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# Andy Warhol's Pantry

Brian L. Frye

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## ANDY WARHOL'S PANTRY

*Brian L. Frye\**

### ABSTRACT

This Article examines Andy Warhol's use of food and food products as a metaphor for commerce and consumption. It observes that Warhol's use of images and marks was often inconsistent with copyright and trademark doctrine, and suggests that the fair use doctrine should incorporate a "Warhol test."

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## I. INTRODUCTION

Andy Warhol may be the most important artist of the 20th Century, and he is certainly the most famous. His notoriety is no accident. He achieved his fame entrepreneurially, by creating art that was about commerce and treating his art like a commercial product. He created the Factory in order to produce mass quantities of paintings and prints.<sup>1</sup> He created a film studio that produced several films a week.<sup>2</sup> He aggressively sought portrait commissions from wealthy patrons. He produced advertisements for commercial products. He even created *Interview*, a successful commercial magazine that is still published.<sup>3</sup>

Among other things, Warhol's art is about consumption. As such, food was a natural subject for his work. While Warhol is probably best known for his iconic paintings of Campbell Soup cans, he often used images of food in his work. Sometimes, he used images of generic food items, like a banana, a hamburger, or an ice cream cone. More often, he used images of brand-name food products, like bottles of Coca-Cola or boxes of Heinz tomato ketchup. Commercial food products are the most literal object of commercial consumption. They exist in order to convince people to purchase and consume them.

Art has always been the subject of commerce. But Warhol literally made commerce the subject of his art, by creating portraits of commercial products. As a result, his work provides an opportunity to reflect on the relationship between creativity and intellectual property. He created by copying, and his creativity consisted in copying. Was Warhol's work consistent with copyright doctrine, and if not, is that a problem with the work or the doctrine?

## II. WARHOL'S BACKGROUND

Andy Warhol was born on August 6, 1928, in Pittsburgh, Pennsylvania.<sup>4</sup> He was the third son of Andrew and Julia Warhola,

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1. See TONY SCHERMAN & DAVID DALTON, *POP: THE GENIUS OF ANDY WARHOL* 196 (2009).

2. DOUGLAS CRIMP, *OUR KIND OF MOVIE: THE FILMS OF ANDY WARHOL 2* (2012) ("The films Warhol made between 1963 and 1968 – and there are very many of them, more than 100, not counting the nearly 500 *Screen Tests* – were taken out of circulation in the early 1970s and only recently have again become available, thanks to the Whitney Museum of American Art's Andy Warhol Film Project and the Museum of Modern Art's film preservation work.").

3. SCHERMAN & DALTON, *supra* note 1, at 434.

4. *Id.* at 3.

Carpatho-Rusyn immigrants from what is now Slovakia, and grew up in a Ruthenian ghetto outside of Pittsburgh.<sup>5</sup> His father was an itinerant construction worker and coal miner who died in 1942, which plunged the family into poverty.<sup>6</sup>

In 1945, Warhol enrolled in the Carnegie Institute of Technology, where he studied commercial art.<sup>7</sup> At Carnegie Tech, he developed a method of producing illustrations with blotted lines by pressing wet ink drawings onto another sheet of paper.<sup>8</sup> In 1949, he graduated and moved to New York to become a commercial illustrator.<sup>9</sup> His first published drawing appeared in the Summer 1949 issue of *Glamour*, and many more commissions quickly followed.<sup>10</sup>

Warhol's distinctive blotted-line technique soon made him one of the most successful illustrators in America.<sup>11</sup> While he was best-known for his stylized drawings of women's shoes, he also drew many food products.<sup>12</sup> For example, he illustrated several advertisements for Martini & Rossi vermouth, as well as a Fourth of July advertisement that included a drawing of a triple-scoop sundae in a glass boat with a paper American flag at both ends.<sup>13</sup>

### III. A BRIEF HISTORY OF WARHOL'S FOOD-RELATED ART

Soon after moving to New York, Warhol started showing his drawings. In 1952, he had his first solo show at the Bodley Gallery, presenting a series of drawings inspired by Truman Capote, and he continued to show his drawings at minor galleries and cafes, eventually winning four awards from the Art Directors Club.<sup>14</sup> In 1956, one of his drawings was even included in the Museum of Modern Art's *Recent Drawings* show, but he was humiliated when the museum refused to

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5. GARY INDIANA, *ANDY WARHOL AND THE CAN THAT SOLD THE WORLD* 4-5 (2010).

6. *Id.*

7. *Id.* at 14-15. The Carnegie Institute of Technology became Carnegie Mellon University in 1967.

8. *Id.* at 15-16.

9. *Id.* at 44.

10. See VICTOR BOCKRIS, *THE LIFE AND DEATH OF ANDY WARHOL* 51-53 (1989).

11. Kenneth Goldsmith, *Success is a Job in New York*, in *ANDY WARHOL "GIANT" SIZE* 14, 14 (2006).

12. INDIANA, *supra* note 5, at 45; see discussion *infra* Parts III.A, B, E, and G.

13. INDIANA, *supra* note 5, at 44-45; see Camper English, *Vintage Martini Ads by Andy Warhol*, *ALCADEMICS* (Aug. 9, 2013, 9:09 AM), <http://www.alcademics.com/2013/08/vintage-martini-ads-by-andy-warhol.html>; see also Bob Nickas, *Somebody Has to Bring Home the Bacon*, *LUCKY PEACH*, July 2012, available at *SLATE* (July 3, 2012, 7:30 AM), [http://www.slate.com/articles/life/food/2012/07/\\_somebody\\_has\\_to\\_bring\\_home\\_the\\_bacon\\_a\\_history\\_of\\_andy\\_warhol\\_s\\_relationship\\_with\\_food\\_from\\_lucky\\_peach\\_single.html](http://www.slate.com/articles/life/food/2012/07/_somebody_has_to_bring_home_the_bacon_a_history_of_andy_warhol_s_relationship_with_food_from_lucky_peach_single.html).

14. INDIANA, *supra* note 5, at 46-47.

accept his drawing as a gift.<sup>15</sup> Warhol wanted to be an artist, not an illustrator.

Determined to break into the art world, Warhol started painting in 1960. His first painting, *Advertisement*, was a collage of advertisements for Pepsi-Cola and plastic surgery, among other things, which he projected onto a canvas and traced in black paint.<sup>16</sup> Subsequent paintings were also based on fragments of advertisements and cartoons, including *Superman*, *Popeye*, *Nancy*, and *Dick Tracy*.<sup>17</sup>

In April 1961, the department store Bonwit Teller used five of Warhol's paintings in its window displays of summer fashions.<sup>18</sup> Soon afterward, Warhol learned that Roy Lichtenstein also made paintings based on advertisements and cartoons.<sup>19</sup> When the Castelli Gallery decided not to represent Warhol because his paintings were too similar to Lichtenstein's, Warhol realized he needed to develop a new style.<sup>20</sup>

At that time, he was doing paintings that you really weren't quite sure what he was going to do. They seemed to be similar in intent to those of Lichtenstein. You couldn't really distinguish what the two were up to. It seemed to have to do with spoofing all kind of things. For instance, at the time I saw *Nose Job [Before and After]*, there were *Dick Tracy* cartoons. Also, Roy Lichtenstein was doing cartoons, was taking little ads in the paper, silly ads, blowing them up in front. So they seemed to be quite similar.<sup>21</sup>

In 1961, Warhol also created hundreds of pen and ink drawings for a cookbook created by his friend and patron Amy Vanderbilt.<sup>22</sup> The drawings range from simple decorations, like a repeated flowerpot motif, to detailed illustrations of the cooking techniques described by Vanderbilt.

#### A. *Campbell's Soup Cans*

[Marcel] Duchamp: If you take a Campbell Soup Can and repeat it fifty times, you are not interested in the retinal image. What interests you is the concept that wants to put fifty

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15. SCHERMAN & DALTON, *supra* note 1, at 34.

16. JOSEPH D. KETNER II, *ANDY WARHOL* 29 (2013).

17. See SCHERMAN & DALTON, *supra* note 1, at 49-50.

18. *Id.* at 60. The five paintings were *Advertisement*, *Little King*, *Superman*, *Before and After*, and *Saturday's Popeye*. *Id.*

19. *Id.* at 69-71.

20. *Id.*

21. See John Wilcock, *Leo Castelli*, in *THE AUTOBIOGRAPHY AND SEX LIFE OF ANDY WARHOL* 44, 45 (Christopher Trela ed., 2010).

