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Bagel Bag as Bellwether? Appropriation Art Under the Canadian Copyright and Trade-marks Acts*

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Abstract

On the 100th anniversary of Marcel Duchamp's "Fountain" and in response to developments on the artistic, judicial and legislative fronts, this article revisits the legality of artistic practices of reference and quotation. While Canadian visual artists have recently begun to incorporate trademarked logos into their works, there is a real possibility that corporate trademark holders may exploit intellectual property law to restrict the use of their marks by second-generation creators. This article assesses hypothetical litigation instituted by a corporate trademark holder against an appropriation artist, and concludes that there is breathing space for new forms of visual artistic production under the *Copyright Act* and the *Trade-marks Act*. Given their built-in balance between expressive interests and those of copyright and trademark holders, these statutes can weather the new challenge posed by contemporary appropriation art.

Résumé

Dans le cadre du 100e anniversaire de la présentation de la Fontaine de Marcel Duchamp, et en réaction aux récents développements dans les mondes artistique, judiciaire et législatif, cet article repense à la légalité de l'utilisation de références et de citations dans les arts. Alors que les artistes visuels canadiens ont récemment commencé à intégrer des logos enregistrés comme marques de commerce dans leurs œuvres, il existe une très véritable possibilité que les propriétaires de marques de commerce invoquent les lois de protection de la propriété intellectuelle pour empêcher les artistes d'utiliser leurs marques. Cet article examine un litige hypothétique entre un propriétaire de marque de commerce enregistrée et un artiste qui utilise cette marque, et conclut que la *Loi sur le droit d'auteur* et la *Loi sur les marques de commerce* accordent suffisamment de liberté pour permettre de nouvelles formes de production d'arts visuels. En raison de leur équilibre intrinsèque entre les intérêts des artistes et de ceux des propriétaires de droits d'auteur et de marques de commerce, ces lois suffisent à surmonter le nouveau défi posé par l'appropriation dans les arts contemporains.

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1.0 Introduction

In 2006, the Appropriation Art Coalition, a self-described consortium of "over 600 artists, curators, directors, educations, writers, associations and organizations from the art sector," authored an open letter in response to Parliament's introduction of Bill C-60.[1] In its letter to the ministers of industry and Canadian heritage, the coalition spoke to its concern that proposed amendments to the *Copyright Act* would have a chilling effect on the creation and circulation of "artworks using appropriation."[2] Appealing to both art historical precedent and social utility, the coalition sought "breathing space," of sorts, for appropriation art under Canadian copyright law:

> Contemporary Art often takes the form of cultural commentary, criticism, parody. Art using appropriation is no exception. The subject of this artistic commentary ranges widely, but often involves the examination of the cultural products of others (e.g. movies, top 40 songs, television, radio, advertising …). Aspects of these are often reproduced as part of the work of art, but in such a way that the subject is transformed and offers the world something new. The new works that are produced comment on the world in which we live and reflect the nature of creativity itself.
>
> The practice of Appropriation has become a fundamental part of many creative cultural activities. Artworks using Appropriation have a long and well documented place in the History of Art. These works are collected and exhibited in major cultural institutions across Canada and throughout the world. We cannot open a book on Modern and Contemporary Art without being presented with some form of Appropriation. The ability to appropriate has not simply changed the way we make art[;] it has changed the way we see the world. And yet we fear that this form of creativity is being threatened and new forms of creativity using appropriation will be prevented even before their potential is recognized. We ask that you, our government, protect our rights as creators and supporters of important cultural works.[3]

The proximate cause that led to the coalition's formation was the proposed introduction of "technological protection measures" (TPMs), or so-called digital locks, which would have ostensibly made it impossible for artists to carry out fair dealings of protected works.[4] However, as Laura Murray and Kirsty Robertson suggest, the coalition would have also turned its mind to the fate of appropriation artists in recent high-profile litigation.[5] *Rogers v Koons* is frequently cited as an example in the literature.[6] In that case, the Second Circuit held that Jeff Koons's "String of Puppies" infringed the copyright in Art Rogers's photograph.[7] While Koons urged, in private, that his

1 "About Us," online: Appropriation Art Coalition <https://web.archive.org/web/20061010103822/http://www.appropriationart.ca/?page_id=2>; Bill C-60, *An Act to Amend the Copyright Act,* 1st Sess, 38th Parl, 2005 (first reading 20 June 2005); *Copyright Act,* RSC 1985, c C-42. In addition to the Appropriation Art Coalition, other interest groups, including the Canadian Music Creators Coalition and the Documentary Organization of Canada, voiced opposition to Bill C-60. See Laura J Murray, "Copyright" in Marc Raboy & Jeremy Shtern, eds, *Media Divides: Communication Rights and the Right to Communicate in Canada* (Vancouver: UBC Press, 2010) 196 at 205.

2 "Open Letter," online: Appropriation Art Coalition <https://web.archive.org/web/20061010103656/http://www.appropriationart.ca/wp-content/uploads/2006/06/Open%20Letter-english.pdf>.

3 *Campbell v Acuff-Rose Music,* 510 US 569 at 579 (1994) (Souter J); "Open Letter," *supra* note 2.

4 "Open Letter," *supra* note 2 ("We understand that the Canadian government is considering legislation to privilege technical measures that protect access to digital works. Such laws must be rejected. The law should not outlaw otherwise legal dealings with copyrighted works merely because a digital lock has been used"); Bill C-60, *supra* note 1, s 1(2); Carys Craig, "Locking Out Lawful Users: Fair Dealing and Anti-Circumvention in Bill C-32" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright"* (Toronto: Irwin Law, 2010) 177 at 202; Graham Reynolds, "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist, ed, From "Radical Extremism" to "Balanced Copyright" (Toronto: Irwin Law, 2010) 395 at 415 [Reynolds, "A Right to Engage"].

5 Laura J Murray & Kirsty Robertson, "Appropriation Appropriated: Ethical, Artistic, and Legal Debates in Canada" in B Courtney Doagoo *et al,* eds, *Intellectual Property for the 21st Century: Interdisciplinary Approaches* (Toronto: Irwin Law, 2014) 368 at 377. For a discussion of the fates of appropriationists working outside the realm of visual art until the early 2000s, see Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: NYU Press, 2001) at 3-4.

6 *Rogers v Koons,* 960 F (2d) 301 (2nd Cir 1992) *[Koons].* See e.g. Lynne A Greenberg, "The Art of Appropriation: Puppies, Piracy, and Post-Modernism" (1992) 11:1 Cardozo Arts & Ent LJ 1. For a more recent high-profile case where an appropriation artist was named a defendant, see *Cariou v Prince,* 714 F (3d) 694 (2nd Cir 2013).

7 *Koons* was held liable for copyright infringement in two other cases decided around that time. The infringing works in question, like "String of Puppies," formed part of the *Banality Show* exhibition held at the Sonnabend Gallery in New York City. See *United Fea-*

"String of Puppies" commented on the original work's utter lack of creativity and stated, under oath, that it was a "satirical critique of our materialistic society," the court held that he could not avail himself of the defence of "fair use."[8] Understanding "parody" to necessitate a critique of the original work, the Second Circuit ruled that Koons's "fair social criticism" was no defence to copyright infringement.[9] Having been described in its immediate aftermath as "an indictment of the whole movement of appropriation art," *Rogers v Koons* continues to be characterized as "a death knell for appropriation art."[10]

This precedent notwithstanding, what is the fate of appropriation art under the Canadian *Copyright Act* (and the *Trade-marks Act*, for that matter)? Legal and artistic developments in recent years compel us to revisit this question. On the one hand, the *Copyright Modernization Act* introduced "parody" and "satire" as new purposes for fair dealing and "non-commercial user-generated content" as a new exception to the infringement of copyright.[11] What appears to be the only literature on Canadian copyright law and appropriation art, a published journal article, unfortunately predates these amendments.[12] On the other hand, the literature also failed to anticipate new appropriation practices by Canadian visual artists that have crystallized in the past few years. Namely, rather than appropriate images from other creators, Canadian visual artists have begun to incorporate trademarked logos into their works. This potentially objectionable use of logos that benefit from concurrent copyright and trademark protection requires us to consider also the causes of action that corporate plaintiffs might assert pursuant to the *Copyright Act*'s moral rights provisions and the *Trade-marks Act*.[13] This question has been given only passing attention in the scholarship.[14] This article argues that, on balance, contrary to some American commentators' claims, there is a breathing space for this new kind of appropriation art under the Canadian *Copyright Act* and *Trade-marks Act*.[15] In line with authors who point to a built-in balance in the *Copyright Act* and *Trade-marks Act* between expressive interests, on the one hand, and copyright and trademark holders' rights, on the other, this article examines the mechanisms by which this equilibrium is achieved.[16] In doing so, it stands to contribute to scholarship that "is sensitive to and protective of expressive rights."[17]

While this article's conclusions may appear "evident on the face of things," it is necessary to clarify the law on appropriation art given the disparities of knowledge and resources between visual artists and corporate trademark owners.[18] Empirical studies speak to how "legislation is effectively irrelevant to the ordinary practice of artists in Canada."[19] Kirsty Robertson writes, "[intellectual property] is not of particular interest to most artists, particularly in the ways that it tends to be applied in debates over appropriation in art."[20] Despite or because of their ignorance of copyright and trademark law, in turn, there is "widespread concern among [artists] about the role of large corporations in mediating access to audiences and markets."[21] Scholars have likewise ominously signalled that "[t]rademarks and free expression are on a collision course."[22] That is, given that visual artists will

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tures Syndicate Inc. v Koons, 817 F Supp 370 (SDNY 1993); Campbell v Koons, 1993 WL 97381 (SDNY 1993).

8 Greenberg, *supra* note 6 at 23; *Koons, supra* note 6 at 310.

9 *Koons, supra* note 6 at 309-10. The distinction has sometimes been framed as "target" versus "weapon" parody: see Anna Spies, "Revering Irreverence: A Fair Dealing Exception for Both Weapon and Target Parodies" (2011) 34:3 UNSWLJ 1122 at 1122 ("the parody 'targets' the original work, rather than use[s] the work as a weapon to attack a third party or as part of wider social criticism"). See also Michael Spence, "*Rogers v Koons:* Copyright and the Problem of Artistic Appropriation" in Daniel McClean, ed, *The Trials of Art* (London, UK: Ridinghouse, 2007) 213.

10 Greenberg, *supra* note 6 at 2; Darren Hudson Hick, "Appropriation and Transformation" (2013) 23 Fordham IP Media & Ent LJ 1155 at 1164. See also Martha Buskirk, "Commodification as Censor: Copyrights and Fair Use" (1992) 60 October 82 at 102 ("This case raises a number of important and troubling questions about the legal status of artistic appropriation, and it may set an important precedent with respect to the appropriation of images in works of art").

11 *Copyright Modernization Act,* SC 2012, c 20.

12 See Karen Lowe, "Shushing the New Aesthetic Vocabulary: Appropriation Art Under the Canadian Copyright Regime" (2008) 17 Dal J Leg Stud 99.

13 See *Euro-Excellence Inc v Kraft Canada Inc,* 2010 FC 1099, 90 CPR (4th) 1.

14 See e.g. Lowe, *supra* note 12 at n 7 ("Appropriation art also raises issues of trademark and moral rights issues"). Cf John Carlin, "Culture Vultures: Artistic Appropriation and Intellectual Property Law" (1988) 13 Colum-Va J L & Arts 104 (discussing appropriation art and trademark law issues, but not moral rights issues).

15 *Copyright Act, supra* note 1*; Trade-marks Act,* RSC 1985, c T-13.

