2008

Everything Is Transformative: Fair Use and Reader Response

Laura A. Heymann
William & Mary Law School, laheym@wm.edu

Everything Is Transformative: Fair Use and Reader Response

Laura A. Heymann*

INTRODUCTION

The Treachery of Images (1929), one of Surrealist artist René Magritte's most famous works, depicts an artistic rendering of a wood-and-plastic pipe. Underneath the image, Magritte has written "Ceci n'est pas une pipe" ("This is not a pipe"). And, of course, Magritte is correct: The image is not a pipe; it's a rendering of a pipe. As Magritte himself noted, "[C]an it be stuffed with tobacco, my pipe? No, it can't be, it's just a representation. So if I had written, 'This is a pipe' below the picture, I would have been lying."[1]

Like other artists of his genre, Magritte's aim was to challenge the conventions of classical art by disrupting the connection between image and reality. A viewer of classical art could readily assume that the model for a woman sitting on a divan was a real-life woman sitting on a real-life divan and that the goal of the artist was to make the painting as life-like as possible.[2] In *The Treachery of Images*, Magritte presents his challenge pointedly, reminding the viewer that, despite the conventions of artistic discourse ("What is that in the painting?" "It's a pipe."), art can never be more than a representation of an ideal object.[3]

But it would not necessarily have been a transgression for Magritte to have written "C'est une pipe" instead. Creators of artistic expression regularly engage in attempts to persuade their audience of the meaning of their art. If he had written

---

* Assistant Professor of Law, College of William & Mary Marshall - Wythe School of Law. Many thanks to Jane Ginsburg, Paul Goldstein, Trotter Hardy, Paul Marcus, Tony Reese, Rebecca Tushnet, the participants in the Fair Use Symposium hosted by the Kernochan Center for Law, Media, and the Arts, and the staff of the *Columbia Journal of Law and the Arts*, as well as to Paul Hellyer and Matthew Kertz for research assistance.

1. Stephanie Barron, *Enigma: The Problem(s) of René Magritte*, *in* MAGRITTE AND CONTEMPORARY ART 9, 17 (Stephanie Barron & Michel Draguet eds. 2006) (quoting interview by Claude Vial in RENÉ MAGRITTE, ÉCRITS COMPLETS 643 (1979)).

2. Harry Levin, *What Is Not Art?*, 2 POETICS TODAY 5, 5 (1980–1981) (noting that classical art "was to be judged primarily by the resemblance of the reproduction to its living model, as in the repeated metaphor of the mirror image, or the anecdote of the birds that pecked at the *trompe-l'oeil* grapes of Zeuxis").

3. As Foucault has noted, "classical painting [speaks]—and [speaks] constantly—while constituting itself entirely outside language . . . " MICHEL FOUCAULT, THIS IS NOT A PIPE 53 (James Harkness trans. 1983); *see also* Scott Durham, *From Magritte to Klossowski: The Simulacrum, between Painting and Narrative*, 64 OCTOBER 16, 28 (1993) ("The target of Magritte's mockery was that redundancy of caption and illustration by which the viewer of representational painting unreflectingly recognizes the resemblance of the sayable to the visible.").

"C'est une pipe," Magritte would have been asking us to interpret the object in his painting as carrying the same meaning as, first, the ideal of a pipe (in Sausserean terms, the signified) and then its referent — in other words, he would have offered not a statement of truth but an argument as to representation. *The Treachery of Images* thus operates in much the same way as do many examples of print advertising (a medium in which Magritte also worked[4]): It presents an image coupled with a statement about that image and asks the viewer to accept that statement. Those viewers who believe in the authority of the artist may accept the statement at face value, but it is always the viewer's choice to do so.

Magritte used the same technique but to opposite effect in *The Key of Dreams* (1930), in which he "mislabels" certain images (a painting of a shoe, for example, is labeled "La Lune" (the moon)), and *Personnage Marchant Vers l'Horizon* (1928–29), in which he labels shapeless blobs with the objects they "represent" (a cloud, the horizon, and so forth). In each of these works, Magritte explores the tension between image and language and the degree to which something represents because the viewer is told, implicitly or explicitly, that it does so. Unlike classical art, in which representation is assumed, Magritte starts from scratch, recognizing the need to make the interpretive argument to the viewer even in instances in which a default connection between representation and reality exists.[5] The reader of the text (I use both terms in their expansive sense) is the one who determines, ultimately, the meaning of the work.[6]

This interpretive move was more fully developed by Roland Barthes in his seminal work, "The Death of the Author," a mode of literary interpretation in which authorial intent is not irrelevant but is given no more privileged perch than any other interpretation.[7] In Barthes' view, a text "is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation," all centering on the reader, who is "simply that someone who holds together in a single field all the traces by which the written text is constituted."[8] Barthes' view, following New Criticism's privileging of the work as a source of

---

4. Michel Draguet, *The Treachery of Images: Keys for a Pop Reading of the Work of Magritte*, *in* MAGRITTE AND CONTEMPORARY ART, *supra* note 1, at 29.

5. Walter Benjamin has charted the same move in photography, in which photographers in the early 1900s created disjuncture between the realism of the medium and the subject. Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* 217 ILLUMINATIONS (1968).

6. Thierry de Duve, *Echoes of the Readymade: Critique of Pure Modernism* (Rosalind Krauss trans.), 70 OCTOBER 60, 76–77 (1994) ("'[T]he masterpiece is declared in the final analysis by the spectator [I]t's the viewers who make the pictures.'") (quoting Marcel Duchamp) (footnote omitted).

7. Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT 142 (Stephen Heath trans., 1977).

8. *Id.* at 148; *see also* RICHARD A. POSNER, LAW AND LITERATURE 211 (rev. ed. 1998) ("In the case of documents, whether literary or legal, 'interpretation' just means reading to make whatever kind of sense one happens to be interested in. This might coincide with the writer's intended meaning, but equally it might be a sense that the reader wants to impress on the writing for reasons remote from anything the writer had in mind."); Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 736 n.54 (1993) ("Textual identity turns on what the reader brings to the reading process, and because readers differ in their cultural, linguistic, and rhetorical background, texts will differ upon successive readings.").

meaning and consistent with what is often called reader-response theory,[9] recognizes that the interpretation of a work is contextual. It depends on how, and among whom, the work is situated, and, as Stanley Fish has noted, the tools a particular interpretive community brings to bear on a particular work.[10]

Although I have previously related Barthes' analysis to how we might consider the trademark-like function of authorship,[11] in this Essay, I suggest that this mode of interpretation might also inform our thinking about the boundaries of fair use in copyright law—specifically, the consideration of whether a claimed fair use is "transformative." U.S. copyright law grants the author of a work a certain bundle of rights, including the right to reproduce and distribute the work, subject to a countervailing right (or defense, depending on where one stands) of others to engage in "fair use" of the work. In *Campbell v. Acuff-Rose Music*, the Supreme Court, relying on a 1990 law review article by Judge Pierre Leval, suggested that an important factor to consider in whether a use was fair was whether the second use was "transformative"—whether it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[12] Although some uses are more appropriately considered with regard to whether they are "transformative" than others, the term has since become as fundamental a part of any fair use analysis as the statutory language itself.

Although some commentators have suggested that the test can be justified on economic grounds,[13] others have suggested that the concept of "transformativeness" should be abandoned altogether, modified in favor of asking whether the second use is "productive" or "complementary," or expanded to take account of speech-promoting activities.[14] The malleable nature of the term has not

---

9. For a brief overview of reader-response theory, *see* Peter J. Rabinowitz, *Reader-Response Theory and Criticism*, *in* THE JOHNS HOPKINS GUIDE TO LITERARY THEORY AND CRITICISM 606 (Michael Groden and Martin Kreiswirth eds. 1994). I do not mean, in this brief summary, to gloss over the variants of reader-response theory or the difficulties therein.

10. *See, e.g.*, STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 141–42 (1989).

11. Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 N.D. L. REV. 1377 (2005).

12. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

13. *See, e.g.*, William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 10 (2000) (noting that transformative use "involves some harm to the copyright holder that is more than offset by lower access costs and possible benefits to third parties").

