

# When Art Borrows: Navigating Copyright in the World of Appropriation Art

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In the realm of contemporary art, the practice of appropriation has emerged as a captivating and often controversial means of artistic expression. The deliberate incorporation of existing artworks into new creations has given rise to a vibrant discourse, where the boundaries between homage, critique and copyright infringement blur. This article explores the intriguing realm of appropriation art, delving into the nuanced legal challenges that come with this form of creative expression. It also illuminates the intersection of law and appropriation art, providing insights from both European and US perspectives.

## **Defining “appropriation art” and its connection to law**

“Appropriation art” refers to the practice of borrowing, sampling or using pre-existing images, objects or elements from other works of art, often from popular culture and incorporating them into a new artistic creation. This form of art frequently involves taking recognizable or iconic images and recontextualizing them to convey new meanings, critique or commentary on various social, cultural or political issues.<sup>1</sup>

The legal landscape surrounding appropriation art is complex, with questions about transformative intent and copyright at the forefront. As artists seek to reinterpret, remix and repurpose existing works, they navigate a delicate balance between freedom of expression and the protection of intellectual property, specifically copyright and exclusive rights granted to rightholders. This article unravels the legal threads woven into appropriation art, dissecting the challenges and controversies that arise within this dynamic space.

## **Where it all began**

Appropriation art emerged significantly in the 20th century, responding to the rise of consumer culture and mass media.<sup>2</sup> Its roots trace back to the Dada movement of the early 20th century emerging in Europe and the United States in the aftermath of World War I. Originally referring to a hobbyhorse in colloquial French, the term "Dada" essentially means nonsense. However, the avant-garde movement itself embodies much more than nonsense. It challenges artistic conventions by embracing the irrational and absurd by using collage and montage techniques.<sup>3</sup>

The 1950s and 1960s witnessed Pop Art celebrating consumerism with artists like Andy Warhol using images from advertising and mass-produced goods. These works have left a lasting impression: Who does not know Andy Warhol's Pop Art painting of the famous Campbell's Soup Cans?<sup>4</sup>

The 1960s marked a conceptual shift in the arts, emphasizing ideas over craftsmanship, exemplified by Marcel Duchamp's “readymades”. The 1970s and 1980s saw the Appropriation Movement flourish, led by artists like Sherrie Levine and Jeff Koons. Levine recreated existing artworks, challenging notions of authorship and originality, sparking debates on ownership and artistic expression boundaries.<sup>5</sup>

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<sup>1</sup> (Lesso, 2023)

<sup>2</sup> (MoMA, MoMA, 2023)

<sup>3</sup> (Tate UK, 2024)

<sup>4</sup> (Campbell, no date)

<sup>5</sup> (Tate, no date)

Moreover, not to forget, appropriation still exists nowadays, maybe even more than ever considering the digital world.

Yet, how is appropriation art handled in the European and American legal systems? If appropriation art has been around for so long, why would there be any legal issues? Are there even legal restrictions and if so, what are they? Does not artistic freedom exist? Is copyright even relevant when it comes to appropriation art?

### **Copyright from an European perspective**

After delving into the history of appropriation art, the next step involves examining it from a legal perspective. This entails contextualizing appropriation art within the realm of copyright, first shedding light on copyright from a European perspective and subsequently from an American viewpoint.

However, first things first. What is copyright anyway? Copyright and industrial property both fall under the term “intellectual property” which comprises all exclusive rights to intellectual creations. Industrial property, on one hand, covers inventions (patents), trademarks, industrial designs and utility models, as well as designations of origin. Copyright, on the other hand, pertains to artistic and literary works.<sup>6</sup>

In simple terms, what does that mean? When someone produces a unique piece of literature, scientific articles or art like poems, films songs or sculptures, copyright safeguards your creation. Only the person creating the work, from whom the work originates, has the exclusive right to disclose the work to the public or allow for its duplication by others. This is the crucial point, since copyright grants the rightholder economic and moral rights, so called exclusive rights. Economic rights ensure that you maintain authority over your work and receive compensation for its utilization, through either selling or licensing. Moral rights typically safeguard your entitlement to assert authorship (attribution right) and the ability to reject alterations to your work (integrity right). In short, the creators have the exclusive right to exploit their works economically and morally and prevent others, who do not have their authorization, to do so.<sup>7</sup>

