1989). Through the Neolithic revolution (approximately 10,000 years ago), dogs stayed on when man settled down into permanent communities. Our psychological commitment to the canine is substantial. In a survey published in *Psychology Today*, pet owners confessed that ninety-nine percent talk to their pets, half keep pictures of their pets in wallets or on display, and one quarter have a portrait of their pet and celebrate the pet's birthday. *Id.* at 4. Even Sigmund Freud loved his pet dog, allegedly named "Topsy," of whom he said: "affection without ambivalence, the simplicity free from the almost unbearable conflicts of civilization, the beauty of an existence complete in itself . . . that feeling of intimate affinity of an indisputed solidarity." *Id.* at 8-9. (It is rich, is it not, to think that Freud's dog's name was "Topsy"?)

My friend, Susan J. Goss, questioned whether Freud's dog was actually named "Topsy" and did further research on the matter. Another more scholarly source indicates that Freud's dog was actually named "Jo-Fi" and that "Topsy" was the name of Maria Bonaparte's dog. 3 Ernest Jones, *The Life and Work of Sigmund Freud* 141 (1957). I was a bit disappointed; while "Jo-Fi" is a pretty dumb name, it is not as silly as "Topsy."

nature and the relentlessness of DNA, folding and unfolding, playing itself out in limp paw after limp paw, over and over again. Maybe he was just taking a picture.

Of one thing I am fairly certain: Art Rogers did not mean to communicate the idea of banality. The dictionary says that “banal” is an adjective, meaning “repeating a worn-out convention or type; unaffecting and drearily predictable . . . [s]ee synonyms at ‘trite.’”⁶⁰ But what is trite about a string of eight, soft, intelligent, big-eyed, freshly minted living things? In my opinion, the species probably would not even matter, although I find those animals that perch on the upper limbs of the evolutionary tree more appealing. Indeed, my aesthetic response might be limited to any string of baby mammals, be they human infants, German shepherds, or dormice, unless someone could capture a string of fish that would make me feel the same way.⁶¹

Even if I am unable to discern the banality, something in Art Rogers’s photograph caught Jeff Koons’s eye, and whatever it was, it struck him as a “workable source” of banality.⁶² This we know only by inference. If someone had stumbled into the Sonnabend Gallery on a whim, knowing nothing about the exhibition or Jeff Koons or postmodernism, the only clue about the artist’s intention would have been the title of the exhibition: “The Banality Show.” What does that sign really mean? That the artworks included in the exhibition represent some banal things out there in the world, like people with puppies? Or that the artworks which represent some things out in the world are themselves banal? Or is it double-whammy banality: that the artworks which represent some banal things out there in the world are banal too? Is it possible that the term “banal” refers not to any objects represented in the artworks, or to the artworks themselves, but to the people looking at them?⁶³ What about Jeff Koons himself? Is he inside the sculpture looking out, immune from prosecution, or does he stand outside with us, alienated from his artwork, indicted as coconspirator for the crime of banality?⁶⁴

60. The American Heritage Dictionary of the English Language 103 (William Morris ed., 1975).

61. Probably, I am just a cornball. I often wonder if my radar for detecting banality might be out of whack. One of the dangers of growing up in Columbus, Ohio is that banality and reality are so indistinguishable, perhaps even co-extensive, that I am never sure when I am in the presence of either, or both.

62. *Rogers v. Koons*, 960 F.2d 301, 305 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

63. Robert Hughes, who is no fan of Jeff Koons or his work, suspected the butt of the joke may indeed be the people looking at Koons’s artwork:

Koons has, however, made a contribution to American culture in the form of comedy: the sight of so many critics, dealers and museum folk peering into the demitasse of his talent and declaring it an oracular well whose contents address issues, as the phrase goes, of class, race, money, sex, obscenity, beauty, power and desire. Art is short, bibliography long.

Robert Hughes, *The Princeling of Kitsch*, *Time*, Feb. 8, 1993, at 79.

64. Separating Jeff Koons from his work is not always that easy. As he himself says (modestly), “My art and my life are totally one. I have everything at my disposal and I’m doing what I want to do. I have my platform, I have the attention, and my voice can be heard. This is the time for Jeff Koons.” Jeff Koons, *The Jeff Koons Handbook* 120 (1992). Next to one of

But even without the rubric of banality, many people who confront Jeff Koons's larger-than-life sculpture must be moved to ask: What is this guy up to? It is hard to see the beauty of the thing, so is he trying to make me laugh? And if so, at what? Is the sculpture supposed to say something funny about two people and eight puppies? Or something funny about a sculpture of two people and eight puppies? Or something funny about someone who would come and look at a sculpture of two people and eight puppies? Or something funny about someone who would pay \$125,000 for a sculpture of two people and eight puppies? Or something funny about someone who would ask: What is this guy up to?

The fact is, we do not really know what either Art Rogers or Jeff Koons was up to. And if it were not for the idea-expression dichotomy, and the power of its application, it would not matter. Both men have created art objects which command our attention, and art objects which command our attention generally become orphans. They are abandoned in public places without hats or mittens, with no piece of paper safety-pinned to their jackets bearing a name, telephone number, or statement of authorial intent. The important relationship is no longer that of parent to child, but of child to stranger, of photograph or sculpture to you or me. What matters now is how *we* see the thing.⁶⁵ And it can be a risky business, this seeing of the thing, this wondering what the guy was up to, even though the guy has vanished into thin air, or has been lowered into a hole in the ground, or scattered ten miles out to sea. The risk is not to the motherless child; the risk is to you and me. It is the risk attendant to any serious exploration or transcendence of self: the risk of revelation.

Sometimes the revelation is metaphysical. One of my favorite paintings is on the second floor of the Museum of Modern Art in New York: Cezanne's painting of hills and rocks and fir trees.⁶⁶ When I first look at it,

my favorite photographs which features Jeff Koons and two pigs, he wrote, "I was there with two pigs—a big one and a little one—so it was like breeding banality. I wanted to debase myself and call myself a pig before the viewer had a chance to, so that they could think more of me." *Id.* at 90.

65. The analogue to the theory of interpretation in visual arts that I am suggesting is the "reader response" theory in literary criticism. Under this theory, an artwork does not consist entirely of the art object itself, but requires the presence of the reader to bring the work into existence:

The work is more than the text, for the text only takes on life when it is realized, and furthermore the realization is by no means independent of the individual disposition of the reader—though this in turn is acted upon by the different patterns of the text.

The convergence of text and reader brings the literary work into existence . . .

Wolfgang Iser, *The Implied Reader: Patterns in Communication in Prose Fiction from Bunyan to Beckett*, in *Reader Response Criticism* 50 (Jane Tompkins ed., 1980).

66. Paul Cezanne, *Pines and Rocks* (1904), reproduced in Matthew Baigel, *A History of American Painting* 165 (1971). What if Cezanne had painted this scene from a photograph and not from "real" life? Would we say that he had infringed upon the photographer's copyright? Cezanne took objects from the realm of reality, regardless of whether he painted from rocks captured in a photograph or from rocks appearing before his eyes, and transformed them into something which seems unreal. Koons has done the same thing, by rendering unreal the very real people and puppies who were portrayed in Art Rogers's photograph. I am grateful to John B. Koegel for this insight and for his other useful observations.

I say to myself, oh, isn't this beautiful, and aren't those lovely greens and blues and browns and rocks and trees, and aren't I grateful I live on this planet and not another. But if I stay in front of that painting for one beat too long, I feel nauseated. Cezanne and I do not agree on the boundaries of things. He does not seem to see categories that I use to grope my way through life, with sharp, crisp edges created by the names I give them: the rock, the tree. Some other version of reality dictates his edges; he uses some other set of principles foreign to me to bring order to chaos.

Sometimes the revelation is political. There is a tremendous painting in the Art Institute in Chicago by Caillebotte, a great, big movie screen of a thing, which has a well-dressed man with a woman on his arm, walking in the rain carrying an umbrella; he is headed straight for me.⁶⁷ There too, I am afraid to stay in front of the painting too long.⁶⁸ I do not fear that the man will not see me and mow me down; I fear that he *will* see me and mow me down. There is a statement in that painting about power and moustacheness and filling up the middle of the picture as a matter of right. I feel like a stray dog, dashing across the street in that Parisian rain, my paws wet and shaggy, my presence in his presence a quirk of fate, and an inconsequential quirk at that.

Sometimes the revelation is personal. In the next room is a soft Renoir of a lady in her bath.⁶⁹ She is plump in her purple pinkness, and she prompts me to think about what she looks like without her clothes on, about what I look like without my clothes on, about the oddness of fat and fashion and the luck of the draw on one's century.

In the postmodern tradition, the revelation is usually conceptual.⁷⁰

67. Gustave Caillebotte, *On A Rainy Day, Place del' Europe* (1877), reproduced in Keith Roberts, *Painters of Light: The World of Impressionism* 55 (1978).

68. Giorgio de Chirico wrote about Schopenhauer's insight that madmen are people who have lost their memories. He cited the example of entering a room and noticing paintings on the wall, a bird cage, a man seated in a chair, and a bookcase with books. These objects do not startle him because

[a] series of memories which are connected one to the other explains to me the logic of what I see. But let us suppose that for a moment, for reasons that remain unexplainable and quite beyond my will, the thread of this series is broken. Who knows how I might see the seated man, the cage, the paintings, the bookcase! Who knows with what astonishment, what terror and possibly with what pleasure and consolation I might view the scene.

Giorgio de Chirico, *On Metaphysical Art*, in *Theories of Modern Art: A Source Book for Artists and Critics* 450 (Herschel B. Chipp ed., 1968) [hereinafter *Theories of Modern Art*]. De Chirico concluded that everything has two aspects, a normal one that most people usually see and another, "the spectral or metaphysical which can be seen only by rare individuals in moments of clairvoyance or metaphysical abstraction . . ." Id.

My guess is that my own terror in the presence of some paintings has to do with an unconscious recognition of these multiple realities and a lack of courage to lose the illusion of my normalcy.

69. Pierre Auguste Renoir, *Nude (Study for The Great Bathers)* (1884-85), reproduced in Sophie Monneret, *Renoir 107* (Emily Read trans., 1989).

70. I found it interesting to discover that at least in 1988, Jeff Koons lived in the Liberty Towers near Wall Street, a full service hotel. He had no studio because "he doesn't paint or draw. What he does is come up with concepts—gathered from shop windows, television, magazines—which he takes to little factories, mostly in Italy, where traditional artisans

Seeing the thing does not really constitute the revelation; it is the idea of seeing the thing in this place, the museum, that leads to uneasy reflection. Urinals and soup cans in sacred spaces must have been disturbing to those who first apprehended them.⁷¹ Their presence in the temple silently chipped away at the assumptions upon which the temple itself had been erected: the privileged status of the art object, the severability of art from

manufacture them." Amei Wallach, *The Art and Power of Jeff Koons*, *Newsday*, Dec. 1, 1988, at 4. Koons's approach to his work is purely conceptual.