14. *See, e.g.*, Jeremy Kudon, Note, *Form over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579 (2000) (proposing the incorporation of a functionality test); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) (proposing to define fair use by reference to identifiable social practices); Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1143 n.29 (1990) (suggesting that even "publication of material in a new 'package'" might well be a transformative use because the new package might serve a different purpose from the original); David Lange & Jennifer Lange Anderson, *Copyright, Fair Use and Transformative Critical Appropriation*, *available at* http://www.law.duke.edu/pd/papers/langeand.pdf (manuscript at 144) (suggesting that "transformation" should include "those entire takings that relocate an appropriated work in transformative settings"); Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 712–13 (1995) (noting that the productive use doctrine "discount[s] the benefits of access, . . .

escaped the notice of commentators; Diane Zimmerman has called it "a nice try at avoiding the fair use mess, but no cigar."[15] This Essay seeks neither to praise nor to bury the term. Rather, I offer a modest proposal: that if the transformativeness inquiry is to be retained as part of the fair use analysis, courts would do well to recognize that the descriptive breadth of the term highlights the amount of work it can do in any given case. For the kinds of copyrighted works for which it can be useful—typically expressive works with artistic "meaning"—the concept of transformativeness should be expanded to include uses of copyrighted works, such as satire, that are not now seen as transformative. But for other kinds of uses—reverse engineering of software or time-shifting of broadcast television programs, for example—transformativeness has no real purchase. And yet courts routinely assess the degree to which the defendant has transformed the plaintiff's work, seeking, like Goldilocks, to find the amount of transformativeness that is "just right."[16]

One way to refocus the inquiry, and to realign it with the ultimate question the fair use doctrine asks, is to borrow from Magritte and Barthes, and approach the question from the other end of the interpretive process. The statute directs courts to consider four factors in determining whether a given use is fair, the first of which is the "purpose and character of the use."[17] By tying the transformativeness inquiry to this factor, courts often, as the word "purpose" suggests, focus their analysis on the creator of the second work. The question then becomes not how the work is perceived or interpreted but what the author intended or hoped to achieve.[18] But the better test of whether a second work has contributed a "new expression, meaning, or message" to the first is to turn to the reader, the one who "holds together in a single field all the traces by which the written text is constituted."[19] Asking the question from the reader's perspective is more likely, I think, to determine whether the defendant's use promotes the delivery of new works to the

---

refusing to weigh them along with the benefits of creation" and thus "unnecessarily narrows the focus of inquiry under the first factor of section 107"); John Tehranian, *Whither Copyright?: Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. REV. 1201 (proposing registration of transformative works and an even division of profits); Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y U.S.A. 513 (1999).

15. Diane Leenheer Zimmerman, *The More Things Change the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A. 251, 268 (1998).

16. I am assuming for purposes of this Essay that the transformative analysis will continue to play a role in fair use analysis, even if, as Barton Beebe has suggested, that commitment may in practice be honored only in the breach. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PENN. L. REV. 549, 604 (2008) (noting that although the doctrine is often dispositive when it is used, "courts and commentators have exaggerated the influence of transformativeness doctrine on our fair use case law").

17. 17 U.S.C. § 107 (2000).

18. At least one court has suggested such, albeit in dicta. Educational Testing Serv. v. Stanley H. Kaplan, 965 F. Supp. 731, 736 n.6 (D. Md. 1997) (suggesting that analysis of the "purpose and character of the use" depends on the defendant's "goals and intent").

19. In this respect "transformativeness" might be considered to be a starting point, rather than an ending point, in the interpretive process. *See, e.g.*, William Safire, *On Language*, N.Y. TIMES, Mar. 2, 2008 (Magazine), at 20 (defining "transformative" as "having the power to transform") (emphasis omitted).

public, the ultimate goal of copyright law.[20]

But turning from the author to the reader is only the starting point—it does not tell us how we determine when something should be deemed to be transformative. Here, too, I propose that we reconceptualize the inquiry to take advantage of the insights of modern artistic interpretation. As Magritte reminds us, the concept of transformativeness in art has no real meaning because everything can be said to be transformative: A painting of a pipe is not a pipe; it is a copy of the ideal of a pipe and so transforms the "original."[21] The next painting of a pipe, even if it is copied from the first, transforms to some degree again, and so on forever. A viewer engages with the painting of a pipe in a slightly different way from her engagement with the object of a pipe, and will engage differently still with a second artist's incorporation of the painting into a new work.

In order for "transformativeness" to have any meaning, therefore (if only in the categories of cases for which it is most relevant[22]), it should not be a binary concept. Instead, the relevant question should be the *degree* of transformativeness—the amount of interpretive distance that the defendant's use of the plaintiff's work creates. If that distance is significant enough to create a distinct and separate discursive community around the second work, the defendant's use is more likely to be transformative (and, perhaps, fair). The focus is therefore not on the author's intent (although, like any statement of authorial interpretation, intent may be relevant evidence) but on the reader's reaction.[23]

This move from "purpose" to interpretation is by no means free from difficulty. A reader-centric mode of interpretation cannot wholly free itself from the influence

---

20. Although they are not unified in their approach, reader-response theorists focus on the interpretive effort as the source of meaning of a work. *See, e.g.*, Wolfgang Iser, *The Reading Process: A Phenomenological Approach*, *in* READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM CRITICISM 50, 54 (Jane P. Tompkins ed. 1980) ("The fact that completely different readers can be differently affected by the 'reality' of a particular text is ample evidence of the degree to which literary texts transform reading into a creative process that is far above mere perception of what is written.").

21. Levin, *supra* note 2 at 6 ("Mimesis can at best be approximation; consummation would mean the real thing in itself, rather than imitation in another medium.").

22. Paul Goldstein suggested in this Symposium's keynote address that fair use analysis has developed, and should develop, differently for different categories of uses. Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433 (2008).

23. In this sense, courts should engage in the same mode of interpretation as they do when they are trying to determine whether a trademark has acquired meaning beyond its dictionary meaning: determining not whether the trademark holder intends a separate meaning but whether the relevant consumer market understands such a meaning. *See, e.g.*, Co-Rect Prods., Inc. v. Marvy! Adver. Photography, Inc., 780 F.2d 1324, 1332 (8th Cir. 1985) ("Desires or intentions of the creator . are irrelevant. Instead, it is the attitude of the consumer that is important."); Seabrook Foods, Inc. v. Bar-Well Foods Ltd., 568 F.2d 1342, 1345 (C.C.P.A. 1977) ("Regardless of [the mark owner's] intentions, it is the association, by the consumer, of the design with [the mark owner] as the source that is determinative."); Plastilite Corp. v. Kassnar Imps., 508 F.2d 824, 827 (C.C.P.A. 1975) (holding that in determining distinctiveness, "it is the association of the mark with a particular source by the ultimate consumers which is to be measured — not [the applicant's] intent" in adopting the mark); *see also* Steven Wilf, *Who Authors Trademarks?*, 17 CARDOZO ARTS & ENT. L.J. 1, 10 (1999) ("The public forms an interpretive community whose reading of trademark symbolism casts it in the role of creating authorial-like meanings about the mark itself.").

of the author: An implicit statement by Andy Warhol that "this soup can is art" is likely to be reflected among readers to a greater extent than a similar statement by an unknown artist. Similarly, relying on reader response to allocate rights presupposes a greater role for readers in determining the scope of the derivative works right. One might be able to show that a film version of a popular novel gives rise—as a result of the creative choices made by the filmmaker—to a distinct discursive community around the film that differs from that surrounding the novel, and yet the novelist might justifiably claim the film to be an infringing derivative work.[24]

But even if perfect clarity of analysis cannot be achieved—perhaps no great surprise in a body of law that often asks jurors to determine whether the overall look and feel of two works is "substantially similar"—there is, I think, a benefit to approaching the transformativeness inquiry from a reader-centric position as opposed to an author-centric one: It reminds us that when we assess artistic meaning—and that is essentially what courts are doing in the fair use analysis, even if they make sure to proclaim that they are not assessing artistic merit[25]—we should keep in mind that meaning is contextual. And it therefore focuses the fair use inquiry not on the second-generation creator, who is often cast as either the hero or the villain in fair use stories, but on the reader (or viewer, or listener), who is, after all, claimed to be the beneficiary of the uses that the doctrine promotes.[26]

I. THE FAIR USE DOCTRINE AND TRANSFORMATIVENESS

The idea that a second author contributes something socially beneficial by building on a previous work instead of creating something out of whole cloth has a long pedigree. Although in some tension with the notion of the Romantic author at the center of U.S. copyright law who creates "original" works, the borrower-as-creator has been a constant presence in intellectual creation, both as a matter of historical description[27] and as a central figure in copyright law fair use commentary. Today's "remix culture" depends on her existence—and she, in turn,

24. On the creation of alternative versions of existing texts, *see* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOYOLA L.A. ENT. L.J. 651 (1997).

