DAVID VERSUS GOLIATH, WRITER VERSUS PUBLISHER: FAIR USE IN LITERARY WORKS AS APPLIED IN *ANVIL PUBLISHING V. ADAM DAVID*[*]

Maria Karla Rosita V. Bernardo[**]

ABSTRACT

In 2015, Adam David input numerous sentences from different short stories in the anthology Fast Food Fiction Delivery into a Javascript-based code. With a click of a button, the hypertext machine would produce a seemingly new story from the random quotes, creating a new whole from severed parts, a narrative that would appear coherent despite its fragmented origins. He then published this on a blog, entitled Hi Ma'am Sir. He considered this his critique of the said short story collection, as for him, it was meant to demonstrate what he thinks is a flattening of aesthetics, politics, language, and form in contemporary short story writing in the Philippines. Anvil, the publisher of Fast Food Fiction Delivery, threatened to sue David for copyright infringement. This Note is an attempt to elucidate the application of fair use in appropriation art and literary criticism, and how it affects the progress and cultivation of arts in the Philippines.

"[S]ubstantially 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 shorn 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

---

[*] *Cite as* Maria Karla Rosita V. Bernardo, *David versus Goliath, Writer versus Publisher: Fair Use in Literary Works as Applied in* Anvil Publishing v. Adam David, 91 PHIL. L.J. 76, (page cited) (2018).

[**] Juris Doctor, University of the Philippines College of Law (2017); B.A. Creative Writing, *cum laude*, University of the Philippines College of Arts and Letters (2012).

The author wishes to thank Prof. Elizabeth Aguiling-Pangalangan for her support, insight, encouragement, and invaluable support for the completion of this Note, which was completed under her guidance for Law 119 (Supervised Legal Research), and Prof. Susan D. Villanueva, under whose tutelage the author was inspired to write on intellectual property and pursue its practice.

and moral calibre and his temperament, and which is revealed in characteristics of phrasing."

—Mark Twain

"Art is either plagiarism or revolution."

—Paul Gauguin

INTRODUCTION

All art is both an expression and creation of something to represent many aspects of human life. It can be an illustration, an ornamentation, or a currency. It can serve as the basis for many careers, from literature to music to the visual arts. The very nature of art implies that it is a never-ending process of creating, incorporating, and producing in order to give rise to newer forms.

Much of art hinges on finding something new in the old, and finding something similar in what is different. It thrives on variance, and because of its constantly evolving nature, it often finds itself clashing with the rigidity of the law. It has been said that law, among all the professions, is the most historically oriented and often the most backward-looking. It is "suspicious of innovation, discontinuities, 'paradigm shifts,' and the energy and brashness of youth."[1] History has changed the ways we create, access, and disseminate works of art and other forms of entertainment. While the rigidity of the law has provided protection for many artists, it has also prevented the development of others. It is apparent, then, that in many instances, the law—particularly copyright law—has not kept pace with the unfolding creative revolution of the arts.[2]

While one can reasonably debate the appropriate scope of intellectual property, including whether exceptions to protection under intellectual property law, such as the fair use exception, should be extended to certain types of art, this Note aims to elucidate the discussion on appropriation, particularly in literature, when used for creative-critical appraisals. These works are created with the intent to challenge the reader and, at the same time, contribute to the progress of art as a whole. Unconsciously, however, it has also invited both readers and legal scholars alike to debate on the nature of

---

[1] Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000).

[2] Urs Gasser & Silke Ernst, *From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age*, THE BERKMAN CENTER FOR INTERNET & SOCIETY AT HARVARD LAW SCHOOL, June 19, 2006, *at* http://ssrn.com/abstract=909223.

freedom of expression and the role of intellectual property in the creation of art and culture. Do we argue for the full, unyielding protection of art, or for the proliferation of art for art's sake, even at the expense of the property rights of others?

In 2015, writer Adam David began typing excerpts from Fast Food Fiction Delivery, an anthology of short stories published by Anvil, and entered them into a Javascript-based code he created. He copied four lines per story: the first and last sentences of each work and two randomly picked sentences in between. Some sentences would have five words, some ten, others fifty. He then typed them all out into four rows and encoded a hypertext machine that would generate random combinations of what amounted to roughly 272 sentences.[3] David then embedded the generator onto a website and titled the blog *Hi Ma'am Sir*—the usual greeting of fast food chain employees—a nod to the theme from which the passages were taken.

With a click of a button, the machine would produce a seemingly new story from the random quotes, creating a new whole from severed parts, a narrative that would appear coherent despite its fragmented origins. Later, he would compile the generated stories into one file and call it *It will be the same / but not quite the same*, echoing his sentiment and criticism towards the said anthology: while every single story was different, they were all essentially alike. There was neither flavor nor texture, much like the fast food its title wanted to embody. The minor changes in font and certain punctuations notwithstanding, *Hi Ma'am Sir* was a faithful retyping of the selected excerpts of Fast Food Fiction Delivery in its published form. Although only a few passages were selected from each story, the differences between the texts David plugged into the code and the outcome were few and minor. Not long after, Anvil Publishing sued Adam David for copyright infringement.

Appropriation of art by other artists is nothing particularly new. Writes Emily Meyers:

> Throughout history, artists have imitated the work of others to learn their craft and to pay homage to previous masters. In the postmodern context, artists have departed from this traditional use of others' images. Many artists now use existing images and objects, both from fine art as well as from advertising and mass media, to challenge the viewer's conceptions of art and iconography. [...] Such artists freely borrow, appropriate and rework existing images

---

[3] Charles Tan, *2015: Manila's Piss Poor Understanding of Copyright*, MEDIUM, Apr. 21, 2015, *available at* https://medium.com/@charlesatan/2015-manila-s-piss-poor-understanding-of-copyright-f2b24c6f7938.

> in an attempt to reshape their audiences' conception of those images. However, these practices can often be construed to infringe upon the copyright of the existing image.[4]

Because not all artists have sufficient knowledge in the field of law to fully comprehend their rights under the existing copyright system, many fear legal prosecution for their use of existing art, whether it be to create new art, pay homage, or criticize. This is further aggravated by how many copyright owners misunderstand their rights and aggressively threaten to assert privileges they may not actually have against other artists. As a result, more and more writers, photographers, painters, and other creatives become hesitant to gamble on the copyright owner's possible legal retort. Instead, they refrain from using existing creations they feel may be necessary for the growth of their own body of work. This effectively hampers and chills these artists' modes of expression.[5]

Although demarcating the boundary between acceptable use and unfair appropriation may be problematic—if not impossible, especially in today's age—such a scope within the copyright doctrine must be clearly articulated in order to preserve a vital mode through which valuable contributions may be made to contemporary art and culture.[6] This recent controversy of writer versus publisher has brought to the forefront the elephant in the room as regards art and law—that is, the concept of *fair use*—which until now has managed to avoid close scrutiny and understanding by popular media and the general Filipino public. Considering the uproar the Anvil petition has caused in the Philippine literary scene, it would be of great public interest to have the matter at hand explored through the lens of the law.

I. THE CURIOUS CASE OF ADAM'S DAVID AND ANVIL'S GOLIATH

A. Short Background on Anvil Publishing v. Adam David

The alleged infringement was performed through a Javascript-based website, *Hi Ma'am Sir,* created by Adam David using random excerpts of the

---

[4] Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J. L. & ARTS 219 (2007).

[5] *Id.*

[6] *Id.*

FAST FOOD FICTION DELIVERY anthology. The system, according to David, operated as follows:[7]

> I went through the anthology and copied four sentences per story—specifically the first and last sentences, and two random sentences somewhere in between. Sometimes a sentence would have five words, sometimes ten. Some sentences were around fifty words long, and a few were made up of a single word. I typed them all out in four rows and encoded a hypertext machine in Javascript to generate random combinations of what amounted to roughly two hundred and seventy two sentences, which I predicted would come up with new stories expressing coherence despite their disparate origins.

