

AFTER ANDY WARHOL?

BRIAN L. FRYE**

*Bad art is still art in the same way that a bad emotion is still an emotion.*¹

Have you ever wanted to own a Warhol? Now's your chance! I'm selling NFTs of 16 paintings created by Andy Warhol in his *Prince* series. But wait. I don't own the copyright in any of those paintings. How can I sell NFTs of them? Let me explain.

THE PHOTOGRAPHER & THE BUSINESS ARTIST

The story begins in 1981, when Lynn Goldsmith created a photograph of Prince.² In 1984, *Vanity Fair* paid Lynn Goldsmith \$400 for a license to use her photograph as an “artist reference” for an illustration that would be published in the magazine.³

* Brian L. Frye is the Dogecoin Professor of Law & Grifting at the University of Kentucky College of Law. To the extent possible under law, I waive all copyright and related or neighboring rights to “After Andy Warhol?” In addition, I explicitly permit plagiarism of this work and specifically object to anyone enforcing plagiarism rules or norms against anyone who plagiarizes this work for any purpose. This means that you may incorporate this work, without attribution or acknowledgment, into work submitted under your own name or any other attribution, for any purpose. See Brian L. Frye, *A License to Plagiarize*, 43 U. ARK. LITTLE ROCK L. REV. 373 (2021).

• IDEA Vol. 63 thanks Brian L. Frye for participating in IDEA's Fall 2022 Symposium “IP in the Metaverse: Protecting IP Rights in the Virtual World.”

¹ Marcel Duchamp, *The Creative Act*, Lecture at the Museum of Modern Art, New York (Oct. 19, 1961).

² *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 32 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

³ *Id.*



Lynn Goldsmith, [*Prince*] (1981)⁴

The artist was Andy Warhol, who used Goldsmith's photograph as the basis for 16 paintings.⁵ One of the paintings was published in *Vanity Fair* in an article about Prince.⁶ As usual, Warhol heavily cropped the photograph,

⁴ Complaint at 13, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 1:17-cv-02532).

⁵ *Andy Warhol Found.*, 11 F.4th at 32.

⁶ *Id.*

using only Prince’s face, and made a silkscreen, which he used to create the paintings.⁷



L: Andy Warhol, *PO 50.544* (1984) (reproduced in *Vanity Fair*)
 R: Andy Warhol, *Prince Series* (1984) (the other 15 paintings in the series)⁸

When Prince died in 2016, *Vanity Fair* reprinted the Warhol illustration on the cover of an issue commemorating his death.⁹ Goldsmith objected that reprinting the photograph wasn’t covered by the original license and threatened to sue *Condé Nast*, the publisher of *Vanity Fair*, for copyright infringement.¹⁰

When the Andy Warhol Foundation learned of Goldsmith’s threat, it filed a declaratory judgment action in the United States District Court for the Southern District of New York, asking the court to find that Warhol’s use of

⁷ *Id.* at 33, 47.

⁸ Brief for Petitioner at 19–22, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, No. 21-869 (U.S. filed June 10, 2022).

⁹ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 35 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

¹⁰ *Id.*

Goldsmith's photograph to create the *Prince Series* was a non-infringing fair use.¹¹ Goldsmith responded by countersuing the Andy Warhol Foundation for copyright infringement.¹²

The district court granted summary judgment to the Andy Warhol Foundation, holding that Warhol's use of Goldsmith's photograph was fair use.¹³ The Second Circuit reversed, holding that Warhol's use of the photograph was not fair use because it was insufficiently transformative, among other things.¹⁴ The Supreme Court granted the Andy Warhol Foundation's petition for a writ of certiorari, and the case is currently pending review.¹⁵

THE PURLOINED PAINTING

So, why does any of this matter? Well, because it affects the copyright status of the works in question, in particular the 16 paintings in Warhol's *Prince Series*. The Copyright Act explicitly provides that copyright does not protect a derivative work that infringes the copyright in the preexisting work on which it is based.¹⁶ In other words,

¹¹ Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 316 (S.D.N.Y. 2019).