Compare Koons's work habits with those of most visual artists who must scramble to find studios, sometimes having to convert a portion of their living quarters into a workshop. In the late 1970s, a municipal ordinance which prohibited families from living and working in the same apartment unit threatened artists in Soho with eviction. With the assistance of the Volunteer Lawyers for the Arts, the artists were successful in getting an exemption for artists who lived and worked under the same roof. Leonard D. DuBoff, *The Deskbook of Art Law* 774 (1977). Jeff Koons seems to carry his studio around in his head.

71. Consider some of the rhetoric in Congressman George A. Dondero's speech given in the United States House of Representatives in 1949:

Leger and Duchamp are now in the United States to aid in the destruction of our standards and traditions. The former has been a contributor to the Communist cause in America; the latter is now fancied by the neurotics as a surrealist. . . . It makes little difference where one studies the record, whether of surrealism, dadaism, abstractionism, cubism, expressionism, or futurism. The evidence of evil design is everywhere, only the roll call of the art contortionists is different. The question is, what have we, the plain American people, done to deserve this sore affliction that has been visited upon us so direly; who has brought down this curse upon us; who has let into our homeland this horde of germ-carrying art vermin?

George A. Dondero, *Modern Art Shackled to Communism*, *reprinted in* *Theories of Modern Art*, *supra* note 68, at 496-97.

Compare this scary rhetoric to some words spoken earlier in this century. In his famous speech inaugurating the "Great Exhibition of German Art" in 1937, Hitler railed against the degenerate, Bolshevik, "Jewish" modern art and sought to demonstrate to the public the moral and aesthetic superiority of the "true German art."

Cubism, Dadaism, Futurism, Impressionism, etc., have nothing to do with our German people. For these concepts are neither old nor modern, but are only the artificial stammerings of men to whom God has denied the grace of a truly artistic talent, and in its place has awarded them the gift of jabbering or deception.

Adolph Hitler, *Speech Inaugurating the "Great Exhibition of German Art" (1937)*, *in* *Theories of Modern Art*, *supra* note 68, at 479. If it turned out that these "so-called artists" really saw things as their paintings portrayed, the

Ministry of Interior of the Reich would then have to take up the question of whether further inheritance of such gruesome malfunctioning of the eyes cannot at least be checked. If, on the other hand, they themselves do not believe in the reality of such impressions but try to harass the nation with this humbug for other reasons, then such an action falls within the jurisdiction of the penal law.

Id. at 480.

It is interesting to note that the young Hitler was himself an artist during the period before the First World War. Recently, twenty of his watercolors were put up for auction in Trieste, causing political protest. Alan Cowell, *Hitler's Watercolors Too Hot for Italy's Comfort*, *N.Y. Times*, Nov. 20, 1992, at A4. While the paintings had been valued at \$250,000, no one wanted to buy them and the auction was declared closed. *Auction of Hitler Watercolors Attracts Only Silence*, *Chi. Trib.*, Nov. 22, 1992, at C28. Although recent literary critics have killed off the notion that an author's will is somehow manifested in a text, most people still believe there is some residue of an artist's self in his or her works. In the instance of Hitler's paintings, no one wants that particular residue of self to reside in their homes, despite the paintings' historical interest.

the rest of messy life, the worship of originality. The risk of revelation was and continues to be real, having quite simply to do with crumbling foundations.

And when I look at a photograph of Jeff Koons's sculpture *String of Puppies*, I suppose, since I know where he fits into the postmodern tradition, that I should think about crumbling foundations. But I don't. When I look at a photograph of that sculpture, I am blasted off my feet by those purple puppies. I have never seen puppies like that; neither have I ever seen such odd orange and beige people, truncated, their legs cut off right below the knees, sucked into the platform of white plaster by a force much stronger than gravity.⁷² And when I gaze at their faces, and into their eyes, my first response is nervous laughter. The laughter covers up a deep apprehension which comes from a flash of insight: The people and the puppies in Jeff Koons's sculpture do not come from this planet.⁷³

This insight raises all kinds of questions about artistic vision, and sleep, and where we fit into the universe. How is it that Jeff Koons came to see the people and the puppies of another place in space? Could it be that an extraterrestrial transmitted the representation to him during rapid eye movement (REM) sleep? What does that tell us about the artist's free will? Is the artist nothing more than a receptor, a crack in the collective will through which a more dominant life form might insinuate itself? Could the image be a warning about what our species might evolve into? Or was the image sent by an alien to convey greetings, to reassure us with familiar forms, to communicate universality, a tender hello through the vast expanse of space, sent on the white petals of a daisy that does not belong in this place? Or maybe the image was not sent at all, but merely witnessed by

72. In an essay entitled *Sculpture in the Expanded Field*, Rosalind Krauss characterized modernist sculpture as nomadic, "functionally placeless and largely self-referential." Rosalind E. Krauss, *Sculpture in the Expanded Field*, in *Anti-Aesthetic: Essays on Postmodern Culture* 31, 35 (Hal Foster ed., 1983). Koons's *String of Puppies* has a modernist aspect to it, at least according to one of Krauss's criteria, the dominance of the base: "Through its fetishization of the base, the [modernist] sculpture reaches downward to absorb the pedestal into itself and away from actual place The base is thus defined as essentially transportable, the marker of the work's homelessness integrated into the very fiber of the sculpture." *Id.* at 35.

One art critic has noted a transition in Koons's work from sculpture to what he calls "statues." It seems as if the presence of the base is primarily responsible for this observation: "Koons is principally a sculptor, but a marked transition occurs in his work in 1986: He stops making sculpture and begins, specifically, to make statues. Sculpture, as a modern ideal, toppled the bourgeois conception of statuary, but Koons put the statue back on its pedestal." Christopher Knight, *Jeff Koons: A Scrubbed New Life*, *L.A. Times*, Dec. 14, 1992, at F1.

73. The Curator of Painting and Sculpture at the San Francisco Museum of Modern Art, John Caldwell, had a similar response:

The work begins to become hallucinatory. What started off as cute or comfortable quickly becomes uncomfortable and even threatening as the larger than life size aspect of the sculpture evokes a sense of being in a dream or even a nightmare This is not a real man and it is not a real woman. They are not alive; they are apparitions. They appear to have been invaded by evil spirits . . . the dogs become mutants or replicants. The figures become demented or demonic. The sculpture becomes horrific. We are unnerved and our sense of our own reality, its sources and its meanings, is called deeply into question.

Affidavit of John Caldwell at 4, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) (No. 91-7396), *cert. denied*, 113 S. Ct. 365 (1992).

Jeff Koons in some nocturnal journey of which he has no memory. And if he is traveling in such a way, where might I find myself inside my own dreams tonight? Will I be able to find my way back to my own bed, and to myself? Do I want to?

That is one way to see *String of Puppies*, but certainly not the only way. My guess is that most people laugh when they first see a picture of the sculpture. The source of their laughter undoubtedly has nothing to do with my own deep apprehension. Maybe they laugh at Koons's alleged critique of our vapid materialistic culture. Maybe they laugh at the scale of those cartoon characters, expanding like Alice from eating some cake without reading its consumer information label.⁷⁴ It does not matter to me what they are laughing at. The loneliness of my interpretation is easy to bear; I have nothing invested in convincing other people of the truth of my revelation.

I do have a lot invested, however, in seeing the sculpture myself, and in having other people see the sculpture so that I can hear what they have to say about those people, or those purple puppies, and what made them laugh in their own nervous way. Who knows, I might come to see the sculpture in a different way. I might even come to see something else in a different way, something having nothing to do with people or puppies, something profound and unexpected.

It is important that we all engage in this risky business of seeing the thing. But the fact is, we will never again be in the presence of *String of Puppies*. Banished from the temple, it may no longer occupy public space. Its existence as a work of art is over. The sculpture got caught in a white mesh net and came to a damp and violent end.

Searching for the right label in the law is not unlike butterfly classification. Butterflies are members of the order Lepidoptera, deriving their name from the presence of scales on the wings. Scientists divide Lepidoptera into a number of super families, among which are the butterflies and the moths.⁷⁵ How does a collector distinguish between a butterfly and a moth? By examining the insect trapped inside his net. Is it a gray-brown color, with simple tapering antennae, wings spread flat, and a set of strong bristles (known as the frenulum) at the base of its hindwings? Was its interrupted flight nocturnal or crepuscular? If so, the captive is probably a moth.⁷⁶ Did it instead rest on a flower with open wings, poised upright over its back? Do its antennae have a clublike swelling at or near the tip? Was its interrupted flight in sunlight? Do the brilliant colors and the iridescence of its wings dazzle the beholder and take his breath away? If so,

74. "'Curiouser and curiouser!' cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English); 'now I'm opening out like the largest telescope that ever was! Good-bye feet!'" Lewis Carroll, *Alice's Adventures in Wonderland* 17 (Heritage Press 1941) (1865).

75. Alexander B. Klots, *A Field Guide to the Butterflies of North America, East of the Great Plains* 57 (Peterson Field Guide Series No. 4, 1951).

76. *Id.*

the captive is probably a butterfly.⁷⁷

The label tells us something about its bearer's value. If the captive is classified as a butterfly, it rates a more refined identification and might be worthy of collection. This is less likely if the classification turns out to be that of moth. There is little romance to a moth collection, no colors to confound. The net is emptied and the bristly, brown insect tossed aside, left to drag its flat-winged back along the dusty road.

The law, too, has labels which have consequence. When the label of "parody" did not attach to Jeff Koons's sculpture, it lost a chance at protection from the fair use exception.⁷⁸ It became a rank and reviled imitation because Jeff Koons intended to create more generally a "satirical critique of our materialistic society," not to poke fun at Art Rogers's photograph.⁷⁹

There were just not enough people who knew about Art Rogers's photograph to recognize what Jeff Koons was allegedly poking fun at.⁸⁰

77. *Id.* at 57-58.

78. Parody is not one of the statutory defenses under 17 U.S.C. § 107 (1988), the House Report on § 107 specifically mentioned it. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 5 (1976). Parody has also been the subject of many judicial decisions. For a summary, see William F. Patry, *The Fair Use Privilege in Copyright Law* 153-76 (1985).

79. *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

80. In legal terms, no part of Jeff Koons's sculpture "conjured up" the ghost of Art Rogers's photograph, since that ghost had not become part of the national psyche. The "conjure up" test is used in considering the third factor in a fair use determination "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(4) (1988). The parodist may use enough of the work to "recall or conjure up the original," but use beyond that runs "the calculated risk that on all the facts involved, a trier of fact may find the taking substantial." *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348, 350 (S.D. Cal. 1955). The test was later expressly applied in *Berlin v. E.C. Publications*, 329 F.2d 541, 544-45 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

In its recent decision on parody, the Supreme Court applied a "transformativeness" test in determining whether a work may claim fair use. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994). Acuff-Rose owned the copyright to Roy Orbison's 1964 hit song, "Oh, Pretty Woman," and the rap group 2 Live Crew wrote and recorded a satirical version of the song called "Pretty Woman," having been denied a license from Acuff-Rose. Acuff-Rose filed suit for copyright infringement, and the district court granted the defendants' motion for summary judgment on the ground that the rap song was a parody protected by the fair use exception. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1160 (M.D. Tenn. 1991). The Sixth Circuit reversed, holding that the use of a copyrighted work primarily for commercial purposes is presumptively unfair. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437, 1439 (6th Cir. 1992). (In oral argument, Justice Scalia did not seem receptive to the use of popular culture in parody, asking "why criticism should be encouraged more than patriotism. If you can criticize society in many different ways . . . why do you need to use my popular and catchy tune?" 62 U.S.L.W. 3343 (U.S. Nov. 16, 1993).)