25. By focusing on whether the defendant's activities impermissibly interfere with the copyright owner's right to exploit the work, the fair use doctrine is at its heart about the reception of each party's activities by the consumer, at least in the cases in which the transformativeness inquiry is relevant. For an overview of aesthetic analyses and their relevance to copyright law, *see* Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

26. Others have written about copyright law from a reader/user perspective. *See generally, e.g.*, Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005); Laura R. Bradford, *Parody and Perception: Using Cognitive Research to Expand Fair Use in Copyright*, 46 B.C. L. REV. 705 (2005); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004); Joseph P. Liu, *Copyright's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003). For an argument that readers have an interest in stable meanings, *see* Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999).

27. *See, e.g.*, John T. Winemiller, *Recontextualizing Handel's Borrowing*, 15 J. MUSICOLOGY 444, 448–449 (1997) (describing instances of "transformative imitation" in various artistic forms in the seventeenth and eighteenth centuries).

depends on fair use.

Although the concept of fair use had been present in U.S. copyright jurisprudence before the 1976 Act—indeed, Congress indicated that section 107 was meant merely to codify existing practices[28]—the addition of section 107 to the Copyright Act channeled courts' consideration of fair use through four factors that courts are required to consider (although they are ostensibly free to consider other factors as well). The first of these factors, "the purpose and character of the use," received some consideration by the Supreme Court in *Sony* and *Harper & Row*, but these cases focused on the noncommercial nature of the use and the questionable acquisition of the copyrighted material, respectively.[29] With its 1994 decision in *Campbell v. Acuff-Rose Music*, however, the Court confronted the use of a copyrighted work that was claimed to be fair because it situated the work in a new context.[30] In considering whether 2 Live Crew's rap song "Oh Pretty Woman" might qualify as a fair use of Roy Orbison's song "Pretty Woman" (the rap version used the repeating hook and the first line from the Orbison song), the Court elaborated on the path that the analysis under the first fair use factor should take:

> The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] 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; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[31]

The Court derived the term "transformative" as a relevant criterion for determining fair use largely from an article by Pierre N. Leval, then a judge on the U.S. District Court for the Southern District of New York.[32] Judge Leval considered the first fair use factor to be asking the question of whether the defendant's use of the work was justified—in other words, did the use "fulfill the objective of copyright law to stimulate creativity for public illumination?"[33] The answer to this question, Judge Leval believed, turned on the extent to which the defendant's use was "transformative": whether it was "productive" and "employ[ed] the quoted matter in a different manner or for a different purpose from the original."[34] A use that merely "repackages or republishes the original" is likely

28. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

29. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

30. *Campbell*, 510 U.S. at 569.

31. *Id.* at 579 (internal citations omitted).

32. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). The term had been used previously by lower courts and in some of the briefs filed in *Campbell*.

33. *Id.* at 1111.

34. *Id.* Justice Blackmun had used the description "productive use" in his dissent in *Sony*. *Sony*,

not transformative, Judge Leval concluded; a use that "adds value to the original" by serving as the basis for creating "new information, new aesthetics, [or] new insights and understandings"[35] encourages the creativity that is at the heart of copyright law.

But when the Court incorporated this language into its opinion in *Campbell*, it engaged in a bit of subtle, but important, transformation itself. No longer was the focus on whether the use of the copyrighted work was "productive" or "add[ed] value to the original," or whether the use yielded "new information, new aesthetics, [or] new insights and understandings." In the Court's view, "transformation" meant that the work "add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[36] This language represents a subtle shift, to be sure, but one that—at least on its face—seems to encourage courts to focus on whether the second artist has added material to the first work to the exclusion of consideration of whether the artist has recontextualized the copyrighted work. In other words, *Campbell* suggests that the focus should be not on whether the defendant has transformed the meaning of the work but on what the defendant has done to the work—a shift in focus from reader interpretation to authorial activity. And perhaps this is not surprising given that section 107 itself directs courts to consider, as part of the first factor, the "purpose and character of the use"—the term "purpose" suggesting an inquiry into authorial intent.

We can see the result of this shift in *Campbell* itself. It is true that 2 Live Crew used the Orbison song as a starting point for developing its work; indeed, the group's manager had contacted Acuff-Rose to negotiate a payment for its use of Orbison's work. But beyond the repeated phrase "[adjective] woman," the first line of the song, and the recurring musical hook, 2 Live Crew did not actually incorporate much expression from its source material. (As the Court noted (quoting the district court), "the words of 2 Live Crew's song copy the original's first line, but then 'quickly degenerat[e] into a play on words, substituting predictable lyrics with shocking ones . . . [that] derisively demonstrat[e] how bland and banal the Orbison song seems to them.'")[37] This emphasis on how quickly 2 Live Crew departed from Orbison's material suggests that "transformativeness" depends to a significant extent on evaluating the second artist's creative activity: when and how strongly he asserts his own authorial presence.

But *Campbell* also provides a starting point for refocusing the inquiry. In considering whether a work claimed to be a parody of a copyrighted work might

---

464 U.S. at 478 (Blackmun, J., dissenting). Commentators have concluded that the "transformative use" test is more restrictive than Justice Blackmun's "productive use" test. *See, e.g.*, Kudon, *supra* note 14, at 591, 595.

35. Leval, *supra* note 32, at 1111. Alternatively, we might describe the new work as "recontextualizing" the former work. *See, e.g.*, Winemiller, *supra* note 27, at 450 ("Only rarely did [Handel] copy whole pieces or lengthy passages without significant alteration—and even then, such literal reuse can be distinguished from its source by its new context and its new text.") (describing Handel's pervasive borrowing from other composers).

36. *Campbell*, 510 U.S. at 579.

37. *Id.* at 582.

constitute fair use, the Court noted that the threshold question is "whether a parodic character may reasonably be perceived."[38] In part, this phrasing (through the use of the word "reasonably") invokes Justice Holmes's view, presented in *Bleistein*, that courts ought not to base their judgments on their assessment of the artistic merit of the challenged work.[39] But this standard also suggests (by describing the question in terms of perception rather than intent) that the inquiry is not whether the judge herself understands the work to be parody, or whether the artist intends the work to be parody, but whether the reasonable reader—"that someone who holds together in a single field all the traces by which the written text is constituted"—would so interpret the work.

II. REFOCUSING THE INQUIRY FROM AUTHOR TO READER

The shift in focus from author to reader and from intent to interpretation travels a familiar path. U.S. copyright law attempts to serve both authors and the public who engage with their works, and these interests are sometimes in tension. Although the law is economic in focus, and so not as author-centric as the Continental moral rights–based regime, it still speaks in terms of the rights of an "author" who receives certain legal rights as the result of creating a property-like entity called the "work." And despite the corporate nature—both historical and modern—of much authorship, copyright law rhetoric continues to elevate the ideal of the Romantic author as the source of creative production.

But as we are often reminded, this property-like regime is meant to exist in service to the public. Copyright is not a reward for creative production as such; it is an incentive to ensure that the public has access to works that would not otherwise exist.[40] The constitutional term limitation has been identified as one way the public benefit is ensured; fair use is another, although the robustness of the latter as a preservation of public benefit may depend on whether one views the doctrine as an affirmative right of readers or simply as an affirmative defense of litigants.

In resolving this tension, choosing on whom to focus—authors or readers—is important. One illustrative difficulty, as some commentators have suggested, results from the focus on the ill-defined "work" as the center from which all rights in the Copyright Act emanate.[41] A "work" is something originating from an

38. *Id.*

39. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes, J.) ("[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of a work, outside of the narrowest and most obvious limits.").

40. *See* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003).

41. Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 576 (2005) ("American copyright law is an enormous legal structure, full of defined terms, all built on one completely undefined term: the 'work.'"); Rotstein, *supra* note 8, at 795 ("Semantically, by reifying the text as 'work,' its 'use' becomes theft, with all the attendant moral connotations. By contrast, the interests at stake may seem far different if a copyright infringement case is viewed as a resolution of the competing right of speakers to engage in acts of speech—a more realistic view in light of contemporary literary thought.").