22. AMY VANDERBILT, *AMY VANDERBILT'S COMPLETE COOKBOOK* (1961).

Campbell soup cans on a canvas.<sup>23</sup>

In late 1961, Warhol began painting “portraits” of Campbell Soup cans.<sup>24</sup> When Irving Blum visited Warhol’s studio in December 1961, Warhol showed him several of the soup can paintings and explained that they were part of a series.<sup>25</sup> Blum immediately offered to show the complete series at the Ferus Gallery in West Hollywood, California, and Warhol accepted.<sup>26</sup> Warhol eventually finished thirty-two small (16”x20”) paintings of Campbell Soup cans, one representing each flavor of Campbell’s soup.<sup>27</sup> The Campbell Soup cans were hand-painted on a white background, and were based on several different images of Campbell Soup cans, including a magazine advertisement, the Campbell Soup Company’s letterhead, and photographs taken by Ed Wallowich.<sup>28</sup>

On July 9, 1962, Warhol’s *Campbell’s Soup Cans* show opened at the Ferus Gallery.<sup>29</sup> Warhol did not specify how to hang the paintings, so Blum displayed them in a row on a wooden ledge, to resemble a shelf in a grocery, and priced each painting at \$100.<sup>30</sup>

The critical response to *Campbell’s Soup Cans* was uniformly negative. The *Los Angeles Times* charged, “[t]his young ‘artist’ is either

23. Rosalind Constable, *New York’s Avant Garde, And How it Got There*, SUNDAY HERALD TRIB. MAG., May 17, 1964, quoted in Ernst Beyeler & Georg Frei, *Introduction*, in ANDY WARHOL: SERIES AND SINGLES 11, 12 (2000). The quote has also appeared in some sources as, “If a man takes 50 Campbell’s soup cans and puts them on canvas, it is not the retinal image that concerns us. What interests us is the concept that wants to put 50 Campbell’s soup cans on a canvas.” Samuel A. Green also used the quote in the exhibition catalogue of “Andy Warhol” at the Institute of Contemporary Art, University of Pennsylvania, Philadelphia (Oct. 8–Nov. 21, 1965). (This was the exhibition at which Warhol and Edie Sedgwick were mobbed and had to escape via the fake ceiling. See Gary Comenas, *Andy Warhol at the ICA*, WARHOLSTARS.ORG, <http://www.warholstars.org/chron/65ica.html> (last visited Jan. 5, 2015).) The quote also later appeared in RAINER CRONE, ANDY WARHOL 22 (1970).

24. Warhol’s first painting of a can of food may have been *Del Monte Peach Halves* (1961), which was executed in a style similar to his *Campbell’s Soup Cans*.

25. See SCHERMAN & DALTON, *supra* note 1, at 87.

26. *Id.*

27. See Andy Warhol, *Campbell’s Soup Cans* (1962) (synthetic polymer paint on thirty-two canvases), available at MUSEUM OF MODERN ART, [http://www.moma.org/collection/object.php?object\\_id=79885](http://www.moma.org/collection/object.php?object_id=79885) (last visited Jan. 5, 2015). In 1961, Campbell Soup produced the following flavors: tomato, vegetable, green pea, clam chowder, beef, cream of asparagus, cream of celery, beef broth, chicken gumbo, pepper pot, chicken, consomme, vegetable beef, chicken noodle, cream of mushroom, scotch broth, bean, vegetarian vegetable, black bean, beef noodle, cream of chicken, onion, turkey noodle, minestrone, chicken vegetable, cream of vegetable, old-fashioned tomato rice, split pea with ham, cheddar cheese, vegetable bean, chili beef, and turkey vegetable. See *id.*

28. See SCHERMAN & DALTON, *supra* note 1, at 75, 119.

29. *Id.* at 118-19.

30. *Id.*

a soft-headed fool or a hard-headed charlatan.”<sup>31</sup> A marginally more charitable critic mused that the show “initially rivets the viewer’s attention . . . by removing the mundane object from its ordinary surroundings and enormously increasing its scale. The initial shock, however, wears off in a matter of seconds, leaving one as bored with the painting as with the object it presents.”<sup>32</sup> And another critic remarked, “I am not at all sure that even the best of Warhol’s work can much outlast the journalism on which it is forced to depend.”<sup>33</sup>

Other artists were also hostile. The *Los Angeles Times* ran a cartoon showing two beatniks standing in front of the “Farout Art Gallery, La Cienega Blvd,” looking at pictures of soup cans, with the caption, “Frankly, the cream of asparagus does nothing for me, but the terrifying intensity of the chicken noodle gives me a real Zen feeling.”<sup>34</sup> And the nearby Primus-Stuart Gallery “erected a Campbell’s soup can pyramid in its front window, beneath a sign reading, ‘Do Not Be Misled. Get the Original. Our Low Price - Two for 33 Cents.’”<sup>35</sup> Warhol welcomed the attention and arranged to have himself photographed at a supermarket, signing a Campbell Soup can.<sup>36</sup>

When the show closed on August 4, 1962, one painting had sold, and five were in contract.<sup>37</sup> Warhol agreed to sell Blum the entire series for ten monthly installments of \$100, so he repurchased the painting that had sold and canceled the contracts.<sup>38</sup> Blum eventually sold *Campbell’s Soup Cans* to the Museum of Modern Art for \$15 million.<sup>39</sup>



### B. *Coca-Cola Bottles*

What's great about this country is that America started the tradition where the richest consumers buy essentially the same things as the poorest. You can be watching TV and see Coca-Cola, and you know that the President drinks Coke, Liz Taylor drinks Coke, and just think, you can drink Coke, too. A Coke is a Coke and no amount of money can get you a better Coke than the one the bum on the corner is drinking. All the Cokes are the same and all the Cokes are good. Liz Taylor knows it, the President knows it, the bum knows it, and you know it.<sup>40</sup>

In early 1962, presumably soon after finishing the *Campbell's Soup Cans*, Warhol began making paintings of Coca-Cola bottles. Like the *Campbell's Soup Cans*, the *Coca-Cola Bottles* were hand-painted and based on advertising images of Coca-Cola bottles.<sup>41</sup> However, Warhol painted the *Coca-Cola Bottles* in different styles. According to Emile de Antonio:

[Andy] had painted two pictures of Coke bottles about six feet tall. One was just a pristine black-and-white Coke bottle. The other had a lot of abstract expressionist marks on it. I said, "Come on, Andy, the abstract one is a piece of shit, the other one is remarkable. It's our society, it's who we are, it's absolutely beautiful and naked, and you ought to destroy the first one and show the other."<sup>42</sup>

Thankfully, Warhol preserved both paintings, which together illustrate a critical moment in the development of his style.

### C. *S&H Green Stamps*

At about the same time, Warhol started painting his first "multiples," or paintings that included multiple reproductions of the same image, beginning with his *S&H Green Stamps* paintings.<sup>43</sup> S&H Green Stamps were trading stamps distributed by the Sperry & Hutchison Company.<sup>44</sup> Sperry & Hutchison sold the stamps to retailers, primarily supermarkets and gas stations, who gave the stamps to consumers.<sup>45</sup> Consumers who collected the stamps could use them to purchase goods from Sperry & Hutchison.<sup>46</sup>

Warhol created his *S&H Green Stamps* paintings by carving art

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40. ANDY WARHOL, *THE PHILOSOPHY OF ANDY WARHOL* 101 (1975).

41. SCHERMAN & DALTON, *supra* note 1, at 123.

42. INDIANA, *supra* note 5, at 59 (quoting BOCKRIS, *supra* note 10, at 98).

43. SCHERMAN & DALTON, *supra* note 1, at 90.

44. *Id.*

45. *Id.*

46. *Id.*



gum erasers into rubber stamps.<sup>47</sup> First, he painted a light-green background, then he stamped on a grid of dark-green images of the stamps and the red S&H logo, before painting in white dots to represent the perforations in the stamps.<sup>48</sup>

#### D. *One Dollar Bills*

Warhol also started to make drawings and paintings of money, primarily one and two dollar bills. While his initial money paintings were hand-painted, he soon began using his drawings and paintings on money as the basis for silkscreens.<sup>49</sup> Screen printing is a method of reproducing images by using a finely-woven mesh or “silkscreen” to support an ink-blocking stencil.<sup>50</sup> Silkscreens are made by transferring an image onto a screen to create a stencil. Ink is pressed through the mesh onto a surface, creating an image of the stencil.<sup>51</sup>

Warhol created silkscreens of his drawings of one and two dollar bills, which he used to make about four dozen paintings, including the large multiples *192 One Dollar Bills* (1962) and *200 One Dollar Bills* (1962).<sup>52</sup> He also created silkscreens of his drawings and paintings of Martinson Coffee can labels and Coca-Cola bottles, which he used to make multiples, including *Martinson Coffee* (1962), *Green Coca-Cola Bottles* (1962), *200 Coca-Cola Bottles* (1962), and *210 Coca-Cola Bottles* (1962).<sup>53</sup>

In early 1962, Eleanor Ward of the Stable Gallery in New York decided to represent Warhol.<sup>54</sup> And on November 6, 1962, Warhol’s first solo exhibition at the Stable opened, to great fanfare.<sup>55</sup> Among other things, Warhol showed *210 Coca-Cola Bottles* (1962) and *Close Cover Before Striking (Coca-Cola)* (1962), a large, silkscreened reproduction of a Coca-Cola matchbook, complete with striker.<sup>56</sup> Reviews of the show were mixed, but every painting sold.<sup>57</sup>

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47. *Id.*; Andy Warhol, *S&H Green Stamps* (1962) (silkscreen ink on synthetic polymer paint on canvas), available at MUSEUM OF MODERN ART, [http://www.moma.org/collection/object.php?object\\_id=79885](http://www.moma.org/collection/object.php?object_id=79885) (last visited Jan. 5, 2015).

48. SCHERMAN & DALTON, *supra* note 1, at 90.

49. Roger Kamholz, *Andy Warhol and “200 One Dollar Bills,”* SOTHEBY’S (Nov. 3, 2013), <http://www.sothebys.com/en/news-video/blogs/all-blogs/21-days-of-andy-warhol/2013/11/andy-warhol-200-one-dollar-bills.html>.

50. SCHERMAN & DALTON, *supra* note 1, at 104-05.

51. Kamholz, *supra* note 49; see also SCHERMAN & DALTON, *supra* note 1, at 105.

52. Kamholz, *supra* note 49; see also SCHERMAN & DALTON, *supra* note 1, at 105.

53. SCHERMAN & DALTON, *supra* note 1, at 107, 110.

54. *Id.* at 117-18.