¹² *Id.*

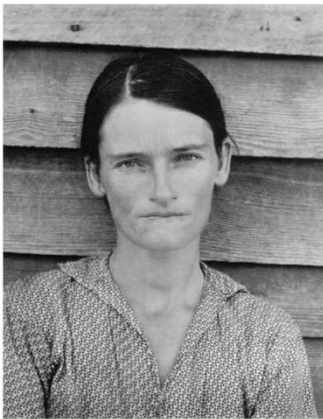
¹³ *Id.* at 331.

¹⁴ Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 125 (2d Cir. 2021), *withdrawn*, 11 F.4th 26 (2d Cir. 2021) (rehearing the case after Google L.L.C. v. Oracle America, Inc., 141 S. Ct. 1183 (2021)).

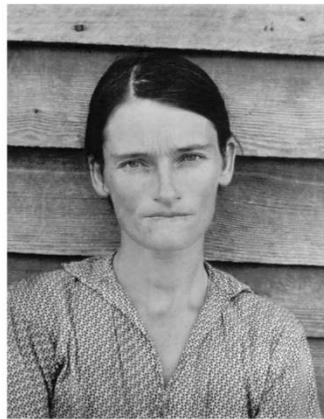
¹⁵ Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

¹⁶ 17 U.S.C. § 103(a) ("The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."); *see also* Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1167–69 (C.D. Cal. 1989) (holding that copyright does not protect any part of a derivative work that infringes

when the Second Circuit disagreed with the Andy Warhol Foundation’s fair use defense and held that Warhol’s *Prince Series* paintings infringed the copyright in Goldsmith’s photograph, it also necessarily held that Warhol’s *Prince Series* paintings are not protected by copyright.¹⁷ Unless and until the Supreme Court reverses the Second Circuit’s holding, Warhol’s *Prince Series* paintings are in the public domain.



Walker Evans
Alabama Tenant Farmer Wife, 1936
Gelatin silver print



Sherrie Levine
After Walker Evans 1981

PLAGIARISM ART

In 1981, as Goldsmith was photographing Prince, Sherrie Levine was photographing photographs created by Walker Evans in the late 1930s, for her series *After Walker*

the copyright in a preexisting work it copies). *But see* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1022–23 (1997) (arguing that denying copyright protection to the original elements of an infringing derivative work is inefficient because it discourages improvements).

¹⁷ See, e.g., *Anderson*, 11 U.S.P.Q.2d at 1167–69 (holding that infringing derivative works are “not entitled to copyright protection”).

Evans.¹⁸ Levine created and sold almost identical copies of Evans's photographs.¹⁹ But she wasn't a copyright infringer, because Evans' photographs were in the public domain. Evans created his photographs as an employee of the Works Progress Administration, and works created by employees of the United States government in the course of their employment are in the public domain.²⁰

Similarly, I am selling NFTs of works that are in the public domain—or unprotected by copyright anyway, at least for the time being. But what if the Supreme Court deems Warhol's use of Goldsmith's photograph a fair use, reinstating his copyright in his *Prince Series* paintings? And what about Goldsmith's copyright in her photograph? If she can use it to suppress Warhol's paintings, or at least claim a cut of Warhol's profits from the *Prince Series*, why can't she also use it in the same way against me? After all, I'm selling NFTs of the very same works the Second Circuit deemed infringing.

THE WORK, THE THIEF, THE COPYRIGHT & THE TOKEN

I'll begin with a counterintuitive, but indisputably accurate observation: most NFTs don't and can't infringe

¹⁸ Carmen Winant, *Sherrie Levine's 'Mayhem': A Retrospective of The Original Fake at The Whitney*, WNYC (Nov. 9, 2011) [hereinafter *Sherrie Levine's Mayhem*], <https://www.wnyc.org/story/169656-sherrie-levines-mayhem-retrospective-original-fake-whitney/> [<https://perma.cc/5RER-YP6Z>].