"author" and so occupies an exalted position rooted in the etymologically related concepts of authority and authenticity. But the work only becomes legally cognizable once it is fixed in a "copy"—no protection obtains for a work that remains in its author's head. And even once the work is fixed in a copy, it remains resistant to definition: Do a novel and its film version contain the same "work," despite their differences?[42] Copyright law's inability to easily answer this question might suggest some fundamental instability in its author-focused view.

Literary theory similarly challenges us to reconsider the foundational authority on which copyright law is constructed. Although their critiques were not directed at the way in which law encourages and protects artistic expression, Barthes' and Foucault's deconstructions of the author are particularly relevant to copyright's concerns, each recognizing the author as a locus of classification but not of meaning.[43] And Magritte's *The Treachery of Images* likewise reminds us that it is not artistic expression that can claim to be "authentic" or "original," because no matter how realistic a representation might be, its representational status necessarily implies the existence of some original outside the representation itself,[44] with "authenticity" therefore being no more than a measure of the distance between the representation and the original.[45]

The relationship of one copy to another can be described by using Foucault's terminology of *resemblance* and *similitude*. The copy created with nature as its model (as Magritte's portrait of a pipe) exemplifies resemblance: the painting is a copy striving (at least in classical art) to asymptotically approach its model. A secondary creation based on this first copy exemplifies similitude, where the comparison is across copies in a never-ending chain.[46] As Foucault wrote in his

---

42. Rotstein, *supra* note 8, at 727 (arguing that "current copyright dogma does not recognize that so-called 'works of authorship' are . unstable and dependent on context"). Rotstein uses this consideration primarily to propose a reformulation of the originality inquiry; the idea/expression inquiry; and the substantial similarity inquiry. *See id.* at 752 ("In *Gracen*, therefore, the derivative work, no matter how much like the underlying work, had a 'different meaning' from the original because it was framed in a distinct context."); *id.* at 776 (concluding that context and convention are useful in separating idea from expression); *id.* at 776–777 (same as to substantial similarity).

43. *See generally* Roland Barthes, *The Death of the Author*, *in* IMAGE, MUSIC, TEXT, *supra* note 7, at 142; Michel Foucault, *What Is an Author?* in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURAL CRITICISM 141 (Josué V. Harari ed. 1979). Julie Cohen has suggested that this rejection of the prominence of authorial creation is also a rejection of "the ideal of transformative use" because both "privilege romanticism." Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 367 (2005). I suggest in this Essay that a shift to reader response minimizes this difficulty.

44. This is true even if that "original" is an entirely fantastic world, existing only in the author's mind before its representation is fixed in a copy.

45. Translator's Introduction to FOUCAULT, *supra* note 3, at 7–8 ("The mystical, Platonic identification of words with the essences of things is what many of Magritte's canvases vigorously assault . . . . When we say that one thing resembles another, after all, we imply that the latter is somehow ontologically superior to, more 'real' than the former—the copy predicates its existence (*qua* copy) upon whatever it submissively imitates."); HUGH BARKER & YUVAL TAYLOR, FAKING IT: THE QUEST FOR AUTHENTICITY IN POPULAR MUSIC 59 (2007) ("[C]alling something 'authentic' is the easiest way to add value to low-culture products."); Benjamin, *supra* note 5, at 220 ("The presence of the original is the prerequisite to the concept of authenticity . . . . The whole sphere of authenticity is outside technical—and, of course, not only technical—reproducibility.").

46. Barton Beebe has identified the same distinction in trademark law. Barton Beebe, *Search and*

analysis of *The Treachery of Images*:

> To me it appears that Magritte dissociated similitude from resemblance, and brought the former into play against the latter. Resemblance has a 'model,' an original element that orders and hierarchizes the increasingly less faithful copies that can be struck from it. Resemblance presupposes a primary reference that prescribes and classes. The similar develops in series that have neither beginning nor end, that can be followed in one direction as easily as in another, that obey no hierarchy, but propagate themselves from small differences among small differences.[47]

Thus, as Magritte explicitly tells us, even what copyright law would call the "original" is itself a copy.[48]

If all artistic creation is in this sense a copy, then "transformativeness" has no inherent meaning: Everything is transformative, because all creative expression is, to a lesser or greater degree, representational. So the transformativeness inquiry is not really focused on whether a second instance of creative expression is transformative of the first in its appearance but on whether it is transformative in its meaning—that is, whether the reader perceives the second copy as signifying something different from the first. What the fair use doctrine should be concerned with, then, is not what an author does when she creates—whether the second author changes the first author's expression in some ascertainable or substantial way—but rather whether the reader perceives an interpretive distance between one copy and another (in other words, a lack of similitude). If distinct discursive communities can be identified surrounding each copy, that fact should lead us to think that the meaning of the expression has been transformed, even if the expression itself has not.

Most texts released to the public create, at the moment of their release, a discursive community around those texts. The community comprises those who engage with the work, whether deliberately or unwillingly, and the discourse is formed as that community begins to offer its interpretive views of that text.[49] Later

---

Persuasion in Trademark Law, 103 MICH. L. REV. 2020, 2028 (2005) (distinguishing "source distinctiveness" from "differential distinctiveness").

47. FOUCAULT, *supra* note 3, at 44; *see also* Silvano Levy, *Foucault on Magritte on Resemblance*, 85 MODERN LANGUAGE REV. 50, 50–51 (1990). (Levy contends that Foucault and Magritte were not entirely aligned on this point. *Id.* at 52 ("Magritte's conception of similitude refers to likeness in the widest sense and consequently spans both the 'similitude' and the 'resemblance' which are expounded by Foucault.")) Harkness notes that by "original," Foucault meant both first in time and generative. *See* FOUCAULT, *supra* note 3, at 62 n.2 (translator's footnote).

48. Durham, *supra* note 3, at 18 (using Magritte's *The Two Mysteries* (1966) to explain the simulacrum as "the copy of a copy" — the image of a pipe being traceable to "the mental image . . . of a pipe, and finally to the ideal or real pipe-in-itself"); *see also* Stephanie Barron, *Enigma: The Problem(s) of René Magritte*, *in* MAGRITTE AND CONTEMPORARY ART, *supra* note 1, at 18 ("One representation has no a priori status as more real than another.").

49. Stanley E. Fish, *Interpreting the* Variorum, *in* READER-RESPONSE CRITICISM, *supra* note 20, at 164, 182 ("Interpretive communities are made up of those who share interpretive strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intentions. . . . The assumption in each community will be that the other is not correctly perceiving the 'true text,' but the truth will be that each perceives the text (or texts) its interpretive strategies demand and call into being.").

discourses react to and build on these earlier discourses, either reinforcing the nature of that discourse or changing it over time, such that a text may receive a very different critical reception years after its creation from the one it enjoyed (or failed to enjoy) at the start. Thus, a discursive community exists—and may only exist—"in relation to a text."[50] Discursive communities need not exist only as formal or scholarly communities; they can be as geographically dispersed and temporally ephemeral as commenters on a blog or members of a fan club.[51]

If the goal is to move the focus in the transformativeness inquiry from author to reader and then to determine how those readers interpret the works at issue—whether a discursive community has been created around a work[52]—what evidence might courts consider? Evidence of critical reception—whether favorable or not—is particularly useful, but may not always be available in litigation, particularly when the plaintiff has moved to enjoin distribution of the work before it has been released to the public.[53] The second author's identity or statements about the second work (ideally not those inspired by the threat of litigation) may also be relevant, not because they are probative of the author's intent or purpose, but because an invitation to consider a work in a particular way from a particular artist

50. Leigh H. Holmes, *Claiming Grounds of Substance: Reading James Boyd White on the U.S. Constitution's Discursive Communities*, 21 RHETORIC SOC'Y Q. 59, 60 (1991). Holmes interprets James Boyd White's theory of constitutional interpretation as a similar "'conversational process,' one poised to redefine communities in individual cases of law." *Id.* at 66 (quoting JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 264 (1984)); *see also* Frederick J. Antczak, *Teaching Rhetoric and Teaching Morality: Some Problems and Possibilities of Ethical Criticism*, 19 RHETORIC SOC'Y Q. 15, 18 (1989) ("In these activities of interpretation and participation, to engage with and in a text is, at least for that time, to become morally different . . . ."); Rotstein, *supra* note 8, at 736 n.54 ("[T]he reader 'actualizes' the text, which comes into existence only when the reader engages (reads, sees, operates) the textual artifact (*e.g.*, book, film, computer program).") (describing the post-structuralist view of texts).

