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Appropriation Art and the Law: *Originality is in the Eye of the Beholder*

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ABSTRACT:Artists have always borrowed elements from the work of other artists; however, the practice of directly appropriating pre-existing images with little transformation is a relatively recent phenomenon. Appropriation art and design challenge longstanding assumptions about originality and authorship. This essay analyzes the legal implications of appropriating art, through examinations of several recent high-profile copyright infringement cases in U.S. courts. Several of the cases involve fashion designers appropriating street art and graffiti. The cases demonstrate a delicate balancing act of protecting the rights of original artists and encouraging proper practices by later artists and designers. As technological innovation and open access to imagery continues to grow, so too will the legal issues implicated in appropriation art.

KEYWORDS: Appropriation art, Copyright, Duchamp, Graffiti, Street art

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I. INTRODUCTION

In the art world, *appropriation* refers to intentionally borrowing, copying, and/or altering an existing image or object. Although throughout history artists have subtlety taken specific elements ─ such as motifs and compositional strategies ─ from other artists, direct appropriation became more prevalent during the twentieth century with the proliferation of accessible images through mass media, including television and the Internet. In addition, the growing acceptance and prevalence of *street art* and graffiti has led to a widespread assumption that public art is a shareable community resource. Appropriation art calls into question traditional notions of originality and has led to the development and expansion of *intellectual property* law.

Unlike mathematics or science (Reiss and Sprenger 2014), the creative arts are based upon subjectivity. In her 1878 book entitled *Molly Bawn*, the Irish novelist, Margaret Wolfe Hungerford (1855-1897) wrote, “beauty is in the eye of the beholder” (Hungerford 1878). Hungerford’s oft-repeated phrase suggests that assessing beauty, including aesthetic or artistic beauty, is a subjective process. This is a commonly held view. What about artistic originalitythough? Is it also subjective? Answering this question is difficult because innovative art practitioners often borrow heavily from others.

The charismatic pioneer of personal computing, Steve Jobs (1955-2011) frequently gave credit to the charismatic pioneer of modern art, Pablo Picasso (1881-1973) for the saying “good artists copy, great artists steal” (Quote Investigator 2013). Picasso, however, did not invent the phrase or the sentiment. The American-born British poet, T. S. Eliot (1888-1965) also deserves some credit. In 1920, Eliot wrote, “immature poets imitate; mature poets steal” (Eliot 1920: 114). Even famous artists, such as Picasso and Eliot, and other types of visionaries, take what they wish from their predecessors and contemporaries. In 1675, the great mathematician and physicist Isaac Newton (1643-1727) wrote, "if I have seen further, it is by standing on the shoulders of giants" (fig. 1).

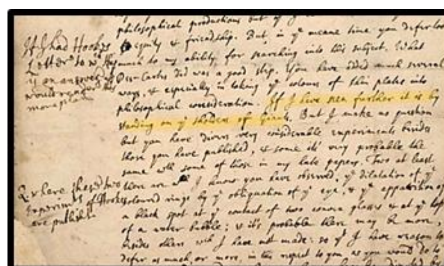

Figure 1.
Isaac Newton. Letter to Robert Hooke (1635-1703), 1675.
Public Domain.

II. CRUCIAL TERMS

Beauty and originality may be open to interpretation, but the legal definitions of theft and appropriation are more clear-cut. The Parliament of the United Kingdom enacted The Theft Act in 1968. The Theft Act created a number of criminal offences against property in England and Wales and defined certain legal terms. The Act defines “appropriates” thusly: “Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property [innocently and later assumes] a right to it by keeping or dealing with it as owner (UK Public General Acts). Putting aside The Act’s *legalese*, appropriation can be an element of theft and it occurs when a person improperly assumes and exercises the rights of the proper owner. In the United States, individual states enact their own penal codes that provide the essential elements of criminal offenses. While the various penal codes vary somewhat, the state of Texas’ definition of theft by appropriation is typical. “A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of [that] property. Appropriation of property is unlawful if: (1) it is without the owner's effective consent; or (2) the property is stolen and the actor appropriates the property knowing it was stolen by another (Texas Penal Code § 31.03). Boiling it down to the basics, taking and using another person’s property without their consent is a crime.