According to the Court, the inquiry focuses on

whether the new work merely "supersede[s] the objects" of the original creation . . . altering the first with new expression, meaning, or message . . . in other words, whether and to what extent the new work is "transformative." . . . [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Id. at 1171 (citations omitted). The objective of copyright law, promoting science and the arts, is furthered by the creation of these transformative works; "[s]uch works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright." *Id.*

"Parody" is a term which refers to "a literary or artistic work that broadly mimics an author's characteristic style and holds it up to ridicule."⁸¹ It belongs in a rather special category of poking fun—a distorted imitation. In order for us to find humor in that imitation, we have to have knowledge of the parodied work.⁸² In the language of philosophy, knowledge of the parodied work is a necessary, although not sufficient, condition for finding the imitation funny. Because Art Rogers's photograph had not entered the nation's "collective subconsciousness,"⁸³ it could not be considered a

(I have dubbed the test to be "transformativeness," although the Supreme Court did not attach a label to it. The test strikes me as sufficiently opaque to become a permanent fixture of copyright jurisprudence.)

81. The American Heritage Dictionary of the English Language 954 (William Morris ed., 1975). Another definition of parody is as follows: "Any form of critical or humorous expression which depends on a preexisting work of authorship for its creation and contains independent effort." Melanie A. Clemmons, *Author Versus Parodist: Striking a Compromise*, 46 Ohio St. L.J. 3, 3 n.1 (1985).

82. The Second Circuit has not taken the position that the satire need only be of the parodied work, but that it must be at least a part of the parodied work. See *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981).

We agree with appellant's argument to the extent of holding that a permissible parody need not be directed solely to the copyrighted song but may also reflect on life in general. However, if the copyrighted song is not at least in part an object of the parody, there is not need to conjure it up.

Id. at 185. The Second Circuit then cited the famous Ninth Circuit opinion, *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). In a much earlier opinion, the Second Circuit indicated that parody had a much broader meaning and could still be a parody even if it did not criticize the underlying work, but instead criticized more general societal trends. *Berlin*, 329 F.2d at 545. In that case, *Mad Magazine* published satiric lyrics that parodied the songs of Irving Berlin. *Id.* at 541-42. While the parodies were written in the same meter as the original lyrics, the subject of humor was not the songs themselves, but a much broader range of social conditions (e.g., "a caustic commentary upon the tendency of a baseball hero to become a television pitchman," or "a burlesque of a feminine hypochondriac"). *Id.* at 543. The parodies were "as diverse in their targets for satire as they were broad in their humor." *Id.* The Second Circuit has since narrowed the scope of permissible parody.

In the recent *2 Live Crew* decision, the Supreme Court reiterated the need for the parody to use "some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works." *Campbell*, 114 S. Ct. at 1172. In a footnote, however, the court indicated that parodies that more loosely target an original than *2 Live Crew's* parody of the rock ballad, "Oh, Pretty Woman," might still fall within the parody analysis, particularly when there is little or no risk of market substitution. In contrast to parodies that risk becoming a substitute for the original,

when there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, 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, as may satire with lesser justification of the borrowing than would otherwise be required.

Id. at 1172 n.14. Surely Koons's sculpture posed no risk of being substituted in the market for Rogers's photograph and notecard, and should thus qualify for this "lesser justification" for the borrowing.

83. "I saw this note card as part of mass culture. It was a commercially presented image. I saw it as resting in the collective sub-consciousness of people (regardless of whether the card had actually ever been seen by such people)." Affidavit of Jeff Koons at 5, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) (No. 91- 7396), *cert. denied*, 113 S. Ct. 365 (1992).

Koons seemed to be drawing from a popularized version of Jungian theory. Jung wrote:

parody.⁸⁴

Why do we cling to such a narrow definition of parody? Here science and the law part company. If a new creature fell into the net and did not fit the preexisting taxonomy, the scientist would not be shy about creating a new box for it. In fact, he would be thrilled, since by custom that new box would bear his own identity, dressed up in elegant Latin. There is a graciousness about change in the scientific community, a receptivity to wonder, predicated on a certitude that the boundaries really exist. The lines were drawn one foggy morning at the beginning of time, and as the sun heats up the day, dispelling the mist, new categories are revealed. The scientist discovers; he does not fabricate.

We lawyers are paralyzed by our deep need and passion for places to put things. The paralysis is derived from our unconscious recognition, the legacy of legal realism, that law-walls are made of papier-mâché. If the only box we can find to accommodate the new creature is too small, we would much rather preserve the structure of the box and sacrifice the new creature. Keeping a category in its place prevents the fragile walls from crumbling, and blind loyalty to the preexisting taxonomy prevents us from confronting our profound skepticism about the ontology of law. Because law-walls are fabricated, we are compelled to treat them as discovery. We cannot afford to be gracious about expanding our taxonomy because we all know who mixed the paste and dipped the strips of paper.

But there should be no shame in papier-mâché, or in the boundary's failure to bear the mark of divinity. Even papier-mâché walls are put up with purpose and design. Our ancestors were not haphazard in their architecture of copyright law. They had a goal: to promote the growth of human knowledge and encourage new forms of expression. Their means of achieving that goal was to give the author a limited monopoly on the objects of his creation. This absolute grant of property, however, also stifled creativity because no one else could use these ideas that copyright law had coaxed into the air. In order to strike the proper balance between protecting the author's property and generating new creations, courts came up with the fair use exception.⁸⁵

There are many symbols, however (among them the most important), that are not individual but *collective* in their nature and origin. These are chiefly religious images . . . [T]hey are in fact 'collective representations,' emanating from primeval dreams and creative fantasies. As such, these images are involuntary spontaneous manifestations and by no means intentional inventions.

Carl G. Jung, *Approaching the Unconscious*, in Carl G. Jung et al., *Man and His Symbols* 41-42 (1964).

84. *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

85. Lord Ellenborough is often cited for his early articulation of the utilitarian objective of the fair use doctrine: "[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science." *Cary v. Kearsley*, 170 Eng. Rep. 679, 681 (1803). The fair use defense is an integral part of the copyright scheme: "Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." Pierce N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

Exceptions are like shadows; the contours of the rules determine their shapes. What was there about parody that promoted the growth of human knowledge and encouraged new forms of expression? Courts have articulated two valuable functions of parody: Parody criticizes a work, and it makes us laugh.⁸⁶ Criticizing a work helps us reevaluate our forms of artistic expression.⁸⁷ When Sid Caesar⁸⁸ and Jack Benny⁸⁹ mimicked the melodramatic movies that many people had paid good money on Saturday afternoon to see, their parodies forced us to confront the violins and our love of crying in the dark over impossible romance in improbable situations. Our laughter was prompted partly by the sappiness of the genre, and partly by the fact that it was now Saturday night, and we were in our living rooms, watching free TV.

It is parody's other function, however, its capacity to make us laugh, that merits its protection. Usually when we laugh, the circumstances prompting the response are not very funny. Mark Twain, in one of his many eruptions of wisdom, once wrote that the "secret source of humor itself is not joy, but sorrow."⁹⁰ People often use humor to channel aggression, to diffuse tensions by providing an avenue of expression for hostile or ambivalent feelings,⁹¹ or as an instrument of survival for the

86. While courts have isolated these two valuable functions of parody—entertainment and criticism—there is little consensus about whether a parody must implicate both values to be protectable. *See, e.g.,* *Elsemere Music, Inc. v. NBC*, 623 F.2d 252, 253 (2d Cir. 1980) (warning that the law of copyright "should be hospitable to the humor of parody" in light of "today's world of often unrelieved solemnity"); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, at 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964) (recognizing parody's value as both entertainment and criticism); *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 361 (N.D. Ga. 1979) (indicating that a parody must have something other than just entertainment value to be protected); *see also* Sheldon N. Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 Conn. L. Rev. 615, 634 (1979) (arguing that it should not matter whether the function of a parody is humor or criticism).

87.

As criticism, however, one may venture a few generalizations. For one thing, it addresses itself not to original qualities of a work of art, but ridicules the pretentious or eccentric and helps separate the wheat from the chaff. . . . More often than not a parody will expose with wit and deftness what is generally agreed to be second-rate. Thus the writer of parody is not without his useful function—to seize upon sham and pretense in the literary world and point out the difference between originality and flim-flam.

Robert P. Falk, *Introduction to The Antic Muse* 8-9 (Robert P. Falk ed., 1955).

88. *See generally* *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348 (1955) (suit to enjoin Caesar's television parody of the film, *From Here to Eternity*).

89. *See generally* *Loew's, Inc. v. CBS*, 131 F. Supp. 165 (S.D. Cal. 1955) (suit to enjoin Benny's radio show parody of the film, *Gaslight*).

90. "Everything human is pathetic. The secret source of Humor itself is not joy but sorrow. There is no humor in heaven." John Bartlett, *Familiar Quotations* 625 (125th ed. 1980) (quoting 1 Mark Twain, *Pudd'nhead Wilson's New Calendar* ch. 10 (1894)).

91. For example, among the Netsilik Eskimos, there exist "joking relationships" between individuals who "were neither indifferent to each other nor very intimate friends." Asen Balikci, *The Netsilik Eskimo* 140 (1970). In these ambivalent relationships, the joking would have a "teasing, aggressive tone and was carried out 'against' the opponent." *Id.* at 139. Sometimes the joking actually resulted in fist fights, "though as soon as the fight was over, friendship was resumed in the midst of laughter as if nothing had happened." *Id.* at 140. This

oppressed.⁹² Humor also can be used to criticize, to tell the truth in a world where self-interest, politeness, and the meanness of hierarchy have created a conspiracy of silence which distorts reality. Parody of something larger than another work of art serves a much more ambitious, critical function: to force scrutiny of our culture and values, and the choices we have made.

History has often assigned the role of truth-teller and social critic to some variant of the fool. In Shakespeare, he is easy to identify by his garb and nomenclature and by the position he occupies in court with such irreverent grace.⁹³ But in other cultures the fool may not be so easy to find. The indigenous people of North and Central America, for example, have developed a form of institutionalized ritual humor known as the sacred or ritual clown.⁹⁴ These ritual clowns are often members of secret cults, associated with the supernatural; society appeals to them for matters concerning fertility, magical healing, and, at one time, military success. Attitudes towards them are marked by ambivalence: "They are laughed at, but they are also respected. They are loved for the humor they provide but they are also feared. People regard them with awe and associate them with supernatural origins and power."⁹⁵

Who are the fools, the ritual clowns, in our culture? Comedians, for one,⁹⁶ and artists like Jeff Koons. Arthur Danto has characterized the work

kind of aggressive joking created closer friendships and allowed for the "free expression of ambivalent feelings in a play atmosphere." *Id.*

There was a parallel practice among the Netsilik known as "song partnerships." *Id.* These, too, were quasi-ritualized expressions of close friendship and consisted of singing mocking and insinuating songs back and forth to each other. *Id.* at 141. Our faculty at Touro have several such song partnerships which we perform regularly at faculty meetings.