¹⁹ *Id.*

²⁰ See 17 U.S.C. § 105 ("Copyright protection under this title is not available for any work of the United States Government . . ."). Of course, the Walker Evans Estate disagrees and claims copyright ownership of the photograph, but it's wrong, and it knows it's wrong. That's why it chickened out of its copyright infringement action against Levine, and instead purchased the entire edition of her work. *Sherrie Levine's Mayhem*, *supra* note 18.

copyright.²¹ Why not? An NFT is just a tiny bit of encrypted data written onto a blockchain.²² The overwhelming majority of NFTs consist of nothing more than information about the owner of the NFT and a URL, which typically points to an image file.²³ Nothing about that is or can be copyright infringing. You can say an NFT represents anything you like without infringing copyright because creating a cryptographic token purporting to represent ownership of a work isn't one of the exclusive rights of copyright owners.²⁴

So, merely creating and selling NFTs that purport to represent ownership of Warhol's *Prince Series* paintings—or anything else—can't infringe copyright because it doesn't implicate any of the exclusive rights of copyright owners. However, using reproductions of a work without permission in order to sell NFTs of that work would almost certainly be infringing.²⁵ Unless, of course, the work in question is in the public domain or otherwise unprotected by copyright, like Warhol's *Prince Series*. You can't infringe a copyright that doesn't exist. So, creating NFTs of Warhol's *Prince Series* paintings and using images of the paintings to sell the NFTs can't be infringing, at least

²¹ See Brian L. Frye, *Are Cryptopunks Copyrightable?*, PEPPERDINE L. REV. (forthcoming).

²² See Brian L. Frye, *How to Sell NFTs Without Really Trying*, 13 HARV. J. SPORTS & ENT. L. 113, 113–14 (2022).

²³ See *id.*

²⁴ See 17 U.S.C. §§ 106, 106A (describing the exclusive rights of copyright owners); see also Brian L. Frye, *Secret Pulp Fiction NFT*, OPENSEA, <https://opensea.io/assets/ethereum/0x495f947276749ce646f68ac8c248420045cb7b5e/86968975984154595632209176507398447769455665707409153213706287745205943664641> [https://perma.cc/K6X3-3YCL] (last visited Jan. 2, 2023).

²⁵ Under the “server rule” adopted by the 9th Circuit, merely pointing to a URL containing an image, without creating a new copy of the image, might not be infringing. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–62 (9th Cir. 2007).

with respect to Warhol, because there's no copyright to infringe, at least for the time being.

What about Goldsmith's copyright in her photograph? It's still valid, and the Second Circuit held that it's infringed by Warhol's *Prince Series* paintings.²⁶ If the paintings themselves infringe Goldsmith's copyright, does using images of the paintings to sell NFTs of the paintings also infringe Goldsmith's copyright? I think not.

For one thing, the NFTs are still irrelevant. If I infringed Goldsmith's copyright by selling NFTs of Warhol's *Prince Series* paintings, it's only because I used images of the paintings to sell the NFTs. So, the question becomes, if Warhol infringed Goldsmith's copyright by creating the paintings, have I infringed Goldsmith's copyright by reproducing images of the paintings?

Maybe, but I think not. If Warhol's paintings infringe Goldsmith's copyright in her photograph, then reproducing images of Warhol's paintings is also *prima facie* infringement of Goldsmith's copyright. But that doesn't mean it's actually infringing. After all, the Second Circuit had to do a fair use analysis to determine whether Warhol's use of Goldsmith's photograph was actually infringing.²⁷

But when the facts change, the fair use analysis must change as well. Unlike Warhol, I didn't use Goldsmith's photograph to create a derivative work. I used Goldsmith's photograph—to the extent I used it at all—only to the extent that I copied Warhol's derivative work based on her photograph. What's more, I used images of Warhol's paintings in order to comment on the litigation and criticize the lunacy of excessive copyright protection.

I won't insult your intelligence by reciting the useless question-begging “fair use factors.” Suffice it to

²⁶ Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022).

²⁷ *See id.*

say that the Copyright Act explicitly states that the use of copyrighted work “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”²⁸ I created a conceptual artwork that uses a copyright infringement action to reflect on the inability of copyright law to coherently mediate and resolve the disputes that arise when the ownership norms of different discursive communities conflict. If that doesn’t satisfy the fair use criteria, I don’t know what does.