Artists rarely invoke criminal law to protect their rights; rather, they utilize civil authority and civil courts, which can provide for monetary compensation. This essay concerns the relationship between art and intellectual property, particularly the role intellectual property rights plays in the context of contemporary artistic production. Intellectual property is a product of the human intellect that the law protects from unauthorized use or *infringement* (acting unlawfully). Intellectual property traditionally encompasses trademarks, patents, and copyrighted materials. “Products of human intellect” refers to creations such as computer programs, literary works, inventions, designs, symbols, images, and artworks. As technology develops over time, and successive generations create new forms of creativity, the definition of intellectual property will continue to grow.

The U.S. Copyright Office defines *copyright* as a form of legal protection provided for "original works of authorship," including literary, dramatic, musical, architectural, pictorial, graphic, sculptural, and audiovisual works. Copyright applies to original creations fixed in a tangible medium of expression. The term copyright literally denotes “‘the right to copy,’ but has come to mean that body of exclusive rights granted by law to copyright owners for protection of their work” (U.S. Copyright Office 2020). An owner’s most significant power is the exclusive right to market his/her work for a specified period. There are a few, very limited exemptions to copyright law permitting a person to use protected work without authorization, in particular the *fair use doctrine*, which will be discussed later.

III. MARCEL DUCHAMP, *L.H.O.O.Q.*

Just as the definition of intellectual property expands, so too does the scope of copyright protection. Copyright currently applies to a wide variety of literary forms (novels, plays, poems, etc.) and a wide variety of visual forms (photographs, drawings, and paintings, etc.). Copyright even comes into play in less traditional media, such as the groundbreaking work of Korean American video artist Nam June Paik (1932-2006) or the contemporary mixed media collages of Richard Prince (born 1949) (Saucier 2020; Passero 1995). Many iconic modern artworks created during the early twentieth century that did not raise copyright concerns might face legal challenges if they were first coming to market today. Consider, for example, Marcel Duchamp’s (1887-1968) *ready-made* work, entitled *L.H.O.O.Q.*, of 1919 (fig. 2) (see Reff 1977).

Figure 2.
Marcel Duchamp. *L.H.O.O.Q.*, 1919.
Public Domain.

Figure 3.
Leonardo da Vinci. *Mona Lisa*, 1503.
Public Domain.

Figure 2 is not an illustration of the *Mona Lisa* (fig. 3), the renowned painting created by Leonardo da Vinci (1452-1519) in 1503; it is instead a *rectified ready-made* produced by Marcel Duchamp (1887-1968) more than four centuries later. Duchamp was a French-born painter and sculptor, as well as a controversial and influential pioneer in conceptual art. Duchamp’s fame (some traditionalists might say notoriety) rests upon the many avant-garde, post-modernist concepts he devised, perhaps the most radical being the *ready-made* sculpture, exemplified by *Bicycle Wheel*, of 1913 (fig. 4).

Figure 4.
Marcel Duchamp. *Bicycle Wheel* (copy of 1913 original).
Public Domain.

Duchamp's creative act involved locating an everyday *objet trouvé* (or "found object") that he then displaced from its original functional context and moved into a new creative context, such as a gallery exhibition or artistic journal. According to Duchamp, the process of displacement turned theobjet trouvé into an *objet d'art* (or "art object"), which could be readily reproduced by anyone. The ready-made was a harbinger of many later developments in post-modernism, which gave precedence to the creative act or decision over the discrete object. While Duchamp's *Bicycle Wheel* does not really bring to mind copyright infringement (though patent infringement might be an issue), the artist's direct appropriation of a copy of the *Mona Lisa* raises intellectual property concerns.