55. *Id.* at 132-33.

56. *Id.* at 108, 133.

57. *Id.* at 135-36.

### E. *Tunafish Disaster*

In mid-1962, Warhol learned that he could make silkscreens from photographs, as well as drawings, and that discovery gradually transformed his style.<sup>58</sup> First, he created silkscreens of photographs of celebrities, which he used to make monumental paintings and multiples like *Marilyn Diptych* (1962) and *Red Elvis* (1962).<sup>59</sup> But in late-1962, he started to make silkscreens of news stories and photographs documenting crime and violence, which became the *Death and Disaster* series.<sup>60</sup>

Most of the *Death and Disaster* paintings were serial compositions, or multiple canvases featuring variations of the same image.<sup>61</sup> For example, Warhol created ten *Electric Chair* (1963) paintings and four double-paneled *Burning Car* (1963) paintings.<sup>62</sup> The *Death and Disaster* series also included eleven *Tunafish Disaster* (1963) paintings, which were based on a *Newsweek* article about two women who died after eating contaminated tuna.<sup>63</sup>

On March 20, 1963, Margaret McCarthy and Collette Brown of Detroit, Michigan died of type “E” botulism, an unusual form of food poisoning caused by contaminated fish products, after eating tuna fish sandwiches made with a can of A&P Chunk Tuna.<sup>64</sup> *Newsweek* ran a story on their deaths, which included photographs of McCarthy and Brown, as well as a can of tuna fish, with the tagline, “Tuning up Tuna.” Warhol made a large silkscreen of the photographs and the tagline, “Seized shipment: Did a leak kill . . . ,” which he used to create the *Tunafish Disaster* (1963) paintings.<sup>65</sup>

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58. *Id.* at 91, 109.

59. *Id.* at 133.

60. *Id.* at 142.

61. *Id.*

62. *Id.* at 142-43.

63. *Tuning Up Tuna*, NEWSWEEK, Aug. 5, 1963, at 60-61; SCHERMAN & DALTON, *supra* note 1, at 145.

64. *Detroit Poisoning Causes Tuna Scare; A&P Pulls Its Brand*, BINGHAMTON PRESS, Mar. 20, 1963, at 5, available at <http://fultonhistory.com/Newspaper4/Binghamton%20NY%20Press%20Grayscale/Binghamton%20NY%20Press%20Grayscale%201963.pdf/Binghamton%20NY%20Press%20Grayscale%201963%20-%203439.pdf>.

65. Andy Warhol, *Tunafish Disaster* (1963) (silkscreen ink and silver paint on linen).



#### F. Boxes

In early 1964, Warhol decided to make replicas of grocery boxes. His assistants collected a selection of cardboard boxes from a nearby Gristedes supermarket and ordered several hundred empty plywood boxes from a local carpenter.<sup>66</sup> Warhol selected five boxes and created silkscreens to replicate the sides and top of each: Brillo soap pads, Campbell tomato juice, Kellogg's corn flakes, Heinz ketchup, and Del Monte peach halves.<sup>67</sup> Warhol and his assistants then painted the plywood boxes a background color and silkscreened the sides and top to resemble the cardboard boxes, leaving the bottom blank.<sup>68</sup>

On April 21, 1964, Warhol's *Brillo* show opened at the Stable,

66. SCHERMAN & DALTON, *supra* note 1, at 212-13.

67. ISABEL KUHL, *ANDY WARHOL* 42 (2007). A Brillo pad is a brand of scouring pad made from steel wool impregnated with soap, generally used in the kitchen to clean dishes. See *Definition of Brillo Pad*, DICTIONARY.COM, <http://dictionary.reference.com/browse/brillo+pad> (last visited Jan. 5, 2015).

68. SCHERMAN & DALTON, *supra* note 1, at 213.

which looked like a supermarket.<sup>69</sup> Hundreds of boxes filled the gallery, stacked almost to the ceiling.<sup>70</sup> The gallery even installed a checkout counter, where purchases were wrapped in plastic.<sup>71</sup>

“Is this an art gallery or Gristede’s warehouse?” said a viewer when pop artist Andy Warhol’s new show opened at the Stable Gallery April 21. Stacked from floor to ceiling were some 400 plywood grocery cartons, painted to resemble cardboard and bearing big-as-life replica trademarks - Brillo, Heinz ketchup, Campbell’s tomato juice, and so on. That was the show.<sup>72</sup>

The boxes were priced at \$200 to \$400, depending on their size, and sold reasonably well.<sup>73</sup> According to the *New York Times*, “enough Warhol cartons had been unloaded to gladden a grocer’s heart,” including one pair of collectors who paid \$6,000 for 20 boxes.<sup>74</sup>

Ironically, the designer of the original Brillo box was also an artist, who was unimpressed by Warhol’s use of his creation:

[A]n abstract painter named Jim Harvey felt slightly (but not very) manqué. On the job for the industrial designing firm Stuart & Gunn, where he is regularly employed, he had designed the *real* Brillo crate in 1961, and somehow failed and still fails to see its potential. “A good commercial design,” he says, “but that’s all.” What’s more, his version is cheaper. Each cardboard carton, duly trademarked, costs the Brillo people between 10 and 15 cents.<sup>75</sup>

The government of Canada agreed with his assessment. In March 1965, when a Toronto gallery tried to import eighty Warhol boxes for a show, the Canadian customs office taxed them as merchandise, rather than art.<sup>76</sup> According to the director of the National Gallery of Canada, the boxes were copies of grocery boxes, not original sculptures.<sup>77</sup>

### G. *Other Food Items*

In addition to brand-name food products, Warhol often used images of generic food items in his artwork. For example, *Cup of Coffee* (1963) is a small silkscreen of a cup and saucer on a yellow background with

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69. *Id.* at 214.

70. *Id.*

71. *Id.* at 216.

72. Grace Glueck, *Art Notes: Boom?*, N.Y. TIMES, May 10, 1964, at X19.

73. *Id.*

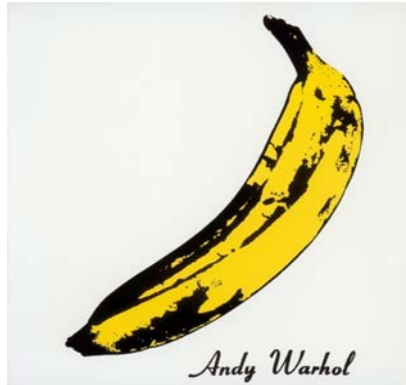
74. *Id.*

75. *Id.*

76. SCHERMAN & DALTON, *supra* note 1, at 215.

77. *Id.*

the legend, “to the Jar!”<sup>78</sup> Similarly, the *Hamburger* (1985-86) series features a large silkscreen of a hamburger, sometimes in color and sometimes in black and white, with the legend, “wholesome - delicious.”<sup>79</sup>



Most notably, Warhol used silkscreened images of bananas in his design for the cover of the first Velvet Underground album, *The Velvet Underground and Nico*.<sup>80</sup> The cover of the first edition of the record consisted of a silkscreened image of an unpeeled yellow banana on a sticker, covering a silkscreened image of a peeled, flesh-colored banana, with the instruction “PEEL SLOWLY AND SEE” in the top right corner and “Andy Warhol” in the lower right corner.<sup>81</sup> Later editions of the record generally dispensed with the sticker and consisted of the silkscreened image of the unpeeled yellow banana and “Andy Warhol” in the lower right corner.

#### H. Eat

In 1964, Warhol made the film *Eat*, which is a silent, black and white close-up of artist Robert Indiana nibbling on a mushroom for forty

78. See Andy Warhol, *Cup of Coffee* (1963) (polymer and silk screen ink on board stamped verso), available at MICHAEL BORGHI FINE ART, <http://www.michaelborghifineart.com/inventory/view/139> (last visited Jan. 5, 2015).

79. See, e.g., Andy Warhol, *Hamburger* (1985-1986) (acrylic on linen), available at WARHOL, <http://www.warhol.org/collection/art/work/1998-1-3175/> (last visited Jan. 5, 2015); see also Andy Warhol, *Double Hamburger* (1986) (silkscreen ink on paper), available at CHRISTIE'S, <http://www.christies.com/lotfinder/drawings-watercolors/andy-warhol-double-hamburger-5351715-details.aspx> (last visited Jan. 5, 2015).

80. THE VELVET UNDERGROUND AND NICO (MGM Records 1967).

81. *Id.*; see *The Velvet Underground & Nico Images*, DISCOGS, <http://www.discogs.com/viewimages?release=371471> (last visited Jan. 5, 2015).

minutes.<sup>82</sup> *Eat* consists of nine 100-foot rolls of black and white 16mm film, which Warhol assembled out of order, so the amount of mushroom remaining is unrelated to the duration of the film.<sup>83</sup> It was filmed at 24 frames per second, but should be projected at 16 frames per second, which imparts a slow-motion effect.<sup>84</sup> The combination of chronological confusion and slow-motion subtly emphasizes the sensuality of the process of eating.