To better illustrate the mechanism of the hypertext machine and how *Hi Ma'am Sir* came up with its results, provided herein is a sample screen-capture[8] of the website:

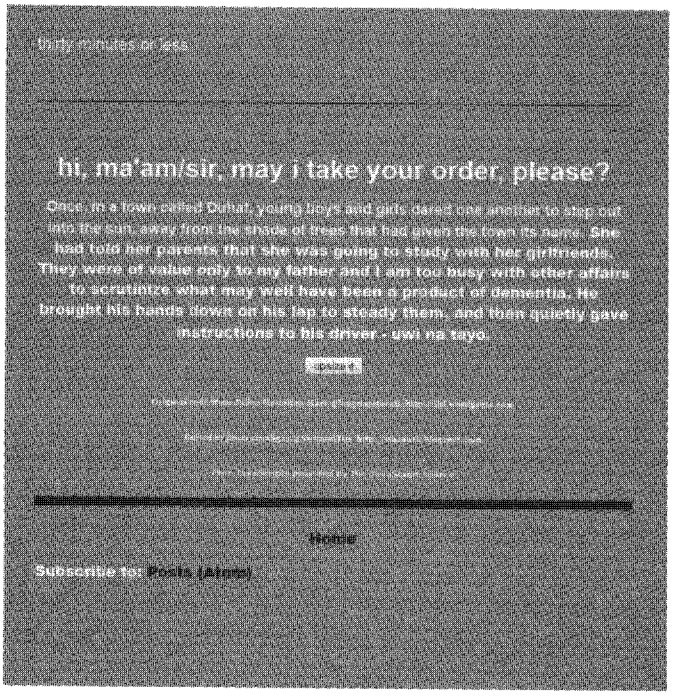
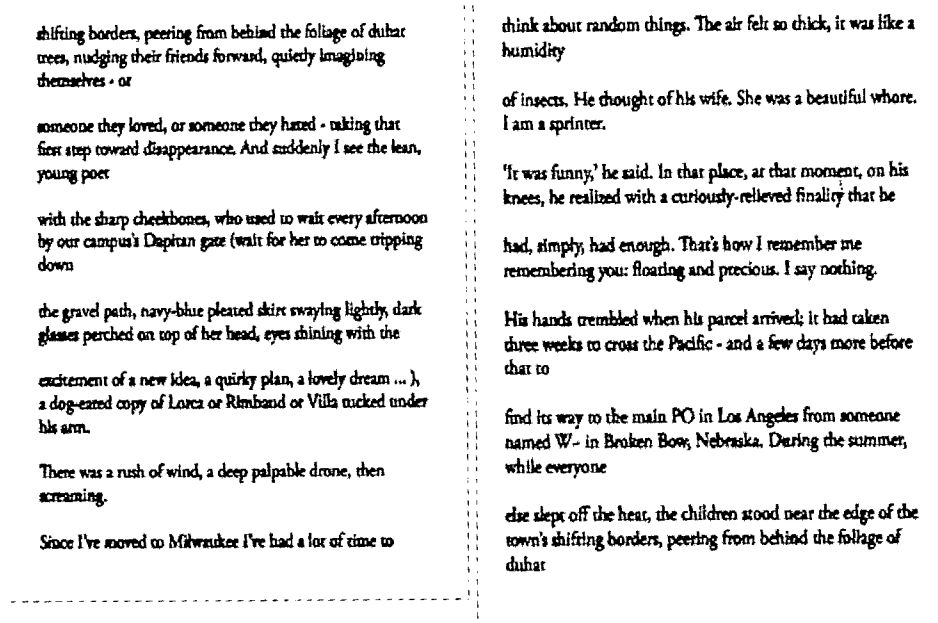


EXHIBIT A. A screenshot of the website after clicking the button "Upsize It." The result is a collection of randomly-generated phrases taken from different pieces found in the anthology FAST FOOD FICTION DELIVERY.

[7] A. David, *thirty minutes or less*, HI MA'AM SIR *at* http://himaamsir.blogspot.com (last accessed Mar. 12, 2018).

[8] Tan, *supra* note 3.



shifting borders, peering from behind the foliage of duhat trees, nudging their friends forward, quietly imagining themselves - or

someone they loved, or someone they hated - taking that first step toward disappearance. And suddenly I see the lean, young poet

with the sharp cheekbones, who used to wait every afternoon by our campus's Dapitan gate (wait for her to come tripping down

the gravel path, navy-blue pleated skirt swaying lightly, dark glasses perched on top of her head, eyes shining with the

excitement of a new idea, a quirky plan, a lovely dream ...), a dog-eared copy of Lorca or Rimbaud or Villa tucked under his arm.

There was a rush of wind, a deep palpable drone, then screaming.

Since I've moved to Milwaukee I've had a lot of time to

think about random things. The air felt so thick, it was like a humidity

of insects. He thought of his wife. She was a beautiful whore. I am a sprinter.

'It was funny,' he said. In that place, at that moment, on his knees, he realized with a curiously-relieved finality that he

had, simply, had enough. That's how I remember me remembering you: floating and precious. I say nothing.

His hands trembled when his parcel arrived; it had taken three weeks to cross the Pacific - and a few days more before that to

find its way to the main PO in Los Angeles from someone named W- in Broken Bow, Nebraska. During the summer, while everyone

else slept off the heat, the children stood near the edge of the town's shifting borders, peering from behind the foliage of duhat

EXHIBIT B. Screenshots of the Portable Document Format (PDF) file of *It will be the same / but not quite the same* as attached in the website as a Mediafire link.

Notice that the product contains no signifiers that indicate the short story from which the sentences were taken. The sentences were put together with the clear intention of having the combination taken as a completely different work. Such is illustrated in *Exhibit B.*

Accessible through Mediafire and Blogspot, David's work is consistent with the trajectory of his writing which has not only questioned notions of originality but has also displayed an impertinent stance on literary tradition through aggressive repurposing of source texts, often to humorous yet critical effect.

"*Hi Ma'am Sir* is a work of literary criticism. It is a part of what aims to be a multimedia critical response to the short story anthology FAST FOOD FICTION DELIVERY," David himself stated in his personal blog.[9] "It was meant to demonstrate what I think is a flattening of aesthetics, politics, language, and form in contemporary English-language short story writing in the Philippines."[10] This gives the audience a clear idea of David's purpose as

[9] Adam David, *thirty minutes or less*, HI MA'AM SIR *at* http://himaamsir.blogspot.com (last accessed 12 March 2018).

[10] *Id.*

to his commission of the allegedly infringing act of using the excerpts without the permission of the authors and publisher.

Noelle Q. De Jesus, Mookie Katigbak-Lacuesta, and Anvil, the editors and publisher, respectively, of FAST FOOD FICTION DELIVERY, threatened to file a complaint against David for copyright infringement, particularly for: (i) not securing permission from the copyright owners; (ii) disfiguring the original form of the anthology material; (iii) failing to acknowledge the anthology's contributors; and (iv) giving the public access to the anthology outside the conditions set by the publisher.

Adam David allegedly violated the following provisions of the Intellectual Property Code of the Philippines:

1. *Reproduction Right under Sec. 177.1 of RA 8293*[11]—The copyright owners of the book have a basic right to authorize or prevent others from reproducing the work or a substantial portion of the work.

2. *Other communication to the public of the work, under Sec. 177.7, in relation to Sec. 171.3 of RA 8293*[12]—The copyright owners of the book have the right to authorize or prevent others from making the same available "by wire or wireless means in such a way that members of the public may access these works from a place and time individually chosen by them."

3. *Publisher's Right, under Sec. 174 of RA 8293*[13]—The publisher has a copyright to the reproduction of the typographical arrangement of the published edition of the work.

4. *Moral Rights, under Sec. 193.1 and 193.3 of RA 8293*[14]—For failure to attribute any of the passages he reproduced and violation of the authors' right to object to any distortion, mutilation, or other derogatory action in relation to their work.

Evidently, David reproduced substantial portions of the book on his site by lifting texts directly from each story without permission from their copyright owners. However, numerous writers and poets have voiced their

---

[11] INTELL. PROP. CODE (1998), § 177.1.
[12] § 177.7.
[13] § 174.
[14] § 193.1, 193.3.

collective dismay over the legal action taken by Anvil. Aside from curtailing the artist's expression and freedom to create, it also restricts the writer's freedom to appropriate and critique a piece of art. The history of art itself all too often tells us that art is a form of appropriation, and as such, there is a need to look into the lines that separate infringement and recreation—lines that are too often blurred in the name of art and discourse.

B. Adam David's Body of Work

To fully appreciate and grasp the controversy in this case, it would be best to study the entirety of Adam David's body of work, deemed by many as radical and, hence, deserving of a more nuanced appreciation. In 2010, David wrote his seminal THE EL BIMBO VARIATIONS,[15] an experimental literary creation that was made out of a simple premise: to write a single line from a popular song by one of the Philippines' most influential bands, the Eraserheads, 99 times.