In *L.H.O.O.Q.* Duchamp's objet trouvé was an inexpensive postcard with a reproduction of da Vinci's masterpiece. In other words, the subject of the objet trouvé was already an objet d'art, as well as a transcendent symbol of western culture. Using Duchamp's terminology, he "rectified" the ready-made object (the postcard representation) by drawing a *van Dyke beard and mustache* onto *Mona Lisa*'s face and by giving the work a new irreverent title: *L.H.O.O.Q.* The title is a somewhat childish and crude play on words. In French, pronouncing the letters *L, H, O, O, Q* sounds a bit like "*Elle a chaud au cul*," or "She has a hot derriere." French avant-garde painter, Francis Picabia first published *L.H.O.O.Q.* in his art and literary magazine *391* (Reff 1977).

Leonardo da Vinci was not alive to witness Duchamp's appropriation, alteration, and redisplay. Hypothetically, though, consider a different scenario: suppose Duchamp and Leonardo lived today and Duchamp wanted to publish *L.H.O.O.Q.* Given the rise in intellectual property law and today's highly litigious art market, perhaps Duchamp would first attempt to obtain Leonardo's permission to use his image. If Leonardo refused, Duchamp might go ahead and publish *L.H.O.O.Q.* anyway. Leonardo would probably then initiate an action in civil court and argue that, despite the alterations, *L.H.O.O.Q.* is, in essence, still his own work. Leonardo might seek an injunction preventing Duchamp from further publication and he might seek specified damages. Undoubtedly, the result of the hypothetical litigation would hinge on certain key questions, such as: (1) Is the postcard producer liable for *contributory copyright infringement*; (2) Even if he lacked authority to use Leonardo's image, could Duchamp freely use the postcard reproduction, which he owned?;and (3) Has the *Mona Lisa*, a ubiquitous cultural icon, passed into the *public domain* (and is, therefore, not subject to copyright protection)? The hypothetical litigation would be contentious and costly.

Before moving on, it is vital to acknowledge the difference between an original artwork, in a traditional medium, such as oil painting on canvas, and a photographic reproduction of an artwork. In 1935, German philosopher and cultural critic, Walter Benjamin (1892-1940) wrote an influential, seminal essay entitled "The Work of Art in the Age of Mechanical Reproduction." Benjamin wrote that artificially reproducing an artwork devalues its *aura*, the distinctive quality surrounding and generated by the artwork. According to Benjamin, "even the most perfect reproduction of a work of art [lacks] one element: Its presence in time and space, its unique existence at the place where it happens to be" (see Benjamin 1969: 214-218). There is undeniable merit in Benjamin's assertion. Actually seeing Leonardo da Vinci's *Mona Lisa* with your own eyes on the wall of the Louvre museum in Paris is a very different experience than seeing a black-and-white photograph of the *Mona Lisa* on a cheap postcard. The painting has a unique presence, physical impressiveness, and aura that the postcard image lacks.

IV. U.S. LITIGATION

The remainder of this essay discusses a few recent legal disputes that shed light on the intersection of individual expression, the art market, and intellectual property law. The first dispute discussed, *Cariou v. Prince*, 714 F.3d 694 (2013), involved the parameters of infringement and the fair use exception to copyright. In law school, students learn a methodology for analyzing legal cases known by the acronym "IRAC." The initials stand for the four primary elements of a legal case: namely the Issue, Rule, Application, and Conclusion. Using the IRAC method to analyze *Cariou v. Prince* is both efficient and effective.

Issue: Richard Prince is a prominent American painter and photographer. The Gagosian Gallery, in New York, represents Mr. Prince. Since the nineteen-eighties, Prince has used an appropriation process known as *re-photography*. He "pulls" (or appropriates) other photographers' images, which he then alters or

manipulates to produce a new work, perhaps a painting or a new photograph. Prince's alterations might be quite substantial or very subtle. According to the Gagosian website, Prince *mines* "from mass media, advertising and entertainment [and] he has redefined the concepts of authorship, ownership, and aura" (Gagosian 2020). In 2009, Prince's redefinition of authorship and his process of re-photography led to litigation.