### I. *Bananas*

I think the part where Mario eats a banana is one of the most sensuous things that's ever been filmed!<sup>85</sup>

Later in 1964, Warhol made the films *Mario Banana #1* and *Mario Banana #2*: both are silent, color close-ups of Mario Montez eating a banana for three and one-half minutes.<sup>86</sup> Both films consist of one 100 foot roll of 16mm film, filmed at 24 frames per second and projected at 16 frames per second.<sup>87</sup> Mario Montez also eats several bananas in the 1964 Warhol film *Harlot*. Other Warhol films also feature banana eating, including the recently preserved film *Nico/Antoine*, which features Pierre Antoine Muracciolo and Christa Päffgen.<sup>88</sup>

### J. *Schrafft's*

In 1968, the Manhattan restaurant chain Schrafft's commissioned Warhol to create a television commercial, hoping to make itself look

82. Anny Shaw, *Artist Interview: Robert Indiana*, ART NEWSPAPER (Oct. 4, 2013), <http://theartnewspaper.com/articles/Artist-interview-Robert-Indiana/30652>.

83. Indiana claims to have eaten more than one mushroom. "Q: Can you tell me the story of starring in Warhol's film? A: Well, I didn't eat anything, I had a whole table full of delicious things to eat and Andy comes in and picks up a mushroom and he says he wants me to eat this and that's the whole film is eating that mushroom. We did cheat, it wasn't one mushroom, it was supposed to be one mushroom. Q: How many mushrooms? A: I can't tell you, that's not nice. I don't want Warhol turning over on his grave, you see." *Id.*

84. BOCKRIS, *supra* note 10, at 143-44.

85. John Wilcock, *Andy as Moviemaker*, in THE AUTOBIOGRAPHY AND SEX LIFE OF ANDY WARHOL 152, 157 (Christopher Trela ed., 2010).

86. Mario Montez was the stage name of René Rivera (July 20, 1935–Sept. 26, 2013). He was one of Warhol's "superstars" and appeared in 13 Warhol films between 1964 and 1966. His stage name was an homage to the actress Maria Montez. He also starred in the Jack Smith films FLAMING CREATURES (1963) and NORMAL LOVE (1963), and the Ron Rice film CHUMLUM (1964). See Douglas Martin, *Mario Montez, a Warhol Glamour Avatar, Dies at 78*, N.Y. TIMES (Oct. 3, 2013), [http://www.nytimes.com/2013/10/04/arts/mario-montez-a-warhol-glamour-avatar-dies-at-78.html?\\_r=0](http://www.nytimes.com/2013/10/04/arts/mario-montez-a-warhol-glamour-avatar-dies-at-78.html?_r=0).

87. SCHERMAN & DALTON, *supra* note 1, at 179.

88. See Program, *The Andy Warhol Museum*, EXPOSED: SONGS FOR UNSEEN WARHOL FILMS, Oct. 17, 2014 [hereinafter EXPOSED].

more hip and relevant.<sup>89</sup> Warhol created a one-minute long commercial, promoting Schrafft's new *Underground Sundae*, which Schrafft's described as:

Yummy Schrafft's vanilla ice cream in two groovy heaps, with three ounces of mind-blowing chocolate sauce undulating within a mountain of pure whipped cream topped with a pulsating maraschino cherry served in a bowl as big as a boat.<sup>90</sup>

Warhol recorded the commercial at a New York television studio in November 1968 with the assistance of Paul Morrissey.<sup>91</sup> Apparently, the scene originally included Viva and Joe Dallesandro.<sup>92</sup> Both were topless, Viva laying on the table and Joe standing behind her, smoking and covering her breasts with his arms; however, Warhol later cut them out of the commercial.<sup>93</sup>

*Time* magazine provided the following description of the advertisement:

Onto the screen flashes a shiny red dot, which turns out to be a maraschino cherry, which turns out to sit atop a chocolate sundae, which turns out to be the focal point for a swirling phantasmagoria of color. All of which, it also turns out, is a 60-second videotape commercial for a venerable Manhattan-based restaurant chain. "The chocolate sundae," proclaims a credit line that rolls diagonally across the TV tube, was "photographed for Schrafft's by Andy Warhol."<sup>94</sup>

Harold H. Brayman also described the commercial:

The screen fills with a magenta blob, which a viewer suddenly realizes is the cherry atop a chocolate sundae. Shimmering first in puce, then fluttering in chartreuse, the colors of the background and the sundae evolve through many colors of the rainbow. Studio noises can be heard. The sundae vibrates to coughs on the soundtrack. "Andy Warhol for a SCHRAFFT'S?" asks the off-screen voice of a lady. Answers an announcer: "A little change is good for everybody."<sup>95</sup>

And according to *Playboy*:

His recent widely discussed commercial for Schrafft's restaurant chain

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89. Nickas, *supra* note 13.

90. Michael Ferguson, *Underground Sundae*, JOE-POURRI (2005), <http://www.joedallesandro.com/sundae.htm>; Nickas, *supra* note 13.

91. Ferguson, *supra* note 90.

92. Nickas, *supra* note 13.

93. Ferguson, *supra* note 90; Nickas, *supra* note 13.

94. *Advertising: Schrafft's Gets With It*, TIME, Oct. 25, 1968, at 114.

95. Nickas, *supra* note 13 (quoting Harold H. Brayman).

was a long, voluptuous panning shot of a chocolate sundae, with “all the mistakes TV can make left in,” the artist explained. “It’s blurry, shady, out of focus.”<sup>96</sup>

Warhol was quite pleased with the results. “‘It’s fun,’ he says, ‘and really pretty, really great.’”<sup>97</sup> Apparently, so was Schrafft’s, which claimed, “[W]e haven’t got just a commercial. We’ve acquired a work of art.”<sup>98</sup> Unfortunately, Schrafft’s failed to preserve the commercial, and no known copies exist.

### K. *Hamburgers*

The most beautiful thing in Tokyo is McDonalds.

The most beautiful thing in Stockholm is McDonalds.

The most beautiful thing in Florence is McDonalds.

Peking and Moscow don’t have anything beautiful yet.<sup>99</sup>

Warhol loved hamburgers. Not only did he create a Hamburger series of paintings, but he also created films of people eating hamburgers. For example, *Mario Montez and Boy* (1965) is a four-minute Warhol film of Mario Montez and Richard Schmidt sharing a hamburger while making out.<sup>100</sup>

Unusually, Warhol himself also appeared in a hamburger-themed work. In 1981, Danish filmmaker Jorgen Leth filmed Andy Warhol eating a hamburger for his film *66 Scenes From America*.<sup>101</sup> Leth showed up at Warhol’s studio unannounced and explained that he wanted to film Warhol eating a hamburger. Warhol liked the idea and readily agreed. Leth arranged to film Warhol at a studio on 14th Street and 5th Avenue and had his assistant purchase a selection of hamburgers. When Warhol arrived, he asked Leth, “Where is the McDonald’s?” Leth responded, “I thought you would maybe not like to identify. . . .” Warhol answered, “No, that is the most beautiful.” Leth offered to have his assistant buy a McDonald’s hamburger, but Warhol said, “No, never mind, I will take the Burger King.”<sup>102</sup>

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96. Paul Carroll, *What’s a Warhol?*, PLAYBOY, Sept. 1969, at 133, 140.

97. *Advertising: Schrafft’s Gets With It*, *supra* note 94.

98. *Id.*

99. WARHOL, *supra* note 40, at 71.

100. *See EXPOSED*, *supra* note 88.

101. *66 SCENES FROM AMERICA* (Jorgen Leth 1982), *available at* DOC ALLIANCE FILMS, <http://dafilms.com/film/8355-66-scenes-from-america/> (last visited Jan. 5, 2015) *and* YOUTUBE, <http://www.youtube.com/watch?v=Ejr9KBQzQPM> (last visited Jan. 5, 2015).

102. *Id.*



Leth told Warhol, “You simply have to eat this hamburger. And then after you finished, you have to eat it, after you finish you should just tell the camera, to the camera, my name is Andy Warhol, I have just eaten a hamburger.” Leth filmed Warhol in a single five-minute take.<sup>103</sup> Warhol finished the hamburger and disposed of the trash in about three and a half minutes. He then sat and stared at the camera for about a minute before saying, “My name is Andy Warhol and I just finished eating a hamburger.”<sup>104</sup> In voice-over, Leth says, “Burger, New York” and the scene ends.<sup>105</sup>

#### L. *Andy-Mat*

In Europe, the royalty and aristocracy used to eat a lot better than the peasants - they weren't eating the same things at all. It was either partridge or porridge, and each class stuck to its own. But when Queen Elizabeth came here and President Eisenhower bought her a hot dog I'm sure he felt confident that she couldn't have had delivered to Buckingham Palace a better hot dog than that one he bought her for maybe twenty cents at the ballpark. Because there *is* no better hot dog than a ballpark hot dog. Not for a dollar, not for ten dollars, not for a hundred thousand dollars could she get a better hot dog. She could get one for twenty cents and so could anybody else.<sup>106</sup>

Warhol loved to eat at the automat, and fantasized about opening his own automat:

“I really like to eat alone. I want to start a chain of restaurants for other people like me called ANDY-MATS—’The Restaurant for the Lonely Person.’ You get your food and then you take your tray into a booth and watch television.”<sup>107</sup>

Automats were fast-food restaurants that consisted of a wall of cubbyholes with glass doors, each of which contained a plate of food.<sup>108</sup> Patrons put coins in a slot, opened the door, and took their food.<sup>109</sup> Automats were popular in New York City, especially the Horn & Hardart chain. The decline of the automat began in the 1970s, and the

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103. *Id.*

104. *Id.*

105. *Id.*

106. WARHOL, *supra* note 40, at 101.

107. *Id.* at 160.