16 See Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the *Charter* Right to Freedom of Expression in the Context of Copyright" (2016) 41:2 Queen's LJ 455 at 460 [Reynolds, "Limits"]; Teresa Scassa, "Trademarks Worth a Thousand Words: Freedom of Expression and the Use of the Trademarks of Others" (2012) 53:4 C de D 877 at 893 [Scassa, "Trademarks"]. *Contra* David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55:2 UT Fac L Rev 175; Graham J Reynolds, "Reconsidering Copyright's Constitutionality" (2016) 53 Osgoode LJ 898.

17 Scassa, "Trademarks," *supra* note 16 at 907.

18 *Ibid* at 894, 905.

19 Murray, *supra* note 1 at 207.

20 Kirsty Robertson, "The Art of the Copy: Labor, Originality, and Value in the Contemporary Art Market" in Laura J Murray, S Tina Piper & Kirsty Robertson, eds, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford: Oxford University Press, 2014) 158 at 175. For a recent, high-profile case where an appropriation artist was named as a defendant, see *Cariou v Prince,* 714 F (3d) 694 (2nd Cir 2013).

21 Murray, *supra* note 1 at 208.

22 Rochelle Cooper Dreyfuss, "Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Am-

continue to incorporate trademarks into their works for a range of expressive purposes, some of these uses are bound to be critical of the goods or the company represented by the logo.[23] In turn, trademark owners will have recourse to intellectual property law to enforce such non-traditional interests as protection of "broader brand image" as opposed to source.[24] As a result, there is a real possibility that trademark owners may

> [use] the blunt tool of copyright [and trademark] law to restrict the use of their works by second-generation creators, even where the interests sought to be protected inhere in integrity, reputation or false association rather than exploitation, market substitution, or incentive destruction.[25]

2.0 A Brief History of Appropriation Art, 1917-2017

Consistent with art historical writing, this article defines "appropriation art" as "artistic practices that build upon the work of those who have come before."[26] In this light, strategies used by visual artists may be situated within a larger "remix aesthetic" that also informs music, design, and fashion.[27] Benjamin Buchloh was the first art historian to take seriously artistic practices of reference and quotation and to trace their origins.[28] In 1982, Buchloh rebuked "[t]he inability of current art history and criticism to recognize the necessity and relevance of this new generation of artists working within the parameters of allegorical appropriation."[29] Despite being associated with the 1980s, appropriation art has not since faded into oblivion. Art historian Martha Buskirk writes, "the tactic itself has not gone away; rather, it has been fully assimilated into a field of contemporary art practices where production and reproduction are interwoven."[30]

In the discussion that follows, this article traces the pedigree of contemporary appropriation art, as the Appropriation Art Coalition implored us to do in its open letter. To this end, it adopts Johnson Okpaluba's rough taxonomy of strategies of reference and quotation: (1) "simulationism"; (2) "pure" appropriation; and (3) montage.[31] Two crucial points emerge from this survey. First, in recent years, visual artists have begun to appropriate trademarked logos in addition to images from other creators, which marks a significant break with past practice. That said, there being at least one precedent for such appropriation, it is an unfortunate oversight that legal scholars have not considered the implications of trademark law for appropriation art. Second, strategies of reference and quotation have owed their existence, above all, to the "conventions of the artistic commonwealth."[32] That visual artists now appropriate the images of non-peers threatens to disrupt this delicate balance of interests inherent in this non-legal normative order.[33]

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biguity" in Graeme B Dinwoodie & Mark D Janis, eds, *Trademark Law and Theory: A Handbook of Contemporary Research* (Northampton, Mass: Edward Elgar, 2008) 261 at 262 [Dreyfuss, "Expressive Values"]. See also Martha Buskirk, "Creative Intent: The Recent Fortunes of Appropriation Art in the United States" in Daniel McClean, ed, *The Trials of Art* (London, UK: Ridinghouse, 2007) 235 at 249 [Buskirk, "Creative Intent"] ("As artists continue to traverse intellectual property lines in order to articulate a response to their commodity-saturated environment, conflicts with corporate entities … are certain to arise from the multitude of ownership and authorship claims dotting this terrain").

23 Scassa, "Trademarks," supra note 16 at 885, 903.

24 *Ibid* at 881. See also Rochelle Cooper Dreyfuss, "Expressive Genericity: Trademarks as Language in the Pepsi Generation" (1990) 65 Notre Dame L Rev 397 at 400-12 [Dreyfuss, "Expressive Genericity"].

25 Laura A Heymann, "The Trademark/Copyright Divide" (2007) 60 SMU L Rev 55 at 57. *Cf* Emir Aly Crowne Mohammed, "Parody as Fair Dealing in Canada: A Guide for Lawyers and Judges" (2009) 4:7 J Intell Prop L & Prac 468 at 471 ("within this context [of parody] most actions for copyright infringement are accompanied by a claim for passing off or trade mark infringement").

26 Buskirk, "Creative Intent," *supra* note 22 at 235. For another definition of appropriation art by the same author, see Martha Buskirk, "Appropriation Under the Gun" (1992) 80:6 Art in America 37 at 37 ("In discussions of contemporary art, appropriation is generally understood as a method that uses recontextualization as a critical strategy. In theory, when an artist places a familiar image in a new context, the maneuver forces the viewer to reconsider how different contexts affect meaning and to understand that all meaning is socially constructed").

27 Laura J Murray, S Tina Piper & Kirsty Robertson, "Copyright over the Border" in Laura J Murray, S Tina Piper & Kirsty Robertson, eds, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford: Oxford University Press, 2014) 15 at 15. See also Kembrew McLeod & Rudolf Kuenzli, eds, *Cutting Across Media: Appropriation Art, Interventionist Collage and Copyright Law* (Durham, NC: Duke University Press, 2011).

28 Buskirk, "Creative Intent," supra note 22 at 235; Robert S Nelson, "Appropriation" in Robert S Nelson & Richard Shiff, eds, *Critical Terms for Art History,* 2nd ed (Chicago: University of Chicago Press, 2003) 160 at 165.

29 Benjamin HD Bucloch, "Allegorical Procedures: Appropriation and Montage in Contemporary Art" in Alexander Alberro & Sabeth Buchmann, eds, *Art After Conceptual Art* (Cambridge, Mass: MIT Press, 2006) 27 at 39.

30 Buskirk, "Creative Intent," supra note 22 at 249.

31 Johnson Okpaluba, "Appropriation Art: Fair Use or Foul?" in Daniel McClean & Karsten Schubert, eds, *Dear Images: Art, Copyright and Culture* (London, UK: Ridinghouse, 2002) 197 at 200. See also Carlin, *supra* note 14 at 107 ("There are … two distinct ways of using such material: collage (in which the source is manipulated within a larger ensemble of imagery and artistic styles), and pure appropriation (where the artist simply copies the original and reattributes it to him or herself)").

32 Daniel McClean, "Piracy and Authorship in Contemporary Art and the Artistic Commonwealth" in Lionel Bently, Jennifer Davis & Jane C Ginsburg, eds, *Copyright and Piracy: An Interdisciplinary Critique* (Cambridge, UK: Cambridge University Press, 2010) 311 at 330.

33 See Martha-Marie Kleinhans & Roderick A Macdonald, "What Is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25 at 29 ("manifold legal norms emerge, change, and negate or reinforce one another in social situations not derived from, tributary to or purportedly

2.1 Simulationism

Simulationism, which had its heyday in the 1980s, is not critical to this article's purposes in that it does not readily implicate copyright or trademark law.[34] This variant of appropriation art is distinguished from other forms of appropriation art in that it entails the recontextualization and transformation of a familiar object rather than an image. Marcel Duchamp is said to be the "father" not only of simulationism but also of appropriation art more generally.[35] Taking seriously Duchamp's procedures is therefore paramount to understanding what appropriationists do. A crucial question for art historians in relation to appropriation art is how to ascertain authorship. To quote Martha Buskirk, "When is a copy a replica, and under what circumstances does it become an original?"[36] Duchamp's inscription of a signature and date, "R. Mutt 1917," on the front of his "Fountain" has been read as "a representation of the idea of the author."[37] What would otherwise be a mass-produced urinal, a found object of modern industrial life, is transformed into a sculpture by this "act of writing."[38]

2.2 "Pure" Appropriation

Signature as a strategy to assert authorship over the copy figures prominently in the work of Sherrie Levine, perhaps the best-known appropriation artist.[39] Her 1981 series *After Walker Evans* has been described as entailing "radical photographic appropriations."[40] Levine sought out and photographed reproductions of famous Depression-era photographs by Walker Evans. While Levine acknowledges the lineage of *After Walker Evans* by naming the original artist in its title, in a discrete move, Levine claims the copy as her own by inscribing her name in pencil on the verso of each print. Art historians have read a "feminist streak" into this act of ostensible authorship.[41] That is, by "overwriting the male artist's signature with her female artist's signature, she at once displaces and replaces him."[42] In mechanically reproducing another's work "under the 'erasure' of her own name," Levine is also taken to have called into question the very notion of originality in art.[43] Thus, Levine's work illustrates some of the conceptual underpinnings of appropriation art. As Darren Hudson Hick explains,

> what links [appropriation] artists is the employment of appropriation in pursuit of artistic projects focused on the art *object*—the nature of the *thing* (in both the original and secondary works)—and the nature of authorship. In many ways, appropriation is *about* appropriation: the viewer is meant to know that the objects and images presented *are* appropriated, and this is meant to say something about the objects and the authorship of the original and new works.[44]

Andy Warhol appropriated imagery not from the art historical canon but from the vernacular of everyday life. In this way, he shares more affinities with Marcel Duchamp, with whom he is frequently compared, and present-day appropriationists than he does with Sherrie Levine.[45] Key to this article's purposes is that Warhol is an early example of a visual artist who appropriated trademarked logos. Warhol's *Brillo Boxes* (alongside his *Campbell Soup* paintings) became an iconic work within his own lifetime.[46] In 1964, at the Stable Gallery in New York City, the artist exhibited nearly 100 of his sculptures, which had been created through a process of mechanical reproduction. Warhol had stencils traced from the label bearing the Brillo logo affixed to cardboard cartons. Painted wooden boxes were later silk-screened, producing sculptures that resembled "real cartons one could see in the stockroom of any supermarket in the land."[47] Yet, unlike Duchamp, Warhol never signed his sculptures. His achievement was not to question the status of the art object per se, as his precursor did, but to lampoon "the lure of the commodity in a media-driven culture."[48] The

structured by State action").

34 See William M Landes, "Copyright, Borrowed Images, and Appropriation Art: An Economic Approach" (2000) 9:1 Geo Mason L Rev 1 at 1 ("Some appropriation art does not implicate copyright law at all").

35 Donald Kuspit, "Some Thoughts About the Significance of Postmodern Appropriation Art" in Richard Brilliant & Dale Kinney, eds, *Reuse Value: Spolia and Appropriation in Art and Architecture from Constantine to Sherrie Levine* (London, UK: Routledge, 2011) 237 at 244.

36 Martha Buskirk, The *Contingent Subject of Contemporary Art* (Cambridge, Mass: MIT Press, 2003) at 72 [Buskirk, *Contingent Subject].*

37 René Payant, "The Shock of the Present" in Jessica Bradley & Lesley Johnston, eds, *Sightlines = Sight Lines: Reading Contemporary Canadian Art* (Montreal: Artextes, 1994) 229 at 231.

38 *Ibid* at 232. See also McClean, supra note 32 at 319 ("The authenticity of artworks is conventionally underpinned by the artist's signature, which registers the artist's 'umbilical' connection to the artwork and verifies that it is finished and ready for exhibition—the artist's signature is typically inserted directly onto the bottom (right-hand) corner of a panting or drawing").

39 Kuspit, *supra* note 35 at 240; Sherri Irvin, "Appropriation and Authorship in Contemporary Art" (2005) 45:2 British J Aesthetics 123 at 125.