David chose the line *"Kamukha mo si Paraluman, nung tayo ay bata pa,"* the opening line of the song "Ang Huling El Bimbo," and produced a work of art that encapsulated different literary styles, techniques, pop cultural references, and perspectives. To so easily manipulate one line and transform it into a commentary on form was unprecedented, at least in the local literary scene. This work was only the first of the many "experiments" David would set himself out to do in a bid to both analyze contemporary Philippine literature and shock its audience.

It is unknown whether the Eraserheads gave David permission to use the line in his book, and if not, if they ever sued him for doing so. In 2009, the book was given the Madrigal-Gonzales First Book Award, a distinction bestowed upon it unanimously by all the judges. The success of the book later led to several re-printings under Central Books. However, despite the commercial availability of THE EL BIMBO VARIATIONS, David himself made the entire collection freely viewable and downloadable by attaching a link of the same to his personal blog, *Oblique Strategies*, as well as the file-sharing platform Scribd. A search on Google would yield several hits leading to the free Portable Document Format (PDF) version of the book. As it would seem, the author appears to have no issue with having his work distributed freely online.

[15] *See* ADAM DAVID, THE EL BIMBO VARIATIONS (2008).

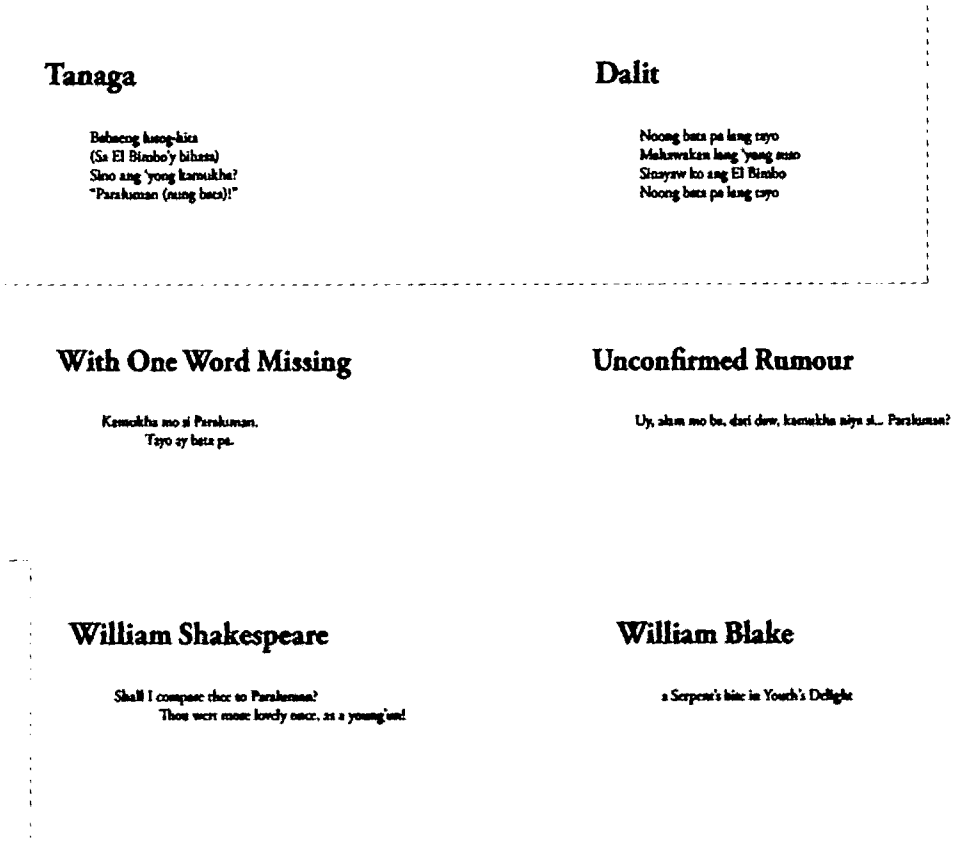


EXHIBIT C. Screenshots of excerpts taken from "The El Bimbo Variations."

Oblique Strategies, David's personal blog which he currently still updates, is replete with short fiction stories as well as commentaries on Philippine literature. David is known for his criticism of other authors and publishers, and he is most vocal of his staunch disapproval on works he thinks are for quick consumption and have no enduring value.

As of this writing, he has on his blog[16] links to five other text-generators that operate the same way as *Hi Ma'am Sir* but contain different material. It is apparent that David, by providing much of his material online for free public consumption, does not intend to profit from the works he produces as a result of his critique and appropriation. By placing links to the hypertext machines on his blog and allowing the users themselves to generate

[16] Adam David, *meta machine museless / the year so far*, OBLIQUE STRATEGIES *at* http://wasaaak.blogspot.com/2015/06/the-year-so-far-2015-edition.html (last accessed 12 March 2018).

the passages with a click of a button, he invites the public to experience his criticism of works such as FAST FOOD FICTION DELIVERY.

That there is no limit to the number of times a user may generate passages from the machine is also demonstrative of David's main point: that the random collection of sentences could be put together in an infinite number of combinations and they would still produce a seemingly coherent whole, indicating that the individual short stories are stylistically and artistically flawed.

II. A TRADITION OF BORROWING

A. Appropriation Art

The history of art is the history of copyrights, of transformations that take place during acts of copying.[17] One of the principal strands of postmodern art, *appropriation art,* involves the incorporation of pre-existing images, objects, and texts into new works of art.[18] "The reuse of pre-existing material in new contexts is a feature typical of modern arts practice, and is considered to be an essential component of postmodern artistic expression."[19] Appropriation art is therefore often described as "an ideological critique that takes or hijacks 'dominant words and images to create insubordinate, counter messages.'"[20] It is identified closely with the practice of "recoding" or creating "a shift in meaning," which occurs purely by the appropriation of an original word, image, or object.[21] Generally referred to as "deconstruction" or "textualization," appropriation is strongly regarded negatively outside of artistic circles as it connotes theft or piracy.[22]

---

[17] HILLEL SCHWARTZ, THE CULTURE OF THE COPY: STRIKING LIKENESSES, UNREASONABLE FACSIMILES 248 (1st ed. 1996).

[18] Walter Lehmann, *The Appropriateness of Appropriating Appropriation Art*, Presentation made for the First Biennial Graduate Student Conference, Institute of Museum Ethics, Seton Hall University *at* http://lehmannstrobel.com/articles/the-appropriateness-of-appropriating-appropriation-art/.

[19] Johnson Okpaluba, *Appropriation Art: Fair Use or Foul?, in* DEAR IMAGES: ART, COPYRIGHT AND CULTURE 197 (2002).

[20] David Tan, *What Do Judges Know About Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law*, 16 MEDIA & ARTS L. REV. 381 (2011).

[21] Isabelle Graw, *Dedication Replacing Appropriation: Fascination, Subversion, and Dispossession in Appropriation Art*, LOUISE LAWLER AND OTHERS 59 (Louise Lawler et al. eds. 2004).

[22] Okpaluba, *supra* note 19.

Appropriation art is defined by the Oxford English Dictionary as "[t]he practice or technique of reworking the images or styles contained in earlier works of art, especially (in later use) in order to provoke critical re-evaluation of well-known pieces by presenting them in new contexts, or to challenge notions of individual creativity or authenticity in art."[23]

Appropriation is a relatively common artistic practice. As surmised by Marcel Duchamp, who is considered by many as the father of appropriation:

> [T]he choice of ready-made is always based on visual indifference and, at the same time, on the total absence of good or bad taste. Now ahead, an artist is no longer just a person who produces a work; he is, above all, a creator who makes choices and these choices make him an artist.[24]

For many artists, appropriation is not an art movement with a proper and autonomous existence, nor is it a movement with one common political purpose. Rather, it is the very "language" referring to the practice of using pre-existing works of art and the technique of borrowing and recontextualizing "found" images.[25] In commenting on or criticizing a text, the artist often uses the direct source as it is, using the contrast or similarity to his own work.[26]

Appropriation is therefore an important method of commenting on art and, consequently, society. It allows artists to juxtapose disparate elements and give them new meanings.[27] For instance, David's *The El Bimbo Variations* claims to be an homage to Raymond Queaneau's *Exercises in Style,* which tells the simple story of a man seeing the same stranger twice in one day in 99 different ways, demonstrating the variety of styles in which storytelling can take place. Pan Pan Gong observes:

> In considering originality and whether or not a piece of appropriation art infringes the copyright of other works, the copyright law should accommodate the fluidity in authorship, and acknowledge that the value existence of work is not limited to the

---

[23] Meyers, *supra* note 5.