51. They are, therefore, different from (although related to) the "patterns" that Michael Madison suggests should form the basis of fair use analysis, in that Prof. Madison seems to focus on practices existing in communities separate from the act of interpretation. *See* Madison, *supra* note 14, at 1624 ("Generally speaking, patterns are structures—social structures and cultural structures—that involve relatively stable sets of beliefs and practices grouped around individuals, institutions, and (often) goals."); *see also id.* at 1675–76 (noting that appropriation artists, as "participants in an emergent practice," must "stake out new roles and practices for members of that practice" and "define their output with reference to those roles and practices" in order to provide the best evidentiary basis for deeming their work a fair use).

52. In discussing the way in which readers arrange themselves around a text, James Porter writes, "We may come from different academic disciplines—philosophy, art, English, or rhetoric—but at the moment we read Foucault on Magritte, we form a new discursive community, one which shares some of the governing principles of our separate disciplines, which is a conglomeration of them, but which in this new unity moves beyond them as well." James E. Porter, *This Is Not a Review of Foucault's* This Is Not a Pipe, 4 RHETORIC REV. 210, 216 (1986).

53. The focus on audience as evidence of transformativeness is not meant to suggest that all readers will play equal roles in this determination. Different readers may have different persuasive authority and so may be more instrumental in the formation of that community. The reaction of the art critic of the *New York Times* is probably more probative of the existence of a discursive community than, say, my opinion. *Cf.* JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 236 (1991) (suggesting that an appropriation artist "works its subversion primarily within the privileged space of the museum, where unauthorized borrowing can always be defended as parody or critical comment").

may well receive a response. And if no such evidence is available (because, for example, the plaintiff is seeking to enjoin initial distribution of the defendant's work), courts are well equipped to act as the "reasonable reader," assessing the question of artistic meaning that is necessary to answer the transformativeness inquiry. As Marcel Duchamp noted, "In the last analysis, the artist may shout from all the rooftops that he is a genius; he will have to wait for the verdict of the spectator in order that his declarations take a social value and that, finally, posterity includes him in the primers of Art History."[54]

III. WHAT IS "TRANSFORMATIVE"?

One might counter that a shift in focus from authorial intent to reader response risks undermining the fair use doctrine or copyright law more generally. Without a more anchored analysis of whether a use is truly transformative, an argument could be made to support the transformative nature of virtually any use. The community that arose around the use of Napster,[55] for example, might argue that it engaged with the songs its members downloaded not in the same way as typical listeners but in an ironic or subversive way, in which the song functioned solely as a means of civil disobedience rather than as a transmission of creative output. But uses such as these are not, I submit, appropriate subjects of the transformativeness inquiry. Transformativeness, as I have framed it, is concerned with whether the defendant's activities as a secondary author have a particular effect on the reader, not on the justification offered for the defendant's use absent a subsequent (and additional) audience. Thus, the "time-shifting" deemed a fair use in *Sony*[56] is not transformative even under this analysis because the discursive community who watches the program at a later time is presumptively the same community who would have watched it at the time of broadcast if it had been able to do so. The same is true of the copying of scientific articles for archival purposes deemed not a fair use in *Texaco*.[57] In neither case should the transformative inquiry be dispositive or even relevant—both cases are predominantly about displacing the copy in which the work is instantiated and, thus, are both better analyzed with respect to other fair use factors.[58]

But the shift in focus may well cause courts to rethink categories of expressive works that have occasionally been deemed not transformative enough:

54. Duve, *supra* note 6, at 83.

55. *See generally* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

56. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984).

57. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 931 (2d Cir. 1994).

58. The fourth fair use factor directs courts to consider whether the second work affects the potential market for the first work by acting as a substitute—in other words, whether audiences will purchase the defendant's work instead of the plaintiff's work because audiences perceive them to be substantially similar (and not because, for example, a critical review leads them to prefer the defendant's work). As Barton Beebe has shown, the first and fourth factors are together highly correlated with the ultimate outcome on fair use and highly correlated to one another. (Prof. Beebe notes that where the two factors point in different directions, the fourth factor appears to exert the stronger influence.) Beebe, *supra* note 16, at 584-85.

appropriation art, in which a work is incorporated wholesale or nearly so, with potentially little material added by the defendant, and satire, in which the target of the defendant's work is typically something other than the plaintiff's work. In both cases, a focus on the defendant's purpose yields a conclusion that the copyrighted work has not been "transformed" in the physical or legal sense, while a focus on reader response may well yield the opposite conclusion.

Appropriation art changes the meaning of a work (and thus engenders a new discursive community) by presenting the work in a different metaphysical frame. The move in the late nineteenth century to recognize photography as copyrightable, despite the argument that photographs, as mere representations of reality, were not original enough to warrant protection,[59] reinforces the idea that framing (in both the physical and the metaphysical sense) is relevant to building a discursive community. The Court in *Burrow-Giles* based its holding on the fact that, given the highly stylized portrayal of Oscar Wilde featured in the photograph, the photographer had contributed significant artistic expression in the form of subject arrangement, lighting, and setting. But as the courts now tell us, no such effort by the photographer is required: simply pressing the shutter button at a particular time and in a particular direction—the framing of existing reality as art—suffices.[60] Marcel Duchamp's *Fountain* (1917) (a "readymade" sculpture consisting of a urinal) and John Cage's *4'33"* (1952) (which transforms long periods of silence and ambient sounds into musical movements through the fixation of the "score," which instructs the orchestra to remain silent (*tacet*) in each movement) are natural heirs to this conclusion. In each case, the degree of transformativeness from the "original" (the subject of the photograph, the urinal, the silence) is minimal when considered in light of the artist's efforts, but much greater when considered in light of the separate discursive communities that form around each.[61] To the extent any discursive community surrounds a urinal in a restroom, it is a very different one from that surrounding the urinal in a gallery, and that may well be enough to consider the latter use transformative.[62] It is in such cases that reader response is

59. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56, 61 (1884).

60. *See, e.g.*, Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (noting that the film taken by Abraham Zapruder of the Kennedy assassination was copyrightable); *see also* GAINES, *supra* note 53, at 56 (contending that *Burrow-Giles*'s theorization of the author led to his eventual displacement).

61. Obviously, Duchamp and Cage were not incorporating copyrighted works, but the transformativeness question is parallel. Duve, *supra* note 6, at 64.

> With a gesture of exemplary economy, Duchamp went straight to the most primary convention, the most elementary . . . of all *modernist* artistic practice, namely that works of art are shown in order to be judged as such. . . . Behold a snow shovel. Either you judge that it's nothing, or that it's art. But once you judge it to be the latter, it carries, implicitly at least, a label saying: "This is art."

Id.; *see also* Thierry de Duve, *This Wouldn't Be a Pipe: Magritte and Marcel Broodthaers*, *in* MAGRITTE AND CONTEMPORARY ART, *supra* note 1, at 95, 101 ("Duchamp's gesture with the readymade was to reduce the artwork to the statement that names it as such.").

62. Levin, *supra* note 2, at 8 (distinguishing Andy Warhol's Campbell's Soup paintings ("crafted reproductions") from "everyday artifacts which are consecrated as art simply by isolating them from their humble utility"). Michael Madison very nicely highlights the issues such art raises in discussing the appropriation photography of Richard Prince. Posting of Michael Madison to madisonian.net,

critical: Contrast the appropriation art of Richard Prince[63] or Sherrie Levine,[64] whose art often consists simply of reframing the works of others, with the defendant's wholesale copying of public domain masterpieces in *Bridgeman*.[65] The discursive community formed around Prince's and Levine's work through gallery displays[66] and critical reception (whether positive or negative) indicates that their activities are transformative in the way fair use should care about; the lack of a separate discursive community around the latter indicates the opposite.[67]

Although this kind of transformation-through-framing is often the goal of "appropriation art," there is no reason why it should be so limited. Consider, for example, the book *The Education of Little Tree*, which purported to be the autobiography of a Native American youth named Forrest Carter. When it was first published, the book received strong critical support. It sold over half a million copies and was a mainstay on college reading lists for courses on Native American literature.[68] When the book was later revealed to be a work of fiction, written by Asa Carter, an avowed segregationist and supporter of George Wallace,[69] a separate discursive community formed around the cultural implications of Carter's pseudonymity. As a matter of reader response, then, the substitution of one author for another with respect to a textually stable work created great instability in that work's meaning, thus transforming the work from a culturally sensitive autobiography to a culturally insensitive act of duplicity.[70]

---

http://madisonian.net/archives/2007/12/07/copyright-infringement-as-an-intentional-tort/ (Dec. 7, 2007). *Compare* Peter Schjeldahl, *The Joker*, THE NEW YORKER, Oct. 15, 2007, at 90, 92 (writing that Prince's prints of Marlboro cowboy advertisements "stick us with the fact that those pictures are beautiful. Any opinions we may have about advertising, cigarettes, and the West founder in our visual bliss.") *with* Robert Hughes, *Mucking with Media: The Whitney Offers a Long Trek Through the Alien Goo*, TIME, Dec. 25, 1989, at 93 (decrying that Richard Prince's appropriations "are credited with value as art").