In 2000, the French photographer Patrick Cariou published a photo essay entitled *Yes Rasta*. Cariou's photographs documented the six years he spent living among Jamaica's Rastafarian communities (fig. 5). In 2008, The Gagosian Gallery exhibited Richard Prince's *Canal Zone* series of paintings. Several of Prince's paintings incorporated Cariou's Rastafarian photographs, with various modifications, including enlarging, blurring, and the addition of color (fig. 6). Neither Prince nor Gagosian had previously sought Cariou's authorization for the use of his images. Cariou then initiated a lawsuit against both Prince and Gagosian in a U.S. federal court claiming copyright infringement.

Figure 5.
Patrick Cariou.
Yes Rasta photograph.

Figure 6.
Richard Prince.
Canal Zone appropriation.

Rule: In their defense, Prince and Gagosian contended they were protected from Cariou's infringement claims by the fair use doctrine, which is explained in Section 107 of the U.S. Copyright Act. Fair use promotes freedom of expression by permitting unlicensed use of copyright-protected works under certain circumstances. Section 107 provides the statutory framework for determining whether something is fair use and identifies certain types of uses — such as criticism, comment, teaching, scholarship, and research — as examples of activities that may qualify as fair use. Section 107 recommends considering the following four factors in evaluating a question of fair use:

(1) Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes. … *'Transformative' uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work*;
(2) Nature of the copyrighted work [the degree to which the work that was used relates to *copyright's purpose of encouraging creative expression*];
(3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) Effect of the use upon the potential market for or value of the copyrighted work [emphasis added] (17 U.S.C. § 107; copyright.gov 2020).

Prince argued that his use of Cariou's photographs was transformative, that he added something new with a different character, and that his new works reflected his own creative expression.

Application: The trial court rejected Prince's argument and held that he had infringed Cariou's copyright. The court thought Prince's new works were insufficiently transformative, and that he was not "commenting upon" or significantly adding to Cariou's photographs. Prince and Gagosian challenged the trial court's decision in an appellate court. After reviewing the evidence for two years, the appellate court reversed the trial court's finding and issued a new decision that helped explain how courts might apply the fair use doctrine.The appellate court found that most of Prince's new works were indeed transformative, and that to a reasonable observer they presented a fundamentally different aesthetic. According to the appellate court, "Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, [but] Prince's crude and jarring works … are hectic and provocative. … Prince has created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work" (*Cariou v. Prince*, 714 F.3d 694).

The appellate court determined the fair use doctrine was applicable and remanded (or sent back) the case back to the lower court for reconsideration.

Conclusion: Before the trial court reached a final decision though, Cariou and Prince announced that they had settled the case. Unfortunately, the settlement left those in the field of copyright law without clear,

guiding precedents. A leading copyright attorney, Amy Goldrich commented, “I can see how [many] will likely be disappointed by this outcome, but there’s a lot more clarity now on how fair use applies. That additional clarity for artists is a good thing” (Boucher 2014).

As a side note, various players in the New York art world submitted briefs in support of Prince, including the Andy Warhol Foundation and Robert Rauschenberg Foundation. They insisted, “The intellectual content and aesthetic meaning of works of art are not always visible to the naked eye without art-historical context” (Boucher 2014). They suggested courts considering fair use cases should obtain the opinions of art historians, curators, and other experts.

V. BEEBE V. RAUSCHENBERG

When faced with accusations of copyright infringement, artists often offer a common defense: examples of “artists using pre-existing objects or images in their art with little transformation” fill the pages of art history and cover the walls of modern art galleries (Tate 2020). Before the First World War, Pablo Picasso and Georges Braque (1882-1963) pasted newspapers, sheet music, and menus into their *synthetic cubist* collages. The cubist innovation ─ creating art from real objects ─ inspired similar collages from *dada* artists working in Zurich during the First World War, as well as Marcel Duchamp’s ready-mades a bit later. During the nineteen-fifties, Jasper Johns (born 1930) and Robert Rauschenberg (1925-2008) carried on the tradition of appropriating images and objects, and influenced a generation of American *pop artists*, including Andy Warhol (1928-1987). According to London’s Tate gallery, since the mid-twentieth century, appropriation has assumed a particularly prominent position in the “long modernist tradition … that questions the nature or definition of art itself” (see, also, Krauss 1985).