[24] Nathalie Heinich, *Le Triple Jeu de l'art Contemporain*, LES EDITIONS DE MINUIT (1998), as cited in Markellou, *infra.*

[25] Marina Markellou, *Appropriation Art under Copyright Protection: Recreation or Speculation?*, 2 EUR. INTELLECT. PROP. REV. 369, 370 (2013).

[26] Matt Jackson, *Commerce versus Art: The Transformation of Fair Use*, 39 J. BROAD & ELEC. MEDIA 190 (1995).

[27] Matt Jackson, *Using Technology to Circumvent the Law: The DMCA's Push to Privatize Copyright,* 23 HASTINGS COMM. & ENT. L.J. 607 (2001).

> visual images but also the artists' reputation, oeuvre, and the ideas behind the work. Since the law does not require works to be completely novel to be considered as original, as long as it does not reproduce a 'substantial part' of the copyright material, appropriation art cannot be said to have infringed on the copyright of appropriated work by virtue of their material similarity.[28]

Consequently, some jurisdictions have distinguished outright "reproduction" of a work from "new original work derived from the original."[29] Appropriation art, in this case, could be considered as new original work derived from the source material if it is accompanied by a change in contextualization and valid new authorship.

B. Derivative Works

In the Philippines, there is no statutory provision directly pertaining to appropriation art. There is likewise no jurisprudence thus far that has discussed appropriation art at length. An observation by Justice Joseph Story would be a fitting starting point for the development of a deeper appreciation of the nature of derivative works. In *Emerson v. Davies,* he states:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. [...] No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence. Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton [...] would be found

---

[28] Pan Pan Gong, *Appropriation Art and Copyright Law,* University of Melbourne (2010).

[29] Nicolas Suzor, *Where the bloody hell does parody fit in Australian copyright law?*, 13 MEDIA & ARTS L. REV. 218 (2008).

> to have gathered much from the abundant stores of current knowledge and classical studies in their days.[30]

In sum, "because all works are in some degree derived from already existing works, almost all intellectual creations may be considered derivative works."[31]

For the local literary and artistic landscape, we can seek guidance in the provisions of the Intellectual Property Code of the Philippines[32] (Republic Act No. 8293, hereinafter, "the Code"). Although the Code does not define the extent and nature of derivative works, it borrows the concept from its counterpart statute in the United States, the Copyright Act of 1976. The Copyright Act defines a derivative work as one "based upon one or more pre-existing works" and includes "any form in which a work may be recast, transformed, or adapted."[33] This definition may well apply to the instances enumerated by the Code.

Section 173 of the Code[34] delineates the scope of "derivative works," providing that:

> Section 173. *Derivative Works.*—173.1. The following derivative works shall also be protected by copyright:
>
> (a) Dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works; and
>
> (b) Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents. (Sec. 2, [P] and [Q], P.D. No. 49)
>
> 173.2. The works referred to in paragraphs (a) and (b) of Subsection 173.1 shall be protected as new works: Provided however, That such new work shall not affect the force of any subsisting copyright upon the original works employed or any part thereof, or be construed to imply any right to such use of the

---

[30] Emerson v. Davies, 8 F.Cas, 615, 619 (1845).

[31] Pedro Jose Bernardo, *Transformative Adaptation, Performance, and Fair Use of Literary and Dramatic Works: Delineating the Rights of Playwrights and Adapters*, 53 ATENEO L.J. 582, 588 (2008).

32 Rep. Act No. 8293 (1997). Intellectual Property Code of the Philippines, hereinafter "the Code."

[33] 17 U.S.C. (2007), § 101.

[34] INTELL. PROP. CODE.

> original works, or to secure or extend copyright in such original works. (Sec. 8, P.D. 49; Art. 10, TRIPS)

Similarly, Title 17 of the US Code on Copyrights defines derivative works as:

> [A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a derivative work.[35]

Based on the foregoing provisions, a "derivative work" is essentially a work that is based on one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.[36] A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work.

A derivative work is a new, original product that includes aspects of a preexisting, already copyrighted work. The result is a "new version" of the original.[37] Generally, the test in determining whether a work is derivative is whether there is sufficient originality in the alleged derivative work such that it constitutes an original work in its own right.[38]

C. The Use of Derivative Work and Appropriation Art in the Context of Discourse and Criticism

To create something new is the very nature of art. It is the pursuit of expressing an idea, a feeling, or a thought through a medium that makes art. Art evolves because its very nature encourages the recreation and innovation

---

[35] 17 U.S.C. (2007), § 101.

[36] Stephanie Morrow, *What are Derivative Works Under Copyright Law*, LEGAL ZOOM (2009), *at* https://www.legalzoom.com/articles/what-are-derivative-works-under-copyright-law (last accessed 23 March 2016).

[37] *Id.*

[38] DUHAIME'S LAW DICTIONARY *at* http://www.duhaime.org/LegalDictionary/D/DerivativeWork.aspx (last accessed 29 November 2015).

of man's expression. Given the many different emotions that humans share with one another and the many ways in which they are influenced thereby, the expression of one's own ideas or thoughts is bound to have an effect on other people's art.

It is inevitable to have works that are inspired by or made as a response to other artworks. The conception of a certain piece need not be completely original—the creation is a sum of many different parts, some of which may be other styles or variations of other pieces of work. Artists look everywhere for inspiration, thus making appropriation unavoidable. In fact, it is even encouraged.

Still, when it comes to certain forms of art such as literature, certain liberties for artistic appropriation are kept at bay. At the risk of having writers ripped off of their works, the law on copyright has provided safeguards to ensure their protection.

Traditionally, to be eligible for copyright protection, a work of art must be embodied in an original form perceptible to the senses, excluding a mere idea or concept.[39] This belief that creative intention cannot be the subject of a monopoly has already been jurisprudentially enshrined in a ruling by a District Court in Paris in 1988.[40] As such, the judgment serves as a reminder that the protection of pre-existing works must not be so excessive as to stifle creativity.

III. FAIR USE AND THE COPYRIGHT CLASH

In recent times, new developments in digital technology have changed the way we produce art. It has become easier to create, edit, and compose art and distribute it to the public for consumption. As a result of these developments, fair use poses a "threat" to copyright law and copyright owners; the uncontrolled copying and distribution of works in the digital sphere renders copyright law hard to enforce. This difficulty undermines authors' incentives to create works for dissemination.[41] It is a double-edged sword, particularly in the field of literature; on the one hand, copyright restrictions allow writers to protect themselves from infringers, but on the other, they limit the freedom of people to build on the work of other artists, thereby putting a cap on the progress of art.

---

[39] Lori Petruzzelli, *Copyright Problems in Post-Modern Art*, 5 DEPAUL-LCA J. ART & ENT. L. 115 (1995).

[40] PARIS DISTRICT COURT, GAZ. PAL., 689-690 (1998).

[41] Okpaluba, *supra* note 22.

A. Section 185: Statutory Fair Use

In its most general sense, fair use refers to any replication of copyrighted material done for a limited and "transformative" purpose, such as to comment upon, criticize, or parody a copyrighted work.[42] Such may be done without permission from the copyright owner. In the Philippines, the criteria for fair use is almost identical to that in the United States, with the exception that here, even unpublished material is included within the ambit of the protection it affords.

The concept of fair use is enshrined in the Code, which provides:

> Section 185. *Fair Use of a Copyrighted Work.*—185.1. The fair use of a copyrighted work for criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes is not an infringement of copyright. Decompilation, which is understood here to be the reproduction of the code and translation of the forms of the computer program to achieve the inter-operability of an independently created computer program with other programs may also constitute fair use. In determining whether the use made of a work in any particular case is fair use, the factors to be considered shall include:
>
> (a) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (b) The nature of the copyrighted work;
>
> (c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (d) The effect of the use upon the potential market for or value of the copyrighted work.
>
> 185.2. The fact that a work is unpublished shall not by itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

---

[42] R. Stim, *What is Fair Use?*, STANFORD COPYRIGHT AND FAIR USE CENTER, *at* https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/ (last accessed 29 November 2015).