What’s more, I’m hardly the first to use images of Warhol’s paintings in order to comment on the litigation. The case has been widely reported, and images of Warhol’s paintings are all over the internet. If I’m an infringer of Goldsmith’s copyright, so is every publication that used images of Warhol’s paintings to illustrate a story about the lawsuit. Sure, I’m selling NFTs and they’re selling advertisements, but what’s the difference? We’re all selling something in the course of engaging in critical commentary.

So, I’m pretty confident that my use of images of Warhol’s uncopyrighted paintings to sell NFTs of those paintings doesn’t infringe Goldsmith’s copyright in her photograph, even if Warhol’s use of the photograph was infringing. My use can be fair, even if his wasn’t. Fair use is fickle that way. And if Goldsmith disagrees, I encourage her to sue me.

POSTSCRIPT

Unsurprisingly, *Warhol v. Goldsmith* attracted a lot of amicus briefs. I couldn’t help chiming in. So, I “wrote” a “plagiarist’s brief,” arguing that plagiarism is the essence of art. Of course, every sentence of my brief was

²⁸ 17 U.S.C. § 107.

plagiarized. It was a cento in the form of an amicus brief, using conceptual art to make a policy argument. Unfortunately, I couldn't file my brief, because of a conflict of interest. It was probably for the best. But I attach my brief as Appendix A.

On October 12, the Supreme Court heard oral argument in *Warhol v. Goldsmith*. As usual, it was unilluminating. Some of the justices seemed sympathetic to Warhol, others to Goldsmith. It's anyone's guess who will win, although it's hard to imagine a holding that makes Warhol an infringer without condemning the bulk of contemporary art. I guess we'll see what happens.

No. 21-869

IN THE

Supreme Court of the United States

ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.,
Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF OF PLAGIARISTS AS *AMICI CURIAE* IN SUPPORT OF
NEITHER PARTY**

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TABLE OF AUTHORITIES

Every sentence in this brief is plagiarized.

INTEREST OF AMICI CURIAE

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ARGUMENT

I start with a rhyme as I enter your mind. What has been will be again, what has been done will be done again. The original is something imaginary. There is nothing new under the sun.

This is a total inversion of the relationship between original and copy. Or the difference between original and copy vanishes altogether. Instead of a difference between original and copy, there appears a difference between old and new. We could even say that the copy is more original than the original, or the copy is closer to the original than the original.

We might also say that originals preserve themselves through copies. But suppose copying is what

makes us human—what then? More than that, what if copying, rather than being an aberration or a mistake or a crime, is a fundamental condition or requirement for anything, human or not, to exist at all?

Writing is a dance that involves imitation, inspiration, and originality. But all things considered, writerly disapproval of plagiarism has remained remarkably consistent over the centuries—really, even over millennia. In academia the immorality of plagiarism is one of the few principles everyone converges on.

Tilting at the plagiarism windmill seems a worthy quest. We all need something to do before the Knight comes. If academics were more concerned about spreading ideas than rewarding authors, plagiarism would not be the moral panic that it is today. But of course, academia is not simply about efficiently producing knowledge as a public good but also about properly crediting the producers.

Drawing from these sources as if draining water from springs and fitting them to my own purposes I find my command of writing made more fluent and easy; and trusting in such authors I set about to compose new teachings. Thus since I saw that such beginnings on their part were laid out for my planned undertaking, I set out to progress further by taking from them.

a. Who Owns This Text?

Plagiarism is a very ancient art. The word “plagiarism” derives from Latin roots: *plagiarius*, an abductor, and *plagiare*, to steal. By “plagiarism” I mean the culpable reuse of earlier texts, customarily described in terms of stealing, in which a person wins false credit by presenting another’s work as his own. An example of plagiarism would be copying this definition and pasting straight into a report.

Plagiarism has been with us since the birth of language and art. For as long as there have been words to

be read, there has been someone there copying the passages. About two thousand years ago when writing was much younger, some writers became so enamored of their expository labors that they resented those who copied their works. These gentlemen, on the whole a rather eloquent group, complained bitterly and cast about for ways to inhibit the temptation to copy and especially to deter copiers from taking credit for the works of others.