Humor, too, can act as a safety valve: "Never in history has the average American citizen found more need for a saving sense of humor. Beset by threats of destruction by atomic bombs, inflation, mounting taxes, overcrowded cities, witch hunters, propagandists, caterwauling commentators, and the incessant clamor of radio and television commercials, he must laugh occasionally to keep from blowing his top altogether." Bennett Cerf, *Laughter Incorporated* 7 (1950), *quoted in* Victor S. Netterville, *Copyright and Tort Aspects of Parody, Mimicry and Humorous Commentary*, 35 S. Cal. L. Rev. 225, 228 n.8 (1962).

92. One study of humor along gender lines suggested that there is a special brand of humor which takes place only in an all-women's setting.

In many preindustrial societies humor created by women individually seems confined to social situations in which only women are present; in an all-female audience women behave more freely and creatively. Common topics for humor development in such gatherings include men's physical appearance . . . their status-seeking activities, and their religious rites. These characteristics are generally presented in an exaggerated and mocking fashion.

Mahadev L. Apte, *Humor and Laughter: An Anthropological Approach* 76 (1985).

93. Shakespeare often conflated foolery and wisdom: "This fellow is wise enough to play the fool, And to do that well, craves a kind of wit." *Twelfth Night* act 3, sc. 1; "The fool doth think he is wise, but the wise man knows himself to be a fool." *As You Like It* act 5, sc. 1.

94. Apte, *supra* note 92, at 163-64.

95. *Id.*

96. As one psychologist of laughter wrote about comedians:

[C]omics tended to describe themselves as healers, in language appropriate to a physician or a priest. And society treats the comedian as double: a low status clown who has priestlike magical powers. Robin Williams and Woody Allen have the same

of Koons and others as “disturbatory.”⁹⁷ Like the fool, they amuse and threaten us by challenging the placement of a different set of papier-mâché walls—walls that separate art from life, author from work of art, advertising from aesthetic object, erotica from pornography.

This sort of humor questions the very categories upon which we have structured the business of law as it regulates the ownership of art. Were the law’s business with art not in a matrix with notions of property, few would notice, and even fewer would care, if an artist relocated a boundary or two. But since the seventeenth century, our legal institutions have crafted the walls of copyright law from an interlocking network of art and property. If a judge’s laughter determines what is property, his sense of humor becomes deadly serious. To destroy categories in one universe has implications in the other.⁹⁸

Judge Cardamone fretted that the broader concept of parody Jeff Koons proposes would allow any artist to purloin the work of another with impunity; there would be no “practicable boundary” to the fair use defense.⁹⁹ I am not certain that his worry is warranted. While I cannot

functions as the court jester and the fool-priest did for their cultures, and we have the same ambivalence toward them.

Norman N. Holland, *Laughing: A Psychology of Humor* 73 (1982).

97. Danto attached the label, “disturbatory art,” to a 1988 exhibit of Koons’s work at the Sonnabend Gallery. Disturbatory art does not just have disturbing contents . . . but [is] art intended instead to modify the consciousness and even change the lives of its “viewers” . . .

....

Disturbation exploits artistic means to social and moral change . . . It is not meant to be beautiful, symmetrical, composed, tasteful . . . It should be ugly, disordered, distorted and offensive: tacky, gross and raucous, jeering, painful, threatening. But it is also meant to be redemptive, finally hopeful, politically sublime.

Arthur C. Danto, *Bad Aesthetic Times*, in *Encounters and Reflections: Art in the Historical Present* 297, 299-301 (1990).

98. For a similar argument about the relationship between subversive artistic expression and the potential undermining of social order, see Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, The Sublime, and the First Amendment*, 1987 *Wis. L. Rev.* 221, 251.

99. *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992). In his concurrence to the 2 Live Crew decision, Justice Kennedy, invoking *Koons*, also stressed that the fair use exception for parody be limited to works that

draw[] upon the original composition to make humorous or ironic commentary about that same composition. . . . It is not enough that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).

Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1180 (1994) (Kennedy, J., concurring) (citation omitted). Justice Kennedy echoed Judge Cardamone’s concern that a broader notion of parody will permit all infringers to claim the parody exception: “If we allow any weak transformation to qualify as a parody, however, we weaken the protection of copyright.” *Id.* at 1181.

In my mind, a parody of a certain work, or of a genre of work, necessarily comments on or criticizes the culture that created it. With the parody of “Oh, Pretty Woman,” for example, 2 Live Crew is not so much poking fun at a particular song, but at the idealized, romanticized version of womanhood and love embodied in its lyrics. I find disturbing images of women in

articulate where this law-wall should be erected, I might shrug my shoulders and acknowledge that, in this instance, *String of Puppies* is a parody. I am vulnerable to such an argument, particularly since the judges have found a similarity of expression in the two works of art that I simply cannot see. Koons may have copied the subject of Art Rogers's photograph, but his sculpture also sent a critical message, or at least embodied a new version of reality that was not contemplated in the photograph. Permitting him to send such a message is consistent with the policies underlying the law of copyright: to promote the generation of new ideas and to encourage new forms of expression.¹⁰⁰

But tearing down papier-mâché walls is threatening to judges who are charged with the preservation of architectural integrity. As long as the subject of the parody remains sufficiently trivial, as long as we are only laughing at ourselves, or crying at failed romance in the dark, ideas about art will stay where they belong—and so will property. The power to declare butterfly, to declare moth, will not be yielded lightly to the fool.

The pretense that law and art have nothing to do with one another has created two wildly diverse universes. The distance between them is psychic.

both songs. Orbison's *Pretty Woman* is a "baby" who can wield power only through physical attraction. 2 Live Crew parodies this version of womanhood, although its substituted view is misogynistic, to say the least. In its version, the woman is either big and hairy, bald-headed, or two-timing. She, too, is powerful, not by passivity and prettiness, but by aggression and deception. 2 Live Crew is not really targeting the Orbison song; it is targeting a dominant view of the nature of women, and substituting it with another view that is equally appalling. I would like to write a version of "Oh, *Pretty Woman*" that would parody the views of both Orbison and 2 Live Crew, and I would not be targeting my rage at the songs.

100. "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." Patricia Kreig, *Copyright, Free Speech, and the Visual Arts*, 93 *Yale L.J.* 1565, 1568 (1984). Another one of the law's killing jars occurs with the allocation of public funds, for example, the Helms amendment aimed at protecting our moral sensibilities and annihilating Robert Mapplethorpe's art. 135 *Cong. Rec.* 8806 (1989). For a discussion of the congressional response to the Mapplethorpe controversy and its chilling effect on the National Endowment for the Arts and the art community, see Mary Ellen Kresse, *Comment, Turmoil at the National Endowment for the Arts: Can Federally Funded Art Survive the "Mapplethorpe Controversy"?*, 39 *Buff. L. Rev.* 231 (1991). See also Owen M. Fiss, *State Activism and State Censorship*, 100 *Yale L.J.* 2087, 2100-01 (1991) (arguing that the judiciary should focus not on meritocratic criteria such as "artistic excellence," but instead on the "effect the exercise of state power has on public debate").

Many interesting law review articles have been written about the interests protected by the law of copyright and the parody defense. See, e.g., Clemmons, *supra* note 81, at 3; Harriette Dorsene, *Satiric Appropriation and The Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 *B.U. L. Rev.* 923 (1985); Charles Goetsch, *Parody as Free Speech*, 3 *W. New Eng. L. Rev.* 39 (1980); Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 *Harv. L. Rev.* 1395 (1984) [hereinafter *Parody Defense*]; see also Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, October, Spring 1990, at 83; Marlin H. Smith, *The Limits of Copyright: Property, Parody, and the Public Domain*, 42 *Duke L.J.* 1233 (1993).

On the physical plane, the inhabitants of each universe often live side by side, sharing the same air, the same fire and water. And on that physical plane, there is communication and a body of shared assumptions, at least on the edge of the day. But once the powdery white dust of domestic existence is blown away by the morning wind, the inhabitants of each universe go to work in very different places. Predictably, they lack knowledge of any other business but their own. The inhabitants of one universe usually cultivate a state of profound ignorance about what has meaning for those who live in the other.¹⁰¹ Indeed, one of the functions of the specialized vocabularies of the law, and of art, is to assure that cosmographical secrets are kept that way, and that the respective histories, theories, and internal debates in the law, and in art, remain a mystery.

With lawyers, at least, this exclusivity of parlance makes sense on the level of greed. People pay us money to talk law-talk with other lawyers; to a certain degree, our existence depends upon being incomprehensible.¹⁰² In the absence of greed, however, it is not so clear to me why this should be true for those who talk art-talk. From the vantage point of an outsider, my intuition is that the opacity of art theory has something to do with having power and status in the field. Being eloquently impenetrable can be a ticket to success in the academy.¹⁰³ And perhaps I am not really such an outsider.

101. Jeff Koons is surely a good example of an artist who is ignorant of the law. He might even be a perfect example of what is referred to as the "willful blindness" doctrine. The Model Penal Code states that "when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." Model Penal Code § 2.02(7) (1962). *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976), is the case most often cited as an example of this doctrine. In *Jewell*, the defendant was paid money to drive a truck with a secret compartment from Mexico into the United States, and he deliberately did not look into the compartment to see if drugs were present. The issue was whether his deliberate ignorance was a culpable state of mind. Koons, too, displays deliberate ignorance about copyright law. His theory is that if the object qualifies as "art," then he must ask for permission. Deposition of Jeff Koons at 169, *Rogers v. Koons*, 960 F.2d 301 (2d Cir.) (No. 91-7396), *cert. denied*, 113 S. Ct. 365 (1992). However, if the object is a postcard picked up in an airport, "to me it is not art, or something that is within the realm of my work that I would need any permission to use." *Id.* at 171. Koons made a natural law argument for how he discovers what the law is: "Q: Did you learn from some source that you didn't need any permission to reproduce things that aren't art? A: No. From my own life experience and understanding of the world that I participate in and my own sense of morality in this world, you know, I think that I try to function in a very reasonable manner within society." *Id.* at 184. Unfortunately, these arguments will not be too persuasive in the late twentieth century in front of a court steeped in the tenets of legal positivism.

102. My cynicism is not shared by all: "If increased specialization alone cannot explain the profession's recently degraded use of language, neither can the more cynical view that greedy lawyers deliberately obfuscate so that only they can decipher the law's mysteries. . . . History more than greed explains the bizarre quality of law talk. . . ." Richard Weisberg, *Poethics: And Other Strategies of Law and Literature* 215 (1992). Weisberg refers to such a cynical view as "heresy." *Id.*

103. Try reading this sentence out loud with feeling: "For the critique of western idealism or logocentrism requires that there is a constitutive discourse of lack of imbricated in a philosophy of presence, which makes the differential or deconstructionist reading possible, 'between the lines.'" Homi K. Bhabha, *The Other Question: Difference, Discrimination and the Discourse of Colonialism*, in *Out There: Marginalization and Contemporary Culture* 72-73 (Russell Ferguson et al. eds., 1990).