The Court has defined fair use as "a privilege to use the copyrighted material in a reasonable manner without the consent of the copyright owner," or as "copying the theme or ideas rather than their expression."[43] It is "an exception to the copyright owner's monopoly of the use of the work to avoid stifling 'the very creativity which that law is designed to foster.'"[44]

The case of *ABS-CBN v. Gozon*[45] is illustrative of this. A discussion of the four factors of fair use is extensively made therein:

> First, the purpose and character of the use of the copyrighted material must fall under those listed in Section 185, thus: "criticism, comment, news reporting, teaching including multiple copies for classroom use, scholarship, research, and similar purposes." The purpose and character requirement is important in view of copyright's goal to promote creativity and encourage creation of works. Hence, commercial use of the copyrighted work can be weighed against fair use.
>
> The "transformative test" is generally used in reviewing the purpose and character of the usage of the copyrighted work. This court must look into whether the copy of the work adds "new expression, meaning or message" to transform it into something else. "Meta-use" can also occur without necessarily transforming the copyrighted work used.
>
> Second, the nature of the copyrighted work is significant in deciding whether its use was fair. If the nature of the work is more factual than creative, then fair use will be weighed in favor of the user.
>
> Third, the amount and substantiality of the portion used is important to determine whether usage falls under fair use. An exact reproduction of a copyrighted work, compared to a small portion of it, can result in the conclusion that its use is not fair. There may also be cases where, though the entirety of the copyrighted work is used without consent, its purpose determines that the usage is still fair. For example, a parody using a substantial amount of copyrighted work may be permissible as fair use as opposed to a copy of a work produced purely for economic gain.

---

[43] Habana v. Robles, G.R. No. 131522, 310 SCRA 511, 545, July 19, 1999 (Davide, Jr., *C.J.*, *dissenting*).

[44] ABS-CBN Corp. v. Gozon, *infra*, *citing* M. Bunker, *Transforming the News: Copyright and Fair Use in News-Related Contexts*, 52 J. COPYRIGHT SOCIETY U.S.A. 309, 311 (2004-2005) *and* Iowa St. Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980).

[45] ABS-CBN Corp. v. Gozon, G.R. No. 195956, 753 SCRA 1, 58-60, Mar. 11, 2015.

> Lastly, the effect of the use on the copyrighted work's market is also weighed for or against the user. If this court finds that the use had or will have a negative impact on the copyrighted work's market, then the use is deemed unfair.[46]

Fair use is generally understood as an affirmative defense. Issues centered on the concept arise when it is found or admitted that the alleged infringer had access to the copyrighted work and, without having first obtained the consent of the copyright proprietor, used the copyrighted work in some way, often in the production or preparation of a new work he would later claim as his own.

In this situation, the copyright proprietor would contend that the use of the copyrighted work effectively invaded certain property rights secured by him, while, on the other hand, the alleged infringer would contend that the use of the copyrighted work was allowable or "fair" and ultimately did not invade, infringe, or violate the copyright, or any other right of the proprietor.[47]

B. Two Sides of the Coin: The Potential Market Factor and Contextual Transformation in Fair Use

The preamble to the Fair Use statute lists six favored uses: critique, commentary, news reporting, teaching, scholarship, and research.[48] Of the six, interests in critique and commentary implicate both the constitutional principles of free speech and expression, as well as authorial interests in promoting the creation of new works and novel expressions of ideas. It is clear that the concept of fair use aims to protects these interests in two ways: *first*, by providing an essential safeguard for resolving conflict between copyright owners' rights and the free speech interests of the public, and *second*, by providing writers with the freedom to make productive use of another's work.[49]

Tracing the history of fair use in American jurisprudence, it is quite evident that while all four factors of fair use are considered equally and the totality of circumstances weighed on a case-to-case basis, there seems to be an inclination towards one factor: the potential market value. The actual effect

---

[46] *Id.*

[47] Leo Herrera-Lim & Gerardo Valero, *The Critical Effect Test: Toward the Protection of Parody as Fair Use*, 59 PHIL. L.J. 349, 351 (1984).

[48] Jonathan Francis, *On Appropriation: Cariou v. Prince and Measuring Contextual Transformation in Fair Use*, 29 BERKELEY TECH. L.J. 681, 689 (2014).

[49] *Id.*

of the unauthorized use on the market value of the work is deemed the most important factor that courts consider in a fair use analysis. Commercial use that directly impairs the market for a work mitigates against fair use, and so does commercial use that interferes with a copyright holder's ability to capitalize on derivative rights.[50]

This was particularly illustrated in the case of *Harper Row v. Nation Enterprises*:[51]

> In 1977, former President Ford contracted with petitioners to publish his as yet unwritten memoirs. The agreement gave petitioners the exclusive first serial right to license prepublication excerpts. Two years later, as the memoirs were nearing completion, petitioners, as the copyright holders, negotiated a prepublication licensing agreement with Time Magazine under which Time agreed to pay $25,000 ($12,500 in advance and the balance at publication) in exchange for the right to excerpt 7,500 words from Mr. Ford's account of his pardon of former President Nixon. Shortly before the Time article's scheduled release, an unauthorized source provided The Nation Magazine with the unpublished Ford manuscript. Working directly from this manuscript, an editor of The Nation produced a 2,250-word article, at least 300 to 400 words of which consisted of verbatim quotes of copyrighted expression taken from the manuscript. It was timed to "scoop" the Time article. As a result of the publication of The Nation's article, Time canceled its article and refused to pay the remaining $12,500 to petitioners. Petitioners then brought suit in Federal District Court against respondent publishers of The Nation, alleging, inter alia, violations of the Copyright Act (Act).[52]

Justice Sandra Day O'Connor, in delivering the opinion of the court, ruled that The Nation's article was not a fair use sanctioned by Section 107 of the Act. Using the four-factor test, he ruled that the effect of the use of the copyrighted work on the market is "undoubtedly the single most important element of fair use."[53] He ruled further that "[f]air use, when properly applied, is limited to copying which does not materially impair the marketability of the work which is copied."[54] The trial court in this case found not merely a potential, but an actual, effect on the market, since Time's cancellation of its

---

[50] *See* ASHLEY PACKARD, DIGITAL MEDIA LAW (1st Ed., 2010).

[51] Harper Row v. Nation Enterprises [hereinafter "Harper Row"], 471 U.S. 539 (1985).

[52] *Id.*, syllabus *at* https://supreme.justia.com/cases/federal/us/471/539/ (last accessed Mar. 12, 2018).

[53] *Id.*

[54] *Id.*

projected serialization as well as its refusal to pay petitioners the $12,500 were the direct effects of the publication's infringement. The determination of the effect on the market is vital because in order to negate fair use, one need only show that if the challenged use "should become widespread, it would adversely affect the *potential* market for the copyrighted work." This inquiry must account for harm to the market not only for the original but also for derivative works.

The weight given to the potential market factor is a divisive issue as it has been "dramatically compressed by judges who ignore the external benefits of fair use, and respond only to the lost dollars publishers ascribe to the doctrine."[55] More often than not, the copyright owners who are affirmatively engaged in diminishing the scope of educational fair use are publishers rather than authors.

Usually, these publishers attack potential fair use in three different ways: *first*, they argue that it reduces profitability in publication, thus de-incentivizing the publication and dissemination of scholarly works; *second,* they argue that fair use operates against the interests of the "impoverished author" since it effectively deprives him of royalties; and *third,* they characterize their profits as a reward for taking the risk in deciding to publish the work.[56] Publishers such as Anvil are likely to echo the same sentiments.

On the other side of the coin, there have been important shifts in sentiment that veer away from the emphasis placed on the potential market factor and instead favor the consideration of the purpose and character of the use. In a seminal law review article on US copyright law,[57] then District Court Judge Pierre Leval argued that the most critical element of the fair use analysis is the "transformativeness" of a work. This article is widely accepted as having initiated a shift in judicial treatment of fair use cases away from commerciality and potential market analysis and towards an analysis based on "transformativeness."[58]

The relationship between transformative works and fair use has been thoroughly explored in several US Supreme Court cases, the latest and most important of which being the case of *Prince v. Cariou.* Before discussing the case in detail, however, it should first be considered that the standard of American courts in determining whether a work is transformative has been

---

[55] Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149 (1998).