Originality is a relative concept in literature. As writers from T. S. Eliot to Harold Bloom have pointed out, ideas are doomed to be rehashed. This wasn't always regarded as a problem. Roman writers subscribed to the idea of *imitatio*: they viewed their role as emulating and reworking earlier masterpieces.

A time is marked not so much by ideas that are argued about as by ideas that are taken for granted. The character of an era hangs upon what needs no defense. Literary borrowing was commonplace in the seventeenth century—Shakespeare borrowed freely from many of his contemporaries, as did Milton. Friendly borrowing remained common in the eighteenth century, and Coleridge, Wordsworth, and Southey all borrowed from one another, sometimes even publishing work under each other's names. It wasn't until the Romantic era, which introduced the notion of the author as solitary genius, that originality came to be viewed as the paramount literary virtue.

The term *plagiarism* has had few critics. In this skeptical age, finding any unexamined concept is something of a novelty. Plagiarism shares a curious semantic feature with the term *pornography*. Even though we cannot agree on specifics, "We know it when we see it." Plagiarism was and remains a murky offense, "best understood not as a sharply defined operation, like beheading, but as a whole range of activities, more like

cooking.” Either we move on to a coherent notion of plagiarism, or suffer what we have.

The world will not run short of definitions of plagiarism. Scholars and literari whip them out when the need arises and the spirit moves, almost by reflex. There is almost no end to the inventory of felonious parallels that the literary and scholarly worlds have fashioned to protect their interests. It follows that most definitions of plagiarism have been more or less deliberately plagiarized from earlier sources. This is the primal irony of plagiarism, but only the first of many.

Now what does all this have to do with rentiership as an economic feature of academia? A sign that academia has become more protective of its own rentier tendencies is its increasing obsession with plagiarism. Plagiarism is ultimately about syntax fetishism, the heart of copyright, which confers intellectual property rights on the first utterance of a particular string of words or symbols, even though it could have been uttered by any other grammatically competent person under the right circumstances.

Of course, “rentiers” do not present themselves that way at all. They see themselves as protecting an asset whose value might otherwise degrade from unmonitored use. Citations, properly arranged, function as currency that one pays to be granted a lease on a staked out piece of intellectual property. Indeed, if academics were more concerned about spreading ideas than rewarding authors, plagiarism would not be the moral panic that it is today. But of course, academia is not simply about efficiently producing knowledge as a public good but also about properly crediting the producers.

The economic story that I am telling may not be the entire explanation for the rise in the value ascribed to originality. The important distinction to make when considering how plagiarism could have existed before

copyright and the modern book trade is the one between ownership as a category of legal and commercial property rights and ownership as a symbolic and moral category. No man but a blockhead ever wrote except for money. But does anyone write just for the money? Laurence Sterne, the plagiarist author of *Tristram Shandy*, said he wrote “not to be *fed* but to be *famous*.” Now, of course, he is. It worked.

b. *The Walrus and the Carpenter*

Why does the plagiarist offend us? Plagiarism is not a crime. If the plagiarist reprints a larger chunk of someone else’s work than a judge finds permissible under the vague doctrine of fair use, he may be violating copyright laws. Judges will sometimes call copyright infringers “plagiarists” though there is no concealment. This loose usage erases what is distinctive about plagiarism.

At the same time, copyright is revered by most established writers and artists as a birthright and bulwark, the source of nurture for their infinitely fragile practices in a rapacious world. Plagiarism and piracy, after all, are the monsters we working artists are taught to dread, as they roam the woods surrounding our tiny preserves of regard and remuneration.

But plagiarism itself is more an ethical offense than a legal one. This means that the penalties for plagiarism are customarily informal social stigmas or formally sanctioned, institutionally enforced but still extralegal punishments. Any academic is licensed and even encouraged to name and shame anyone else as a plagiarist, regardless of whether the plagiarized party cares that her words or ideas have been appropriated without permission.