108. Bob Nickas, *The Andy Warhol New York City Diet*, LUCKY PEACH, July 2012, available at SLATE (July 4, 2012, 7:15 AM), [http://www.slate.com/articles/life/food/2012/07/the\\_andy\\_warhol\\_new\\_york\\_city\\_diet\\_part\\_2\\_of\\_a\\_history\\_of\\_the\\_artist\\_s\\_relationship\\_with\\_food\\_from\\_lucky\\_peach\\_single.html](http://www.slate.com/articles/life/food/2012/07/the_andy_warhol_new_york_city_diet_part_2_of_a_history_of_the_artist_s_relationship_with_food_from_lucky_peach_single.html).

109. *Id.*

last Horn & Hardart automat closed in 1991.<sup>110</sup>

Warhol almost managed to make his automat dream a reality. A 1977 photograph shows Warhol seated at a conference table, surrounded by his Andy-Mat business partners: architect Araldo Cossutta, developer Geoffrey Leeds, and financier C. Cheever Hardwick III.<sup>111</sup> They planned to open an international chain of Andy-Mats, where diners would order through an intercom system and be served reheated TV dinners.<sup>112</sup> Maxime de la Falaise designed the menu for the restaurant, which featured shepherd's pie and Irish lamb stew, key lime pie for dessert, and Warhol's signature "nursery cocktail" of milk on the rocks.<sup>113</sup> The first Andy-Mat was scheduled to open in the fall of 1977 at 74th Street and Madison, but it never materialized.<sup>114</sup>



### M. Warhol's Cornucopia

*“What kinds of things does he like to eat the most? He loves chocolate and ice cream. Does he still eat as much as he used*

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*; Nicola Twilley, *Pneumatic Fantastic: The Enduring Allure of Tube Transportation*, GOOD MAG. (Dec. 24, 2010), <http://magazine.good.is/slideshows/pneumatic-fantastic-the-enduring-allure-of-tube-transportation>; Jan Whitaker, *Good Eaters: Andy Warhol*, RESTURANT-ING THROUGH HIST. (Apr. 13, 2010, 4:23 PM), <http://restaurant-ingthroughhistory.com/2010/04/13/good-eaters-andy-warhol/>.

to? No, he's on a diet."<sup>115</sup>

"When I met him, he was eating lots of candy. What was he eating on the trip [to California in 1963]? He wasn't hung up on candy. Oh, regular entrees. He's quite a steak eater."<sup>116</sup>

Why did Warhol use food and food-related products so prominently in his artwork? The answer is unclear, in part because of Warhol's deliberate ambiguity. For example, there are many different explanations of Warhol's decision to paint the *Campbell's Soup Cans*.

Some scholars claim that Muriel Latow suggested the idea of painting Campbell Soup cans.<sup>117</sup> Supposedly, Latow, Ted Carey, and David Mann visited Warhol's home.<sup>118</sup> Warhol was trying to decide what to paint and asked for Latow's advice, but she refused to provide any until he wrote her a check for \$50.<sup>119</sup>

According to Latow, she immediately suggested that he make large paintings of Campbell Soup cans.<sup>120</sup> According to Mann, Latow asked Warhol what he disliked, and he replied, "I hate grocery shopping," so she asked him to list the products sold at the grocery store.<sup>121</sup> Warhol soon mentioned Campbell soup, and said he hated it. "He said that his mother made it every day for lunch and after all those years, it was like, 'Oh, Mom - again?'"<sup>122</sup> Latow asked which flavor of soup Warhol disliked, and he responded, "All of them," so she suggested that he paint them all.<sup>123</sup>

Latow also claims to have suggested the idea of painting money, a claim that Warhol at least tacitly endorsed.<sup>124</sup> But according to Emile de Antonio, the idea of painting money was actually suggested by Eleanor Ward.<sup>125</sup> When Warhol asked for a show at her gallery, she "pulled out

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115. John Wilcock, *Gerard Malanga*, in *THE AUTOBIOGRAPHY AND SEX LIFE OF ANDY WARHOL* 110, 120 (Christopher Trela ed., 2010).

116. John Wilcock, *Taylor Mead*, in *THE AUTOBIOGRAPHY AND SEX LIFE OF ANDY WARHOL* 132, 134 (Christopher Trela ed., 2010).

117. SCHERMAN & DALTON, *supra* note 1, at 74.

118. *Id.*

119. *Id.* at 74-75; INDIANA, *supra* note 5, at 83. The Andy Warhol Museum archives include a \$50 check dated November 23, 1961, written by Andy Warhol from Andy Warhol Enterprises to Muriel Latow.

120. SCHERMAN & DALTON, *supra* note 1, at 74.

121. Gary Comenas, *The Origin of Andy Warhol's Soup Cans or The Synthesis of Nothingness*, WARHOLSTARS.ORG (2003/revised 2010), [http://www.warholstars.org/andy\\_warhol\\_soup\\_can.html](http://www.warholstars.org/andy_warhol_soup_can.html).

122. *Id.*

123. SCHERMAN & DALTON, *supra* note 1, at 74-75 (emphasis in original).

124. *Id.* at 75-76 (emphasis in original).

125. Comenas, *supra* note 121.

her lucky two-dollar bill and sort of waved it in his face and she said, 'Andy, it just so happens I have November, which as you know is the best month to show, and if you do a painting of this two-dollar bill for me I'll give you a show.'"<sup>126</sup>

Warhol cheerfully acknowledged soliciting suggestions of subject matter, so it is quite probable that one or more people suggested that he paint Campbell Soup cans, money, or any number of other things. But he received far more suggestions than he actually used. "He was saying, 'That's great,' to everything Henry [Geldzahler] was saying, but you knew he was going to make his own decisions; given eight choices, he would have chosen one."<sup>127</sup>

By contrast, Robert Indiana claims that Warhol painted *Campbell's Soup Cans* simply because he liked Campbell Soup: "I knew Andy very well. The reason he painted soup cans is that he liked soup."<sup>128</sup> According to Vito Giallo, one of Warhol's assistants, Warhol's mother made him soup and a sandwich every day for lunch, and his favorite flavor of soup was tomato.<sup>129</sup> Sometimes Warhol corroborated Indiana's claim, agreeing that he painted the *Campbell's Soup Cans* because he had it for lunch every day: "Oh yeah, I had Campbell's soup every day for lunch for about 20 years. And a sandwich."<sup>130</sup>

On other occasions, Warhol claimed that he painted the *Campbell's Soup Cans* because they reminded him of his childhood. In 1962, when an interviewer asked, "What do your rows of Campbell soup cans signify?," Warhol replied, "They're things I had when I was a child."<sup>131</sup> Warhol's brothers confirmed that their childhood lunch was always Campbell's soup and a sandwich, and that their mother let Warhol pick the flavor of soup.<sup>132</sup> According to Paul Warhola, "Everything that he did actually was part of his life from the time he was a youngster. Mother always served Campbell's soup. She always had a good supply. Andy was fond of chicken noodle, you know, chicken rice."<sup>133</sup> Notably, the design of the Campbell Soup can in 1961 was almost identical to the

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126. *Id.*

127. John Wilcock, *Mario Amaya, in THE AUTOBIOGRAPHY AND SEX LIFE OF ANDY WARHOL* 18, 24 (Christopher Trela ed., 2010).

128. Deborah Solomon, *The Way We Live Now: Questions for Robert Indiana*, N.Y. TIMES, Dec. 1, 2002, <http://www.nytimes.com/2002/12/01/magazine/the-way-we-live-now-12-01-02-questions-for-robert-indiana-vital-signs.html>.

129. Comenas, *supra* note 121 (citing JOHN O'CONNOR & BENJAMIN LIU, UNSEEN WARHOL 20 (1996)).

130. *Id.* (citing I'LL BE YOUR MIRROR: THE SELECTED ANDY WARHOL INTERVIEWS 242 (Kenneth Goldsmith ed., 2004)).

131. *Id.* (citing I'LL BE YOUR MIRROR, *supra* note 130, at 5).

132. INDIANA, *supra* note 5, at 7.

133. Comenas, *supra* note 121.

design of Warhol's childhood.<sup>134</sup>

Warhol also claimed that the *Campbell's Soup Cans* were inspired by the tin-can flowers that his mother made and sold to help support the family:

David Yarritu: "I heard that your mother used to make these little tin flowers and sell them to help support you in the early days."

Andy Warhol: "Oh God, yes, it's true, the tin flowers were made out of those fruit cans, that's the reason why I did my first tin-can paintings. You take a tin-can, the bigger the tin-can the better, like the family size ones that peach halves come in, and I think you cut them with scissors. It's very easy and you just make flowers out of them. My mother always had lots of cans around, including the soup cans."<sup>135</sup>

Many scholars have seized on these connections between Warhol's childhood and his choice of subject matter. For example, Gilda Williams suggested that Warhol's use of food-related products in his artwork reflected his working-class roots and connection to his mother:

Paradoxically, it was by abandoning the American aristocracy of the Vanderbilts and Manhattan socialites with whom he lunched, and turning to his immigrant mother's kitchen that Warhol found America's most authentic images of itself - the Campbell's Soup cans, the Coke bottles, the Daily News, the dollar bills, the Brillo boxes. Warhol stumbled across "the real America" in the pantry of a woman who never adapted to the American way of life, or mastered the English language, or altered a peasant lifestyle which revolved around daily visits to the local food store. The signature repetitiousness in his work, habitually interpreted by art critics as, say, the "machine-like alienation of modern life in our media-saturated world", was more a reflection of the sad routine of a lonely, elderly woman who pasted stamps into books, stacked soup cans in her cupboard, or collected returnable Coke bottles. In this same light, the arrangement of 32 Campbell's Soup Cans 1961-2 is not necessarily another incarnation of the Modernist/Minimalist grid, as it is generally read, but also a kind of calendar, marking the daily task of feeding one's family.<sup>136</sup>

Arthur Danto compared the *Campbell's Soup Cans* to the Orthodox icons that Warhol saw as a child:

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134. *Id.*

135. *Id.*

136. Gilda Williams, *Warhol Stumbled Across 'The Real America' in the Pantry of a Woman who Never Adapted to the American Way of Life*, TATE (May 1, 2007), <http://www.tate.org.uk/context-comment/articles/warhol-stumbled-across-real-america-pantry-woman-who-never-adapted-american>.