Within the European legal system the Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (2001/29/EC) (in short, the EU Information Society Directive) is particularly relevant. The Directive harmonizes the economic rights granted to authors and holders of copyright (the reproduction right, the right of public communication and the distribution right), and the exceptions and limitations to these rights.<sup>8</sup>

Exceptions and limitations can be found under Article 5 of the Directive. They refer to certain cases in which the use of copyrighted works is permitted without the express consent of the rightholder. These exceptions and limitations are important instruments for achieving an appropriate balance between the interests of right holders and the needs of the society. The three-step test, which has its origins from Article 9(2) of the Berne Convention<sup>9</sup>, stipulates that the exceptions and limitations apply only when the use of the protected subject matter does not contradict the regular exploitation of the work or other subject matter and does not unjustifiably harm the legitimate interests of the rightholder. The exceptions and limitations, however, according to the three step test, have to be applied in special circumstances in line with the requirements listed in Article 5(5) of Infosoc Directive. Still, with the

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<sup>6</sup> (European Parliament, 2023)

<sup>7</sup> (European Union, 2023)

<sup>8</sup> (EUR-lex, 2021)

<sup>9</sup> (Griffiths & Mylly, 2021)

exclusion of temporary copies (Article 5(1)), exceptions and limitations are optional for EU Member States to implement in their own national laws.<sup>10</sup>

The connection between exceptions and limitations and appropriation art is that artists practicing appropriation art sometimes rely on exceptions and limitations to copyright law to create their works, especially when using existing copyrighted works. If the use can be covered by an exception, artists practicing appropriation art can create their creative works by drawing on pre-existing cultural material. However, the question of permissibility depends on the specific circumstance, the laws of the country in question and the copyright rules.

Article 5(3)k of the InfoSoc Directive mentions an exception to the rights of reproduction and communication to the public "for the purpose of caricature, parody or pastiche". But what do these terms mean?

A parody is a form of artistic expression that involves the creation of a new work, often humorous or satirical, by imitating and exaggerating the style, features or themes of an existing work. In a parody, elements of the original work are deliberately imitated or mimicked to convey a commentary, criticism, or a humorous take on the source material.<sup>11</sup> A caricature, on the other hand, is a form of artistic representation that exaggerates the distinctive features or traits of a person, object, or concept to create a humorous or satirical effect. In a caricature, certain physical or characteristic features are emphasized and distorted for comic or critical effect, often highlighting the subject's unique or exaggerated qualities.<sup>12</sup> Last but not least, Pastiche refers to a creative work that imitates or pays homage to the style, techniques, or themes of another work or multiple works. Unlike parody, which often involves humor or criticism, pastiche seeks to emulate or replicate the characteristics of the original works without necessarily mocking or commenting on them.<sup>13</sup>

And what does that mean in a legal context? Article 5(3)k InfoSoc Directive allows EU member states to introduce an exception to certain copyright protections "for the purpose of caricature, parody, or pastiche."

The provision recognizes that in the context of caricature, parody or pastiche, creators may need to borrow substantial parts of the original work to effectively convey their message or artistic intent. Importantly, this exemption implies that, under certain circumstances, the creators of such derivative works do not need the authorization of the original work's author to utilize substantial elements of the source material.

However, the application of this exception may vary among EU member states, as they have the flexibility to implement and interpret these provisions within their national legal frameworks. The overarching goal of Article 5(3)k is to strike a balance between the rights of copyright holders and the promotion of freedom of expression and artistic innovation.<sup>14</sup>

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<sup>10</sup> (Rosati, 2019)

<sup>11</sup> (Cambridge dictionary, 2023)

<sup>12</sup> (Urban dictionary, 2023)

<sup>13</sup> (Urban dictionary, [www.dictionary.cambridge.org](http://www.dictionary.cambridge.org), 2023)

<sup>14</sup> (European Audiovisual Observatory, 2017)