If an offense there be, is it because the plagiarist has committed some form of original sin? It borders on the quaint to employ such a term as *sin*. Our society doesn’t

much believe in sin anymore, and if there is anything left of it, the mores of plagiarism is a good place to look. If one espouses the theory of plagiarism as theft, then dire punishment becomes acceptable, even requisite. Explanations are not admissible and intentions of no consequence. The stigma of plagiarism never seems to fade completely, not because it is an especially heinous offense, but because it is embarrassingly second rate; its practitioners are pathetic, almost ridiculous.

Despite the fact that plagiarism has always been taboo, readers are often more forgiving of historical offenses. The problem was, no one really liked it. The purchaser of a novel is interested not merely, if at all, in the identity of the producer of the physical tome (the publisher), but also, and indeed primarily, in the identity of the creator of the story it conveys (the author). And the author, of course, has at least as much interest in avoiding passing off (or reverse passing off) of his creation as does the publisher. Each of us thinks that our contribution to society is unique and so deserves public recognition, which plagiarism clouds.

c. The Burial of the Dead

In one respect the charge of plagiarism is a marvelous one to make. Someone, somewhere will find any source dependency in any degree to be plagiarism. More than that, it does not take a vigorous hunt to find a definition that will fit the alleged offense. It is typical of plagiarism charges that often the significance of *what* was used is totally ignored in favor of the fact that it *was* used. The problem is that there seems to be an almost total lack of context for understanding what it means to copy, what a copy is, what the uses of copying are.

There is a common contention that a person charged is innocent until proven guilty. But the individual charged with plagiarism frequently is obliged to demonstrate

innocence by proving the negative side of the case. The public is an examiner, but an absent-minded one. The mere charge of plagiarism can be and often is as devastating as plagiarism proved. The label is the academic equivalent of the mark of Cain. It is chiefly in poetry that plagiarism is allowed to pass; and certainly, of all larcenies, it is that which is least dangerous to society.

The idea that ideas can be plagiarized is not a good idea. Yet no one has suggested that ideas and “apt phrases” be excluded from the grounds of plagiarism. The scene of a crime, too, is deserted; it is photographed for the purpose of establishing evidence. For the first time, captions have become obligatory. And it is clear that they have an altogether different character than the title of a painting.

Protecting the manner of expression cannot be allowed to become the tail that wags the dog. In modern commercial society, which places the stamp of personality on goods both physical and intellectual for economic reasons unrelated to high culture, a verdict of plagiarism is pronounced without regard to the quality of the plagiarized original or, for that matter, of the plagiarizing copy. Readers are no more interested in plagiarism as such than eaters are. They are interested in the quality of the reading experience that a work gives them. Must we disillusion these readers?

d. What is an Author?

The image of literature to be found in ordinary culture is tyrannically centered on the author. Nevertheless, these aspects of an individual, which we designate as an author (or which comprise an individual as an author), are projections, in terms always more or less psychological, of our way of handling texts. Secondly, the “author-function” is not universal or constant in all discourse. Even within our civilization, the same types of texts have not always required authors. We can easily

imagine a culture where discourse would circulate without any need for an author. Discourses, whatever their status, form, or value, and regardless of our manner of handling them, would unfold in a pervasive anonymity.

I am not certain that the consequences derived from the disappearance or death of the author have been fully explored or that the importance of this event has been appreciated. To be specific, it seems to me that the themes destined to replace the privileged position accorded the author have merely served to arrest the possibility of genuine change. What matter who's speaking, someone said, what matter who's speaking. It is language which speaks, not the author. Literature has always been a crucible in which familiar themes are continually recast. Time gives poetry to a battlefield.

In that sense, then, all culture is plagiarism. For substantially all ideas are second-hand, consciously and unconsciously drawn from a million outside sources, and daily used by the garnerer with a pride and satisfaction born of the superstition that he originated them; whereas there is not a rag of originality about them anywhere except the little discoloration they get from his mental and moral calibre and his temperament, and which is revealed in characteristics of phrasing.

As if there was much of anything in any human utterance, oral or written, except plagiarism! When aestheticians say that every great artist is a great critic, this is what they mean: great artists know what is worth using, and they use it well. An original work is simply something that is different enough from some existing work that it could not be confused with it.