The array is severely frontal, like Byzantine portraits, and the four rows of eight paintings each were like an up-to-date iconostasis – a wall of icons such as the one in the Orthodox church in which Andy's mother, Julia Warhola, worshipped in Pittsburgh when he was growing up.<sup>137</sup>

There may be some truth to these observations. Warhol's friends consistently noted his unusually close relationship with his mother, who lived with him until shortly before her death, as well as his habit of attending church.<sup>138</sup> But the sentimentalism that they attribute to Warhol's work is inconsistent with his own description of his artistic practice, as well as the exhaustive documentary record of his behavior.<sup>139</sup>

In private, Warhol sometimes gave a more philosophical reason for painting the *Campbell's Soup Cans*. According to Ronald Tavel, Warhol told Aaron Fine in September 1962, "I wanted to paint nothing. I was looking for something that was the essence of nothing, and that was it."<sup>140</sup> Similarly, Bert Greene recalled that "After Andy began his Pop Art, Aaron [Fine] asked him why he was doing it, and Andy said, 'It's the synthesis of nothingness,' which is, of course, the Dada reply."<sup>141</sup>

#### IV. ART & COMMERCE

Perhaps the best explanation of Warhol's decision to paint the *Campbell's Soup Cans* is the most cynical: "When asked, 'Tell us, Andy, why did you paint a soup can?' he would archly reply: 'Because I love the product and I love all products, they're so beautiful.'"<sup>142</sup>

From the moment that Warhol burst into the art world in 1962, he insisted that his work was about consumption: "I just paint things I always thought were beautiful, things you use every day and never think about. I'm working on soups, and I've been doing some paintings of money. I just do it because I like it."<sup>143</sup>

Unlike his Abstract Expressionist predecessors, who rejected consumer culture, Warhol embraced it, mechanically reproducing images of iconic products. "Painting a soup can is not in itself a radical

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137. Roger Kamholz, *Andy Warhol and the Series Paintings*, SOTHEBY'S (Oct. 27, 2013), <http://www.sothebys.com/en/news-video/blogs/all-blogs/21-days-of-andy-warhol/2013/10/andy-warhol-and-the-series-paintings.html>.

138. INDIANA, *supra* note 5, at 7-9.

139. *Id.*

140. Comenas, *supra* note 121.

141. *Id.*

142. SCHERMAN & DALTON, *supra* note 1, at 103.

143. *The Slice-of-Cake School*, TIME, May 11, 1962, at 55.

act. But what was radical in Warhol was that he adapted the means of production of soup cans to the way he produced paintings, turning them out en masse—consumer art mimicking the process as well as the look of consumer culture.”<sup>144</sup>

Accordingly, he embraced commerce and mechanical reproduction: “Paintings are too hard . . . The things I want to show are mechanical. Machines have less problems. I’d like to be a machine, wouldn’t you?”<sup>145</sup>

As Leo Castelli explained, while he found Warhol’s early paintings unclear:

I began to see the Campbell’s Soup Cans and the Coca-Cola Bottle painting, and that seemed to be clear. They seemed to have to do with repetition, with mass production, so already he became very different from Liechtenstein because Liechtenstein never did repeats. In fact, repeating things was one of the hallmarks of Andy at that period, all using food products, those *Green Stamps*, and *Dollar Bills*, and he did them over and over again.<sup>146</sup>

But Warhol did more than celebrate consumer culture. He insisted that all culture is consumer culture, and that the art world is just another kind of consumer culture. “Warhol did not only render consumer products as art; he also made art into a consumer product. He turned the hallowed artist into just another businessman.”<sup>147</sup> Recalling the tradition of still-life paintings, which memorialized the wealth of their owner in order to provide a reminder of mortality, Warhol celebrated consumer culture in order to demystify the art world.<sup>148</sup>

And Warhol used food and food-related products in his artwork in order to emphasize that art is a commodity that is consumed like any other. His *Campbell’s Soup Cans* and *Coca-Cola Bottles* were presented en masse, as if at a grocery store. His *Brillo Boxes* turned the art gallery into a supermarket. His *S&H Green Stamps* resembled a book of trading stamps saved by a consumer. And his *One Dollar Bills* were literally exchanged for money.

As Robert Hughes keenly observed:

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144. Robert Hughes, *Man for the Machine*, TIME, May 17, 1971, at 106.

145. *Pop Art - Cult of the Commonplace*, TIME, May 3, 1963, at 73.

146. Wilcock, *supra* note 21, at 45.

147. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 296 (2009).

148. See generally Rachel Snow, *Warhol In and Out of the Still Life Tradition*, in ANDY WARHOL: THE ANDY WARHOL PHOTOGRAPHIC LEGACY PROJECT 27 (2010), available at UPSTATE, [http://www.uscupstate.edu/uploadedFiles/Academics/Arts\\_and\\_Sciences/Fine\\_Arts/Visual\\_Arts/Warhol\\_Catalogue\(3\).pdf](http://www.uscupstate.edu/uploadedFiles/Academics/Arts_and_Sciences/Fine_Arts/Visual_Arts/Warhol_Catalogue(3).pdf).

When Warhol's series of cans, dollar bills, stickers and movie stars appeared in the early and middle '60s, they were thought ironic, an indictment of consumer culture; and a Goyaesque mordancy was attributed to his silk-screen portraits. Because it was deemed improper for an artist to be so drawn to what was decadent, ephemeral or trashy, it was assumed that Warhol was being ironic. But irony is intervention, between perceiver and the perceived, and Warhol does not intervene in that way.<sup>149</sup>

In other words, Warhol inverted the idea of good taste by painting portraits of things that taste good, implying that art is like food, and we consume what we like.<sup>150</sup>

#### A. *Warhol the Infringer*

Obviously, Warhol's use of images of branded food products in his work created the potential for copyright and trademark infringement litigation. Many of his works incorporated or consisted almost entirely of copyrighted images and trademarked logos. For example, Warhol's *Campbell's Soup Cans*, *Coca-Cola Bottles*, and *S&H Green Stamps* paintings, as well as his *Brillo Box*, *Campbell's Tomato Juice Box*, *Kellogg's Corn Flakes Box*, *Heinz Ketchup Box*, and *Del Monte Peach Halves Box* sculptures, were all at least *prima facie* infringements of copyrighted labels and trademarked logos. Likewise, his photographic silkscreens were at least *prima facie* infringements of the copyright in the photograph, as well as any copyright or trademark in the subject of the photograph.

Surprisingly, Warhol was rarely involved in intellectual property disputes, despite the ubiquity of copyrighted images and trademarked logos in his work. While some intellectual property owners considered filing infringement actions against Warhol, and a few even sent cease and desist letters, Warhol never litigated an infringement litigation. On the rare occasion that an intellectual property owner aggressively pursued an infringement claim, Warhol either settled the claim or withdrew the allegedly infringing work.<sup>151</sup>

#### B. *The Campbell Soup Company*



149. Hughes, *supra* note 144, at 107-08.

150. See Dave Hickey, *Andy and the Dream: the Stuff is Made Of*, in ANDY WARHOL "GIANT" SIZE 6, 12 (2006).

151. See SCHERMAN & DALTON, *supra* note 144, at 369-72.



For example, when the Campbell Soup Company learned about Warhol's *Campbell's Soup Cans*, it initially considered filing an infringement action, but then decided to wait and see how the public reacted to the paintings: "There's some evidence to show there was a little bit of concern, but they decided to take a wait-and-see approach."<sup>152</sup>

Publicly, Warhol was blasé about the risk of copyright and trademark infringement actions:

Brillo liked it, but Campbell's Soup, they were really upset and they were going to do something about it, and then it went by so quickly and I guess there really wasn't anything they could do. But actually when I lived in Pittsburgh, the Heinz factory was there, and I used to go visit the Heinz factory a lot. They used to give pickle pins. I should have done Heinz soup. I did the Heinz Ketchup box instead.<sup>153</sup>

But according to David Bourdon, Warhol was privately concerned about both the risk of litigation and his relationship to Campbell:

*Can you remember anything in particular about when he did the soup cans?* He didn't want the Campbell Soup Company to know anything about it because he thought that they would do something to prevent his creating and selling the paintings.

*Why did he think that? It was good publicity for them.* He didn't want any commercial tie-in with the Campbell Soup Company because I think I mentioned that it might be good publicity for them if a real artist was painting their wares. Later, a photographer and some publicity men from the Campbell Soup Company tried to break into his house and photograph his paintings.

*Why? To put in their annual report. Why didn't they just ask his permission?* Andy wouldn't let them in. Of course, after he had done the

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152. *Campbell Channels Andy Warhol for New Soup Cans*, ASSOCIATED PRESS, Aug. 29, 2012, available at USA TODAY, <http://usatoday30.usatoday.com/money/industries/retail/story/2012-08-29/campbell-soup-andy-warhol-target/57399686/1> (quoting Jonathon Thorn, Archivist, Campbell Soup Company).