In 1974, Robert Rauschenberg began displaying his *Hoarfrost* series, in which he used solvent to transfer images from newspapers and magazines onto fabric. The series included a print entitled *Pull* (fig. 7). In November 1976, Rauschenberg appeared on the cover of *Time* magazine and *Pull* appeared in the featured article.

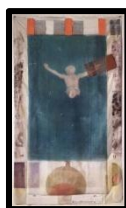

Figure 7.
Robert Rauschenberg. *Pull*, ca. 1975.
Public Domain.

Pull’s central motif is a solvent transfer of a photograph showing a cliff diver from above about to plunge into water. The renowned San Francisco-based photographer, Morton Beebe took the photograph and it originally appeared in a Nikon camera advertising campaign. Beebe did not realize Rauschenberg had “lifted” his photograph until Beebe’s friends, the artists Christo (1935-2020) and Jeanne-Claude (1935-2019) showed him the *Time* magazine article. On January 4, 1977, Beebe sent Rauschenberg a letter:

“Dear Mr. Rauschenberg:
Imitation is the height of flattery. In seeing the outstanding cover story on you in Time Magazine of November 29, 1976, I noticed, as did a number of my friends, a remarkable similarity between the reproduction of your original piece of art, entitled "PULL, 1974," of a diver vanishing into a pool. There is a remarkable resemblance to a photograph of mine of a Mexican diver plunging off a cliff in Acapulco, copyrighted in 1972, and published as a portfolio of my work by Nikon, the camera company. … I would appreciate hearing from you on this matter. When next in New York this spring I hope we shall have a chance to meet. … Best wishes for a happy new year.
Morton Beebe” (Beebe 2020).

Apparently, Rauschenberg thought he had done nothing wrong. After receiving Beebe’s letter, Rauschenberg wrote back:

“Dear Mr. Beebe,
I was surprised to read your reaction to the imagery I used in "Pull", 1974. Having used collage in my work since 1949, I have never felt that I was infringing on anyone's rights as I have consistently transformed these images sympathetically with the use of solvent transfer, collage and reversal as ingredients in the compositions

which are dependent on reportage of current events and elements in our current environment hopefully to give the work the possibility of being reconsidered and viewed in a totally new concept. I have received many letters from people expressing their happiness and pride in seeing their images incorporated and transformed in my work. … I welcome the opportunity to meet you when you are next in New York City. … Wishing you continued success.
Sincerely, Robert Rauschenberg" (Beebe 2020).

Rauschenberg's appropriation, however, did not elicit Beebe's "happiness," nor his "pride," and he initiated a civil action against Rauschenberg for using his photograph without first obtaining permission. The stage was set for a court of law to clarify officially the legality of artistic appropriation and to provide binding legal precedent on the limits of the fair use doctrine. Unfortunately, though, as happened later in *Cariou v. Prince*, before the dispute had progressed very far the parties reached an out-of-court settlement. Rauschenberg agreed to pay Beebe US$3,000 and to give him a copy of *Pull*. Rauschenberg also promised that when he exhibited *Pull*, catalogues and wall labels would include proper acknowledgement of his print's source. In all likelihood, Beebe decided to settle the case because expensive legal fees were involved and in the U.S. civil litigants typically bear their own costs. As an aside, Beebe later sold his copy of *Pull*, reportedly for US$13,000 (undoubtedly, it is worth far more today) and, after settling the suit, Rauschenberg switched to using his own photographs almost exclusively.

VI. REMEDIES FOR INFRINGEMENT

What remedies are available to a plaintiff in a copyright infringement case? Remember, copyright is a type of intellectual property right ("IPR"), as are trademarks, patents, and trade secrets. Although IPRs seem *incorporeal* (in the sense that they cannot be seen or touched), they are a form of personal moveable property. The theft of traditional *corporeal* property (that having a tangible form and structure), such as a diamond ring, for example, is usually dealt with through traditional law enforcement and the criminal courts. However, English and U.S. law generally require the owner of IPRs to enforce them against infringers via a private civil action. The remedies available to a successful claimant in a private civil infringement action include an injunction and damages.