63. *See* Richard Prince Art, http://www.richardprinceart.com (last visited Apr. 24, 2008).

64. *See* Paula Cooper Gallery, Sherrie Levine, http://www.paulacoopergallery.com/artists/sle/sle.html (last visited Apr. 24, 2008).

65. Bridgeman Art Library v. Corel Corp., 25 F. Supp. 2d 421, 423 (S.D.N.Y. 1998).

66. Duve, *supra* note 61, at 102 ("[E]very last thing that has successfully introduced itself into a museum or art gallery bears an invisible label stating *This is art*. . . . [But c]oming from a museum, the statement "This is art" does not transform the thing presented into art; it cites it as already called art.").

67. Duve, *supra* note 6, at 90 ("Indeed, a reproduction of art is an object the artist hasn't made, from which its viewer does not draw a completed aesthetic experience, and which the museological institution neither valorizes nor legitimates as a work. A reproduction of art does nothing beyond declaring the existence, as art, of the work that is its referent."). For an interesting continuation of this theme, see the website After Sherrie Levine, which displays Michael Mandiberg's scans of Levine's photographs of Walker Evans's work "as a comment on how we come to know information in this burgeoning digital age." Michael Mandiberg, After Sherrie Levine, http://www.aftersherrielevine.com (last visited Apr. 24, 2008).

68. LAURA BROWDER, SLIPPERY CHARACTERS: ETHNIC IMPERSONATORS AND AMERICAN IDENTITIES 132 (2000); Henry Louis Gates, Jr., *"Authenticity," or the Lesson of Little Tree*, N.Y. TIMES BOOK REV., Nov. 24, 1991, at 1, 26.

69. *See, e.g.*, Dan T. Carter, *The Transformation of a Klansman*, N.Y. TIMES, Oct. 4, 1991, at A31; Allen Barra, *The Education of Little Fraud*, SALON, http://dir.salon.com/books/feature/2001/12/20/carter/index.html?source=search&aim=/books/feature; Gates, Jr., *supra* note 68, at 1.

70. I don't mean to minimize here the way in which this conception of transformativeness represents a break from what courts have traditionally considered. I will note only that, as I have

Two cases involving the appropriation artist Jeff Koons illustrate how the choice of approach can matter. *Rogers v. Koons* involved the use of a photograph by Art Rogers of a couple holding a litter of puppies in a sculpture by Koons.[71] The sculpture was part of Koons's "Banality Show" and so, in the spirit of the show's theme, highlighted the bland wholesomeness of the original photograph by adding comical touches to the sculpture (clown noses on the dogs, for example). The Second Circuit, in holding that Koons's work was not a fair use, devoted much time in the opinion to characterizing Koons as a bad actor—describing how he bought a notecard featuring the photograph, tore off the copyright notice, gave it to his team, and told them to copy it, emphasizing the importance of replicating certain elements.[72] Although the court accepted Koons's description of the genre in which he was working,[73] the court offered only two sentences on the critical reception or interpretive possibilities of the finished sculpture, noting only when it was displayed and that three copies of the work were sold.[74] The decision to focus on Koons's statements of intent[75] rather than evidence of contemporaneous reader reaction[76] drove the transformativeness analysis:

> If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use—without insuring

---

suggested, the inquiry is always contextual, such that these types of examples cannot categorically be ruled out.

71. Rogers v. Koons, 960 F.2d 301, 304 (2d Cir. 1992).

72. *Id.* at 305 (noting that Koons directed his artisans that the sculpture "must be just like photo—features of photo must be captured").

73. *Id.* at 309. As Louise Harmon points out, however, the court distanced itself from the interpretive process by prefacing its statements on appropriation art with phrases like "Koons argues" and "Koons states." Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 399 n.104 (1994).

74. *Rogers*, 960 F.2d at 305 ("When it was finished, 'String of Puppies' was displayed at the Sonnabend Gallery, which opened the Banality Show on November 19, 1988. Three of the four copies made were sold to collectors for a total of $367,000; the fourth or artist's copy was kept by Koons."). The court did note of Koons generally that his work had been exhibited in over 100 shows; that he was represented by galleries in New York, Chicago, and Cologne; that his works sell for over $100,000; and that he was "hailed by some as a 'modern Michelangelo,' while others find his art 'truly offensive.'" *Id.* at 304. The district court noted that the sculpture had "unquestioned status as a work of art," but did not explore this further, concluding that "considerations of commerce" outweighed its artistic value. Rogers v. Koons, 751 F. Supp. 474, 479-80 (S.D.N.Y. 1990).

75. *Cf.* Harmon, *supra* note 73, at 386 ("The fact is, we do not really know what either Art Rogers or Jeff Koons was up to. . . . Both men have created art objects which command our attention, and art objects which command our attention generally become orphans.").

76. *See, e.g.*, Arthur C. Danto, *The 1989 Whitney Biennial*, NATION, June 5, 1989, at 789 ("Koons has claimed this imagery as his own, has taken over its colors, its cloying saccharinities, its gluey sentimentalities, its blank indifference to the existence and meaning of high art, and given it a monumentality that makes it flagrantly visible, a feast for appetites no one dreamt existed and which the art world hates itself for acknowledging."); Adam Gopnik, *The Art World: Lost and Found*, THE NEW YORKER, Feb. 20, 1989, at 107 ("[Koons's] exhibition this winter at the Sonnabend Gallery shocked people who claimed not to have been shocked by anything since the early sixties, and caused a scandal of a sort that was (especially in the year of the seventy-fifth anniversary of the Armory show) almost touching in its re-creation of an earlier and more embattled era in the history of modern art."); David McCracken, *Cuteness with an Edge in Jeff Koons' Work*, CHI. TRIB., Dec. 16, 1988, at 75 (calling the show "indispensable").

> public awareness of the original work—there would be no practicable boundary to the fair use defense. Koons' claim that his infringement of Rogers' work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus cannot be accepted. The rule's function is to insure that credit is given where credit is due.[77]

Of course, Koons's sculpture—as the title of the show implies—relied on its audience's recognition that there was an underlying work.[78] While that recognition may not have been universal, a reader-focused analysis of transformativeness would have, at the very least, acknowledged its existence.

Contrast, however, the same court's approach in *Blanch v. Koons* fourteen years later, which, although still adhering to notions of authorial intent, adopted language indicating a focus on interpretation.[79] The case involved Koons's use of a photograph taken by Andrea Blanch of the lower part of a woman's bare legs crossed at the ankles. The photograph, which highlighted the metallic nail polish on the model's toes, was part of a six-page spread on metallic makeup. Koons incorporated the photograph into a painting featuring three additional pairs of women's legs. In holding that Koons's work constituted fair use, the Second Circuit devoted much more effort than it had in 1992 to describing the messages conveyed by each work, highlighting Koons's efforts to engage viewers in a different interpretive discourse from that of Blanch.[80] It may well be that the evolution in the court's assessment of transformativeness in the later case was largely a function of how the case was presented (or the reception of the court to a reader-response theory); indeed, the court in *Blanch* acknowledged that Koons's "clear conception of his reasons for using [the photograph], and his ability to articulate those reasons, ease[d the court's] analysis."[81] Courts, too, become members of discursive communities each time they take on a copyright case, even though they may not always realize it.[82]

Secondary uses characterized as "satire" might also be viewed differently depending on the approach the court takes. The *Campbell* Court distinguished "satire" from "parody" by concluding that while parody uses a copyrighted work to comment on the work itself, and thus engages in justifiable (and necessary) borrowing, satire "can stand on its own two feet and so requires justification for the very act of borrowing" to avoid a conclusion that the defendant has used the copyrighted work merely "to get attention or to avoid the drudgery in working up

---

77. *Rogers*, 960 F.2d at 310.