153. I'LL BE YOUR MIRROR, *supra* note 130, at 243.

boxes - he really needed a great deal of money to finance his movies - then he had Billy Linich call the Campbell Soup Company and propose that they buy one hundred of his boxes. At that point they became very aloof and said that it was too commercial for them.<sup>154</sup>

In any case, Campbell soon recovered from its fit of pique, realized that Warhol's *Campbell's Soup Cans* were a publicity bonanza, and embraced them. On May 19, 1964, Campbell Product Marketing Manager William MacFarland wrote to Warhol:

Dear Mr. Warhol:

I have followed your career for some time. Your work has evoked a great deal of interest here at Campbell Soup Company for obvious reasons.

At one time I had hoped to be able to acquire one of your Campbell Soup label paintings - but I'm afraid you have gotten much too expensive for me.

I did want to tell you, however, that we admired your work and I have since learned that you like Tomato Soup. I am taking the liberty of having a couple of cases of our Tomato Soup delivered to you at this address.

We wish you continued success and good fortune.<sup>155</sup>

Later that year, Campbell paid Warhol \$2,000 to make a painting of a can of Campbell Tomato Soup as a retirement present for Oliver G. Willits, the chairman of its board of directors.<sup>156</sup> In 1985, Campbell commissioned Warhol to make paintings of its new dry soup mixes, for use in advertisements.<sup>157</sup> And in 1993, it bought one of Warhol's *Campbell's Tomato Soup* paintings for its boardroom.<sup>158</sup> Campbell also invited Warhol to visit its headquarters in Camden, New Jersey, but there is no record of him accepting the invitation.<sup>159</sup> David Bourdon has suggested that Warhol's *Campbell's Soup Cans* even inspired Campbell to use a Campbell Soup can as its logo:

What's that Campbell's Soup Company report you have there? Oh, this. I have been holding onto this for a long time.

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154. John Wilcock, *David Bourdon, in THE AUTOBIOGRAPHY AND SEX LIFE OF ANDY WARHOL* 38, 42-43 (Christopher Trela ed., 2010).

155. Letter from William P. MacFarland, Prod. Mktg. Manager, Campbell Soup Company, to Andy Warhol (May 19, 1964) (on file with author).

156. *Campbell Channels Andy Warhol for New Soup Cans, supra* note 154.

157. *Id.*

158. *Id.*

159. *Id.*

*There's nothing in it.* No, there's nothing in it. I used to get these Campbell's soup envelopes, but that was after he'd done the can.

*Well, they wouldn't have put it on their envelopes unless he painted it.* That's not really one of his paintings. See the giant figure in the center? His paintings have plain, gold circles because the figure was too difficult to stencil.

It wouldn't have occurred to Campbell's to put a soup can on their envelopes until the painting? It's speculation.<sup>160</sup>

More recently, Campbell has introduced limited-edition Campbell Soup cans inspired by Warhol's paintings.<sup>161</sup> In 2004, it sold 75,000 four-packs of Warhol-inspired cans at Giant Eagle, a Pittsburgh-based supermarket operator, in 2006; it sold 12,000 Warhol-inspired cans at Barney's in New York; and in 2012, it sold 1.2 million Warhol-inspired cans at Target stores nationwide.<sup>162</sup>

To celebrate the 50th anniversary of Andy Warhol's 1962 famed work, 32 Campbell's Soup Cans, Campbell Soup Company (NYSE:CPB) is introducing limited-edition cans of Campbell's® Condensed Tomato soup with labels derived from original Warhol artwork. The four specially-designed labels reflect Warhol's pop-art style and use vibrant, eye-catching color combinations like orange and blue, and pink and teal.<sup>163</sup>

Ironically, the Warhol-inspired Campbell Soup cans were produced under license from the Andy Warhol Foundation.<sup>164</sup>

### C. *The Coca-Cola Corporation*

By contrast, while the Coca-Cola Corporation initially ignored Warhol's use of images of Coca-Cola bottles, it changed its mind because of how Warhol used the Coca-Cola bottle. In the 1960s, a group called the Arts Council managed the Gallery at the YW/YMHA in Philadelphia.<sup>165</sup> In 1967, the Arts Council created "The Museum of

160. Wilcock, *supra* note 154, at 43.

161. *Campbell Channels Andy Warhol for New Soup Cans*, *supra* note 154.

162. *Id.*

163. See Press Release, Campbell Soup Company, Campbell Celebrates Andy Warhol and 50 Years of Pop Culture History (Aug. 29, 2012), <http://investor.campbellsoupcompany.com/phoenix.zhtml?c=88650&p=irol-newsArticle&ID=1729916&highlight=>

164. See Katherine Dorsett Bennett, *Andy Warhol's "15 Minutes" of Fame are Not up Yet*, CNN (Sept. 5, 2012, 8:33 PM), <http://www.cnn.com/2012/09/05/living/campbell-soup-company-andy-warhol/>.

165. *YM/YWHA Arts Council Records, 1962-2006*, ARCHIVES OF AMERICAN ART, <http://www.aaa.si.edu/collections/ymywha-arts-council-records-9559> (last visited Jan. 5, 2015).

Merchandise,” a store in which it sold useful things created by artists.<sup>166</sup> Warhol created a cologne or “toilet water” called *You're In/Eau d'Andy*, which was bottled in silver-painted Coca-Cola bottles and displayed in wooden Coca-Cola crates, which he offered for sale at the Museum of Merchandise.<sup>167</sup> The cologne was actually Cassell Silver Lining, repackaged in silver Coca-Cola bottles.<sup>168</sup>

Eight days after *You're In* went on sale, Warhol and the YW/YMHA received cease and desist letters from the Coca-Cola Corporation, informing them that the Coca-Cola logo and bottle were both protected by trademark.<sup>169</sup> Warhol stopped selling *You're In*, but he offered a free silver Coca-Cola bottle with a purchase of Cassell Silver Lining.<sup>170</sup>

## V. WARHOL V. OTHER ARTISTS

Notably, on the few occasions when Warhol was actually sued for infringement, the plaintiff was invariably another artist, not a company. For example, in June 1964, *Modern Photography* published a color photograph of hibiscus flowers made by Executive Editor Patricia Caulfield.<sup>171</sup> Warhol saw the photo and decided to use it as the basis for his series of *Flowers* paintings.<sup>172</sup> Apparently, Warhol agreed to license the image from Caulfield, but failed to pay the licensing fee.<sup>173</sup> Caulfield eventually filed an infringement action against Warhol, which Warhol settled.<sup>174</sup> As Ivan Karp explained:

Warhol had apparently agreed to pay the party a fee to use the flower picture as a source material only. The *Flowers* as he did them were entirely different. The fee was something like \$45 to get the rights to it. It was very reasonable. He agreed to do it, but apparently never sent the check, and several years later when his fame was very expensive, we received this document in the mail, and it was a lawsuit about the pilfering of the image. We compared the originals with what Andy had done, and I don't think that the case would ever have stood up in court

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166. SCHERMAN & DALTON, *supra* note 1, at 399.

167. *Id.* at 399-400.

168. *Id.* at 400.

169. *Id.*

170. *Id.*

171. Daniel McClean, *Piracy and Authorship in Contemporary Art and the Artistic Commonwealth*, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 311, 333 (Lionel Bently et al. eds., 2010).

172. John Wilcock, *Ivan Karp*, in THE AUTOBIOGRAPHY AND SEX LIFE OF ANDY WARHOL 92, 101 (Christopher Trella ed., 2010).

173. *Id.* at 100.

174. *Id.* at 101.

because they were obviously different. *How much did it cost you to settle?* Several thousand dollars.<sup>175</sup>

Photographer Charles Moore also filed an infringement action against Warhol, based on the use of Moore's photographs of Jackie Kennedy in Warhol's *Jackie* series, which was also settled.<sup>176</sup>

Apparently, these infringement actions and the threat of additional similar actions caused Warhol to change his approach to his artwork:

Andy realized that he had to be very careful about appropriating for the fear of being sued again. He opted to start taking his own photographs. His entry into photography vis a vis his creation of silkscreen paintings was done out of necessity.<sup>177</sup>

## VI. WARHOL'S THEORY OF INTELLECTUAL PROPERTY

In fact, Warhol was quite dismissive of intellectual property in general. While all of his pronouncements - public and private - should be taken with a generous lump of salt, he professed to disregard it entirely:

Paul Taylor: You've been in trouble for using someone else's image as far back as 1964. What do you think about the legal situation of appropriated imagery and the copyright situation?

Andy Warhol: I don't know. It's just like a Coca-Cola bottle when you buy it you always think that it's yours and you can do what ever you like with it. Now it's sort of different because you pay a deposit on the bottle. We're having the same problem now with the John Wayne pictures. I don't want to get involved, it's too much trouble. I think that you buy a magazine, you pay for it, it's yours. I don't get mad when people take my things.<sup>178</sup>

Warhol bristled at the suggestion that his use of copyrighted images and trademarked logos was in any way improper:

David Bourdon: You are doing something new in making exclusive use of second-hand images. In transliterating newspaper or magazine ads to canvas, and in employing silk screens of photographs, you have consistently used preconceived images.

Andy Warhol: I thought you were about to say I was stealing from somebody and I was about to terminate the interview.

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175. *Id.*

176. SCHERMAN & DALTON, *supra* note 1, at 238.

177. *Freezing a Motion Picture: An Interview with Gerard Malanga*, in ANDY WARHOL PHOTOGRAPHY 115, 116 (Hamburg Kunsthalle & The Andy Warhol Museum eds., 1999).