Yet, what of a context that questions the concept of a work? What, in short, is the strange unit designated by the term, work? What is necessary to its composition, if a work is not something written by a person called an "author"? Where a work had the duty of creating

immortality, it now attains the right to kill, to become the murderer of its author. Thus, the distinction between author and public is about to lose its basic character. The difference becomes merely functional; it may vary from case to case. At any moment the reader is ready to turn into a writer.

The uniqueness of a work of art is inseparable from its being embedded in the fabric of tradition. This tradition itself is thoroughly alive and extremely changeable. It takes a thousand men to invent a telegraph, or a steam engine, or a phonograph, or a telephone or any other important thing—and the last man gets the credit and we forget the others. He added his little mite—that is all he did. These object lessons should teach us that ninety-nine parts of all things that proceed from the intellect are plagiarisms, pure and simple; and the lesson ought to make us modest. But nothing can do that.

e. What Drives People to Plagiarize?

This song has nothing tricky about it. The making of a plagiarist can be hard to distinguish from the making of a writer. A spy under questioning by the enemy is in a state surpassing dread because he knows that he must sooner or later tell the truth. All the plagiarist risks is his reputation and a lawsuit. Yes, trust them not: for there is an upstart crow, beautified with our feathers, that with his tiger's heart wrapped in a player's hide, supposes he is as well able to bombast out a blank verse as the best of you.

To say that someone is not a plagiarist is a feeble compliment. Art may be bad, good or indifferent, but, whatever adjective is used, we must call it art, and bad art is still art. To an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility. If the self is written and rewritten by previous texts, how is it possible not to write other people's

works? Explicit, full attribution of all sources is impossible and not even desirable.

If plagiarists are not sinister and Machiavellian, then why do they do it? This question gets asked every time there's a fresh revelation of plagiarism, whether it's in the literary world, journalism, or academia. There's never a satisfying answer, but there are at least lots of guesses, often somewhat at odds with each other: laziness or panic, narcissism or low self-esteem, ambition or deliberate self-sabotage.

Perhaps in a general sense we are all dependent on the thoughts and images of others. It is obviously insufficient to repeat empty slogans: the author has disappeared; God and man died a common death. Rather, we should reexamine the empty space left by the author's disappearance.

There is no intellectual enterprise that is not ultimately pointless. Most artists are brought to their vocation when their own nascent gifts are awakened by the work of a master. That is to say, most artists are converted to art by art itself. It chooses you, so to speak. In the end, there is nothing said that has not been said before. History, the *mother* of truth!—the idea is staggering.

Fame is a form—perhaps the worst form—of incomprehension. When culture becomes nothing more than a commodity, it must also become the star commodity of the spectacular society. Movie stars who have led adventure-packed lives are often too egocentric to discover patterns, too inarticulate to express intentions, too restless to record or remember events. Ghostwriters do it for them. After all, you may justly call what you buy yours.

And those who came earlier seem to me to have opened up, not to have taken away what can be said. It matters much whether you approach exhausted material or ground that has been tilled. The latter increases day by day, and things discovered do not get in the way of new

discoveries. Furthermore, the person who writes last has it best: he finds words prepared for use that, when handled differently, acquire a new aspect. If I have seen further it is by standing on the shoulders of giants.

The desire to be original and the desire to be successful are not wholly compatible. Originality, I fear, is too often only undetected and frequently unconscious plagiarism. Those who do not want to imitate anything, produce nothing. The kernel, the soul—let us go further and say the substance, the bulk, the actual and valuable material of all human utterances—is plagiarism. Our most original compositions are composed exclusively of expressions derived from others.

You can not will spontaneity. But you can introduce the unpredictable spontaneous factor with a pair of scissors. A cento is a collage-poem composed of lines lifted from other sources—often, though not always, from great poets of the past. In Latin the word *cento* means “patchwork,” and the verse form resembles a quilt of discrete lines stitched together to make a whole. The word *cento* is also Italian for “one hundred,” and some mosaic poems consist of exactly 100 lines.

Writing a cento may be a kind of extension of the act of reading, a way to prolong the pleasure. All writing is in fact cut ups. A collage of words read heard overhead. What else? And your way, is it really your way? What, moreover, can you call your own? The house you live in, the food you swallow, the clothes you wear—you neither built the house nor raised the food nor made the clothes. The same goes for your ideas. You moved into them ready-made.