The character of IPRs is essentially negative: they give owners the right to stop others from doing certain things, if they do not first obtain the owner's consent. For example, Morton Beebe wanted to stop Robert Rauschenberg from using (and profiting from) his photograph without consent. If he had not settled the case outside of court, Beebe could have conceivably obtained a prohibitory injunction, which is an order requiring an individual or individuals to refrain (or cease) from doing certain defined acts that are the exclusive preserve of the IPR owner. In infringement cases, the injunction is probably the most important and common remedy plaintiffs seek. Typically, at the beginning of a civil action a plaintiff seeks a *temporary injunction* during the pendency of litigation (to prevent *unjust enrichment*). If the plaintiff ultimately prevails on the merits, the court may then enter a *final injunction* order, directing the losing party to take action or cease from taking some action in the future (17 U.S.C. § 502).

If Morton Beebe had seen his action through to a successful completion, and if Robert Rauschenberg was found to be an infringer of copyright, Rauschenberg may have been liable for Beebe's actual damages and any profits that were attributable to Rauschenberg's infringement (17 U.S.C. § 502). The goal of awarding damages is to compensate the IPR owner for the invasion of his rights. Damages, an award of a certain amount of money, are intended to put the copyright owner back, as far as is practicable, into the position he/she would have been in if there had been no infringement. Of course, in general the successful plaintiff must offer verifiable proof of his/her actual damages, though a U.S. court also has authority to award statutory damages of as little as US$750. Perhaps Beebe's legal team thought they would be unable to prove substantial damages, and therefore decided to settle the case out of court, on the best possible terms.

VII. APPROPRIATION OF STREET ART

The latest U.S. litigation over the allowable limits of appropriation art and design has centered on protections afforded to so-called *street art*. Street art is created in public spaces, typically without official permission. It runs the gamut from simple graffiti *tags* on trains to elaborate murals on the sides of buildings. The mysterious English street artist and political activist known as Banksy has received considerable attention from art critics and journalists in recent decades, raising the profile of street art internationally (Jones 2013). Although street art's detractors may believe unauthorized, public art should be held to a different standard, the intent of IP law is to encourage a wide range of creativity and to give diverse artists the exclusive right to profit from their creations, at least for a limited period.

The American street artist, David Anasagasti works under several artistic monikers, including AholSniffsGlue. Anasagasti paints on public walls in his hometown of Miami, Florida. His murals are

immediately identifiable by his recurrent use of a characteristic motif: a sleepy-eyeball (fig. 8). In 2013, the clothing retailer American Eagle Outfitters began using Anasagasti's art and his eyeball motif for a worldwide marketing campaign promoting its spring 2014 fashion line. Anasagasti did not give American Eagle permission to use his work and he received no compensation. One of the advertisements showed a model, wearing American Eagle attire, holding a spray-paint can in front one of Anasagasti outdoor murals, implying the model had created the painting (fig. 9). Anasagasti went through the process of registering a copyright for his drowsy eye motif, but only after American Eagle had already begun its campaign. Anasagasti initiated an infringement action in a New York federal court. The issue was whether publically displayed street art merited the same legal protection as does traditionally displayed artworks, such as Leonardo's *Mona Lisa*. In 2013-2014, American Eagle reported more than three billion U.S. dollars in annual revenue, and the company opted to settle out of court. Apparently, American Eagle's legal team feared the court would look unfavorably on the company's decision to simply appropriate well-known street art without first seeking proper authorization from its creator.

Figure 8.
Detail of a David Anasagasti mural in Miami.

Figure 9.
American Eagle Outfitters ad, 2014.