178. Paul Taylor, *Andy Warhol: The Last Interview*, in ANDY WARHOL: THE LATE WORK 120 (2004).

Bourdon: Of course you have found a new use for the preconceived image. Different artists could use the same preconceived images in many different ways.

Warhol: I just like to see things used and re-used. It appeals to my American sense of thrift.<sup>179</sup>

Most perceptively, Warhol implicitly recognized the “creativity effect” associated with intellectual property, which causes the creators of intellectual property to overvalue their creations:<sup>180</sup>

It's hard to be creative and it's also hard not to think that what you do is creative or hard not to be called creative because everybody is always talking about that and individuality. Everybody's always being creative. And it's so funny when you say things aren't, like the shoe I would draw for an advertisement was called a “creation” but the drawing of it was not.<sup>181</sup>

By contrast, Warhol maintained that he would “endorse anything for money” and explicitly conceived of his artistic practice as a business:

Business art is the step that comes after Art. I started as a commercial artist, and I want to finish as a business artist. After I did the thing called “art” or whatever it's called, I went into business art. I wanted to be an Art Businessman or Business Artist. Being good in business is the most fascinating kind of art. During the hippie era, people put down the idea of business - they'd say, “Money is bad,” and “Working is bad,” but making money is art and working is art and good business is the best art.<sup>182</sup>

The Andy Warhol Foundation has embraced this sentiment and liberally licenses Warhol's copyrights and trademarks.<sup>183</sup>

## VII. WARHOL & INTELLECTUAL PROPERTY DOCTRINE

It is unclear why Warhol chose to avoid or settle infringement actions, rather than litigate them. As a savvy businessman, he probably saw the cost of litigation as far higher than the cost of settling. But he probably also saw a strong likelihood that he would lose.

As noted above, many of Warhol's works incorporated elements

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179. I'LL BE YOUR MIRROR, *supra* note 130, at 7.

180. See generally Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011).

181. Interview, *Andy Warhol*, ARTNEWS, Nov. 1963, at 26.

182. WARHOL, *supra* note 40, at 92.

183. *Frequently Asked Questions*, ANDY WARHOL FOUNDATION FOR VISUAL ARTS, <http://www.warholfoundation.org/faq/index.html> (last visited Jan. 5, 2015).

that were *prima facie* copyright or trademark infringements. The whole point of Warhol's work was that it intentionally copied images and marks. Warhol's only viable defense was fair use.

In the 1960s, the fair use doctrine was quite narrow. For example, the Second Circuit defined fair use as "copying the theme or ideas rather than their expression."<sup>184</sup> And courts generally held that copying a substantial amount of a copyrighted work was not a fair use.<sup>185</sup> While courts generally held that fair use protected parody, because a parody is not a substitute for the original work, they still held that parodies could not use too substantial an amount of the original work.<sup>186</sup> As the Ninth Circuit explained: "The test of infringement is whether the work is recognizable by an ordinary observer as having been taken from the copyrighted source. Slight differences and variations will not serve as a defense."<sup>187</sup>

In other words, under the 1960s version of the fair use doctrine, Warhol probably would have lost an infringement action. His works were literal copies of pre-existing works, without explicit commentary or obvious parody. Any casual observer would recognize the copyrighted source. In fact, that was the whole point.

More importantly, Warhol's work was vilified by critics and misunderstood by the public. As noted above, Warhol's *Campbell's Soup Cans* were almost universally treated as a joke, until their iconic power became apparent. If Campbell had filed an infringement action against Warhol, no jury in the country would have ruled in Warhol's favor.

While the fair use doctrine is considerably broader today, it is unclear whether it would enable Warhol to prevail in an infringement action. As it stands, the fair use doctrine primarily protects "transformative" uses of copyrighted works.<sup>188</sup> But it remains unclear when a use is transformative and when it is not. Often, fact-finders seem to rely on the alleged infringer's ability to explain how it transformed the original work.

For example, in *Rogers v. Koons*, the Second Circuit held that Jeff Koons's use of a photograph made by Art Rogers as the basis for a sculpture was not a fair use, in large part because Koons failed to explain how he transformed Rogers's photograph.<sup>189</sup> By contrast, in *Blanch v.*

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184. *Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533, 537 (2d Cir. 1938).

185. *See Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962).

186. *See Berlin v. E. C. Publ'ns, Inc.*, 329 F.2d 541, 544-45 (2d Cir. 1964).

187. *Bradbury v. Columbia Broad. Sys., Inc.*, 287 F.2d 478, 485 (9th Cir. 1961).

188. *See generally Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

189. *See Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir. 1992).

*Koons*, the Second Circuit held that Jeff Koons's use of a photograph made by Andrea Blanch in a collage was a fair use, based primarily on Koons's explanation of how he transformed Blanch's photograph.<sup>190</sup>

And this dynamic persists. In 2008, Richard Prince created a series of paintings titled *Canal Zone*, which incorporated photographs made by Patrice Cariou into a collage.<sup>191</sup> Cariou filed an infringement action against Prince.<sup>192</sup> The district court held that Prince's use of Cariou's photographs was not a fair use, primarily because it was insufficiently transformative.<sup>193</sup> Among other things, the district court relied on Prince's testimony that his use of the photographs was not intended to express a particular message.<sup>194</sup> The Second Circuit ultimately reversed, holding that at least some of Prince's uses of Cariou's photographs were transformative.<sup>195</sup> The Second Circuit discounted Prince's testimony, finding that his collages "have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's."<sup>196</sup> However, the Second Circuit did not find that all of Prince's uses of Cariou's works were transformative as a matter of law and remanded the action for the district court to determine whether five of Prince's paintings were fair uses of Cariou's photographs.<sup>197</sup>

Commentators disagree as to whether Prince's use of Cariou's works were transformative fair uses. Several scholars filed an amicus brief on behalf of the Andy Warhol Foundation in *Prince v. Cariou*, arguing that Prince's use of Cariou's photographs was a transformative fair use, primarily because Prince transformed the meaning of the photographs.<sup>198</sup> But other scholars have argued that Prince's use of Cariou's photographs was not necessarily a transformative fair use, primarily because he used them for the same purpose as the original and failed to explain how he transformed their meaning.<sup>199</sup> Both are

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190. See *Blanch v. Koons*, 467 F.3d 244, 256-59 (2d Cir. 2006).

191. *Cariou v. Prince*, 784 F. Supp. 2d 337, 343-44 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

192. *Id.* at 342.

193. *Id.* at 352, 355.

194. *Cariou*, 784 F. Supp. 2d at 349.

195. *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013).

196. *Id.* at 708.

197. *Id.* at 712.

198. See generally Brief for The Andy Warhol Foundation For the Visual Arts, Inc. as Amici Curiae Supporting Appellants, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (No. 11-1197-cv), available at <http://cyberlaw.stanford.edu/files/publication/files/CariouVPrinceWarholFoundationAmicusBrief.pdf>.

199. See *Judicial Activism and the Return of Formalism in the Cariou v. Prince Decision*, CLANCCO (Apr. 29, 2013), <http://clancco.com/wp/2013/04/art-law-cariou-prince-copyright/>; see



reasonable interpretations of the fair use doctrine, as it stands.

But if Prince's use of Cariou's photographs was not a fair use, then none of Warhol's uses of copyrighted images and trademarked logos were fair uses. Whatever you think of the propriety and merit of Prince's use of Cariou's photographs, he changed them as least as much, if not more so, as Warhol changed his reproductions of Campbell Soup cans and Coca-Cola bottles. In addition, both Warhol and Prince resisted the demand to attribute a particular intention or meaning to their appropriation of existing images. If Prince's artistic practice is on the margins of fair use, so is Warhol's.

### VIII. THE WARHOL TEST

Some intellectual property scholars recognize that existing copyright doctrine is a poor fit for images, especially for images as they are used by artists.<sup>200</sup> Accordingly, scholars have argued that courts should abandon the doctrine of substantial similarity with respect to images and restrict copyright infringement of images to identical or near identical copies.<sup>201</sup> But even this revision of copyright doctrine may not spare Warhol's use of copyrighted images.

Constitutional law scholars generally use the *Brown* test as a rule of thumb for evaluating the legitimacy of a theory of constitutional interpretation. "MOST law professors agree that any serious normative theory of constitutional interpretation must be consistent with *Brown v. Board of Education* and show why the case was correctly decided."<sup>202</sup> The *Brown* test is effectively a meta-theory, which recognizes the principle that if a theory produces results inconsistent with fundamental normative values, the problem is with the theory, not the values.

Perhaps intellectual property scholars ought to adopt a similar "Warhol test" of theories of the fair use doctrine. Andy Warhol was one of the most influential artists of the 20th Century. He almost single-handedly transformed both the art world and the public perception of art. His work inspired legions of successors and is the subject of endless scholarly commentary. Warhol's work is precisely the kind of aesthetic innovation that copyright is intended to promote and the fair use doctrine

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also *Copyright Law – Fair Use – Second Circuit Holds That Appropriation Artwork Need Not Comment on the Original to be Transformative – Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), 127 HARV. L. REV. 1228 (2014).

200. See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 738-39 (2012).

201. *Id.* at 738.

202. See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1537 (2004).

is supposed to protect. It follows that a serious theory of the fair use doctrine ought to be consistent with Warhol's use of copyrighted images and trademarked logos and explain how they were transformative fair uses. If a theory of the fair use doctrine cannot account for and protect Warhol's artwork, the problem is with the theory, not with Warhol.