The same might be said of a certain genre of law review, perhaps even this one.

Does it matter that those who talk law-talk and those who talk art-talk cannot talk to one another? Usually not. At least in most instances, each universe seems to operate just fine without understanding the other. But when the law interferes with the business of art, invariably to protect someone's property, it may jeopardize the survival of a work of art. Whenever the issue involves property, the power relationship is crystal clear: Law trumps art. The judge has the power to permanently enjoin someone like Jeff Koons from showing his sculpture, to order that Koons relinquish copies of his sculpture, and to hold Jeff Koons in contempt for failure to comply. Suddenly the judge's ignorance matters. He wears the black robe of justice, and hidden in its folds are the enforcement mechanisms of the state: deprivation of the artist's property and liberty, annihilation of his art.

I am willing to hazard a guess that the judges who heard Koons's case did not understand the strategy of appropriation. Judge Cardamone of the Second Circuit made a stab at it, but the few paragraphs he devoted to Koons's place in art history made little impact on the decision.¹⁰⁴ They remained like a cyst in the text, encased in a tough membranous sac so that none of the contents would leak or spill out. And truth to tell, for those of us trained in the law, it is not all that easy to figure out where in the tradition Jeff Koons fits.

Modernism in art history seems to have acquired a relatively coherent meaning. It refers to a theory of art which dominated the art world from the middle of the nineteenth century until some time during the late 1960s and early 1970s.¹⁰⁵ The major theorists of modernism were Clive Bell and

104. In his recitation of the facts, Judge Cardamone wrote:

He [Koons] works in an art tradition dating back to the beginning of the twentieth century. This tradition defines its efforts as follows: when the artist finishes his work, the meaning of the original object has been extracted and an entirely new meaning set in its place. An example is Andy Warhol's reproduction of multiple images of Campbell's Soup cans. Koons's most famous work in this genre is a stainless steel casting of an inflatable rabbit holding a carrot.

Rogers v. Koons, 960 F.2d 301, 304 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

Later, on the issue of parody, Judge Cardamone discussed the strategy of appropriation and delved into its history, making reference to Cubism and Dadaism, but distanced the court by prefacing each statement with: "Koons argues," "he insists," "these themes," or "Koons states." *Id.* at 309. At the end of the paragraph, Judge Cardamone concluded, "We accept this definition of the objective of this group of American artists." *Id.* It is clear to me, at least, that the court may have "accepted" the definition of the postmodern artist's strategy, but has not accepted the strategy itself.

105. We can see Modernist ideas present in the art of Edouard Manet and also in contemporaneous writings about Manet. Regarding the purity of painting, and its purposeful separation from the rest of the culture, history, and philosophy, Emile Zola wrote of Manet:

The artist is neither painting history nor his soul. What is termed 'composition' does not exist for him, and he has not set himself the task of representing some abstract idea or some historical episode. And it is because of this he should neither be judged as a moralist nor as a literary man. He should be judged simply as a painter . . . Don't expect anything of him except a truthful and literal interpretation. He neither sings

Roger Fry in England, and Clement Greenberg and Michael Fried in this country.

In a series of essays published from the 1930s to the 1960s, Clement Greenberg saw "modernism as the fulfillment of the promise of the Enlightenment in which rational determinations governed the parceling of all disciplines, all fields of knowledge, into discrete areas of competence—this applied to science, philosophy, history, as well as art."¹⁰⁶ In each field, excellence would be marked by "self-criticism, self-definition, and elimination of elements from other disciplines."¹⁰⁷ Thus, for Greenberg, the task of painting was to achieve purity, and that purity would be pursued by a maniacal preoccupation with the inherent qualities of the medium of painting itself—its materials, its color, its application, its optical flatness.¹⁰⁸

For Michael Fried, too, there was an insistence on the self-sufficiency of painting. Greenberg and Fried viewed anything extrinsic to the medium, in particular literary or theatrical narration, as an impurity.¹⁰⁹ Modernism

nor philosophizes. He knows how to paint and that is all . . . I see him as an analyst painter.

Emile Zola, Edouard Manet, in *Modern Art and Modernism: A Critical Anthology* 29, 33 (Francis Francina & Charles Harrison eds., 1982).

It tends to be "late Modernism," however, and in particular the writings of the formalists, Greenberg and Fried, during the 1950s and early 1960s, against whom the postmodernists rebelled. For a useful summary of this period of art history made accessible to lawyers, see Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 *Yale L.J.* 1359 (1990).

106. Greenberg wrote: "The essence of Modernism lies, as I see it, in the use of the characteristic methods of a discipline to criticize the discipline itself—not in order to subvert it, but to entrench it more firmly in its area of competence." Clement Greenberg, *Modernist Painting*, in *Esthetics Contemporary* 195 (Richard Kostelanetz ed., 1989). According to Greenberg, the Enlightenment robbed the arts of "all tasks they could take seriously," and in order to save themselves from being "assimilated to entertainment pure and simple," the arts had to "demonstrat[e] that the kind of experience they provided was valuable in its own right and not to be obtained from any other kind of activity." *Id.* at 195-96.

107. *Id.*

108.

It quickly emerged that the unique and proper area of competence of each art coincided with all that was unique to the nature of its medium. The task of self-criticism became to eliminate from the effects of each art any and every effect that might conceivably be borrowed from or by the medium of any other art. Thereby each art would be rendered "pure," and in its "purity" find the guarantee of its standards of quality as well as of its independence.

Id. at 196.

109. Fried characterized the relationship between theater and modernist painting—indeed between theater and all the arts—as a "war." Michael Fried, *Art and Objecthood*, in *Aesthetics: A Critical Anthology* (George Dickie & Richard J. Sclafani eds., 1977). Only through their ability to "defeat theater" with its degenerate influence could the arts survive. *Id.* at 456. It is the presence of the audience in theater which "modernist sensibility finds intolerable." *Id.* Fried preferred art to be independent of the beholder.

Fried criticized Susan Sontag for having a "theatrical sensibility." *Id.* at 457. In an essay, Sontag commented on recent artistic strategies of using not only paint, but "hair, photographs, wax, sand, bicycle tires, their own toothbrushes and socks," to challenge traditional boundaries between "art and non-art." Susan Sontag, *Against Interpretation* 296-297 (1967). These strategies also employ "many established distinctions within the world of culture itself—that between form and content, the frivolous and the serious, and (a favorite of literary intellectuals) 'high' and 'low' culture." *Id.* at 297. To the message in Sontag's essay, Fried

embodied a desire to create and maintain a sharp distinction between art and the rest of life. It emphasized purity, exclusivity, and the severance of art from any political, social, or cultural influences.¹¹⁰

"Postmodern art" turns out to be a lot more difficult to pin down. People use this term in many different ways,¹¹¹ but at least in the context of art history, it almost always signifies a rejection of the ideas of modernism. Compared to the elegance of Greenberg's effort to parcel out to each discipline a discrete area of competence, postmodernism is messy. Gone are the rigid, formally structured categories of "art" and "real life." Postmodernism confuses art and real life. It borrows from popular culture, from the world of advertising, movies, and TV,¹¹² in implicit recognition that art is

responded with alarm: "The truth is that the distinction between the frivolous and the serious becomes more urgent, even absolute, every day, and the enterprises of the modernist arts more purely motivated by the felt need to perpetuate the standards and values of the high art of the past." Fried, *supra*, at 457.

110. There is also an assumption in the later period of Modernism, dominated by Greenberg, that there could be such a thing as a universal judgment of taste. This notion was based on the aesthetic theories of Immanuel Kant. Kant believed that judgments of taste were not cognitive or logical, but "aesthetic—which means that it is one whose determining ground cannot be other than aesthetic." Immanuel Kant, *The Critique of Judgment*, reprinted in *Aesthetics: A Critical Anthology*, *supra* note 109, at 643. When we have an aesthetic reaction to an object, it is based not on our interest in the object's function or our desire for the object, but on a "pure disinterested delight" when looking at the object. *Id.* at 644. Kant believed that these judgments of taste, these aesthetic reactions, though characterized as "subjective" because they were not based on logic or cognition, were universally held. If someone feels something is "beautiful," and does so "completely free in respect of the like which he accords to the object," he may regard that judgment "as resting on what he may also presuppose in every other person; and therefore he must believe that he has reason for demanding a similar delight from everyone." *Id.* at 648. It is our ability to feel pleasure and our rationality which enable us to see objects as beautiful. "Beauty has purport and significance only for human beings, i.e., for being at once animal and rational." *Id.* at 647.

Postmodernism rejects this assumption of the universality of a judgment of taste: "Not only does the postmodernist work claim no such authority, it also actively seeks to undermine all such claims; hence, its generally deconstructive thrust." Craig Owens, *The Discourse of Others: Feminists and Postmodernism*, in *The Antiaesthetic: Essays on Postmodern Culture* 58 (Hal Foster ed., 1983).

111. "Attempts to define Post-Modernism in the arts often have failed, perhaps because Post-Modernism represents not a single, clear movement, but a pluralist and many-faceted rebellion against the dictates of Modernism." Adler, *supra* note 105, at 1363.

For an excellent discussion of the various uses of the term "postmodern" and an introduction to the participants in postmodern discourse, see E. Ann Kaplan, *Introduction to Postmodernism and Its Discontents* 1-9 (E. Ann Kaplan ed., 1988).

112. Perhaps television itself has created a postmodern generation. E. Ann Kaplan wrote about our "televisual sense of existing in some timeless present; neither texts nor the institution of television itself is historically situated." E. Ann Kaplan, *Rocking Around the Clock: Music Television, Postmodernism, and Consumer Culture* 29 (1987). MTV, in particular "blurs previous distinctions between past, present, and future, along with its blurring of separations such as those between popular and avant-garde art, between different aesthetic genres and artistic modes." *Id.* at 144. For a discussion of audio collage techniques such as digital sampling and the copyright law's response to various forms of aural pastiche, see Alan Korn, *Renaming that Tune: Aural Collage, Parody and Fair Use*, 22 *Golden Gate U. L. Rev.* 321 (1992). Digital sampling, particularly by rap artists, has invoked the ire of some courts. See *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182 (S.D.N.Y. 1991), in which Judge Duffy cited Exodus—"Thou shalt not steal"—as authority for holding that the rap artists infringed another musician's copyright by sampling a portion of his

influenced by and reflected in the prevailing political and cultural experience of our society. The postmodern artist self-consciously works within a certain historical context, and he blatantly borrows from the past and from other artists who share his own time.¹¹³ There is a critique of originality and the sanctity of authorship in this borrowing aspect of postmodernism.¹¹⁴ Art is robbed of its purity, and the artist, deprived of his status as Romantic genius,¹¹⁵ takes on a new role, a role which Walter Benjamin has charac-

recording, "The conduct of the defendants, herein, however violates not only the Seventh Commandment, but also the copyright laws of this country." *Id.* at 183.