[56] *Id.*

[57] Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

[58] Packard, *supra* note 53.

whether or not "the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."[59] On the subject, Pedro Jose Bernardo writes:

> A more precise definition of such work would place it as a subsequent intellectual creation that displays some degree of distinguishable variation from a prior work and, at the same time, is nonetheless substantially similar to the original. [...] It is in the nexus between these seemingly conflicting elements that the determination of the existence of a derivative work—something that has been transformed enough—lies. [...]
>
> The link that ties a subsequent work to the original upon which it is based lies in the inherent interplay between distinguishable variation and substantial similarity. While distinguishable variation may entitle an alleged derivative work to separate copyright protection, its substantial similarity to the original would require prior permission from the original author. Absent such authorization, the secondary author would be liable for infringement.[60]

To draw the difference, Leval recognized two crucial facts with regard to creativity: *first*, that no creative activity is wholly original; and *second*, that much of the creative product is explicitly referential.[61] It is this "secondary creativity" that fair use seeks to protect from uninhibited prosecution.[62]

Leval's formulation of transformative use was formally adopted by the Supreme Court in the case of *Campbell v. Acuff-Rose Music.*[63] In holding that creating a rap version of Roy Orbison's song "Oh, Pretty Woman" is considered a form of fair use of the copyrighted tune, the court shifted its emphasis from the commercial nature of the secondary work to its "transformative value"—the parody's creation of "new insights and understandings" of the original target.[64] In so doing, the Supreme Court abandoned the rigid interpretation of fair use, ensuring that even "commercial" parodies may evade liability for copyright infringement.

---

[59] Leval, *supra* note 55.

[60] Bernardo, *supra* note 31, at 589.

[61] Leval, *supra* note 55, at 1109.

[62] *Id.* at 1110.

[63] Campbell v. Acuff-Rose Music, Inc. [hereinafter "Acuff-Rose"], 510 U.S. 569, 579 (1994).

[64] Leval, *supra* note 55.

However, the elimination of the commercial presumption affects only parodic works. On *Acuff-Rose,* Roxana Badin writes:

> [W]hile *Acuff-Rose* has rescued one form of valuable artistic expression from an outmoded view of creative value, it nonetheless implicitly excluded appropriation art from fair use protection. By carving out a place for commercial parodies, the decision essentially split the universe of creative re-use into acceptable parodies and non-parodic works, which are frowned upon as impermissible commercial copying. Thus, the Court ignored the transformative value of creative work that criticizes without parodying its target [...].[65]

Creative work that criticizes without parodying its target is precisely the category of art Adam David's *Hi Ma'am Sir* hypertext-machine falls under.

C. Is Criticism Necessary? A Look into *Roger v. Koons* and *Cariou v. Prince*

To better appreciate the nuances of fair use, it would be helpful to look into two influential cases decided by US courts involving the intersection of contemporary art and intellectual property. By observing the difference in the way these two cases were decided, we may then be able to gauge how similar cases concerning literary works should be resolved in the Philippines. In the 1992 case of *Rogers v. Koons*,[66] influential postwar artist Jeff Koons made a sculpture of a photograph taken by Art Rogers of two people holding several puppies. The resemblance between the photograph and the sculpture was undeniable—both pieces displayed a man wearing a polo and a woman with short hair and bangs, sitting side-by-side, holding eight puppies. There were a few subtle differences found between the works, however, such as the exaggerated noses of the puppies, the flowers added to the girl's hair, and the varying designs of the benches they were sitting on.

Jeff Koons' sculpture, entitled "String of Puppies," was reproduced thrice and sold for a total of $367,000. When Rogers discovered the existence of these sculptures on the front page of a newspaper, he wasted no time in suing Koons as well as the gallery that represented him. During trial, although Koons did not deny having copied Rogers' photograph, he claimed that his art constituted fair use by parody.

---

[65] Roxana Badin, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from Campbell v. Acuff-Rose Music, Inc.*, 60 BROOKLYN L. REV. 1653 (1995).

[66] 960 F. 2d 301 (2d Cir. 1992).

The court disagreed with Koons and ruled in favor of Rogers. It noted that the similarities between both works were recognizable to the average eye, and reiterated the established legal standard that copyright infringement does not require "literal identical copying of every detail" and that "small changes here and there are unavailing." Such "unavailing" changes include a change in media, the change from black and white to color, the addition of flowers in the couple's hair, or the more bulbous noses of the puppies. These were not enough to avoid infringement.[67]

Rejecting Koons' claim of the work being a parody and therefore protected under fair use, the court thus found that "String of Puppies" was a copy of Rogers' photograph. This conclusion was further bolstered by the fact that, according to court reports, Koons had asked his assistants to copy as much detail as possible from the photograph. Finding the sculpture to be a "substantially similar" copy of the photograph, the court did not believe that Koons was commenting on the photograph specifically and used the reproduction in substantially different art form.

Almost twenty years later, another landmark case on appropriation art was thrust into the spotlight, centered on the dispute between photographer Patrick Cariou and appropriation artist Richard Prince. Cariou took a series of photographs of Rastafarians and published them in a book called YES, RASTA. Prince then made a series of appropriation artworks which included collages of Cariou's photos.[68] While a previous court case decided in a summary judgment that Prince's works constituted copyright infringement, the Second Circuit Court of Appeals overturned the decision in spite of the lack of intention on Prince's part to comment on the work, which up until then had been one of the tests that helped determine whether a certain use was legal.

The 2013 decision of the Court of Appeals in *Cariou v. Prince*[69] provides a resolute approach. The court pointed out in clear and forceful language that copyright is not intended to give authors or other artists "absolute ownership" in their works, as if by natural right, to wit:

---

[67] Owen, Wickersham & Erickson, P.C., *Legalities 30: Jeff Koons and Copyright Infringement*, *at* https://www.owe.com/resources/legalities/30-jeff-koons-copyright-infringement/ (last accessed March 8, 2018).

[68] Kevin Smith, *Fair use for appropriation art,* Scholarly Communications @ Duke (blog), Duke University Libraries, 2013, *at* http://blogs.library.duke.edu/scholcomm/2013/04/30/fair-use-for-appropriation-art/ (last accessed Mar. 12, 2018).

[69] 714 F.3d 694 (2d Cir. 2013).

> The purpose of the copyright law is '[t]o promote the Progress of Science and useful Arts.' As Judge Pierre Leval of this court has explained, '[t]he copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.' Fair use is 'necessary to achieve that purpose.' Because 'excessively broad protection would stifle, rather than advance, the law's objective,' fair use doctrine mediates between 'the property rights [copyright law] established in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others, which must be protected up to a point.'[70]

For Justice Baker, who penned the decision, "the ultimate test of fair use... is whether the law's goal of 'promot[ing] the Progress of Science and useful Arts,'...would be better served by allowing the use than by preventing it."[71] One factor to consider, which addresses the manner in which the copied work is used, is "the heart of the fair use inquiry."[72] If the secondary use adds value to the original—that is, if the original work is merely utilized as raw material that is then transformed into a whole new contextual product—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. For use to be fair, it "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."[73]

The standard provided for in *Cariou v. Prince* for deciding whether a work has a transformative purpose is made clear. Quoting the Supreme Court in the *Campbell* case, transformation can exist even without direct comment on the original whenever the original work is altered with "new expression, meaning, or message". In other words, the new work can be transformative if it "supersede[s] the object of the original creation" by offering something new: a novel insight, understanding, or comprehension.

Despite their differing resolutions, it is clear that the cases of both *Roger v. Koons* and *Cariou v. Prince* tell us that when a piece of art lends a commentary on an earlier piece of art, the former may not be considered as infringement. If, according to the consideration of the court, the appropriated work criticizes enough of the original, it is "different enough" to be considered within fair use. The fair use exception, then, is now a question of

---

[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

what means is used to make the commentary and how much variation the critique makes in order to give the newer art transformative value.

IV. DECONSTRUCTING HI MA'AM SIR AND THE POSSIBLE LEGAL RAMIFICATIONS OF ANVIL PUBLISHING V. DAVID

A. The Justification of David's Reproduction

The issue we now face is whether a piece of work such as Adam David's hypertext machine can be considered as "transformed enough" for it to fall within the fair use exception.

Using the *Campbell v. Acuff-Rose* and *Roger v. Koons* cases as a guide, it would appear that while there is substantial similarity between *Hi Ma'am Sir* and the Fast Food Fiction Delivery anthology, the commentary of the former on the latter makes it fall considerably within the ambit of fair use.

The *Roger* case established that when there is direct copying, there is no further need to consider the substantial similarity of the two works. To constitute "copying" in terms of infringement, direct evidence of copying will suffice; establishing substantial similarity is necessary only when there is no direct evidence of copying.[74] The works from Fast Food Fiction Delivery were lifted as is—David had no intention of changing the lifted sentences' form or content precisely because the very point of his exercise was to critique them on their literary value. David himself, in explaining how *Hi Ma'am Sir* worked, admitted to lifting the passages and plugging them into the Javascript code. Given this, Anvil may find sufficient basis in Roger's argument in order to hold David liable for copyright infringement. Since Koons used the identical expression of the idea that Rogers created, and that under ordinary observation, the exact composition of the sentences were all incorporated into the hypertext machine, Anvil can argue that David did the same.