### **“I didn’t copy since I’m covered by the right to artistic freedom”**

In the realm of appropriation art, a compelling tension arises between artistic freedom and copyright. Appropriation artists use existing works as a starting point for their own creations, leading to a creative dialogue. On one side, appropriation artists are granted the right to freedom of the arts and sciences according to Article 13 EU Charter of Fundamental Rights (CFR)<sup>15</sup> allowing artists to critically engage with existing works and generate new meanings. In Austria, artistic freedom is granted under Article 17a of the Basic Law on the General Rights of Nationals (“Staatsgrundgesetz”).<sup>16</sup> On the other side is property right, ensuring the safeguarding of intellectual property and granting control over the use and exploitation of a work. The right to property according to Article 17 CFR further protects intellectual property as well.<sup>17</sup> This tension results in legal challenges as the lines between artistic inspiration and copyright infringement often blur.

### ***Fair use in the U.S.***

How does the American copyright system tackle this issue? First of all, , copyright is handled differently in the U.S. than in the EU. In the United States, a legal construct called “fair use” exists, which we do not have in Europe. The term “fair use” signifies the acceptable utilization of copyrighted materials without explicit permission from the copyright holder(s).<sup>18</sup> This doctrine aims to avoid a strict application of copyright law that could hinder the creative process. It permits the utilization and expansion of earlier works in a manner that does not infringe the copyright of the rightholders of the earlier works.<sup>19</sup> Fair use generally applies to commentaries, critiques, research, teaching and scholarly purposes.<sup>20</sup> Assessing whether fair use applies to a particular use of copyrighted material is crucial for each instance. This determination can sometimes be perplexing as it heavily relies on the facts of the case at hand, which can yield diverse outcomes.

The most effective way to gauge whether the intended use of a work protected by copyright qualifies as fair use is by employing the four factors delineated in section 107 of U.S. Copyright Law. These criteria encompass:

- (1) The intended Purpose of use, including whether the use is “transformative”;
- (2) The Nature of the work to be utilized;
- (3) The Quantity of the work to be employed; and
- (4) The Potential Impact of using the work.<sup>21</sup>

### **Warhol-Foundation vs. Goldsmith**

How are appropriation art and copyright connected in the United States? What does the Supreme Court say? In this context, the recently decided case “Warhol-Foundation vs. Goldsmith” (“Warhol case”)<sup>22</sup> before the Supreme Court comes into play where it tackles appropriation art and elements underlying it.

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<sup>15</sup> (European Union Agency for Fundamental Rights, fra.europa.eu, 2007)

<sup>16</sup> (RIS, 2024)

<sup>17</sup> (European Union Agency for Fundamental Rights, fra.europa.eu, 2007)

<sup>18</sup> (Supreme Court, 2023)

<sup>19</sup> (Harvard, 2023)

<sup>20</sup> (U.S. Copyright Office , 2023)

<sup>21</sup> (U.S. Copyright Office , 2023)

<sup>22</sup> (Supreme Court, 2023)

Fundamentally, "Vanity Fair", a magazine about celebrities, fashion, art and politics having its headquarter in New York City<sup>23</sup>, obtained a license for a single-use purpose for a 1981 photograph of the singer Prince taken by photographer Lynn Goldsmith. This license was granted for a single specific purpose of use, meaning for one time only.<sup>24</sup> The magazine commissioned Andy Warhol to create an illustration of the picture for the magazine. However, Warhol produced multiple other artworks using variations of the same picture with different color schemes resulting in a Prince Series of 16 works derived from Goldsmith's copyrighted photograph. In 2016, following Prince's death, "Condé Nast", a publisher and at the same time Vanity Fair's parent company, utilized one of these varied renditions of Prince for the cover of a commemorative edition magazine named "The Genius of Prince". They were asking the Andy Warhol Foundation ("AWF") about reusing the Prince photo, however, Goldsmith came away empty-handed. She even only found out about the Prince series in 2016, when she saw "Orange Prince", an orange silkscreen portrait of the musician Prince created by Andy Warhol, on the cover of "Condé Nast" magazine.<sup>25</sup> Goldsmith informed AWF of the alleged infringement of copyright she holds in her earlier picture, which was re-used by Warhol. Subsequently, AWF filed a lawsuit against Goldsmith seeking a declaration of non-infringement or, alternatively, a determination of fair use.<sup>26</sup>