Dance presents another set of copyright problems altogether. The courts have not yet addressed the issue of originality in choreographic works, many of which use well-known, often-used steps. There is also the problem of whether these works of authorship are "fixed," since dance is a performance art. There are methods of notation, but many dancers find notation a difficult and unsatisfactory language. *See generally* Barbara Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. Miami L. Rev. 287 (1984).

113. This borrowing from history has not always garnered enthusiastic praise. One critic, Thomas Lawson, characterized the strategy as "cultural cannibalism." Thomas Lawson, *Last Exit: Painting*, in *Theories of Contemporary Art* 148 (Richard Hertz ed., 1985).

These young painters ingratiate themselves by pretending to be in awe of history. Their enterprise is distinguished by an homage to the past, and in particular by a nostalgia for the early days of modernism. But what they give us is a pastiche of historical consciousness, an exercise in bad faith. . . . For by decontextualizing their sources and refusing to provide a new, suitably critical frame for them, they dismiss the particularities of history in favor of a generalizing mythology, and thus succumb to sentimentality.

Id. at 147.

114. Krauss wrote of the challenge that the existence of a copy makes to art history, arguing that there are two responses. One is to "refine the procedures of connoisseurship" so that we can make even finer distinctions between the genuine and the copy. Rosalind Krauss, *Originality as Repetition: Introduction*, October, Summer 1986, at 36. Nelson Goodman made a similar suggestion that we could train ourselves to distinguish "perceptual differences so slight that they can be made out, if at all, only after much experience and long practice," between the Van Meegeren forgery and the original Vermeer. Nelson Goodman, *Art and Authenticity*, in *Aesthetics Today* 187, 192 (Morris Philipson & Paul J. Gudel eds., 1980). Krauss's other response was to "wonder if the very category of original—whether the physical original, or the singular author as origin—if these very categories are themselves far more fragile and open to question than it seemed." Krauss, *supra*, at 36.

Koons[s] work too critiques the notion of originality:

Koons is nothing if not attuned to his environment. Look at all the current buzzwords to which his work speaks. His art is largely strategic. Images have been appropriated from photographs of popular culture and then collaged together into spanking new commodities. They were made collectively, even anonymously, by workshops in northern Italy. What seems to matter is not the originality of the artist, but rather images that belong to an entire culture and that everyone in that culture can use.

Michael Brenson, *Greed Plus Glitz, With a Dollop of Innocence*, N.Y. Times, Dec. 18, 1988, at 41.

115. Martha Woodmansee has done some fascinating research into the early associations between the Romantic genius and the rise of the notion of "authorship." Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 Eighteenth Century Stud. 425 (1983). Woodmansee started with the English literary theorist, Edward Young, the author of the 1759 "Conjectures on Original Composition," and traces his influence on German writers of the period. Young "preached originality in place of the reigning emphasis on the mastery of rules extrapolated from classical literature, and he located the source of this essential quality in the poet's own genius." *Id.* at 430. German

terized as political.¹¹⁶

Copying from the vocabulary of art has a long history.¹¹⁷ Art historian Rosalind Krauss pointed out that even before the era of postmodernism, painters like Ingres, who borrowed chronically from the pool of artistic images that preceded him, challenged the notion of originality in traditional art history. It became an accepted practice that each generation would recycle themes in the art world.¹¹⁸ Ingres's borrowing did not infringe on anyone's property rights; he was only mastering technique. Marcel Duchamp, who borrowed from the world of industry to create his ready-mades, also avoided the infringement of any property rights.¹¹⁹

writers were receptive to Young's ideas because they "answered the pressing need of writers in Germany to establish ownership in the form of copyright law." *Id.* at 430.

For an excellent "disaggregation" of the concept of "authorship" in copyright law, as "deployed in texts and in cultural understandings," see Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 Duke L.J. 455, 456. I am grateful to both Martha Woodmansee and Peter Jaszi's scholarship for generating my interest in copyright law. They organized a meeting of 80 scholars who came at the invitation of the Society for Critical Exchange in April 1991 to "explore the social and cultural construction of authorship in relation to the evolution of proprietary rights in texts." Conference, *Intellectual Property and the Construction of Authorship*, 10 Cardozo Arts & Ent. L.J. 277 (1992). The collection of the papers from that meeting is quite remarkable. *See also* Peter Jaszi & Martha Woodmansee, *The Construction of Authorship: Textual Appropriation in Law & Literature* (1994).

116. Writing in the 1930s, Walter Benjamin was the first to address the subject of how mechanical reproduction might influence our conception of art. Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *Modern Art and Modernism* 217 (Francis Francina & Charles Harrison eds., 1982). The ability to make an infinite number of copies from a single negative means there is no identifiable "original," no single object with its own "unique existence at the place where it happens to be." *Id.* at 218. Benjamin pointed out that the "presence of the original is the prerequisite to the concept of authenticity," and that with mechanical reproduction, the authority of an object is diminished. *Id.* at 218. Not only can a reproductive process alter the object with techniques such as magnification or slow motion, but the object no longer has a "unique existence." *Id.* at 219. It can "meet the beholder or listener in his own particular situation," emancipating art "from its parasitical dependence on ritual." *Id.* at 219-20. Benjamin took a rather optimistic view of this process, looking at the reproducibility of art as a potentially powerful political force. *See also* Walter Benjamin, *The Author as Producer*, in *Modern Art and Modernism*, *supra*, at 213 (exploring the relationship between artistic practices and broader social concerns).

117. *See, e.g.*, John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 Colum.-VLA J.L. & Arts 103 (1988); Lynn A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 Cardozo Arts & Ent. L.J. 1 (1992); *see also* Elizabeth H. Wang, (Re)Productive Rights: Copyright and the Postmodern Artist, 14 Colum.-VLA J.L. & Arts 261 (1990).

118. Krauss, *supra* note 72, at 36.

119. "Ready-mades" was a term given by Marcel Duchamp to his sculptures consisting of commercial goods which could be (and indeed were) purchased at hardware stores and then exhibited with no alteration except for the addition of a title. For example, Duchamp took a snow shovel and wrote on it, "In Advance of the Broken Arm." His most famous ready-made, dated 1917, was entitled *Fountain*; it was a urinal. By relocating the object, giving it a title, and placing it in an exhibition, Duchamp's work forced the viewer to consider not only the object anew, but also to consider what constitutes the category of art. As Arthur Danto put it, "Duchamp did not merely raise the question what is Art, but rather why is something a work of art when something exactly like it is not . . . in Duchamp's case the question he raises as an artwork has a genuinely philosophical form" Arthur Danto, *The Philosophical Disenfranchisement of Art* 15 (1986).

Borrowing a urinal from the streets of Paris and putting it into an exhibition may have caused eyebrows to rise, but it did not take the urinal maker's property away.

But when the artist began to appropriate not objects, techniques, or style, but actual images that another human being had created, the strategy began to take on a new meaning.¹²⁰ During the early 1960s, Robert Rauschenberg took photographs from the pages of magazines and introduced them onto the canvases of his assemblages.¹²¹ The art critic Douglas Crimp referred to these acts of appropriation by Rauschenberg as "the moment of transition to postmodernism."¹²² The "insularity of art's discourse" and the main social institution of art, the museum, had already been threatened by the introduction of the photograph into the category of art.¹²³ With the photograph's capacity for infinite reproduction, there was no assurance of authenticity or originality upon which the museum

About his ready-mades, Duchamp echoed the postmodern critique of originality: "Another aspect of the 'readymade' is its lack of uniqueness The replica of a 'readymade' delivering the same message: In fact nearly every one of the 'ready-mades' existing today is not an original in the conventional sense." Marcel Duchamp, *Apropos of "Readymades,"* in *Esthetics Contemporary* 84, 84 (Richard Kostelanetz ed., 1989).

120. In art history, the term "appropriation" has been used in several different ways. John Paoletti summarized some of the various uses as follows:

1. simple appropriation, or taking an object from the context for which it was produced and placing it in an art context; i.e., a Duchamp ready-made; 2. transforming the re-used object by placing it—either whole or fragmented—into some compositional matrix with other found objects or with some deliberately created forms or text; i.e., any collage; 3. constructed (crafted) references to specific earlier images—not necessarily works of art—rather like direct quotation, but usually framed by the artist's own "text" i.e., Pop imagery or certain current shamanistic images; 4. constructed references to earlier styles—again not deriving necessarily from the arena usually called art—which then become the artist's text or part of the content of the painting; i.e., certain Pop re-uses of cartoon-like drawing or certain contemporary German and Italian painting; 5. A mixture of 3 and 4 which might produce at one extreme a totally new image or at the opposite extreme, direct replication of the earlier image.

John Paoletti, *Art and Appropriation*, in *The Art of Appropriation*, Catalog of the Alternative Museum 3, 3 (1985). This list of kinds of appropriations is obviously not limited to these five. It is difficult to squeeze Koons's sculpture into the list, for example, although it comes closest to a transformation of a specific earlier image.

Jean Lipman and Richard Marshall have written a fascinating book, *Art about Art*, which explores the subject of art that takes as other art as its subject. Of particular interest is the introduction written by Leo Steinberg which discusses our choices of metaphors for these kinds of transactions. If we say that a work is "inspired" or "influenced" by another artist, the metaphor is "that of a reflex, an involuntary response to a stimulus," which negates the intentionality of the artist and is thus less reprehensible. Leo Steinberg, *Introduction* to Jean Lipman & Richard Marshall, *Art About Art* 5, 21 (1978). If we use "borrow" or "quote," or even "steal," the artist's act is volitional, and "empoisons our judgment" by "arousing our tenderest feelings about possessions." *Id.* at 25. In my mind, "appropriation" is another metaphor which belongs to the "theft of property" category. By using the term, we may already have inadvertently passed a judgment of condemnation.

121. See Gay Morris, *When Artists Use Photographs: Is It Fair Use, Legitimate Transformation or Rip-Off?*, *Artnews*, Jan. 1981, at 102, 103-04.

122. Douglas Crimp, *Appropriating Appropriation*, in *Theories of Contemporary Art* 152, 157 (Richard Hertz ed., 1985).

123. *Id.* at 161.

determined "its body of objects and its field of knowledge."¹²⁴ Rauschenberg's appropriations too, by giving way to "frank confiscation, quotation, excerptation," undermined traditional notions of authenticity and blurred the boundaries between art and nonart. According to Crimp, Rauschenberg had destroyed "the guarded autonomy of modernist painting."¹²⁵

So when Jeff Koons appropriated the photograph of Art Rogers, his conduct was not without precedent.¹²⁶ Behind Koons's use of another's image were ideas that belonged solidly to the postmodern tradition. The various meanings of these strategies of appropriation, however, could easily escape someone who does not inhabit the universe of art.¹²⁷ These ideas—the attacks on originality, on the model of the artist as genius, on the separation of art from the rest of the mess we live in, on the hermeneutical primacy of authorial intent—are all ghosts which haunt the art object, but are manifested nowhere on its surface. They are visible only to the cognoscenti. To appreciate their value, or at least to articulate their value, one must either be a member of the artworld or perch on the edge of the artworld long enough to catch a glimpse of what is going on. Indeed, without a historical context in which to place these art objects, the strategies of appropriation look just like theft.