40 Irvin, *supra* note 39 at 125.

41 Kuspit, *supra* note 35 at 240; Nelson, *supra* note 28 at 165.

42 Kuspit, *supra* note 35 at 241.

43 Ibid at 240; Rosalind Krauss, *The Originality of the Avant-Garde and Other Modernist Myths* (Cambridge, Mass: MIT Press, 1985) at 168. See also Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction" in Hannah Arendt, ed, *Illuminations: Essays and Reflections* (New York: Harcourt, Brace & World, 1968) 219.

44 Hick, *supra* note 10 at 1178 [emphasis in original]. See also McClean, *supra* note 32 at 328. Following the creation of her *After Walker Evans* series, Levine apparently stopped using Evans's photographs as material under the threat of legal action by the artist's estate: see Irvin, *supra* note 39 at 132.

45 Buskirk, *Contingent Subject, supra* note 36 at 78; Arthur C Danto, *Andy Warhol* (New Haven, Conn: Yale University Press, 2009) at 51.

46 Danto, *supra* note 45 at 52.

47 *Ibid* at 61. It is said that James Harvey, an abstract expressionist painter and part-time designer who had conceived the Brillo box's label, contemplated instituting proceedings for what might be deemed, in Canada, the infringement of his right to paternity: see Michael J Golec, *The Brillo Box Archive: Aesthetics, Design, and Art* (Hanover, NH: University Press of New England, 2008) at 5.

48 Buskirk, *Contingent Subject, supra* note 36 at 80.

recontextualization of "an entirely vernacular object of everyday life," with its trappings of "utilitarian familiarity," in the gallery was crucial to this critique.[49] As this article will subsequently show, contemporary artists have also appropriated trademarked logos in order to advance critiques of material society.

2.3 Montage

Barbara Kruger comes to mind as the closest forerunner of present-day appropriationists whose work can be described as montage. Yet, unlike her descendants, Kruger limited her acts of reference and quotation to found images.[50] Kruger's photo collages are highly conceptual. In appropriating commercial imagery from mass media and later overlaying text thereon, Kruger sought to rehabilitate the copy into "an active commentary."[51] Her collages seek to confront and agitate the viewer, with the "verbal labels" in Futura Bold typeface affixed onto the second-hand photos being addressed to her.[52] The artist shares a feminist *modus operandi* with Sherrie Levine in that Kruger sought to lay bare the coded nature of mass-produced imagery that is "male-identified."[53] Produced in 1980, "Untitled (Perfect)" best illustrates her political impulse. The montage consists of a photograph of a female torso whose hands are clasped in prayer, over which the word "Perfect" is laid. The work therefore critiques societal expectations that women embody chaste propriety and passive femininity. What Kruger recognized decades before present-day appropriationists is that commercial imagery is loaded with meaning. Thus, her practices of reference and quotation amount to "not only an appropriation of that imagery but also an appropriation of the *power* of that imagery."[54]

Chloe Wise, a native of Montreal, names Marcel Duchamp, Andy Warhol, and Cindy Sherman as major influences on her work.[55] The critic Jeffrey Deitch notes her "updated Pop Art aesthetic" and her "personal remix of the historical and the new" as the prominent features of her work.[56] That is, her art "breaks down the traditional hierarchies between media and between high art and popular culture."[57] Like that of Sherrie Levine, Wise's work presumes a certain familiarity with canonical art history on the viewer's part. "Rococo Chanel (Marble)" consists of a blown-up sample of "The Swing" by Jean-Honoré Fragonard that has been printed on canvas. However, the 18th-century painting has been "rebranded" for the 21st century: Wise's work has been embossed with a Chanel logo in the bottom-right corner. When first exhibited at Division Gallery in Montreal, the work was installed behind "The Swing (Dior)," a sex swing decorated with Dior hardware, to complete the homage to Fragonard. Wise's use of trademarked logos transcends media. "I Remember Everything I've Ever Eaten," an oil painting, depicts model Hari Nef in a manner that recalls "Le Déjeuner sur l'herbe" by Édouard Manet. Yet Wise's detailed rendition of a carton of Blue Diamond almond milk makes clear that "Hari's picnic is a contemporary still life."[58] In Wise's other works, appropriated trademarks are more focal. In "LV on a Leash," the Louis Vuitton logo is playfully recreated from four plasticized strips of bacon. The leather leash dangling from the sculpture and onto the gallery's floor suggests that consumers are enslaved to fashion and submissive to their desires for luxury goods peddled by the fashion house.[59]

The works of Wise's Canadian compatriots, Fucci and Tava, speak directly to commodity fetishism through their use of trademarked logos.[60] Fucci and Tava play with an aesthetic that may be described as "luxury bootleg."[61] The term refers to a present-day phenomenon whereby "do-it-yourself" designers affix one or more luxury logos to down-market goods, which are later sold as independent creations in limited runs.[62] Ava Nirui's "Gucci x Champion bootleg hoodie," a garment on which the logos of a luxury fashion house and sportswear brand are skilfully reproduced and melded, can be cited as an example.[63] Similarly, in their works, Fucci and Tava depict vernacular objects of everyday life that have been literally branded as luxury objects. In two 2015 untitled illustrations whose vibrant palette is reminiscent of Andy Warhol's portraiture, Fucci represents a package of cigarettes emblazoned with a Chanel logo and a surfboard stamped with the Stüssy logo. In "Milk & Run" by Tava, two cartoon criminals speed off in a getaway vehicle that features a Chanel hood ornament. The use of trademarked logos to make a statement about commodity fetishism is more explicit in Fucci's case. A self-described "female-centric

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49 Danto, *supra* note 45 at 64; Buskirk, *Contingent Subject*, *supra* note 36 at 80.
50 Margot Lovejoy, *Postmodern Currents: Art and Artists in the Age of Electronic Media* (Ann Arbor, Mich: UMI Research Press, 1989) at 74.
51 *Ibid.*
52 WJT Mitchell, "What Do Pictures *Really* Want?" (1996) 77 October 71 at 80.
53 Lovejoy, *supra* note 50 at 74.
54 *Ibid* at 76 [emphasis added].
55 Greg Mania, "Chloe Wise," *Creem Magazine* (27 January 2015), online: <https://milk.xyz/articles/3281-Rolling-on-the-Floor-Laughing-with-Chloe-Wise/>.
56 Jeffrey Deitch, "Concrete Comedy" in *Chloe Wise* (Brugge, Belgium: die Keure, 2016) 8 at 9.
57 *Ibid.*
58 *Ibid.*
59 *Cf* Charles E Colman, "Fashion, Sexism, and the United States Federal Judiciary" (2013) 4 Vestoj 53.
60 Fucci has been accused of imitating the expression of Pieter Janssen, a prolific Dutch artist who goes professionally by the moniker Parra: see "Is Illustrator Fucci en keiharde Piet Parra rip-off?" (1 May 2016), Men & Style (blog), online: <www.menandstyle.nl/2016/03/illustrator-fucci-is-een-keiharde-piet-parra-rip-off/>.
61 David Fischer, "These Luxury Bootlegs Are Pure Art" (23 October 2016), *Highsnobiety* (blog), online: <https://www.highsnobiety.com/2016/10/23/ava-nirui-luxury-sportswear-bootlegs/>.
62 *Ibid.*
63 Rebecca Kim, "Ava Nirui Releases a Gucci x Champion Bootleg Hoodie" (19 November 2016), *Hypebeast* (blog), online: <https://hypebeast.com/2016/11/ava-nirui-gucci-champion-hoodie>.

pop artist," Fucci's subject matter is objects of desire of the heterosexual male gaze.[64] In his second untitled illustration, Fucci explicitly links covetous lust for a woman's body to that for the "luxury bootleg." Finally, of all the present-day appropriationists discussed, Tava's work raises the most issues in the casual viewer's mind as to whether his practices of reference and quotation have been authorized. Although the artist has collaborated with and been commissioned by TOMS and Hugo Boss, among other corporations, it is unclear to the casual viewer whether his other works have received similar sanction.[65]

2.4 Accounting for a Century of Appropriation Art

How does one justify practices of reference and quotation that appear to fly in the face of intellectual property law norms, such as the *sine qua non* of "originality" in copyright law?[66] To make sense of these artistic strategies, one must shake off historically circumscribed understandings of intellectual property law that are rooted in so-called Romantic individualism. As Rosemary Coombe explains,

> [i]n these constructions of authorship, the writer is represented in Romantic terms as an autonomous individual who creates fictions with an imagination free of all constraint. For such an author, everything in the world must be available and accessible as an "idea" that can be transformed into his "expression," which thus becomes his "work." Through his labor, he makes these "ideas" his own; his possession of the "work" is justified by his expressive activity. So long as the author does not copy another's expression, he is free to find his themes, plots, ideas and characters anywhere he pleases, and to make these his own (this is also the model of authorship that dominates Anglo-American laws of copyright).[67]

In defending "the legitimacy and social value of Appropriation," John Carlin describes the demise of unmediated access to this realm of ideas by the late 20th century.[68] In the late 1980s, he wrote, "our social environment is increasingly determined by simulated signs and … the realm of the 'imaginary' has supplanted that of the 'real' in determining our sense of self and nature."[69] The basic mode of representation having shifted from mimesis to semiotics, "culture functions as the ideal artistic referent."[70] Carlin concludes, "contemporary artists … should be free to reproduce our 'nature,' even if some of it is made from commercial signs and imagery that are protected by copyright and trademark."[71] Martha Buskirk echoes Carlin's sentiment: "In the context of a cultural landscape veritably littered with copyrighted images and trademarked products, it becomes difficult to imagine circumstances in which one could avoid entanglement with protected imagery."[72] Buskirk concurs with his tenet that "society needs artists to comment upon corporate imagery in order to balance its monopoly over our sense of social reality."[73] In Buskirk's view, an entity's commercial success is "double-edged": "the more deeply entrenched its product is in the cultural consciousness, the more its status as icon makes it a likely target."[74] On this view, trademarked logos can therefore be legitimately exacted by artists from corporate entities.

Daniel McClean's theory of the "artistic commonwealth" is instructive in making sense of why practices of reference and quotation have persisted and been legitimated, namely, through their assimilation into art historical discourse and art institutions.[75] By the same token, the theory also portends future lawsuits between appropriationists and trademark holders. McClean holds that all artists belong to a commonwealth in which they share common forms, images, styles and ideas.[76] He understands the notion of "the artist as 'genius' originator" to have little application; what abound are "traditions and conventions of copying, in particular homage."[77] However, this does not mean that appropriation is unbounded. Rather, as Sherri Irvin writes, "responsibility

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64 Seidi Hakkanen, "Fucci; Pop Art's Next Killer Artist" (5 March 2016), *Sleepless in Suburbia* (blog), online: <www.postsuburbia.com/artists/2016/3/5/fucci-pop-arts-next-killer-artist>.

65 See "Home," online: Antoine Tavaglione <www.antoinetavaglione.com>.

66 See Greenberg, *supra* note 6 at 8-18; *CCH Canadian Ltd v Law Society of Upper Canada*, 2013 SCC 73 at para 24, [2013] 3 SCR 1168, McLachlin CJ [Cinar].

67 Rosemary J Coombe, *The Cultural Life of Intellectual Properties* (Durham, NC: Duke University Press, 1998) at 211. See also McClean, *supra* note 32 at 317; Rosemary J Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6:2 Can JL & Jur 249; Roland Barthes, "The Death of the Author" in Stephen Heath, ed, *Image, Music, Text* (New York: Hill and Wang, 1977) 142; Michel Foucault, "What Is an Author?" in Donald F Bouchard, ed, *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Ithaca, NY: Cornell University Press, 1977) 124.

68 Carlin, *supra* note 14 at 110.

69 *Ibid.* See also Guy Debord, *The Society of the Spectacle,* translated by Donald Nicholson-Smith (New York: Zone Books, 1995).

70 Carlin, *supra* note 14 at 110.

71 *Ibid* at 111.