78. The court's concern that Koons had failed to give credit "where credit is due" was therefore more likely a concern that Koons had improperly suggested Rogers' approval of Koons's use. To the extent this is a valid concern, I have suggested that it is one better handled by trademark-related law. *See* Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 55–56 (2007).

79. Blanch v. Koons, 467 F.3d 244, 252 (2d Cir. 2006).

80. *Id.* at 252 ("'I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.'") (quoting Koons affidavit). The court also noted that Blanch did not contest Koons's explanation. *Id.*

81. *Id.* at 255 n.5.

82. *Cf.* Harmon, *supra* note 73, at 409 n.135 (noting that the judges in *Rogers* were not members of the same interpretive community as the expert witnesses offered by Koons).

something fresh."[83] A court that focuses on the defendant's purpose or intent in creating his work, therefore, might place an inordinate amount of weight on whether the second work falls into the reductionist category of "parody" or of "satire," such that whether or not the second work targets the copyrighted work may well be dispositive of the transformativeness question.

But a second work can make use of a copyrighted work in a pointed or humorous way that neither targets the copyrighted work nor is an attempt "to avoid the drudgery in working up something fresh." When a defendant recontextualizes an iconic work—in much the same way that Andy Warhol did with a Campbell's soup can—the iconic status of the copyrighted work itself is transformed: the audience, seeing the old work in the new, engages with the former work in a different way. If the copyrighted work goes unrecognized in the second work, it is much less likely that any transformation occurs, and the second artist might well be justly accused of borrowing to "avoid the drudgery in working up something fresh." It therefore should not matter whether the use of the copyrighted work is only so much as is needed to "remind the [defendant's] audience of the [plaintiff's] work" or whether the defendant uses the copyrighted work "as a target rather than as a weapon."[84]

In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, for example, the court concluded that the defendant's use of characters and rhyme schemes from the Dr. Seuss children's classic *The Cat in the Hat* as the basis for a humorous book about the O.J. Simpson trial was not transformative because it did not qualify as a "parody," as defined in *Campbell*.[85] A parody, the Ninth Circuit noted, is a creation in which the copyrighted work is the target of humorous criticism; a satire, by contrast, uses the copyrighted work to make fun of some other target.[86] Thus, because the author's goal in *The Cat Not in the Hat* was not to criticize or ridicule Dr. Seuss's work but to target the O.J. Simpson trial, the court held that there was "no effort to create a transformative work with 'new expression, meaning, or message.'"[87] A focus on the reader, however, might yield a different result on the transformativeness inquiry. Rather than asking whether the second author intended to ridicule the copyrighted work or something else, a court might consider how readers respond to the use of the copyrighted work by the defendant. In this case, the discursive community around the original work (*The Cat in the Hat*) is likely to be found quite distinct from the community that forms around *The Cat Not in the Hat*: the first is composed of parents and their children engaging with the work as a children's story; the second is composed of readers who are well familiar with the

83. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81 (1994).

84. *See* Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 71–72 (1992).

85. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

86. *Id.* at 1400 (citing *Campbell*). The *Campbell* Court did not, however, conclude that a satire could not be transformative; it merely concluded that satire may require additional "justification for the very act of borrowing." *Campbell*, 510 U.S. at 581; *see also* Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 984 (2004) (noting how courts have disregarded *Campbell*'s "nuanced reasoning" in favor of a strict parody/satire distinction).

87. *Dr. Seuss Enters.*, 109 F.3d at 1401.

onic meter and storyline from the children's classic and who appreciate (whether ey respond positively or negatively) the use of an iconic children's story to tell e tale of a gruesome murder, the trial of which might reasonably have been ıaracterized as a media circus. With such a use, the plaintiff's copyrighted work ıs indeed been "transformed."[88]

This is not to say that courts engage in the wrong approach consistently.[89] Some ıurts have phrased the transformative inquiry in language suggesting a focus on ader interpretation rather than authorial intent even as they retain the unhelpful ıcus on "parody."[90] Other courts seem to have recognized divergent discursive ɔmmunities in cases involving the release of completed standardized tests to ırents of special education students (as opposed to competitors or future test kers);[91] the use of copyrighted works as exhibits to legal filings;[92] and image-ısed search engines, in which the work displayed is engaged with not as a work of t but as a visual representation of a textual response ("this work responds to your ıery").[93] In each such instance, the reader responding to the defendant's use of e copyrighted work is a very different reader from the one engaging with the aintiff's version of the copyrighted work. Similarly, courts have correctly ɔclined to recognize as transformative works that engage with much the same

88. *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179 (C.D. Cal. 98), is another such case. The court in *Columbia Pictures* held that an advertising poster for the ichael Moore documentary *The Big One*, which mimicked the style and appearance of the advertising ster for *Men in Black* (featuring Will Smith and Tommy Lee Jones) merely used the latter "as a hicle to poke fun at another target—corporate America" rather than the *Men In Black* film itself. As a sult, the court held, no transformation had occurred, even though the entire point of the documentary ster was to reflect viewers' recognition of the then well-known *Men in Black* poster on which it was sed. *Id.* at 1188. The court in *Leibovitz* reached a different result only by characterizing the Leslie elsen film poster as commenting on the "seriousness, even the pretentiousness," of the original Demi oore *Vanity Fair* cover it copied. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114 (2d Cir. 98).

89. *See* R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & RTS 467 (2008). The court in *Bill Graham Archives*, for example, had the right idea, although it did t state its conclusion in specific reader-response terms. *See* Bill Graham Archives, LLC v. Dorling ndersley Ltd., 448 F.3d 605, 609–11 (2d Cir. 2006) (holding that Grateful Dead concert posters produced as part of timeline in biography were used differently from original advertising use). To the tent that courts such as that in *Bill Graham Archives* use the word "purpose" to suggest reader sponse, I have no issue, except for a desire for greater clarity in terminology.

90. *See, e.g.*, Abilene Music, Inc. v. Sony Music Enter., Inc., 320 F. Supp. 2d 84, 89-90 .D.N.Y. 2003) ("[T]he question is not whether Ghostface Killah intended *The Forest* purely as a rody of *Wonderful World*, but whether, considered as a whole, *The Forest* 'differs [from the original] a way that may reasonably be perceived as commenting, through ridicule, on what a viewer might asonably think' is the unrealistically uplifting message of *Wonderful World*.") (quoting Leibovitz v. ıramount Pictures Corp., 137 F.3d 109, 114 (2d Cir. 1998)) (citation omitted). Notably, the *Abilene* urt also credited the fact that reviews of the defendant's song discussed the defendant's use of the aintiff's work "in terms of its alteration of the original" and thus "evidence[d] the transformative ture of [the defendant's] use." *Abilene Music*, 320 F. Supp. 2d at 91. *But see id.* at 92 (in dicta, jecting as fair use the use of the plaintiff's song over images of war).

91. *See, e.g.*, Newport-Mesa Unified Sch. Dist. v. State of Cal. Dept. of Educ., 371 F. Supp. 2d 70 (C.D. Cal. 2005).

92. *See, e.g.*, Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982).

93. *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–20 (9th Cir. 2003).

discursive community as the original work: trivia books based on popular television shows[94] and marketing materials for a particular product,[95] to take two examples.

What, then, do we do with works that engage a distinct discursive community, but do so in a way that might traditionally be seen as within the province of the copyright owner's derivative works right?[96] A film version of a novel that highlights buried or unexplored themes, a rap version of a popular ballad,[97] and a cover or karaoke version of a hit song might be said to engage with an interpretive community distinct from that of the original, and yet all might also be said to be "a work based upon one or more preexisting works," including "any other form in which a work may be . . . transformed."[98] But none of these uses interferes with the first author's ability to create an adaptation that appeals to her original discursive community, a community that forms, in part, around the fact that the derivative work emanates from or is approved by the author.[99] As in both Koons cases and *Dr. Seuss*, reader recognition of the defendant's recontextualization mediates any potential conflict between a reader-response view of transformativeness and the derivative work right.[100] Richard Prince's photography is transformative precisely because viewers understand the presence of Jim Krantz's photography (aided considerably by the Guggenheim's decision to display

94. *See, e.g.*, Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132 (2d Cir. 1998) (trivia book based on *Seinfeld*); Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329 (S.D.N.Y. 1998) (trivia book based on *Star Trek*).