The cold hard fact is, most of the inhabitants of the universe of law know little and care less about the spectral ideas that hover around these objects of art. These ideas are not the business of the law; the business of the law is to protect private property. And in conducting their business, the inhabitants of the law universe are trained to consider empirical evidence. Look at this picture, and look at that one. Do the photographs look similar? Yes, two people and eight dogs. All reasonable people would agree. Does the parody exception apply? No. The sculpture does not make fun of the photograph. Motion for summary judgment granted.

124. Id.

125. Id.

126. Sherry Levine's work provides another example. In the early 1980s, Levine took photographs, reproducing exact copies of some of Edward Weston's famous nudes. After matting her copies, she titled the work *After Edward Weston*. Id. When Levine discussed her work, she made clear that

piracy, with its overtones of infringement and lack of authorization, *was the point . . .* by literally *taking* the pictures she did, and then showing them as hers, she wanted it understood that she was flatly questioning—no, flatly undermining—those most hallowed principles of art in the modern era: originality, intention, expression.

Gerald Marzorati, *Art in the (Re)Making*, *Artnews*, May 1986, at 90, 91. The Weston estate saw the rephotographs and threatened Levine with a lawsuit, and she stopped rephotographing Weston's pictures. Id. at 97.

127. Arthur Danto described the "artworld" which is populated by artists, art historians, curators, collectors, gallery owners, art dealers, and museum attendees in Arthur Danto, *The Artistic Enfranchisement of Real Objects: The Artworld*, in *Aesthetics: A Critical Anthology*, supra note 109, at 22. The artworld is acutely aware of the history of art, its former and present image makers, and their place in that history. In their writings and discussions about art, the members of the artworld share not only theoretical bases from which to understand artworks, but also a special language of art. In a later article, Danto discussed the judgment members of the artworld make to designate an object an "artwork," an object in which they internalize "the history and theory of art." Arthur Danto, *The Last Work of Art: Artworks and Real Things*, in *Aesthetics: A Critical Anthology*, supra note 109, at 558.

The inhabitants of the law universe are not trained to consider the invisible realm, the intellectual ectoplasm of postmodern art.

I have a friend who is no friend of postmodern art.¹²⁸ I should be more precise: She is no friend of the ideas embodied in postmodern art. Sometimes I accuse her of having only one template. She hates positivism in the law as well and, like many idealists, is a closet natural law theorist. She also hates moral skepticism and pragmatic notions of truth, secretly believing in the Good and the True. So it was inevitable that when she considered the nature of art, the same pattern would show up. Of course, she would hate the ideology of postmodernism, even though she has admitted to a weakness for Koons's purple puppies.

Like so many of us, my friend was just born at the wrong time. She would have enjoyed being a thinking adult in the 1950s, when there was renewed fervor about modernism in art and neutrality in the law. She would have been pleased to sit down to lunch with Clement Greenberg and Herbert Wechsler in the summer of 1950. Instead, that bloody business of birth engaged her, so even if they had invited her, lunch was out of the question.

Just think of the things they could have talked about. On her right, Greenberg could have talked about the fineness of art, its purity, its seriousness of intent. With the sharp point of a mechanical pencil he could have drawn for her that line between art and reality. Art would have nothing to do with entering a building marked "museum," but would rather be a matter of objectivity. Even better, he could show her how to distinguish good art from bad. And on her left would be Herbert Wechsler. We all know what he would say:¹²⁹ more heavenly talk about abstraction and the law's crystalline beauty and autonomy. There would be a white table cloth on the table.

Instead, she is stuck with the likes of Andy Warhol, who would never let a minor detail like death get in the way of lunch, and Robert Rauschenberg, and David Salle. And of course, there is that great charlatan of the art world, the master of commodification, the crafter of purple

128. My good friend and colleague, Deborah Waire Post, has consented to the revelation of her identity.

129.

To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? . . .

. . . . A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15, 19 (1959).

puppies and urine-colored pornography, Jeff Koons.¹³⁰ It is hard to imagine who would occupy Wechsler's chair, but it would be the most indeterminate, critical legal something-or-other of them all.¹³¹ They would probably not even eat at a table, but would each occupy a naugahyde-covered stool in a Greek diner, facing a mirror mottled with gold, peering out at each other over monumental plasticized menus, their eyes meeting fleetingly in the dark other world of reflection. The surface would be Formica.

My friend and I had talked about the Koons case a lot, and she had read the Second Circuit opinion with great delight. Here was an opinion rich with things to gloat about. In particular, it amused and appalled her that someone like Jeff Koons had to argue in court: "The trial judge is uneducated in art and is therefore not an appropriate decisionmaker in a copyright infringement suit."¹³²

Surely this must have been a painful statement for a postmodernist to make, she argued to me. It implies that the subject of art is a discrete

130. Many critics have been outraged by Koons's work. In one review of his recent work featuring sculptures of Koons and his wife in various intimate poses, Mark Stevens called Koons a "decadent artist." "A decadent artist lacks the imaginative will to do more than trivialize and italicize his themes and the tradition in which he works." Mark Stevens, *Adventures in the Skin Trade*, *The New Republic*, Jan. 20, 1992, at 29. Another art critic, Kenneth Baker, wrote about the same show: "People ought not to shy away from this show. There is much to chew on here, like it or not. But afterwards be sure to spit it out." Kenneth Baker, *The Message In Koons[s] Kitsch*, *S.F. Chron.*, Dec. 19, 1992, at D1.

But some critics find value in Koons's work. Richard Huntingto wrote, "If, as Koons[s] work implies, there is nowhere to go with our values, no hidden discoveries to make, then Koons[s] enlarged bric-a-brac may be rare indeed— honest art in a dishonest age." Richard Huntingto, *From Flowers to Flesh: 'Bad Boy' Artist Jeff Koons*, In *Words and Pictures*, *Buff. News*, Feb. 28, 1993, at 7. In a European art magazine, Hildegund Amanshauser wrote that Koons "ennobles" the surface of a photograph when he transfers it to the medium of painting. Hildegund Amanshauser, *Pornographic Scenes of a Normal Married Life*, *Camera Aus.: Int'l* 35, 36 (1992).

Other critics are ambivalent. Annie Sprinkle wrote: "Through the courageous works in this show and through his flamboyant life-as-art, Koons refutes our deepest notions of what art is supposed to be." Annie Sprinkle, *Hard-Core Heaven*, *Arts Mag.*, March 1992, at 46, 48. However, she ended her review with the following ominous remarks:

Call me paranoid, but the parallels between fascism's exaltation of the clean white neoclassical form and Koons are almost too uncanny. Koons's Germanic quest for immaculately conceived surfaces, people, and environments is reminiscent of Hitler's obsession with racial purity. Koons's love affair with everyday treacly romantic schlock is strikingly similar to the nostalgic hankering for the simple pleasures of true Bavarian folk art.

Id. Thus, there is truly no consensus about whether Jeff Koons is the great charlatan of the artworld or not.

131. I have a hard time keeping track. For a good, although I suppose dated, presentation of *Who's Who in Critical Legal Studies*, see 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). David Luban saw a close affinity between critical legal studies and modernism. See David Luban, *Legal Modernism*, 84 *Mich. L. Rev.* 1656 (1986). Under Luban's scheme, I am proposing that my friend will be having lunch with a member of the "avant-garde."

132. *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

category of privileged knowledge,¹³³ that only a high priest of the artworld could have access to its secrets. This is a distinctly unpostmodern point of view. After all, a postmodernist would believe that art is just a chunk of reality that we have moved into a museum or a gallery and positioned in such a way that its consumers will know which way to face in its presence. Since the subject of art is no different from the subject of everyday life, there should be no need to hire a holy man to render an interpretation. We are all competent to look and see, and what you see is what you get, and if you don't get what you see, that's okay too. So why would Koons need an expert witness?

Her question was, as always, a really good one. What would an expert witness possibly have to say? Do the inhabitants of the law world need an expert in art to inform them that they do not need an expert in art? Do they require the invocation of a metacritic whose very words would establish that his words had no intrinsic meaning, indeed, that the Koons purple puppies had no intrinsic meaning? I can just imagine the scene taking place in one of those district court rooms in the city, paneled in federal wood. The metacritic would be on the witness stand. By reciting the litany of his credentials to establish his expertise, he would quickly sketch himself in with magic marker. Then, when asked what those purple puppies could possibly mean, he would just as quickly erase himself from the witness stand. First an arm would disappear, then the torso and other arm, and finally the talking head, until all that was left were his lips, suspended in air like the Cheshire cat's. "The witness may step down," which presents logistical problems since lips don't have legs.

So there does seem to be an inconsistency, as my friend has pointed out to me. To argue that postmodern art is so esoteric that it needs an expert witness to translate its meaning implies the existence of a discrete area of competence. This is indeed a distinctly modern stance, and from his deposition, it is not the only distinctly modern stance that Jeff Koons has ever assumed.¹³⁴

133. Art experts certainly exist, although their role is usually confined to authentication of art, appraisals, and investment consultation. *See generally* Steven Mark Levy, *Liability of the Art Expert for Professional Malpractice*, 1991 Wis. L. Rev. 595.

134. Koons articulated a rather unpostmodern definition of art in his deposition. He was not willing, for example, to call Art Rogers an "artist," although he did concede that some photographers qualified. The distinction he made seemed to hinge on whether the editions were limited and where the photographs were viewed. If "it is something that is reproduced over and over and over again to penetrate into a culture," then it was not art, but "just part of the public domain." Affidavit of Jeff Koons at 172, *Koons*, 960 F.2d 301 (No. 91-7396). Later, when asked how to tell if a photograph is "art," Koons responded: "[I]f it communicates specifically, very very specifically to a viewer in realms that are artistic. And it doesn't really deal in the realms of the informal. It presents itself in the realm of the formal. Art is a gesture you don't take lightly. It doesn't present itself lightly. It doesn't present itself as a cupcake." *Id.* at 173. (And Rogers's "photograph post card," Koons considered a cupcake.) These sentiments are more modern than postmodern.

Koons is not the only postmodern artist to make distinctly modern arguments in defense of his work. Jim Haberman, the creator of "surrealistic fine art photograph," sued *Hustler Magazine* for its reproduction of two of his postcards. *Haberman v. Hustler Magazine*, 626 F. Supp. 201 (D. Mass. 1986). The district court held that the magazine had made fair use of the copyrighted work, largely because the publication of the postcards had not materially impaired

As a closet natural law theorist, my friend believes that in order for something to be Good and True, it must be rational, and for her, rationality entails consistency. She has a real talent for ferreting out these fundamental inconsistencies and performs her task with a missionary zeal, believing that if she finds one, it matters. I can still remember years ago when we were struggling with critical legal studies, and she came upon this insight: Critical legal scholars espouse nonhierarchical relationships, and yet their language is so difficult and inaccessible that it creates a new hierarchy—those who understand it and those who do not. (We were among the latter.) Once she had stumbled upon this insight, she gave up on the critical legal scholars altogether, having lost faith in their enterprise. After that, whatever else they might have had to say was inaudible to her, drowned out by the roar of inconsistency.