The plagiarist does not play fair. To discover in the course of research some engaging detail we know can be put into a story where it will do some good can hardly be classed as a felonious act—it is simply what we do. Writers are naturally drawn to the color and the music of

this English idiom we are blessed to have inherited. When given the choice we will usually try to use the more vivid and tuneful among its words. One could write a book consisting entirely of unacknowledged passages from other writers, provided one took only a small amount from each work.

As if there was much of anything in any human utterance, oral or written, except plagiarism! Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different. The kernel, the soul—let us go further and say the substance, the bulk, the actual and valuable material of all human utterances—is plagiarism. For substantially all ideas are second-hand, consciously and unconsciously drawn from a million outside sources.

Every artist takes. What else do we do but endlessly recycle stories? It's a process that's been happening since the ancient Greek tragedians first recycled the stories of Homer for the Festival of Dionysus, or Shakespeare tapped into the almost bottomless well of the Chroniclers, or novelists decided they wanted to write historical fiction. The fact is, it's not what you take but what you do with it that counts.

The bees plunder the flowers here and there, but afterward they make of them honey, which is all theirs. Even so with the pieces borrowed from others. We must make them our own. Truth and reason are common to everyone, and no more belong to the man who first spoke them than to the man who says them later. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

Aren't citations useful for the reader? Sometimes. But let's not pretend that the reader's needs play a substantial role in the mandate of the plagiarism police: outrage against plagiarists is about protecting idea-creators,

not readers. Indifference to source allows us to assimilate what we read, what we are told, what others say and think and write and paint, as intensely and richly as if they were primary experiences. It allows us to see and hear with other eyes and ears, to enter into other minds, to assimilate the art and science and religion of the whole culture, to enter into and contribute to the common mind, the general commonwealth of knowledge.

This sort of sharing and participation, this communion, would not be possible if all our knowledge, our memories, were tagged and identified, seen as private, exclusively ours. Memory is dialogic and arises not only from direct experience but from the intercourse of many minds.

f. Information Wants to Be Free

Is there such a thing as a resolution to a plagiarism story? If any “originality” is involved, it consists in the ability to pour old wine into new bottles such that it tastes different, if not better. The individual author isn’t all that important. In a world which really is topsy-turvy, the true is a moment of the false.

This was once revealed to me in a dream. People who don’t work never get bored. When an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand and the execution is a perfunctory affair. We must expect great innovations to transform the entire technique of the arts, thereby affecting artistic invention itself and perhaps even bringing about an amazing change in our very notion of art.

We may be entering the twilight of plagiarism. Ideas improve. The meaning of words participates in the improvement. Plagiarism is necessary. Progress implies it. It embraces an author’s phrase, makes use of his expressions, erases a false idea, and replaces it with the right idea. There is no reason to accept a second rate

product when you can have the best. And the best is there for all.

It is perhaps difficult for epistemologists to comprehend that we might normally inhabit an artworld: life as one big exhibition. It will become easier in the future. I made these little verses, another carried off the reward. Thus, bees, you do not make honey for yourselves. If anyone has, as need arises, turned such a thing to his own use, it should rightly be ascribed to him as his own instead of theft. When a thing has been said and well said, have no scruple: take it and copy it. In this case, which is the original and which the copy?

Let us not mince words: the marvelous is always beautiful, anything marvelous is beautiful, in fact only the marvelous is beautiful. I have only made up a bunch of other men's flowers, providing of my own only the string that ties them together. This is what constitutes their melancholy, incomparable beauty.

Do not all the bold descriptions we have given amount to the definition of prayer? What art has been granted a dream more poetical and more real at the same time! Only the most high-minded persons, in the most perfect and mysterious moments of their lives, should be allowed to enter its ambience. If this is plagiarism, we need more plagiarism.

Gosh, I wish I could do it all over.

CONCLUSION

For the foregoing reasons, do what thou wilt shall be the whole of the law.

Respectfully submitted,

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July 22, 2022