72 Buskirk, "Creative Intent," *supra* note 22 at 248.

73 Carlin, *supra* note 14 at 111. See also Murray, *supra* note 1 at 209 ("Appropriation was described as a survival skill in a world where commercial products inundate all citizens without their permission").

74 Buskirk, "Creative Intent," *supra* note 22 at 238.

75 See Irvin, *supra* note 39 at 126 ("The work of the most radical appropriation artists has been accepted as art, and they have been accepted as artists, receiving every form of recognition for which artists and artworks are eligible[.] … Moreover, the kind of recognition the artists have received suggests that the art world takes them seriously as the authors of their work"). For a challenge to McClean's theory, see Jonathan Griffiths, "Copyright's Imperfect Republic and the Artistic Commonwealth" in Lionel Bently, Jennifer Davis & Jane C Ginsburg, eds, *Copyright and Piracy: An Interdisciplinary Critique* (Cambridge, UK: Cambridge University Press, 2010) 340.

76 McClean, *supra* note 32 at 327.

77 *Ibid* at 329.

is constitutive of authorship."[78] That is, incorporation of another's imagery is permitted because either the viewer can be presumed to have knowledge of the original material's source, or the second-generation creator has indicated that source. In this way, the appropriationist "assumes responsibility for and is validated (in contrast to the forger) as the author of an artwork as much as the author of the original artwork that is subject to appropriation."[79]

That commercially minded parties are not understood to participate in this "artistic commonwealth" can explain why trademark holders and expressive interests are said to be "on a collision course."[80] McClean points out that conventions of copying have broken down and been judicialized where artists have crossed the high-low cultural divide – that is, where artists have reproduced "imagery taken from the everyday world."[81] McClean understands the origin of the litigation in *Rogers v Koons*, between a commercial photographer and a pop artist, on these very terms.[82] Although, in the past, appropriation artists could rely on their peers' countenance as they created works, the same is no longer true as Chloe Wise, Fucci, Tava and others have begun to incorporate trademarked logos into their works. Does copyright and trademark law afford trademark holders private rights to censor expressive interests?[83] That question is taken up by this article in the remaining sections.

3.0 Appropriation Art and Copyright Issues

While practices of quotation and reference came to prominence in the Canadian art scene after 2014, this new wave of appropriation art has been accompanied by a sea change on the judicial and legislative fronts alike. On the one hand, the 2004 decision of the Supreme Court of Canada in *CCH* radically overhauled the judicial understanding of and approach to "fair dealing" under the *Copyright Act*.[84] On the other hand, the *Copyright Modernization Act*, enacted in 2012, introduced "parody" and "satire" as purposes for fair dealing and "non-commercial user-generated content" as a new exception to the infringement of copyright.[85] While the *Copyright Act* seeks to strike "a balance between the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator," the statute can achieve its purpose even in the face of new forms of appropriation art.[86] Predating this recent statutory development, the lone scholarly work on appropriation art and Canadian copyright law came to the opposite conclusion, arguing that *Michelin* stood in the way of breathing space for practices of quotation and reference.[87] In what follows, this article discusses the evolution of Canadian copyright law in respect of fair dealing and how appropriation artists may find shelter thereunder. It also briefly considers the new defence of "non-commercial user-generated content" as a means by which appropriation artists can evade attempts by trademark holders to use copyright as a blunt tool of censorship.

3.1 Originality: An Ersatz "Defence" to Copyright Infringement

Because the judicial approach to fair dealing was "uncertain at best" prior to *CCH*, artists who parodied the works of others devised imaginative arguments in litigation over copyright infringement.[88] One ersatz defence, which emerged sporadically in the case law as late as 1999, was to claim that the second-generation work constituted an original work and thereby did not infringe the copyright in the targeted work.[89] Often, the defendant would emphasize the "labour, imagination and talent" that he had invested in the parody.[90] This line of thought can be traced to *Joy Music*, a 1960 English judgment, wherein McNair J held, "no infringement of the plaintiffs' rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result."[91] Not only was his *dictum* subsequently rebuked in two later English decisions, it was also rejected by

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78 Irvin, *supra* note 39 at 123.

79 McClean, *supra* note 32 at 330. There is also a normative rule within this "artistic commonwealth" that unauthorized reproduction of another's work is permissible if the original work has been sufficiently transformed: Murray, *supra* note 1 at 210 ("there was a fairly widespread idea that one should have more rights to use without permission if one transformed the material to a high degree").

80 Dreyfuss, "Expressive Values," *supra* note 22 at 262.

81 McClean, *supra* note 32 at 331. On the high-low cultural divide, see Clement Greenberg, "Avant-Garde and Kitsch" (1939) 6 Partisan Rev 34.

82 In support of his thesis, McClean also cites a dispute over copyright infringement between Andy Warhol and Patricia Caulfield, a commercial photographer. For a more detailed discussion of this dispute, see Buskirk, *Contingent Subject, supra* note 36 at 80-87.

83 Carlin, *supra* note 14 at 135.

84 CCH, *supra* note 66.

85 *Copyright Modernization Act, supra* note 11.

86 *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at para 30, [2002] 2 SCR 336, Binnie J [*Théberge*].

87 *Compagnie Générale des Établissements Michelin—Michelin & Cie v National Automobile, Aerospace, Transportation and General Works Union of Canada (CAW-Canada),* [1997] 2 FCR 206, 71 CPR (3d) 348 (FCTD) *[Michelin* cited to FCR]; Lowe, *supra* note 12 at 111 ("As the law currently stands after *Michelin,* the only way for an appropriation artist to escape liability under the *Copyright Act* is either to obtain a license from the copyright holder or to avoid a finding of infringement altogether by not reproducing a substantial portion of the original work").

88 James Zegers, "Parody and Fair Use in Canada After *Campbell v Acuff Rose"* (1994) 11 CIPR 205 at 205.

89 *Productions Avanti Ciné-Vidéo Inc v Favreau* (1999), 1 CPR (4th) 128 at 154, 177 DLR (4th) 568 (Qc CA), Gendreau JA [*Avanti* cited to CPR], leave to appeal to SCC refused, [2000] 1 SCR xi ("It would seem that parody can be seen from two angles: an exception to copyright infringement under section 27(1) (now 29) of the *Act,* or an original work as such").

90 *Ibid.*

91 *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd,* [1960] QB 60 at 70, McNair J.

the Federal Court in *Michelin*.[92] In that case, Teitelbaum J held, "it is immaterial if the defendants have employed some labour and some originality if there is nonetheless reproduction of a substantial part of the original."[93]

To set aside McNair J's *dictum* makes sense in terms of both copyright law and artistic practice. "Originality" for the purposes of the *Copyright Act* is not defined by the "sweat of the brow" standard.[94] In addition, notwithstanding any "revision and alteration" to the target work, the test for whether an artist has taken a substantial part thereof entails comparison of the target and new works: "whether there has been substantial copying focuses on whether the copied features constitute a substantial part *of the plaintiff's work*—not whether they amount to a substantial part *of the defendant's work*."[95] While an appropriationist must "conjure up" the target work to make an effective parody, she will ordinarily take a substantial part of the work and thereby be *prima facie* liable for copyright infringement.[96] Therefore, where an appropriationist is sued for copyright infringement by a trademark holder, the more effective litigation strategy will be to have recourse to fair dealing.

3.2 Fair-Dealing Pre-CCH

If courts were loath to entertain defendant appropriationists' claims to originality, were they any more receptive to artists' recourses to fair dealing? Carys Craig paints a bleak portrait of the judicial treatment of fair dealing prior to *CCH*:

> For a long time, the Canadian approach to fair dealing was one of single-minded reliance upon specific rules, together with a distinct unwillingness to reconsider the purpose of fair dealing with the larger policy aims of copyright law. The result was a lack of principled discussion about the defence, and a wide refusal to entertain it. This effectively eviscerated fair dealing; it was bound too tightly to the strict statutory language and encumbered with an apparent, if unarticulated, sense that use of another's work without permission was de facto unfair.[97]

In keeping with her characterization of the general judicial posture, Craig speaks to how courts often invoked "a bright-line mechanical rule that would preclude fair dealing on the facts of the case."[98] Although the case law on fair dealing before *CCH* is meagre, one can find a handful of judicial pronouncements in this vein.[99] In *Zamacois*, Angers J was asked to determine whether a newspaper could reproduce the plaintiff's article in its entirety in a commentary.[100] He ruled in the negative, holding that "a critic cannot, without being guilty of infringement, reproduce in full, without the author's permission, the work which he criticizes."[101] In other words, the factor described as "the amount of the dealing" in *CCH* was seen as wholly determinative of whether a given dealing was fair. In *Avanti*, the Quebec Court of Appeal more explicitly articulated a search for bright lines. In a concurring opinion, Rothman JA described "an important line separating a parody of a dramatic work created by another writer or artist and the appropriation or use of that work solely to capitalize on or 'cash in' on its originality and popularity."[102] In *Avanti*, the factor described as "the effect of the dealing on the work" in *CCH* was the be-all and end-all of the fair-dealing test.

However, one may also discern a countercurrent in the pre-2004 jurisprudence. In *Allen*, the Ontario Divisional Court expressly declined to follow *Zamacois*, holding that in reproducing the claimant's photograph as part of a cover story, the *Toronto Star* dealt with the work fairly.[103] Sedwick J described the test for fair dealing as "purposeful" and held that it does not *ipso facto* entail "a mechanical measurement of the extent of copying involved."[104] He held that judges must consider "other factors" such as "the nature or purpose of the use."[105] Applying these criteria to the appeal at bar, Sedwick J ruled that the defendant newspaper's dealing did not aim "to gain an unfair

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92 See *Schweppes Ltd v Wellingtons Ltd,* [1984] RSR 210 (Ch); *Williamson Music Ltd v Pearson Partnership,* [1987] FSR 97 (Ch); Michael Spence, "Intellectual Property and the Problem of Parody" (1998) 114 Law Q Rev 594 at 596 [Spence, "Parody"] ("An earlier view that the parody would not constitute an infringement of the work if it in turn amounted to a copyright work, is no longer part of the United Kingdom Law").

93 *Michelin, supra* note 87 at para 57. But see Avanti, supra note 89 at 154-55, Gendreau JA (availability of "defence" is not explicitly ruled out).

94 *CCH, supra* note 66 at para 24, McLachlin CJ.

95 *Cinar, supra* note 66 at para 39, McLachlin CJ [emphasis in original].

96 See e.g. Spence, "Parody," *supra* note 92 at 596.

97 Carys Craig, "The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Form" in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 437 at 443 [Craig, "Fair Dealing"].

98 *Ibid. Cf* Giuseppina D'Agostina, "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use" (2008) 53 McGill LJ 309 at 329 ("Most commentators argue that courts pre-*CCH* had a restrictive interpretation of fair dealing").

99 Zegers, *supra* note 88 at 205; Craig, "Fair Dealing," *supra* note 97 at 438 ("fair dealing was for many years all but redundant in the Canadian courts: rarely raised and cursorily rejected").

100 *Zamacois v Douville and Marchand,* [1943] 2 DLR 257, 2 CPR 270 (Ex Ct) [*Zamacois* cited to DLR].

101 *Ibid* at 285.

102 *Avanti, supra* note 89 at 135, Rothman JA, concurring.

103 *Allen v Toronto Star Newspapers Ltd* (1997), 36 OR (3d) 201 at 210, 78 CPR (3d) 115 (Div Ct) [Allen cited to OR] ("To the extent that this decision is an authority for the proposition that reproduction of an entire newspaper article or, in this case, a photograph of a magazine cover, can never be considered a fair dealing with the article (or magazine cover) for purposes of news summary or reporting, we respectfully disagree").

104 *Ibid* at 209.