The fact that the generated texts are exact reproductions of sentences from the original material fails to resolve the question: *was the text transformed?* This is critical when analyzing fair use, because the lack of transformative use does not bar a determination of fair use in all circumstances. Recall that the goal of copyright is to promote science and the arts and is generally furthered by the creation of transformative works.[75] To that end, works that merely copy

---

[74] Rogers v. Koons, 960 F. 2d 301 (2d Cir. 1992).

[75] Laura Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 451 (2008).

the original are less likely to further the purpose of copyright protection and will likely constitute copyright infringement.[76]

It can be said that the compilation and putting together of such works resulted in their modification, making them derivative by nature. It can even be argued that precisely because *Hi Ma'am Sir* is a work of literary criticism, the use of the exact same sentences and putting them together in different arrangements is necessary to attain the goal of such a commentary.

In one of David's blogs,[77] he explained that the hypertext project is part of what he intends to be a multimedia critical response to the short story anthology. The first part of the critical response is an essay, *Nutrition Facts: Always Look at the Label*,[78] a review focusing on what David perceives to be the anthology's lack of an acute curatorial framework. *Hi Ma'am Sir* was the second part of the critical response, meant to demonstrate what David thought was "a flattening of aesthetics, politics, language, and form in contemporary English-language short story writing in the Philippines."[79] David maintains that the process of taking Fast Food Fiction Delivery and turning it into *Hi Ma'am Sir* was thoroughly transformative and resulted in absolute, doubtless, and significant differences between them, such that one would never be confused for the other.[80] Thus it may be said that David's work was not "merely a copy of the original", but a copy with a purpose.

Jurisprudence has provided that copying, in itself, is not prohibited when it serves the greater purpose of making contributions to art or, at the very least, a new comprehension of something already in existence. Consider parodies, for instance. A parody is a work created to mock or poke fun at a work of original authorship. For the purposes of copyright law, the heart of any parodist's defense of his work is that the very nature of parody is the use of elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.[81]

> Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the

---

[76] *Acuff-Rose*, 510 U.S. at 579.

[77] David, *supra* note 10.

[78] David, *Nutrition Facts: Always Look at Label*, Wasak (blog), *at* http://wasaaak.blogspot.com/2015/03/nutrition-facts-always-look-at-label.html (last accessed 12 March 2018).

[79] *Id.*

[80] *Id.*

[81] *Acuff-Rose*, 510 U.S. at 569.

> parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.[82]

In David's case, the very act of repurposing the texts and generating them in an order different from their original form is the commentary. He did not touch the sentences at all, merely plugging them inside a Javascript hat and pulling them out in a jumble. It can be said that they were unchanged; it was just their arrangement—which was critical to the flow of each story—that was touched. It was a distorted imitation.

Can *Hi Ma'am Sir* be considered a parody? Was there enough change in the way it was copied in order for it to have any transformative value? While David may not have intended *Hi Ma'am Sir* to be a parody of FAST FOOD FICTION DELIVERY, a look into the nature of the process he followed would justify the conclusion that it was, in fact, a mockery of the original.

In *Cariou v. Prince*, the Court of Appeals said that what is critical in determining the existence of copyright infringement is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, even without Prince's stated intention to do so.[83] Proceeding from this, the court examined how an artwork may be reasonably perceived by an ordinary audience in order to assess its transformative nature. If we were to disregard David's intention in creating *Hi Ma'am Sir,* which is essentially to make a commentary, and look instead at the body of work itself, we can conclude that David's combinations of excerpts effectively transform the identities of the stories from FAST FOOD FICTION DELIVERY, thereby rendering *Hi Ma'am Sir* completely distinct from the original work.

A short story is the sum of all its sentences; the flow of the plot is achieved because of the particular arrangement and stylization of each sentence. When one cuts a story apart, each sentence can still stand on its own. Nevertheless, it would no longer contribute to a greater narrative—that

---

[82] *Id.*

[83] Cariou v. Prince, 714 F. 3D 694 (2d Cir. 2013).

is, until it is attached again to other sentences. Each sentence could, perhaps, retain its literal meaning, but it would no longer have the nuances it had when it was attached to the story from which it originally came. Sentences brought together randomly try to align with each other, and while the result is jarring, the product is a new whole. Therefore, the combination of sentences produced by David's hypertext machine is not just a presentation of the same material in a new form, similar to how, for example, a book is converted into a movie. Rather, the new composition adds something new and presents the sentences with a fundamentally different aesthetic.

The consideration of the purpose and manner of copying also requires that the other factors of fair use be considered. The second element of fair use is the nature of the copyrighted work. The trend in jurisprudence both here and abroad is that creative and fictional works are given more protection than factual works. As elucidated in the US case of *Stewart v. Abend,*[84] in general, fair use is more likely to be found in factual works than in fictional works. "[A]pplication of the fair use defense [is] greater . . . in the case of factual works than in the case of works of fiction or fantasy."[85] In the United States, courts usually examine the nature of the copyrighted work while recognizing that some works are "closer to the core of intended copyright protection than others."[86] Considering that FAST FOOD FICTION DELIVERY is a creative work, this element weighs more in favor of Anvil Publishing.

The third element, which considers the amount of components taken from the original work, is easy to assess. The less an original work is copied, the more likely that the use would be considered fair.[87] This element can be determined through a comparative quantitative analysis of the original and new works. In this case, considering that David took only four sentences from each short story in FAST FOOD FICTION DELIVERY, namely, the first, the last, and two random ones in between, *Hi Ma'am Sir* hardly constitutes a reproduction of a substantial portion of the original work.

Lastly, the final consideration used when conducting a fair-use analysis is the effect of the secondary work on the potential market for the original—that is, the possibility of a loss of profit or marketability for the original work. This factor examines the economic harm caused by the alleged

---

[84] Stewart v. Abend, 495 U.S. 207 (1990).

[85] *Id.*

[86] On Davis v. The Gap, Inc., 246 F.3d 152 (2001).

[87] Leval, *supra* note 55.

infringer's copying.[88] In this case, David himself stated in his blog that he has never earned even a centavo from *Hi Ma'am Sir* and never intends to do so. In addition to this, considering that the hypertext machine both combines the initial texts and produces the final text at random, it cannot possibly be construed as being a substantial enough imitation of the original such that it would dent the anthology's actual sales.

Harm should be measured by analyzing whether the alleged infringer's work usurps or weakens the market demand of the original.[89] This element can be decided in either of two ways: on the one hand, Anvil could argue that since David's hypertext machine is critical in nature, it may significantly affect the sales of Fast Food Fiction Delivery. On the other hand, the website to which the text-generator is attached contains no explanations from David, nor any indication that the product operates to criticize FAST FOOD FICTION DELIVERY. Hence, visitors may not even be aware that the passages came from different stories, let alone that particular anthology. David may argue that there was no intention on his part to use *Hi Ma'am Sir* for commercial gain; as such, no actual harm can be presumed.

B. Discussing Anvil Publishing's Other Causes of Action

American jurisprudence, as well as the intent of copyright law to encourage the proliferation of the arts, works in favor of David as a defense against the first cause of action (*Sec. 177.1 of the I.P Code* on the reproduction of the work or substantial portion of the work). At this point, it would now be appropriate to likewise examine *Hi Ma'am Sir* alongside the other grounds raised by Anvil against David.

Since judgment has yet to be reached on this case, the legal ramifications and defenses of both parties shall be discussed in line with conjectures based on the law and jurisprudence that is available as of this writing.

1. Section 177.7: Other communication to the public of the work (in relation to 171.3's economic rights)

---

[88] Eric Gorman, *Appropriate Testing and Resolution: How to Determine Whether Appropriation Art is Transformative "Fair Use" or Merely an Unauthorized Derivative,* 43 ST. MARY'S L.J. 289, 312 (2012).

[89] Eveready Battery Co. v. Adolph Coors Co., 765 F. Supp. 440 (1991).

Section 177.7 is tied to 171.3 because any communication of the piece to the public correlates with the ability of the work to earn profit. If the piece is distributed to the public outside of the means allowed by Anvil as copyright owner, it may impact the sales of the anthology, thereby affecting Anvil's economic rights.