Immediately following the American Eagle case, Italian fashion designer Roberto Cavalli faced similar allegations of copyright infringement and false designation of origin. Again, the dispute was over alleged misappropriation of street art. Three San Francisco artists ─ Jason Williams, Victor Chapa and Jeffrey Rubin, who are known professionally as Revok, Reyes and Steel ─ collaborated on a very large mural that covered the side of a building in San Francisco's Mission District (fig. 10). Revok, Reyes and Steel contended that designs in Cavalli's spring/summer 2014 collection directly copied their mural's specific motifs and general *aesthetics*. Aesthetics is the philosophical study of beauty and taste. According to the plaintiff's court documents, Cavalli and his retailers (including Nordstrom, Amazon, and Zappos) introduced clothing and accessories "in which every square inch … was adorned with graffiti art" that unmistakably resembled their original mural. The artists alleged Cavalli not only copied their "signature" work, but also copied their "stylized signatures" for his designs. In addition, a few items were even superimposed with the spray-painted signature "Just Cavalli" (fig. 11). According to Revok, Reyes and Steel this gave "the false impression that Cavalli himself was the [original] artist" (fig. 11) (Gardner 2014). As American Eagle had done, Robert Cavalli settled the case out of court.

Figure 10.
Revok, Reyes and Steel, San Francisco mural.

Figure 11.
A "Just Cavalli" shirt, 2014.

One final street art case ─ *Tierney v. Moschino* ─ merits consideration. The Brooklyn, New York, graffiti and street artist, Joseph Tierney commonly works under his professional name Rime. In 2012, Rime painted a mural on the side of a building in Detroit, which he gave the imaginative title *Vandal Eyes* (fig. 12). In 2015, the Italian luxury fashion house Moschino presented its "Graffiti Line" at Milan's Fashion Week. During the presentation of Moschino's collection, the model Gigi Hadid walked down the runway wearing a gown adorned with a reproduction of *Vandal Eyes*. Other gowns also featured elements of the mural and the name "RIME" appeared on at least two items. A few months later, the American singer and cultural icon, Katy Perry wore a "Vandal Eyes gown" to the Met Gala, a fundraising event held annually to benefit the Costume Institute of New York's Metropolitan Museum of Art. Moschino's creative director, Jeremy Scott also appeared, wearing a "Vandal Eyes jacket," and as the fashion world looked on, Scott bowed down dramatically and kissed Perry's outstretched hand (fig. 13). In 2016, Rime filed a lawsuit against the Italian luxury fashion house and Jeremy Scott, claiming copyright infringement and unauthorized use of his (professional) name.

Figure 12.
Rime, *Vandal Eyes*.

Figure 13.
Perry and Scott at the Met Gala, 2015.

In his complaint, Rime described Perry and Scott's Met Gala appearance as a "crass and commercial publicity stunt" that exploited his creativity and damaged his credibility at a street artist. Rime claimed that he "generally eschew[ed] connections to consumerism, except in carefully selected instances … [because] nothing is more antithetical to the outsider 'street cred' that is essential to graffiti artists than association with European chic, luxury, and glamour ─ of which Moschino is the epitome." Rime claimed that Moschino's wrongdoing left him "wide open to charges of 'selling out'." (*Tierney v. Moschino* 2015). In response, Moschino and Scott filed a motion for summary judgment arguing Rime lacked standing to bring his claims because, they said, *Vandal Eyes* was the product of an illegal act that should not receive legal protection. They described Rime an "unabashed felon," because he did not have permission from the Detroit building owner before creating his mural. According to Moschino and Scott's motion, "as a matter of public policy and basic logic, it would make no sense to grant legal protection to work that is created entirely illegally" (*Tierney v. Moschino* 2015).

Unfortunately, the litigants settled the case before the judge ruled on the summary judgment motion, leaving Moschino and Scott's claims in limbo. The litigants did not disclose the terms; however, Rime told reporters, "I am glad the case is settled [and] very satisfied with the outcome. Graffiti is a form of art that deserves the same respect and legal protection that other forms of expression are entitled to" (Kim 2016).

VIII. A FINAL CASE

Although artists have frequently accused fashion designers of copyright infringement, the same accusation has been heard in other areas of the social arena that rely on visual communication. For example, Shepard Fairey, a street artist and the creator of the Barack Obama's iconic "HOPE campaign poster" (fig. 14), faced accusations of improper appropriation. Throughout his career, Fairey has painted graffiti and posted sticker art on public buildings to promote social and political causes. In 2004, he helped create a series of "anti-war, anti-Bush" posters for a street art campaign called "Be the Revolution." Four years later, Fairey designed a street poster supporting Barack Obama, which over time came to embody Obama's 2008 presidential campaign message.