105 *Ibid* at 211.

commercial or competitive advantage."[106] In citing and discussing *Hubbard*, the English decision that would inform *CCH*'s approach to fair dealing, Sedwick J had laid the seeds for a more expansive and flexible understanding of fair dealing.[107]

Despite this would-be openness to artistic strategies of reference and quotation, recourse to the defence of fair dealing prior to *CCH* was stultified by a conservative reading of the statutory purposes now found in section 29 of the *Copyright Act*. Carys Craig describes *Michelin* as "the most striking example of the restrictive interpretation of enumerated purposes."[108] Teitelbaum J characterized the defendants' argument that parody was a form of "criticism" for the purposes of the *Copyright Act* as a "radical interpretation of the law."[109] In determining that "parody" was not synonymous with "criticism," Teitelbaum J privileged a narrow view of criticism as "an exercise through which excerpts of a work are presented and dissected through analysis."[110] In doing so, he had regard to the role of the judiciary in relation to the legislature.[111] Teitelbaum J held that "exceptions to copyright infringement should be strictly interpreted."[112] That is, the exceptions are "exhaustively listed" and "a closed set."[113] In his view, to "give the word 'criticism' such a large meaning that it includes parody … would be creating a new exception to copyright infringement, a step that only Parliament would have the jurisdiction to do."[114] Teitelbaum J found ostensible support for his circumspect approach in his reading of the Supreme Court of Canada's decision in *Bishop v Stevens*, which he understood to warn against "reading in exceptions to copyright infringement."[115] Even if parody could be taken to be a form of criticism, Teitelbaum J found that the defendants had not "actively" mentioned the source and author's name; "implicit" acknowledgment of the original was insufficient.[116]

By refusing to bring strategies of reference and quotation that parody another work within the ambit of "criticism," Teitelbaum J produced a result that some had considered self-evidently wrong. James Zegger had written four years earlier, "the Canadian *Copyright Act* by implication includes parody, since parody is, by definition, a form of criticism."[117] As a result of *Michelin*, Canadian and English copyright law took divergent paths. One year after *Michelin*, the English Court of Appeal in *Pro Sieben* held that "criticism" should be "interpreted liberally" and thereby encompass most parodic uses of another's work.[118]

3.3 Fair Dealing Post-CCH

Despite being a "dramatic shift" or "breakthrough" in respect of the judicial treatment of fair dealing, *CCH* did not wholly reverse the fortunes of appropriation artists.[119] That said, the court in *CCH* did create more "breathing space" for artistic practices of quotation and reference by rehabilitating the fair-dealing exception as both "an integral part of the *Copyright Act*" and "a user's right."[120] In declining to characterize fair dealing as "simply a defence," the court invoked the purpose of copyright law articulated in *Théberge*: "to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."[121] As has been noted, in describing fair dealing as an "exception" that should be "strictly interpreted," Teitelbaum J referred to *Bishop*, wherein the court upheld an "author-centric view which focused on the exclusive right of authors and copyright owners to control how their works were used in the marketplace."[122] Linking the court's understanding of the purposes of copyright law to fair dealing, Carys Craig writes, "the abstract concept of public interest has been concretized in the form of

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106 *Ibid* at 209.
107 *Ibid* at 210; *Hubbard v Vospar,* [1972] 1 All ER 1023, [1972] QB 84 (CA).
108 Craig, "Fair Dealing," *supra* note 97 at 444; D'Agostina, *supra* note 98 at 329 ("Perhaps most illustrative of this [restrictive] approach is *Michelin").*
109 *Michelin, supra* note 87 at para 59.
110 Graham Reynolds, "Parodists' Rights and Copyright in a Digital Canada" in Rosemary J Coombe, Darren Wershler & Martin Zeilinger, eds, *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press, 2014) 237 at 245.
111 *Michelin, supra* note 87 at paras 61, 66, 71.
112 *Ibid* at para 65.
113 *Ibid.*
114 *Ibid.*
115 *Ibid; Bishop v Stevens,* [1990] 2 SCR 467, 72 DLR (4th) 97.
116 *Michelin, supra* note 87 at paras 68, 69. For later criticism on this point, see Mohammed, *supra* note 25 at 471 ("the Court's rejection of [the defendants'] argument ignores the subtle drafting of the Act. … [A]n effective parody will satisfy section 29.1 of the Act by implicitly conjuring the underlying work being parodied").
117 Zegers, *supra* note 88 at 209. See also Craig, "Fair Dealing," *supra* note 97 at 445 ("It would not have required much imagination or judicial creativity to bring parody within the fair dealing provisions as a species of criticism").
118 *Pro Sieben Media AG v Carlton Television Ltd,* [1999] 1 WLR 605 at 614, [1998] All ER (D) 751, Robert Walker LJ ("'Criticism or review' and 'reporting current events' are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally[.] … Criticism of a work need not be limited to criticism of style. It may also extend to the ideas to be found in a work and its social or moral implications").
119 Graham Reynolds, "Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada" (2009) 33:2 Man LJ 243 at 254 [Reynolds, "Necessarily Critical"].
120 CCH, *supra* note 66 at para 48, McLachlin CJ.
121 *Ibid; Théberge, supra* note 86. See also *Society of Composers, Authors and Music Publishers of Canada v Bell Canada,* 2012 SCC 36 at para 11, [2012] 2 SCR 326, Abella J [SOCAN] ("CCH confirmed that users' rights are an essential part of furthering the public interest objectives of the *Copyright Act.* One of the tools employed to achieve the proper balance between protection and access in the Act is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement").
122 *Michelin, supra* note 87 at para 66; SOCAN, supra note 121 at para 9, Abella J; *Bishop, supra* note 115. See also Reynolds, "Limits," *supra* note 16 at 470 ("Vaver's use of the term user rights can thus be seen as a conscious push back against the *Michelin* approach").

users' *rights*."[123] She muses on the significance of the court's recognition of fair dealing as a user's right as follows:

> The term "users' rights" is important primarily because it creates the potential for conflicts between owners and users to be fought on equal footing, and lends legitimacy to the demands of users who have been characterized as opportunists, free riders, and scoundrels. Users claiming the freedom to deal fairly with copyrighted works can now be seen to be demanding recognition of their own rights and not simply seeking to violate or limit the rights of others.[124]

The court in *CCH* held that the fair-dealing exception in section 29 of the *Copyright Act*, being "an integral part of the scheme of copyright," is always available to a defendant in infringement proceedings.[125] In other words, "fair dealing allows users to engage in some activities that might otherwise amount to copyright infringement."[126] The inquiry into fair dealing is twofold and the onus rests on the defendant to satisfy both components of the test.[127] First, she must establish that her dealing is for one of the purposes listed in section 29. Second, she must prove that she dealt with the work "fairly." In determining whether the dealing is "fair," a court may look to a number of factors, including (1) the purpose of the dealing, (2) the character of the dealing, (3) the amount of the dealing, (4) the existence of any alternatives to the dealing, (5) the nature of the work, and (6) the effect of the dealing on the work. Whereas fairness is considered "a question of fact," the court in *CCH* held that "these considerations will not arise in every case of fair dealing."[128] It clarified, however, "this list of factors provides a useful analytical framework to govern determinations of fairness in future cases."[129] In the discussion that follows, this article engages in a fair-dealing analysis of a situation in which an artist wholly appropriates a trademarked logo in which copyright exists. However, for reasons that will become clear, it proceeds directly to the second factor of the fair-dealing test, the character of the dealing. I submit that, as a general rule, an appropriation artist will be able to prove that her dealing was fair.

The character of the dealing describes "how the works were dealt with."[130] In assessing this factor, the court must look to how widely the target work was distributed.[131] In *Access Copyright*, Abella J clarified that this assessment is quantitative rather than qualitative: the focus is on "the quantification of the dissemination."[132] That a single copy of the target work is used or that others cannot make further copies of the derivative work may favour a finding of fairness.[133] In holding that a judge may take "custom or practice" into account, the court in *CCH* held that it is legitimate to consider norms within a given community. While it is unclear from whose vantage point these norms are to be assessed, should that of the rights holder be valued, custom or practice might work injustice against creators.[134] Under this factor, appropriation artists such as Chloe Wise who engage in the medium of sculpture or painting will be more favoured than those who create graphic illustrations, such as Fucci. Given that "LV on a Leash" and "I Remember Everything I've Ever Eaten" are unique objects and will not widely distribute the target work, the appropriation will tend to weigh in favour of a finding of fairness. Although the court in *CCH* did not expressly apply custom or practice, it remains to be seen how this standard might be invoked by artists such as Fucci in future infringement proceedings.[135]

The third factor, the amount of the dealing, is considered by some to be "a weaker consideration."[136] In this article's hypothetical scenario, the court would determine the quantity of the target work that the artist has incorporated into her work.[137] In *CCH*, the court held that "the quantity of the work taken will not be determinative of fairness" and "it may be possible to deal fairly with a whole work."[138] The court implied that the possibility of wholly appropriating a target work depends partly on its medium: "there might be no other way to criticize or review certain types of works such as photographs."[139] Given the apparent space that the court carved out for the appropriation of visual as opposed to other works, I submit that the amount of the dealing will not be an important factor where artists appropriate a trademarked logo.

In contrast, the fourth factor, alternatives to the dealing, will likely be the focus of litigation where an artist is sued by a trademark holder for having incorporated a logo into her work. While the spectre of *Rogers v Koons* (and its fraught distinction between "target" and "weapon" parodies) seems to haunt the

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123 Craig, "Fair Dealing," *supra* note 97 at 453 [emphasis in original]. See also Reynolds, "Limits," *supra* note 16 at 471 ("During the period in which the author-centric approach was the governing approach to copyright in Canada, defences to copyright infringement such as fair dealing were interpreted in a narrow, restrictive manner").

124 Craig, "Fair Dealing," *supra* note 97 at 454.

125 *CCH, supra* note 66 at para 49, McLachlin CJ.

126 *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright),* 2012 SCC 37 at para 12, [2012] 2 SCR 345, Abella J *[Access Copyright].*

127 *Ibid; SOCAN, supra* note 121 at para 13, Abella J.

128 *CCH, supra* note 66 at para 53, McLachlin CJ.

129 *Ibid.*

130 *Ibid* at para 55, McLachlin CJ.

131 *Ibid.*

132 *Access Copyright, supra note* 126 at para 30, Abella J.

133 *CCH, supra note* 66 at para 55, McLachlin CJ; *SOCAN, supra* note 121 at para 38, Abella J.

134 D'Agostina, *supra* note 98 at 321.

135 *Ibid.*

136 *Ibid.*

137 *SOCAN, supra* note 121 at para 39, Abella J.

138 *CCH, supra* note 66 at para 56, McLachlin CJ.

139 *Ibid.*

analysis, the court in *CCH* seemed to hold that the American precedent should not be strictly followed. A court may rule that a given dealing is unfair where a non-copyrighted equivalent of the target work had been available and where use of the target work was not "reasonably necessary to achieve the ultimate purpose."[140] Present-day appropriationists such as Chloe Wise and Fucci tend to use trademarks to make statements about commodity fetishism and the construction of selfhood in a consumer culture. Given that these artists do not comment as such on their target works, some have argued that the targets could be readily substituted for others in order to attain the same artistic ends.[141] These artists' use of trademarked logos cannot, therefore, be qualified as "reasonably necessary."[142] However, this argument ignores the subtleties of the court's *dictum* in *CCH*: "if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness."[143] As Graham Reynolds notes,

> [t]his choice of example suggests that "reasonably necessary" will not be a high bar to reach. It suggests, for instance, that it would be reasonably necessary to use a copyrighted work in the context of criticism if the criticism—although effective—would not be equally effective without reproducing the work.[144]

This rejection of a "strict necessity" test makes sense in view of the courts' purported reluctance to make aesthetic judgments.[145] For instance, in *Hay*, Stewart J described how "[t]he function of the Judge has always been to weigh evidence and propound existing law."[146] Given the court's inability to weigh artistic values, he held, "the tribunal should not attempt to exercise a personal aesthetic judgement."[147] So that the application of this fair-dealing factor respects this deferential judicial posture, I submit that the court should not readily engage in second-guessing and substitute its opinion for that of the second-generation creator.