The issue of fair use is relevant when there is an excessively widespread dissemination of derivative works that will likely diminish the original work's potential market.[90] Should the unauthorized use become widespread, a copyright owner need only demonstrate that such use would prejudice the potential market of his work in order to successfully hold the alleged infringer liable.[91] On this point, Anvil could raise the fact that *Hi Ma'am Sir* is being shared online for free and is constantly available for viewing by anyone on the internet, thus allowing for the copyrighted material to be read by people who have not purchased the book. Since it is difficult to control and track to whom the links to *Hi Ma'am Sir* and its PDF counterpart, *It will be the same / but not quite the same,* are shared, Anvil loses control over the dissemination of the work to the public.

David can counter this argument, however, by saying that the so-called "reproduction" is random and does not directly compete with Anvil's anthology per se. The existence of the hypertext machine deprives neither Anvil nor the stories' writers of any earnings, as the machine does not give the reader the narrative or structure of any part of the anthology. If readers were to come across *Hi Ma'am Sir* and realize that it contains excerpts from FAST FOOD FICTION DELIVERY, the discovery may even pique their interest. On the website itself, there are no words discouraging people from picking up a copy for themselves. If anything, the criticism that David aims to bring to the fore invites the readers to examine and critique the work for themselves, which would entail them buying the anthology for their own perusal.

Based on the foregoing, the argument for David thus proves to be weightier on this particular point.

2. Section 174: Published Edition of Work (Publisher's Copyright to the Typographical Arrangement of the Published Edition of the Work)

This provision states that while individual authors own the copyright to their short stories, it is the publisher who has the copyright to the particular

---

[90] *Harper Row*, 471 U.S. at 539.

[91] *Id.*

arrangement of the stories as presented in anthologies like FAST FOOD FICTION DELIVERY.

As regards the website *Hi Ma'am Sir*, Anvil no longer has a cause of action under this provision since the hypertext machine generates the final product randomly. David did not copy the typographical arrangement of the work; in fact, he tore it apart. The specific arrangement of sentences and stories used in the anthology, which would ultimately serve as the grounds for Anvil's claim of copyright infringement, is not at all retained. As for the PDF file, it appears that it merely contains a reproduction of the results generated by the hypertext machine, a compilation of a random sampling of passages that were produced by the Javascript-based code after a click of a button. Hence, it also does not contain the same typographical arrangement that appears on the published edition of FAST FOOD FICTION DELIVERY.

On this point, David, once again, has the more persuasive advantage.

3. Section 193.1 and Section 193.3 (Pertaining to the Author's Moral Rights)

Section 193.1 essentially requires that the author of the works be rightfully given attribution. Not only does the hypertext machine fail to identify that the works are actually part of an anthology published by Anvil, it also fails to identify that they are excerpts from different short stories written by different writers. It is apparent, then, that no attribution whatsoever is given to the authors. The four sentences taken from each story are randomly placed together, and the results generated by the hypertext machine bear no indication that they are a product of the random splicing of cut-up parts.

Meanwhile, Section 193.3 prevents the distortion, mutilation, and other forms of modification of works that would be prejudicial to the author's original product or to his reputation. The hypertext machine itself, by its very nature, cuts up the short stories and brings forth a new whole—clearly a mutilation of the originals in order to form a new passage. Furthermore, considering the fact that the whole point of *Hi Ma'am Sir* is to critique the stylistic quality of the works featured in the anthology, it may also be argued that this mutilation resulted in the smearing of the reputation of the featured writers. In other words, David's method of criticizing the anthology is in itself an affront not only to the quality of writing produced by the authors, but also to the credibility of Anvil as a publishing house as regards the kind of writing it deems worthy of publication.

Based on these two provisions, it is Anvil that seems to possess a stronger foothold. Nevertheless, David could argue in defense that since he does not mention the names of any of the authors, it is impossible for him to have smeared their reputations.

V. CONCLUSION: A LIBERAL TREATMENT OF TRANSFORMATIVE WORKS

Often, courts have struggled with the conceptual underpinnings of the artistic form, especially when it intersects with the law and its ramifications. Looking at the trend of judicial decisions in the US that addressed copyright and fair use in the realm of appropriation art, one can see that courts have been far from consistent. In sum, however, the American judiciary "has done admirably, often expanding its understanding of the fair use doctrine in order to serve the core goal of copyright—to promote the arts."[92] It is thus the hope of this author that the same liberality and consideration for the proliferation of the arts be applied in the Philippine setting, especially in this particular case.

Having been patterned after its US counterpart, the Intellectual Property Code possesses the same potential as its predecessor for tolerance towards the concept of fair use. In reality, however, instead of protecting writers and artists while promoting a culture that is open to critique and commentary, the Code is instead often used by major art world players, including publishers, to stifle discourse and experimentation by asserting their economic rights, thereby defeating the spirit of the law which intends to encourage freedom of expression and the proliferation of art and discourse.

This is not to say that publishers are necessarily against the growth of art. In fact, they play a key role in ensuring that art, particularly literature, remains accessible to all. They publish work for public consumption—works that would not have otherwise reached its audience if not for their production and dissemination. As clearly demonstrated in the case at hand, however, the dynamics between writer and publisher often escalate into a battle between the Artist and The Bigger Artist.

Both parties are artists and writers. Both contribute significantly to the flourishing of the Philippine literary scene. Unfortunately, however, the

---

[92] Francis, *supra* note 46.

interest of one in protecting its own capital and profit often clashes with the objective of the other, whose primary goal is often to encourage discourse.

It is not difficult to see the concern of the writers whose works are included in the anthology and why they rally behind Anvil in pursuing the case against David. After all, they too are writers, who individually are mere artists struggling to disseminate their works to a wider audience. It is only understandable that they be concerned about the alleged infringement David committed against their works, especially since his critique had come in a very disapproving package.

Considering the nature of *Hi Ma'am Sir*, however, as well as the abundant jurisprudence on fair use that champions its cause, it is necessary that these authors see the bigger picture at hand. The jurisprudence on the fair use doctrine has transformed the concept of a copyright from a utilitarian system of ownership into a system of rights that enables authors to, on the one hand, protect their works, and on the other hand, freely exercise creative efforts without the fear of being silenced.

The relationship of substantial similarity and fair use points to the nascent but clearly perceivable liberality with which the Code has treated, and should continue to treat, derivative works, especially transformative and appropriation art. Philippine Courts should be reminded that "[n]ot only does [the Code] extend separate copyright to such derivative works without need of consent from the original author or creator," but also that "the positive trend in the interpretation of the provisions of Fair Use [...] illustrates the basic thrust of promoting the free exchange of knowledge and ideas so indispensable in any free society."[93] A liberal attitude should be considered and adapted, since it enlivens the very concept of copyright as a balance between the rights of the author and the interests of the public in general, even in a case that involves writers and artists on opposing sides.

As of this writing, there has yet to be a landmark case on literary appropriation in the Philippines. *Anvil Publishing v. David* certainly possesses the potential to set an influential legal precedent. The literary community is abuzz with opinions regarding the matter, with both parties receiving more or less the same degree of support.

Still, it is the group of smaller, more "underground" writers who side with David whose sentiments ring louder than that of everyone else. This is not unexpected—after all, it is precisely this "indie" community that the law

---

[93] Bernardo, *supra* note 31.

seeks to protect the most since it is often their claim of ownership over their creations that prove to be the most vulnerable.

The fact of the matter is that Adam David felt so strongly about his negative critique of FAST FOOD FICTION DELIVERY, so much so that writing a scathing review just would not do. He had to create a script and a code, input texts from numerous short stories, and make a website just to make his point.

Certainly, we should not foster an environment in which creativity can be dismissed and silenced simply because it is critical. And certainly, if we truly aim for a progressive and radical literary landscape, we should be open to the means by which critique might be done creatively.[94]

The suit by Anvil is a sad reminder of how creativity can be stifled by the clashing of artistic and economic interests of writers, and how those with the financial resources can threaten those who already earn so little despite significant contributions to art and literary discourse. Such a vision of copyright not only betrays the intentions of the framers of the Code but also comes at a great price to progress in the arts.

- o0o -

[92] Katrina Santiago, *A Case for Creative Critical Engagement,* Radikal Chick (blog), *at* http://www.radikalchick.com/a-case-for-creative-critical-engagement-onliteraturemonth/ (last accessed Mar. 12, 2018).