My standards are a lot lower. Not being a believer in cosmic coherence, or perhaps human coherence, it does not bother me to discover a modern notion in the midst of postmodern palaver. It still strikes me as a good idea to educate judges about postmodernism, its place in art history, and the meaning of appropriation, even if in so doing we violate a tenet of postmodernism.¹³⁵ Given that some of those judges had the power to, and did, impose the death penalty on Jeff Koons's *String of Puppies*, they should have known the nature of what they were doing in.

their marketability. *Id.* at 213.

What really offended Haberman was the fact that his work had appeared in the pages of a magazine like *Hustler*. He testified that he would "not have objected if the same use of his pictures and same commentary had been made by a newspaper or fine art magazine." *Id.* at 209. This kind of line-drawing between "fine art" and a "commercial magazine" is hardly consistent with the postmodern tradition to which Haberman's work belongs.

135. We certainly cannot blame Koons's attorney for failing to educate the courts hearing his client's case. It may be that Stanley Fish could shed some insight into why the judges could not hear the arguments, or see the differences in the sculpture and the photograph. In Stanley Fish's vocabulary, the judges who looked at the photograph of Koons's sculpture were not in the same "interpretive community" as the expert witnesses in art who were called upon to defend Koons's artistic practices. For example, Kathy Halbreich, a curator of the Museum of Fine Arts, stated that "Koons is using the group of puppies not to show the job of reproduction but the fear we have in mass production and in the glut of information which bombards us daily." Affidavit of Kathy Halbreich at 5, *Koons*, 960 F.2d 301 (91-7396). Brenda Richardson, the Deputy Director for Art at the Baltimore Museum of Art, found it appalling that Koons's sculpture was alleged to have an illegal connection with the Rogers note card: "The sculpture is totally the product of Koons's aesthetic choices. For any artist the universe is an image bank. A central objective of the artist is to process and re-interpret images in our culture into disuct [sic] artistic statement." Affidavit of Brenda Richardson at 3, *Koons*, 960 F.2d 301 (No. 91-7396). So why do these and other members of the art world have no trouble seeing what Koons is up to in *String of Puppies*? Because they are members of the interpretive community which helped to create the strategies of which Koons availed himself in the creation of the work. According to Fish, the interpretive community, rather than the text or the reader of the text, produces meanings and is

responsible for the emergence of formal features. Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties. In other words these strategies exist prior to the act of reading and therefore determine the shape of what is read rather than, as is usually assumed, the other way around.

Stanley Fish, *Is There a Text in This Class?* 14 (1980).

On the other hand, what else would I believe, being an inhabitant of the universe of law? Of course, I would try to get my way with words, since in my universe, words are what matter. With visual art, however, words are rejected as a medium because words are not up to the task. Some communication can only take place through imagery and can never be translated into verbal expression. Understanding may elude and transcend language.¹³⁶

My friend, too, had an interpretation of *String of Puppies*, and if her way of seeing the thing is indeed Good and True, it goes further towards explaining why Jeff Koons lost the case than any noises I might make.¹³⁷ It is all very simple, she says. The man who sits on the bench in Art Rogers's photograph is the man who sits on the bench inside the black robe of justice. The artist Art Rogers portrays that man as white, handsome, intelligent, prosperous, and deserving of a much younger woman. The artist Jeff Koons portrays that man as a goofball.¹³⁸ Not only that, she

136. Stanislavski wrote about the role that the unconscious plays in the creative process:

In the first period of conscious work on a role, an actor feels his way into the life of his part, without altogether understanding what is going on in it, in him, and around him. When he reaches the region of the subconscious the eyes of his soul are opened and he is aware of everything, even minute details, and it all acquires an entirely new significance. He is conscious of new feelings, conceptions, visions, attitudes, both in his role and in himself. Beyond the threshold one's inner life, of its own accord, takes on a simple, full form, because organic nature directs all the important centres of our creative apparatus. Consciousness knows nothing of all this: even our feelings cannot find their way around in this region—and yet without them true creativeness is impossible.

Stanislavski, *supra* note 5, at 266-67.

137. Her theory is based on a premise that judges are human and not only have aesthetic sensibilities, but tempers as well. Others have called into question whether judges are really immune to matters of taste, or to a sense of outrage for that matter. "*Air Pirates* . . . and the conjure-up doctrine itself seem comprehensible only as veiled attempts by judges both to vent their outrage at mimicry that they consider tasteless and offensive and to vindicate the moral rights of the authors." Parody Defense, *supra* note 100, at 1406.

138. In rummaging through the literature about the function of art in other cultures, I ran into Horton's description of some sculptures by the Kalabari of southern Nigeria. These sculptures were used as "houses" for the spirits of the Kalabari religion. The carving was compared to the name of the spirits, and as the Kalabari put it, "the spirits come and stay in their names." R. Horton, *Kalabari Sculpture* (1965), *described in* Robert Layton, *The Anthropology of Art* 7-8 (1991). Thus, the sculpture allowed the Kalabari to localize the spirits and to control them. Its function was pragmatic: to manipulate the unseen forces in their world. Perhaps my friend was right, and Jeff Koons had indeed tried to capture the spirits of powerful, upper-middle class white men, their younger women, and their pets in "*String of Puppies*."

Such a theory would explain the ugliness of Koons's sculpture, at least according to the Kalabari. As Horton wrote,

Perhaps the most striking thing one notices is the general apathy about sculpture as a visual object Some evidence suggests that as visual objects, sculptures tend to evoke not merely apathy but actual repulsion. Thus one can refer to a man's ugliness by comparing his face with a spirit sculpture.

Id. at 7.

Although beauty was not a criterion for judging whether a sculpture was "good," there were ways of judging the worth of a carving. The crucial thing was that a carved spirit figure resemble the "decayed object that it replaces." *Id.* at 8.

continues, but the court held litigant Jeff Koons in contempt.¹³⁹ He deliberately violated the terms of the district court's injunction by trying to ship his sculpture across the sea. The court saw Koons's conduct not as an act of desperation, not as an understandable gesture of parental rescue, but as an act of defiance.¹⁴⁰ To the judge, who was already feeling oddly like a goofball, Koons was saying only one thing: As an artist, he was above the law.¹⁴¹

And we all know: Law trumps art.

Some forms of execution are discriminating. With a beheading, for example, the executioner already knows the identity of his victim while he sharpens the blade. Indeed, an elaborate process to select this particular head for separation usually precedes the execution. Because there is a one-to-one ratio of decapitator to decapitated, with only a small area of physical contact between the metal and the flesh, there is little chance that another neck might accidentally fall on the block. There is no phalanx of executioners on the platform to muddy the causal waters and no pressing crowd of potential victims. A beheading is a duet. There is one human being with an ax in his hand and one human being with his eyes to the ground.

When I first started reading about beetles and the killing jar, I imagined that it, too, was a discriminating form of execution. Here is how

If an object is so crudely carved as to be virtually unrecognizable, it will certainly be rejected Closely related to this criterion is the insistence that no cult-object should resemble any other spirit more than it resembles its own previous versions Production of a cult-object appropriate to the wrong spirit is not only useless; it is positively dangerous to the carver.

Id.

139. Jeff Koons is not the only artist to have violated a court order to stop production or circulation of a work. Dan O'Neill, the artist who drew the Walt Disney characters in the underground comic that was the subject of *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), continued to produce parodies of Disney characters even after the court's decision. Carlin, *supra* note 117, at 121 n.80. See Dan O'Neill, *Communique # 1 from the MLF (Mouse Liberation Front), Coevolution Q.*, Spring 1979, at 42.

140. Hobbes regarded laughter as an expression of superiority: "Sudden glory is the passion which maketh those grimaces called laughter; and is caused either by some sudden act of their own that pleaseth them or by the apprehension of some deformed thing in another, by comparison whereof they suddenly applaud themselves." Thomas Hobbes, *Leviathan*, ch. VI, at 125 (C.B. Macpherson ed., 1968) (1651). By the use of humor, Koons may be asserting a superiority that the court quite understandably does not find funny. It might not be so much that they don't get the joke, but that they do.

141. Carlo Carra wrote about the mental state of the artist during the act of creation, and his thoughts about the power of the artist seemed relevant to Koons's case:

Thus, in this somnambulistic voyage, I return to that infinite particle of eternity that is within me, by means of which I feel in contact with my truer self, and I try to penetrate the recondite intimacy of ordinary things, which are the last to be conquered. . . . I feel as if I were the law itself, not a simple rendezvous of elements.

Carlo Carra, *The Quadrant of the Spirit*, in *Theories of Modern Art*, *supra* note 68, at 453-54.

I thought it would work. Two fingers would grasp the beetle by his sides and lift him into the air. Legs waving wildly with the frantic freedom of no gravity, his beetle body would be lowered in its entirety into the sweating jar. His natural defenses—that hard carapace to protect him from assault and those strong jaws and pincers to attack—could not save him. The poison would enter insidiously, from down below, from that nethermost region of vulnerability. He would breathe the sharp sweetness of potassium cyanide, in and out, in and out, in and out. The pressure of need would do the beetle in. This form of execution, too, has the structure of a musical composition, but not a duet, rather, two vocal selections performed in seriatim: first an aimless little tune hummed by the owner of the two fingers, and then a gasping, desperate song of pain and annihilation.

Art object as beetle. In the case of direct censorship, the prey is killed just as I imagined: The judge picks up the beetle between his two fingers and eases him into the killing jar. When this happens, it is a public execution, and there will usually be an audience to watch the beetle's frantic struggle for air, perhaps with a sense of satisfaction. Even with an indirect form of censorship, such as copyright infringement, the execution is a public one, and there, too, the collector is deliberate as he unscrews the lid and drops in the offending beetle. The victim is identified; he is a life in being, and the bearer of a name.

Jeff Koons's sculpture was the beetle whose death we have just witnessed. But the law's net is wide, and as the collector sweeps through the grass in purposeful pursuit of his prey, he inadvertently picks up other creatures between the layers of white marquisette. The collector may think he has captured only one beetle, but when he opens the lid, other living things—unidentified, too small to see—tumble into the killing jar. Other artworks may never reach maturation; some may never be conceived. There is much to mourn in Jeff Koons's defeat. Little unseen deaths inside you, inside me.

At dusk, the fireflies levitate and spiral upwards. Across canyons of darkness, they pulsate a yellow glow of intermittent illumination, silently signaling to one another in solemn recognition: the living lanterns of the night.

During the day, the sun's bright light distracts us from the ache of mortality and the indifference of infinity. But when that light has faded, we are left alone with the nothingness of night. Its blackness goes on forever, and we do not.

The fireflies punctuate the night sky with luminosity. They bring fire to the dark. They make bearable our journey, as we spin and hurtle through empty space.

During the day, the fireflies lay low, hiding in the shade, under leaves and in the long grass. Their reclusion renders them vulnerable to the haphazard sweep of the collector's net—and to the killing jar. What loss, the pulse of signification? What loss, their extermination?

Whose feet are wet? Who breathes the vapors of this murderous dew?