By rejecting a "strict necessity" test, the court in *CCH* seemed to give considerable latitude to the choices of appropriation artists. That is, it did not institute a bright-line rule against "use of another's copyrighted work to make a statement on some aspect of society at large," as did the Second Circuit in *Rogers v Koons*.[148] In theory, artists can and sometimes do use public-domain works to make statements about market society (as does Chloe Wise in "I Remember Everything I've Ever Eaten" by paying homage to "Le Déjeuner sur l'herbe"). Yet, without recourse to the use of trademarked logos, their statements are arguably not as equally effective. In this vein, the court in *CCH* seemed to sanction the view articulated by art historian Martha Buskirk in respect of artistic appropriation of trademarked logos: "the more deeply entrenched its product is in the cultural consciousness, the more its status as icon makes it a likely target."[149]

The fifth factor, the nature of the work, will plainly weigh in the same manner where an artist appropriates a trademarked logo. The nature of the work concerns whether it is published or confidential.[150] Because it is registered, a trademarked logo is inherently "published."

The final factor, the effect of the dealing on the work, concerns whether "the reproduced work is likely to compete with the market of the original work."[151] The framing of this factor indicates that the court's focus is on the *economic* interests of the rights holder – that is, whether the dealing usurps demand for the original work.[152] With this factor, there is no consideration of whether, for instance, an artist's use of a target work affects its integrity; this is the concern of other causes of action, such as the moral rights provisions of the *Copyright Act*.[153] In a reversal of onus, the party who argues that a given dealing is unfair must adduce evidence that links or attributes the dealing to any negative economic impact.[154] A trademark holder will usually have difficulty proving that an artist's use of a logo will cause

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140 *Ibid* at para 57, McLachlin CJ.

141 Reynolds, "A Right to Engage," *supra* note 4 at 408 ("If the purpose of the dealing is to critique one song by combining it with another in the form of a mash-up, for instance, it is difficult to argue that such criticism would be equally effective if it didn't 'actually reproduce the copyrighted work it was criticizing.' If the purpose of the dealing is to critique an elected politician's actions, however, it could be argued that such a criticism could be equally effective in a form other than through a parody of a popular song directed at that politician").

142 *CCH, supra* note 66 at para 57, McLachlin CJ.

143 *Ibid.*

144 Reynolds, "Limits," *supra* note 16 at 480.

145 For a critical take on this supposed reluctance, see Robert Kirk Walker & Ben Depoorter, "Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard" (2005) 109:2 Nw UL Rev 343.

146 *Hay v Sloan* (1957), 12 DLR (2d) 397 at 401, 27 CPR 132 (Ont SC) *[Hay* cited to DLR].

147 *Ibid* at 402. See also *Bleistein v Donaldson Lithographing Co,* 188 US 239 at 251 (1903) ("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").

148 *Koons, supra* note 6 at 310.

149 Buskirk, "Creative Intent," *supra* note 22 at 238.

150 *CCH, supra* note 66 at para 58, McLachlin CJ.

151 *Ibid at* para 60, McLachlin CJ.

152 Reynolds, "Limits," *supra* note 16 at 485; *SOCAN, supra* note 121 at para 48, Abella J.

153 Reynolds, "Limits," *supra* note 16 at 484.

154 D'Agostina, *supra* note 98 at 324; Reynolds, "Limits," *supra* note 16 at 485-86. See also *Access Copyright, supra* note 126 at para 35, Abella J ("In CCH, the Court concluded that since no evidence had been tendered by the publishers of legal works to show that the market for the works had decreased *as a result* of the copies made by the Great Library, the detrimental impact had not been demonstrated. Similarly, other than the bald fact of a decline in sales over 20 years, there is no evidence from Access Copyright

any negative economic impact in the sense defined in *CCH*. Although works by artists such as Chloe Wise teeter on the brink of criticism of corporations and may cause viewers to consider them in another light, "brand image" is not an interest protected by copyright.

In sum, the court in *CCH* made clear that these factors, whether taken individually or cumulatively, are determinative of whether a given dealing is fair.[155] Some circumstances will require courts to consider other factors in making this determination.[156] That said, I submit that where an artist appropriates a trademarked logo, her dealing with the work should usually be considered fair. Although "alternatives to the dealing" will be the most litigated factor, *CCH* arguably gives considerable latitude to the creative choices of appropriation artists.

3.4 Lingering Concerns After CCH and the Impact of the Copyright Modernization Act

What led one author to conclude in 2008 that Canadian copyright law "does not bode well for appropriation"?[157] In the aftermath of *CCH*, an artist who engaged in quotation and reference could likely prove that she dealt with the target work fairly. Yet she faced difficulty in establishing that her dealing was for one of the purposes provided for in section 29 of the *Copyright Act*, absent any specific protection of parody.[158] In other words, the hurdle imposed by Teitelbaum J in *Michelin* remained. Although the court in *CCH* called for the purposes listed in section 29 to be given a "large and liberal interpretation," leading some scholars to conclude that parody could be read into "criticism," lower courts did not follow suit.[159] For instance, in *Canwest*, Master Donaldson followed *Michelin* in holding, "parody is not an exception to copyright infringement."[160] In this light, Graham Reynolds wrote, "relying on litigation to ensure the protection of parody is a risky proposition."[161] In his view, only the legislation of "parody" as an enumerated purpose of fair dealing could resolve the lingering concerns for appropriation artists in the aftermath of *CCH*.[162]

Three years after Reynolds penned his plea, Parliament legislated both "parody" and "satire" as purposes for fair dealing following the enactment of the *Copyright Modernization Act*. Although these terms are not defined in the *Copyright Act*, courts will be required to engage in an exercise of statutory interpretation pursuant to which they must examine the "words of an Act … in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[163] Parliament being presumed to use words in their ordinary sense, most uses of trademarked logos by appropriation artists will be caught either by "satire" or by "parody."[164] The *Oxford English Dictionary* defines "satire" as "the use of humour, irony, exaggeration, or ridicule to expose and criticize people's stupidity or vices, particularly in the context of contemporary politics and other topical issues";[165] and "parody" as "humorous exaggerated imitation of an author, literary work, style, etc., esp. for purposes of ridicule."[166] When artists such as Chloe Wise and Fucci use trademarks to comment on broader societal themes such as commodity fetishism and the construction of selfhood in a consumer culture, they are arguably using their target works for the purposes of satire. In effect, by legislating both "parody" and "satire" as purposes for fair dealing, Parliament avoided splitting hairs over "target" and "weapon" parodies, as did the Second Circuit in *Rogers v Koons*. In Canadian copyright law, then, the artist need not ridicule the style and expression of the target work per se.[167]

Following the enactment of the *Copyright Modernization Act*, courts should prove more receptive to appropriation artists'

demonstrating any link between photocopying short excerpts and the decline in textbook sales").

155 *CCH, supra* note 66 at para 60, McLachlin CJ ("These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing").

156 *Ibid.*

157 Lowe, *supra* note 12 at 107.

158 Craig, "Fair Dealing," *supra* note 97 at 459 ("Appropriation art … and other such creative uses of prior works, further the public purpose of copyright but likely fall outside the limited purposes of fair dealing"); Reynolds, "A Right to Engage," *supra* note 4 at 397 ("many acts will not be protected by fair dealing as it is currently written and interpreted").

159 *CCH, supra* note 66 at para 51, McLachlin CJ; D'Agostina, *supra* note 98 at 359 ("In light of *CCH's* liberal interpretation of the enumerated grounds, it may be argued that 'criticism' could now encompass parody. Michelin no longer seems to be good law"); Mohammed, *supra* note 25 at 470 ("the ratio in *CCH* concerning the broad, liberal interpretation of the fair dealing provisions of the Act, must be read into the common law to provide a defence of parody against allegations of copyright infringement").

160 *Canwest v Horizon,* 2008 BCSC 1609 at para 4, 173 ACWS (3d) 431.

161 Reynolds, "Necessarily Critical," *supra* note 119 at 256.

162 *Ibid* at 245. See also Rebecca Katz, "Fan Fiction and Canadian Copyright Law: Defending Fan Narratives in the Wake of Canada's Copyright Reforms" (2014) 12 CJLT 86 at 86 ("the Copyright Modernization Act's addition of a distinct parody and satire category may suggest that the original criticism exemption did not in fact include parodies or satires, and that Parliament intended to correct that omission by protecting parodic and satirical works as fair dealing in future").

163 *Rizzo & Rizzo Shoes Ltd (Re),* 2015 SCC 57 at para 48, [2015] 3 SCR 615, Rothstein J *[SODRAC].*

164 See e.g. *ESA, supra* note 163 at para 78, Rothstein J, dissenting.

165 *Oxford English Dictionary,* 3rd ed, *sub verbo* "satire." On the use of the *Oxford English Dictionary* in ascertaining the ordinary meaning of statutory terms, see Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed (Markham, Ont: LexisNexis, 2014) at paras 3.30-3.41. On problems with the use of dictionary meanings in ascertaining the ordinary sense of "parody" and "satire" for the purposes of the Australian *Copyright Act,* see Conal Condren *et al,* "Defining Parody and Satire: Australian Copyright Law and Its New Exception" (2008) 13 Med & Arts L Rev 276 & 402.

166 *Oxford English Dictionary,* 3rd ed, *sub verbo* "parody."

167 *Koons, supra* note 6 at 309-10.

recourse to the fair-dealing exception. As the court in *SOCAN* explained, given that purposes of fair dealing are to be given a "large and liberal interpretation," the first step of the fair-dealing analysis presents "a relatively low threshold."[168] While, in turn, "the analytical heavy-hitting is done in determining whether the dealing was fair," I submit that most uses of trademarked logos by appropriation artists will be held to be fair.[169]

3.5 Non-Commercial User-Generated Content Exception

Introduced in tandem with new purposes of fair dealing by the *Copyright Modernization Act*, the "non-commercial user-generated content" (UGC) exception may provide an additional recourse to appropriation artists who are pursued by trademark holders. That the UGC exception is placed apart from its fair-dealing counterpart in the *Copyright Act* may be taken to indicate that the two should be considered separate and distinct.[170] This article gives passing consideration to the UGC exception for two reasons. First, the fair-dealing exception will protect artists who engage in practices of quotation and reference in the normal course of things. Second, while the relationship between the UGC and fair-dealing exceptions remains to be worked out, it appears from *CCH* that a defendant will be expected to rely on the broader fair-dealing exception given that "it is always available."[171]

Despite having been characterized as the "YouTube exception" in parliamentary debate, there is no reason why a visual artist could not invoke the UGC exception.[172] The principle of technological neutrality recognizes that, "absent Parliamentary intent to the contrary, the *Copyright Act* should not be interpreted or applied to favour or discriminate against any particular form of technology."[173] In this vein, the drafting of the UGC exception does not specify that the target or the user-generated work must exist in digital form.[174] Where an artist uses a target work in the creation of another, she does not infringe the rights holder's copyright under section 29.21 if four conditions are cumulatively satisfied. First, the use of the work must be for non-commercial purposes. Second, the source must be mentioned, if it is reasonable to do so in the circumstances. Third, the defendant must have had reasonable grounds to believe that the target work did not infringe copyright. Fourth, the defendant's use of the target work must not have a "substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work."[175]