Essentially, the fair use doctrine permits specific unauthorized uses of copyrighted works if they are deemed beneficial to society. This doctrine weighs four factors to determine whether a use is fair, as mentioned above, and the recent U.S. Court focus has centered on the factor of "transformativeness" when analyzing fair use. This concept emerged from the Supreme Court's 1994 decision in Campbell v. Acuff-Rose Music, saying that:

*"under the first of the four § 107 factors, 'the purpose and character of the use, including whether such use is of a commercial nature ...', the enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is "transformative," altering the original with new expression, meaning, or message. The 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, defining transformative work as one that "alters the original with new expression, meaning or message.".*<sup>27</sup>

The Warhol case initially saw the District Court ruling in favor of Warhol, deeming his use of Goldsmith's photograph transformative. However, the Second Circuit overturned this decision, arguing that the District Court erred by subjectively assessing the transformative nature of Warhol's work.

The Supreme Court sided with the Second Circuit's interpretation, emphasizing that the evaluation of transformativeness should focus on the specific use of the secondary work, not the content itself. It stressed that the intention or perception of the artist or critic should not solely determine transformativeness, as this could lead to any alteration being recognized as transformative, thus undermining the copyright owner's rights. The Court clarified that while new expression or meaning may be relevant, it is not decisive on its own. Moreover, it highlighted that the extent of transformation

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<sup>23</sup> (Vanity Fair, 2024)

<sup>24</sup> (Supreme Court, 2023)

<sup>25</sup> (Davis, 2023)

<sup>26</sup> (Supreme Court, 2023)

<sup>27</sup> (See: Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)).

must exceed what is needed for a derivative work and should be balanced against other factors, including the use's commercial nature.

In the end, the court ruled in favor of Goldsmith. They argued that Goldsmith's original works, including her photograph of Prince, are protected by copyright, granting her the right to control works deriving from her own works. The use of copyrighted material may be deemed fair under certain conditions, such as having a distinct purpose from the purpose of the original. However, in this case, AWF's use of Goldsmith's photograph in a licensed image for a special edition magazine about Prince closely aligns with the original purpose, being commercial in nature. AWF has not provided a compelling justification for this unauthorized use, favoring Goldsmith in terms of the "purpose and character of the use" under §107(1).<sup>28</sup>

Importantly, the Court limited its assessment to the specific use challenged, like the magazine cover, avoiding broader opinions on the work's creation or potential alternative uses. This narrow focus might limit the ruling's scope. Some view this decision as narrowing fair use, while others see it fortifying fair use arguments in certain contexts, like using copyrighted materials for training AI models, where the purpose differs significantly from the original.<sup>29</sup>

### **WHAAM! BLAM!**

In summary, it can be said that the field of appropriation art operates in a complicated legal landscape in which artistic freedom is mixed with copyright considerations. This form of expression, which has its origins in avant-garde movements such as Dada and has developed further via Pop Art and the Appropriation movement, has repeatedly given rise to legal discussions. Ultimately, the legal development of appropriation art underscores the ongoing exploration of its ethical, legal and social dimensions and highlights the delicate balance between artistic expression and copyright protection.

Are you eager to delve even deeper into the topic of appropriation art after reading this article? Good news, because here is an intriguing film recommendation for you! In a documentary from 2022 titled "WHAAM! BLAM! Roy Lichtenstein and the Art of Appropriation," director James Hussey delves into the ongoing debate. Through interviews with experts on Lichtenstein's works, museum directors and comic artists, along with visual comparisons between Lichtenstein's works and the appropriated comic strips, the film navigates through this controversy. Hussey emphasizes that "WHAAM! BLAM!" does not seek to expose or "cancel" Lichtenstein but rather aims to foster discussion. It delves into the ethical, legal and human dimensions of artistic appropriation, intending to prompt dialogue. The documentary acknowledges appropriation as a fundamental artistic gesture, recognizing Lichtenstein's conceptual intentions and his enduring impact within Pop art.<sup>30</sup>

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<sup>28</sup> (Supreme Court, 2023)

<sup>29</sup> (Perkins Coie LLP, 2023)

<sup>30</sup> (Chen, 2023)

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