The "HOPE poster" was a stenciled portrait in red, beige and blue, with empty space allocated at the bottom that allowed for inserting various textual messages (hope, change, progress, etc.). Fairey and his associates distributed his poster and design widely, in hard and softcopies. The Obama campaign, at first tacitly, then officially, approved the poster. In February 2008, Barack Obama sent Shepard Fairey a letter of gratitude, writing, in part, "I would like to thank you for using your talent in support of my campaign. The political messages involved in your work have encouraged Americans to believe they can change the status-quo. Your images have a profound effect on people, whether seen in a gallery or on a stop sign. I am privileged to be a part of your artwork and proud to have your support" (fig. 15).

Figure 14.
Shepard Fairey poster.

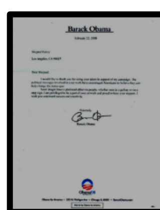

Figure 15.
Obama's letter to Shepard Fairey.

Figure 16.
Mannie Garcia photo.

After Barack Obama assumed the presidency, the Smithsonian Institution bought Fairey's original stenciled version to display in Washington, D.C.'s National Portrait Gallery alongside other presidential portraits. After the Smithsonian unveiling, Mannie Garcia, a freelance photographer who had worked for the Associated Press ("AP"), came forward and revealed that Fairey's image was based directly on his photograph (fig. 16). Fairey did not acknowledge Garcia or AP as his source. AP then initiated a lawsuit seeking

compensation for copyright infringement. Shepard Fairey in turn sought a declaratory judgment that his poster represented fair use of the original photograph, because he had transformed (cropped) the original and added something new, by painting it red, white, and blue, and by adding the word “HOPE.” As the reader may have already guessed, the parties settled out of court and details of the settlement have remained confidential.

One factor differentiating this case from those already mentioned is that AP, rather than Mannie Garcia, brought the copyright infringement action. Garcia took the photograph (the original artwork), but as an independent contractor he presumably retained no copyright interest in his work; he contractually signed away those rights to AP. Often, art museums claim copyright over *reproductions of works* in their collections, independently from the original artists and creators (see, for example, Museum of Fine Arts Boston 2020). These claims become problematic when the original artwork enters the “public domain,” and is no longer subject to copyright protection (see Fishman 2012). An artwork arrives in the public domain when its copyright expires, when the copyright owner fails to follow copyright renewal rules, when the copyright owner deliberately places it in the public domain (makes a “dedication”), or if copyright law no longer applies because the work is very old or the creator died long ago (Stanford 2020). Recently, many art museums have begun to relinquish their problematic copyright claims and have recognized their cultural treasures are “are in the public domain [and] should be freely accessible to and usable by the public” through offering open access images (Goldman 2020).

IX. CONCLUSION

This brings us back to Walter Benjamin’s essay “The Work of Art in the Age of Mechanical Reproduction.” Nearly a century ago, Benjamin discussed how reproducing an artwork devalues its aura, the distinctive quality generated by the artwork itself. David Anasagasti, the street artists in the Cavalli case, Rime (and even Leonardo da Vinci) would probably agree with Benjamin’s analysis. When a fashion designer appropriates and reuses graffiti or street art the process alters the original work’s special aura, “its presence in time and space, its unique existence [and meaning] at the place where it happens to be.” This is also true when a (street) artist appropriates and reuses a commercial or news photograph, as in the Beebe and AP cases. In both scenarios, intellectual property law indicates appropriators should first obtain the creator’s permission before altering and reusing a work. Walter Benjamin perhaps never envisioned the innovations of the twenty-first century, when a seemingly infinite number of high-definition electronic images of fine art, street art, and other forms of creative expression are just a click away. The legal community will continue racing to keep up with technological advances, new forms of art, and the ramifications of open access media. The challenge will be balancing the rights of original artists in their creative expressions and encouraging proper practices by those who wish to “stand on their shoulders.”

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