Although section 29.21 was enacted to remedy the imbalances in power that exist between rights holders and creators, should appropriation artists invoke the UGC exception if pursued by trademark holders for copyright infringement? Two factors make recourse to this exception rather than the fair-dealing exception risky. First, appropriationists will be precluded from invoking section 29.21 if they sell their works on the art market. Second, and more importantly, Parliament's inclusion of the words "or otherwise" to define the fourth condition might allow courts to consider the non-financial impacts of an appropriation artist's use of the target work – for example, whether it creates unfavourable distinctions in the viewer's mind.[176] Although this consideration is precluded under the "effect of the dealing on the work" factor in a fair-dealing analysis, the expansive wording of section 29.21(d) makes it appear legitimate. Since the four conditions under the UGC exception are not only onerous but also open-ended, appropriation artists will be better served by invoking the fair-dealing exception.[177]

4.0 Appropriation Art and Moral Rights

While it may seem odd to consider moral rights in cases where an artist makes use of a corporate trademark, at least one author posits "moral rights [are] appropriate to protect corporate economic interests."[178] Given that a corporate trademark holder will likely seek to use copyright law as a "blunt tool" to protect reputational interests, as Laura Heymann predicts, for the sake of completeness this article briefly considers the viability of a claim framed under section 28.2(1)(b) of the *Copyright Act*.[179] That paragraph provides that an author's right to the integrity of his work is infringed where the work is used in association with a cause, among other things, to the prejudice of the author's honour or reputation. Where an artist appropriates a trademark for expressive ends, she may very well associate it with causes seen as unfavourable to the corporation.[180] However, I submit

168 *CCH, supra* note 66 at para 51, McLachlin CJ; *SOCAN, supra* note 121 at para 27, Abella J.
169 *SOCAN, supra* note 121 at para 27, Abella J.
170 *Katz, supra* note 162 at 106.
171 Teresa Scassa, "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 431 at 444; D'Agostina, supra 98 at 325 ("CCH favours parties relying on fair dealing over those who make use of other exceptions"); *CCH, supra* note 66 at para 49, McLachlin CJ.
172 Katz, *supra* note 162 at 87, 97.
173 *SODRAC, supra* note 163 at para 66, Rothstein J. See also ESA, *supra* note 163 at para 9, Abella J.
174 Katz, *supra* note 162 at 97 ("the provision does not specify or limit the types or content or media that it will encompass"); Fraser Turnbull, "The Morality of Mash-Ups: Moral Rights and Canada's Non-Commercial User-Generated Content Exception" (2014) 26:2 IPJ 217 at 220.
175 *Copyright Act, supra* note 1, s 29.21.
176 Katz, *supra* note 162 at 101.
177 *Ibid;* Turnbull, *supra* note 174 at 223.
178 Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford: Oxford University Press, 2006) at para 12.05.
179 Heymann, *supra* note 25 at 57.
180 See Maree Sainsbury, "Parody, Satire, Honour and Reputation: The Interplay Between Moral and Economic Rights" (2007) 18 AIPJ

that there are two hurdles to the use of section 28.2(1)(b) as a quasi-depreciation remedy by corporate trademark holders.

In theory, an individual may infringe an author's right to the integrity of his work despite having dealt with it fairly. The fair-dealing exception in section 29 of the *Copyright Act* does not apply to moral rights because economic and moral rights are considered distinct.[181] In *Théberge*, the majority articulated this "dualist approach": "The separate structures in the Act to cover economic rights on the one hand and moral rights on the other show that a clear distinction and separation was intended."[182] Yet the absence of any express defences to infringement of moral rights is not problematic as such. As Binnie J noted in *Théberge*, there exist "limitations that are an essential part of the moral rights created by Parliament."[183] These inherent limitations will prevent trademark holders from using an author's right to integrity as a quasi-depreciation remedy.

The fact that only an author can exercise moral rights prevents corporate trademark holders from having recourse to section 28.2(1)(b) of the *Copyright Act* as a means of protecting reputational interests. This conclusion emerges from both the rationale for moral rights and a reading of the statute. On the one hand, as Binnie J held in *Théberge*, moral rights are based on an understanding of "the artist's œ*uvre* as an extension of his or her personality."[184] On the other, pursuant to section 14.1(2) of the Act, moral rights may not be assigned, indicating that only the author of a work can institute an action for the infringement of his right under section 28.2(1)(b). Courts have rejected attempts by corporations to exercise moral rights on behalf of an author. In *Confetti Records*, Lewison J dismissed a record company's claim that the defendant's mash-up infringed the moral rights held by the author of a musical work.[185] In other words, "the record company was merely trying to assert rights they did not have."[186] Therefore, claims by trademark holders against appropriation artists on the basis of section 28.2(1)(b) of the *Copyright Act* will fail at this first stage.

The fact that section 28.2(1)(b) protects an author's honour or reputation only *as an author* is another limitation of the provision.[187] In the context of Canadian federalism, this limitation is arguably elevated to a constitutional requirement. The protection of reputational interests generally has a "double aspect," because it is an area in which the provinces may legislate pursuant to their jurisdiction over "property and civil rights in the province."[188] In order for the cause of action enshrined in section 28.2(1)(b) to be valid pursuant to Parliament's jurisdiction over "copyrights," it must be read in a way that makes it "sufficiently integrated" into the *Copyright Act*.[189] I submit that only where honour or reputation is interpreted as honour or reputation in one's capacity *as an author* is this requirement met. David Vaver explains, in turn, that one's authorial interests are violated where third-party acts "depreciate the market value of [the author's] work and, ultimately, the author's income."[190] Given the narrow interpretation that must be given to the interests that section 28.2(1)(b) envisages, the provision cannot be used by corporate trademark holders to protect non-authorial types of reputational interests. Corporate trademark holders must instead rely on sections 20 and 22 of the *Trade-marks Act* to do the same.

5.0 Appropriation Art and Trademark Issues

The "economic" account of trademark law cannot explain why trademarks and expressive interests are said to be "on a collision course."[191] Indifferent to "their commercial evolution," the Supreme Court of Canada has remained steadfast in its adherence to a traditional understanding of trademarks.[192] In *Mattel*, the court stated that a mark is "a guarantee of origin and inferentially, an assurance to the consumer that the quality will be what he or she had come to associate with a particular trade-mark."[193] In *Masterpiece*, the court reiterated that a mark is as "an indication of provenance."[194] That is, it "allows consumers to know, when they

149 at 149.

181 Kristin Lingren, "Canada" in Gillian Davies & Kevin Garnett, eds, *Moral Rights* (London, UK: Sweet & Maxwell, 2010) 677 at para 23-003.

182 *Théberge, supra* note 86 at para 59, Binnie J.

183 *Ibid* at para 22, Binnie J.

184 *Ibid* at para 15, Binnie J.

185 *Confetti Records v Warner Music UK Ltd,* [2003] EWHC 1274 (Ch).

186 Turnbull, *supra* note 174 at 227.

187 For a discussion of the meanings of "honour" and "reputation," see Dennis Lim, "Prejudice to Honour or Reputation in Copyright Law" (2007) 33:2 Monash UL Rev 290.

188 See *Multiple Access Ltd v McCutcheon,* 2016 SCC 23 at para 50, [2016] 1 SCR 467, Wagner and Côté JJ; Lingren, supra note 181 at para 23-023; David Vaver, "Authors' Moral Rights in Canada" (1983) 14:3 Intl Rev Ind Prop & C'right L 329 at 366; Émile Colas, "Le droit moral de l'artiste sur son oeuvre" (1981) 59 Can Bar Rev 521 at 541; Mistrale Goudreau, "Le droit moral de l'auteur au Canada" (1994) 25 RGD 403 at 422-23.

189 *Kirkbi AG v Ritvik Holdings Inc,* 2005 SCC 65 at paras 20, 32, [2005] 3 SCR 302, LeBel J *[Kirkbi].*

190 David Vaver, "Author's Moral Rights in Canada—Reform Proposals in Canada: Charter or Barter of Rights for Creators?" (1987) 25:4 Osgoode LJ 749 at 757.

191 Barton Beebe, "The Semiotic Account of Trademark Doctrine and Trademark Culture" in Graeme B Dinwoodie & Mark D Janis, eds, *Trademark Law and Theory: A Handbook of Contemporary Research* (Northampton, Mass: Edward Elgar, 2008) 42 at 43 [Beebe, "Semiotic Account"]; Dreyfuss, "Expressive Values," *supra* note 22 at 262. See also Barton Beebe, "The Semiotic Analysis of Trade-mark Law" (2004) 51 UCLA L Rev 621.

192 *Mattel, Inc v 3894207 Canada Inc,* 2006 SCC 22 at para 2, [2006] 1 SCR 772, Binnie J *[Mattel].*

193 *Ibid.*

194 *Masterpiece Inc v Alavida Lifestyles Inc,* 2011 SCC 387 at para 1, [2011] 2 SCR 387, Rothstein J [*Masterpiece*]. See also *Kirkbi, supra* note 189 at para 39, LeBel J ("a mark … [is] a symbol of a connection between a source of a product and the product itself").

are considering a purchase, who stands behind those goods or services."[195] This definition of a trademark as an indicator of trade source, which minimizes search costs, tells only half the story.[196] Since the late 20th century, trademarks have also served a so-called expressive function, which has little to do with purchasing decisions.[197] Teresa Scassa writes, "as corporate owners have enhanced the messages conveyed by trademark (from source to quality to brand identity), the symbols have become more densely packed with meaning."[198] Foreign courts have taken notice of this development in ruling on claims by trademark holders against appropriationists. For instance, in *Laugh It Off*, decided by the Constitutional Court of South Africa, Sachs J observed,

> [i]n a society driven by consumerism and material symbols, trademarks have become important marketing and commercial tools that occupy a prominent place in the public mind. Consequently, companies and producers of consumer goods invest substantial sums of money to develop, publicise and protect the distinctive nature of their trademarks; in the process, well-known trademarks become targets for parody. Parodists may then have varying motivations for their artistic work; some hope to entertain, while others engage in social commentary … .[199]

The future conflict between trademark holders and expressive interests can be understood as a question of who should garner the value of this "surplus interest."[200] However, as Rochelle Cooper Dreyfuss warns, "[i]f investment is dispositive of the trademark owner's right to control, then the public's ability to evoke the expressive dimension of marks is in danger of a significant restriction."[201] In this vein, Carys Craig implores us to consider how to balance "the protection of trade-marks and the guarantee of freedom of expression."[202] The response of foreign courts to this question has varied. As Dreyfuss observes in a later essay,

> cases with expressive claims to trademark usage have arisen in jurisdictions around the world and adjudicators have developed a variety of responses. In some places, judges exploit statutory language and the facts of the case to limit the ambit of trademark protection and preserve place for free (or free-er) speech; other jurisdictions recognize very strong trademark claims, but courts will balance these rights against constitutive norms.[203]

I submit that where an appropriation artist is sued by a trademark holder for infringement or depreciation, the proper judicial response is to recognize the limited nature of the plaintiff's monopoly by "exploit[ing] statutory language." That is, the *Trade-marks Act* reflects an implicit balance between trademark holders and expressive interests, Parliament having limited the trademark holder's monopoly in significant ways.[204] As Wright J held in *Canada Safeway*, trademark law does "not prevent individuals, corporations, or even competitors from using the trade mark of another for purposes unrelated to protection for commercial or trade reasons."[205] In this sense, a defendant's recourse to the *Charter of Rights and Freedoms* or the legislation of a fair-dealing exception in trademark law is redundant.[206] As Lord Neuberger noted in a speech, "what is needed is not a rights based defence but a more considered approach to the proper limits of trade-mark law."[207] In the following discussion, this article analyzes how a trademark holder would face considerable obstacles in making out a claim for infringement or depreciation against an appropriation artist who uses its trademark in one of her works. While these conclusions may appear obvious, this clarification of the law is necessary since these causes of action are ripe for abuse by corporate trademark holders. Describing "the chilling effect that overzealously applied trademark law could have on the free circulation of ideas," Sachs J in *Laugh It Off* observed,

> when applied against non-competitor parody artists, the tarnishment theory of trademark dilution

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195 *Masterpiece, supra* note 194 at para 1.
196 Beebe, "Semiotic Account," *supra* note 191 at 43; Scassa, "Trademarks," *supra* note 16 at 880.
197 Dreyfuss, "Expressive Genericity," *supra* note 24 at 400-1.
198 Scassa, "Trademarks," *supra* note 16 at 886.
199 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another,* [2005] ZACC 7 at para 78, Sachs J *[Laugh It Off].*
200 Dreyfuss, "Expressive Genericity," *supra* note 24 at 403.
201 *Ibid* at 405.
202 Carys J Craig, "Perfume by Any Other Name May Smell as Sweet … But Who Can Say? A Comment on *L'Oreal v Bellure,"* Case Comment, (2010) 22 IPJ 319 at 328 [Craig, "L'Oreal"].
203 Dreyfuss, "Expressive Values," *supra* note 22 at 266.
204 Scassa, "Trademarks," *supra* note 16 at 893, 907.
205 *Canada Safeway Limited v Manitoba Food & Commercial Workers, Local 832,* [1983] 5 WWR 321 at 324, 19 ACWS (2d) 449 (Man QB), rev'd [1983] 5 WWR 327, 73 CPR (2d) 234 (Man CA).
206 Craig, "L'Oreal," *supra* note 202 at 331 ("In Canadian trade-mark law there is, for example, no exception to liability for the fair use of a protected mark"). See *Bell Express Vu Ltd Partnership v Tedmonds & Co* (2001), 104 ACWS (3d) 856 at para 42 (Ont Sup Ct), Nordheimer J ("The evidence here does not establish any commercial use of the plaintiff's trademark. The website does not promote wares or services in competition to those of the plaintiff. Rather, the website promotes criticism of the plaintiff as a commercial enterprise. In that regard, its function could be characterized as the exercise of free speech and, consequently, may well be said to be protected by virtue of section 2(b) of the *Charter of Rights and Freedoms,* although that issue was not raised before me"). Singapore has a statutory fair-dealing exception in its trademarks statute: *Trade-marks Act* (Cap 332, 2005 Rev Ed Sing), s 28(4) ("a person who uses a registered trade mark does not infringe the trade mark if such use—(a) constitutes fair use in comparative commercial advertising or promotion; (b) is for a non-commercial purpose; or (c) is for the purpose of news reporting or news commentary").
207 Lord Neuberger, "Trademark Dilution and Parody" (Harold G Fox Memorial Lecture 2015, 20 February 2015), (2015) 28 IPJ 1 at 18.

> may in protecting the reputation of a mark's owner, effectively act as a defamation statute. As such[,] it … could serve as an over-deterrent. It could chill public discourse because trademark law could be used to encourage prospective speakers to engage in undue self-censorship to avoid the negative consequence of speaking—namely, being involved in a ruinous lawsuit. The cost could be inordinately high for an individual faced with a lawsuit aimed at silencing a critic, not only in terms of general litigation expenses, but also through the disruption of families and emotional upheaval. Such protracted vexation can have the effect of discouraging even the hardiest of souls from exercising their free speech rights.[208]

5.1 Trademark Infringement

Where a corporate trademark holder asserts a claim for trademark infringement against an appropriationist, it will usually fail at the first stage. However, the dearth of case law on the use of trademarks for expressive ends since *Michelin* may be taken to indicate that would-be defendants have not come to the same realization. *Michelin*, which is largely consistent with the decision of the Supreme Court of Canada in *Veuve Clicquot*, held that the court's inquiry under section 20 of the *Trade-marks Act* proceeds in two steps.[209] The court must first ascertain whether the defendant "used" the plaintiff's trademark as a trademark. If it did, the court must then determine whether there exists any likelihood of confusion.

An artist's incorporation of a trademark into her work will not be readily characterized as "use" within the meaning of section 20 of the *Trade-marks Act*. As Teitelbaum J noted in *Michelin*, "this seemingly straightforward term has been qualified and given a particular meaning."[210] The defendant must have used the trademark as an indicator of trade source in order to have infringed on the trademark holder's monopoly.[211] That is, the inquiry into "use" focuses on whether the artist engaged in "commercial activity" following her appropriation of a trademark.[212] In holding that "'use' is designed so that not all users of trade-marks belonging to another person are caught within the threads of the infringement provisions," Teitelbaum J spoke to the Act's built-in balance between infringement and legitimate expressive uses.[213] As in *Michelin*, the "nature" of an appropriation artist's activities will usually prove "an immovable obstacle for the plaintiff's claim for relief" in this article's hypothetical scenario.[214] Where an artist merely uses a trademark for the purposes of comment or criticism, there is no infringement of the trademark holder's monopoly.[215]

Should the inquiry into "use" fail to screen out a trademark holder's claim against an appropriation artist, the second step of the infringement analysis will usually defeat it. In *Veuve Clicquot*, the court restated the "traditional" approach to the likelihood of confusion as whether the defendant's use of the trademark is confusing to the somewhat-hurried consumer in all the surrounding circumstances.[216] Whether a likelihood of confusion exists is a question of fact and "different circumstances will be given different weight in a context-specific assessment."[217] A reading of *Michelin* suggests that in the context of expressive uses of trademarks, two factors are paramount: whether the defendant has subjected the target trademark to a significant degree of transformation and whether she has "amply indicated" the origin of her work.[218] Present-day appropriationists appear to only rarely transform trademarks in incorporating them into collages or other works. Chloe Wise, for instance, used hardware from an actual Dior handbag in creating "The Swing (Dior)." However, the second factor will be satisfied by most appropriation artists. As this article's survey of artistic practices has shown, an artist's signature of her work has become a *sine qua non* of asserting authorship over her work and serves the same function as the defendant union's "logo in the top right-hand corner" of its pamphlets in *Michelin*.[219] In all the surrounding circumstances, then, an appropriation artist's use of a corporate trademark would not be likely to confuse the somewhat-hurried viewer.

5.2 Trademark Depreciation

Where a corporate trademark holder pursues an appropriation artist, it is more likely to allege trademark depreciation than infringement, given that section 22 of the *Trade-marks Act* does not require confusion of origin.[220] Depreciation being a "super weapon," Carys Craig describes how it is "capable of restricting basic competitive practices as well as commercial (and other) speech."[221] Other scholars speak more bluntly to the threat that

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208 *Laugh It Off, supra* note 199 at paras 104, 106.
209 Teresa Scassa, *Canadian Trademark Law,* 2nd ed (Toronto: LexisNexis, 2015) at para 8.29 [Scassa, *Trademark Law]; Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée,* 2006 SCC 23, [2006] 1 SCR 824 *[Veuve Clicquot].*
210 *Michelin, supra* note 87 at para 29, Teitelbaum J.
211 *Ibid* at para 22, Teitelbaum J ("To qualify as 'use as a trademark,' therefore, the mark must be used for the purpose of identifying or pinpointing the source of the goods and services. In other words, to use a mark as a trademark, the person who used the mark on the goods or in connection with the services must have intended the marks to indicate the origin of the goods or services").
212 *Ibid* at para 40, Teitelbaum J.
213 *Ibid* at para 29, Teitelbaum J; Scassa, *Trademark Law, supra* note 209 at para 8.7.
214 *Michelin, supra* note 87 at para 38, Teitelbaum J.
215 Scassa, *Trademark Law, supra* note 209 at para 8.16.
216 *Masterpiece, supra* note 194 at para 40, Rothstein J; *Veuve Clicquot, supra* note 209 at para 21, Binnie J.
217 *Veuve Clicquot, supra* note 209 at paras 14, 21, Binnie J.
218 *Michelin, supra* note 87 at para 41, Teitelbaum J.
219 *Ibid.*
220 Lord Neuberger, *supra* note 207 at 10.
221 Veuve Clicquot, *supra* note 209 at para 45, Binnie J; Craig, "L'Oreal," *supra* note 202 at 330.

the right of action poses to expressive interests. Rochelle Cooper Dreyfuss writes:

> At the normative level, [depreciation] shifts the focus from the pure signaling capacity of the mark (its ability to denote source and quality) to other functions (such as instilling cachet in the brand). Because it suggests that all the value in a mark belongs to the trademark holder, this shift reinforces the notion that every free ride is actionable. More prosaically, making a case for [depreciation] does not require a showing of a likelihood of confusion. As a result, it removes from the judicial toolbox one of the major factual devices for resolving the tension between proprietary and expressive interests.[222]

The test for trademark depreciation as formulated in *Veuve Clicquot* appears to carve out space for the use of trademarks by appropriation artists. The cause of action has four elements, the first of which requires the defendant to have used the trademark "in connection with wares or services."[223] As Teitelbaum J noted in *Michelin*, "use" is therefore "the basic building block or linchpin" for causes of action under both section 20 and section 22 of the *Trade-marks Act*.[224] Accordingly, the court in *Veuve Clicquot* apparently limited the scope of depreciation to uses of a trademark in a commercial context.[225] While an appropriation artist may sell her work on the art market and thereby bring her "use" of a target trademark within the meaning recognized by the *Trade-marks Act*, the fourth element of a cause of action for depreciation will not be readily made out. That is, it is not clear that the likely effect of that use would be to depreciate the trademark's goodwill.[226] *Michelin* suggests that expressive uses of trademarks will not plainly "have a negative effect or depreciate the drawing power of the plaintiff's marks *in the marketplace*."[227] Although the viewer may have "second thoughts" about a corporation upon viewing a second-generation work, the corporation's "reputation" or "specific role in the marketplace" will remain unscathed.[228] That said, the court in *Veuve Clicquot* may have left depreciation susceptible to abuse by trademark holders against expressive interests, holding "Canadian courts have not yet had an opportunity to explore its limits."[229] However, if the need to reformulate the test arises, courts should police the boundaries of a trademark holder's monopoly to create breathing space for non-commercial, expressive interests such as appropriation art.

6.0 Conclusion

Marshall McLuhan, the Canadian media theorist, once likened art to an "early warning system."[230] That is, many issues that surround the role of intellectual property law in society have first emerged in artistic practices.[231] Appropriation art, being but one manifestation of a larger "remix aesthetic," makes for an ideal case study to investigate whether there is "breathing space" under Canadian copyright and trademark law for new forms of cultural production. While some scholars have foretold a future clash between trademark holders and expressive interests, appropriation art will likely be a terrain on which it will be fought. That Canadian visual artists have begun to cross the high-low cultural divide, reproducing trademarked logos as opposed to canonical imagery, is a key sign of this development to come.

This article contributes to the scholarship on appropriation art and Canadian intellectual property law, building on where the sole scholarly work had left off in 2008. Having taken stock of recent developments on the legislative and judicial fronts, this article holds that new forms of appropriation art can flourish under the *Copyright Act* and *Trade-marks Act*. Namely, if pursued by a corporate trademark holder for copyright infringement, an appropriation artist will usually be able to rely on the fair-dealing exception in section 29 of the *Copyright Act*. Alternatively, any claim by the holder against the artist for infringement and dilution under sections 20 and 22 of the *Trade-marks Act* would likely fail. While there is a real possibility that trademark holders may exploit intellectual property law to restrict the use of their works by second-generation creators, this article has affirmed that the *Copyright Act* and *Trade-marks Act* contain built-in protections for artistic practices of reference and quotation.

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222 *Laugh It Off, supra* note 199 at paras 104, 106.
223 *Veuve Clicquot, supra* note 209 at para 46, Binnie J.
224 *Michelin, supra* note 87 at para 33, Teitelbaum J.
225 Scassa, "Trademarks," *supra* note 16 at 896.
226 *Veuve Clicquot, supra* note 209 at para 46, Binnie J.
227 *Michelin, supra* note 87 at para 46, Teitelbaum J [emphasis in original].
228 *Ibid.*
229 *Veuve Clicquot, supra* note 209 at para 67, Binnie J.
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