95. *See, e.g.*, Straus v. DVC Worldwide, Inc., 484 F. Supp. 2d 620 (S.D. Tex. 2007); Batesville Services, Inc. v. Funeral Depot, Inc., No. 1:02-cv-01011-DFH-TAB, 2004 U.S. Dist. LEXIS 24336 (S.D. Ind. Nov. 10, 2004). Translations and abridgments, both paradigmatic derivative works, would also fall into this category as presumably they seek to engage with audiences in much the same way as the original work. I recognize, however, that these lines cannot always be cleanly drawn. *See* Derek Bambauer, *Faulty Math: The Economics of Legalizing "The Grey Album,"* 59 Ala. L. Rev. 345, 396 (2008) (noting difficulties presented by "uncontrolled translations").

96. *See* Zimmerman, *supra* note 15, at 261 ("After all, transformation is the hallmark of a derivative work, too, and copyright owners are ordinarily allowed to decide by whom, whether and when such works can be produced."); Weinreb, *supra* note 14, at 1144 (giving as an example the Alfred Hitchcock film *Rear Window* and the story on which it was based). *But see* Lange & Anderson, *supra* note 14, at 151 ("[T]he question of derivative work status is of no greater consequence than would follow were the second work a simple copy. If critical transformation begets fair use, then the exclusive rights must gracefully step aside pro tanto.").

97. Although it found that 2 Live Crew's rap version of Roy Orbison's song might qualify as fair use if considered a parody of the copyrighted work, the Supreme Court instructed the district court to consider whether 2 Live Crew's song was a market substitute for a rap version of the Orbison work. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593–94 (1994).

98. 17 U.S.C. § 101 (2000).

99. I think it is therefore unclear whether the timing concern raised by some commentators is as strong as it might appear on its face. *See, e.g.*, Bambauer, *supra* note 95 (contending that competition in the derivative market is preferable). *But see, e.g.*, Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 392 (2005) ("If unexploited markets were left to fair uses by default, copyright owners would find themselves in a race to exploit their works in as many markets as possible to preserve their future rights.").

100. *See* Bradford, *supra* note 26, at 764 ("It may be that consumers are perfectly capable of contextualizing reworkings of expressive texts if they have sufficient information about the source."). Greg Lastowka has proposed adding a fifth factor to the statutory fair use provision that considers the extent to which the defendant has attributed the original work to the plaintiff. Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 84 (2007).

Prince's work);[101] likewise, a cover version of a popular song may well be transformative when listeners are familiar with the original and appreciate the interpretive shift.[102]

Does this then mean that the transformativeness inquiry is nothing more than a mirror of the fourth fair use factor, which considers "the effect of the use upon the potential market for or value of the copyrighted work"?[103] After all, the argument might go, the existence of a distinct interpretive community suggests the existence of a distinct market for the work. But while the transformative use may indeed give rise to a new market, it is most likely a market motivated by the defendant's contribution and not the plaintiff's.[104] The value of a Jeff Koons sculpture results from the viewer's desire to be part of the discursive community surrounding the sculpture, not from that viewer's membership (if it exists) in the community around Art Rogers' photograph. And similarly, as one court suggested in rejecting the plaintiff's assertion that the defendant's use of three lines of *What a Wonderful World* in a rap song was infringing, "it is hardly likely that Ghostface Killah's audience would be more attracted to a rap song because of its exploitation of a traditional pop song like *Wonderful World*."[105]

---

101. Among his other works, Richard Prince rephotographed a series of images Jim Krantz photographed for a Marlboro ad campaign. One report suggested that, as with Art Rogers, Krantz's primary concern was with confirming viewers' understandings of the transformative nature of the work. Randy Kennedy, *If the Copy Is an Artwork, Then What's the Original?*, N.Y. TIMES, Dec. 6, 2007, at E1, E5 (quoting Krantz as saying that he wanted viewers of Prince's work to know that "'there are actually people behind these images, and I'm one of them'").

102. *See, e.g.*, Lorne Manly, *Paul Anka Is Back, 63 and Swinging*, N.Y. TIMES, June 8, 2005, at E1 (describing Anka's swing interpretation of well-known rock songs); Keith Dixon, *Pat Boone, Minus Those White Bucks*, N.Y. TIMES, May 4, 1997, at 20 (describing Pat Boone's covers of heavy metal songs). The current compulsory licensing scheme for musical compositions, 17 U.S.C. § 115 (2000), might be interpreted as acknowledging the transformative nature of such uses.

Linda M. Scott suggests a similar type of transformative use: the evening programming of the cable television channel Nick at Nite, which schedules classic television programs in "tongue-in-cheek juxtaposition," with each program "promoted in a fashion that points up the contradictions between past and present." Linda M. Scott, *Spectacular Vernacular: Literacy and Commercial Culture in the Postmodern Age*, 10 INT'L J. RES. MARKETING 251 (1993). Even though each program is (presumably) presented in its entirety, the contextualization transforms the meaning by engaging a new discursive community. Although this use would, I submit, qualify as "transformative," that need not mean that the use is fair; a compulsory license might likewise be appropriate here.

103. 17 U.S.C. § 107 (2000).

104. *Cf.* Comedy III Prods, Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 407 (Cal. 2001) ("[I]n determining whether a work is sufficiently transformative [in a right of publicity case], courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity.").

105. Abilene Music, Inc. v. Sony Music Enter., Inc., 320 F. Supp. 2d 84, 92 n.3 (S.D.N.Y. 2003); *see also, e.g.*, Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After* Campbell, 7 COMM'N. L. & POL'Y 1, 20 (2002) ("[T]he chances that consumers will substitute an opportunistic and vacuous 'satire' of the Simpson case for a beloved children's classic are minimal.") (discussing *Dr. Seuss Enters. v. Penguin Books USA, Inc.*).

CONCLUSION

By suggesting that virtually everything is transformative, I do not mean to suggest that nothing is infringing. Not every use of preexisting material will engender a sufficiently discrete interpretive community, as I have suggested above; moreover, the transformativeness analysis is but part of the overall fair use inquiry. Indeed, the focus on transformativeness from the reader's perspective might well serve to remind us of the limits of transformativeness as a key to fair use, and might reduce the amount of rote recitation that seems to occur in the case law.

The change in focus may well have other salutary effects. As one commentator has suggested, courts' focus on the author's activities may change how artistic works are created in the first place.[106] The artist concerned about landing well within the fair use safe harbor may shape her work to highlight the preexisting work or to make her work more humorous than critical in nature, anticipating a court that is looking for obvious signs of parody. The author-centered approach creates similar difficulties for the second artist who does not assert his presence in a language judges are willing or able to understand—the appropriation artist and the satirist, to take two examples—who may then feel trapped between their honest artistic impulses and the seeming rigidity of the existing legal framework. And it moves the inquiry outside the litigation context, where artists may seek to offer self-serving statements of "intent" and "purpose."

But if shifting the transformativeness inquiry to consider reader response rather than author activity expands the types of uses that are deemed transformative, that may not be a bad thing. The goal of copyright law, after all, is to "promote the Progress of Science,"[107] and facilitating dissemination of multiple meanings of the same work can achieve that goal as well as the dissemination of multiple works. As Jane Tompkins has noted, the lesson to be drawn from reader-response criticism is that a text "is what it does"[108]—its meaning, in other words, comes not from what the author has constructed but from its ability to effect a certain kind of change in its reader. Thus, if we are to retain transformativeness as a relevant answer, then, let us at least ask the right question—not "Who is speaking?"[109] but "Who is listening?"

106. Zahr Said Stauffer, *"Po-mo Karaoke" or Postcolonial Pastiche? What Fair Use Analysis Could Draw from Literary Criticism*, 31 COLUM. J.L. & ARTS 43, 55–56 (2007).

107. U.S. CONST. art. I, § 8, cl. 8.

108. Jane P. Tompkins, *The Reader in History: The Changing Shape of Literary Response*, *in* READER-RESPONSE CRITICISM, *supra* note 20, at 201, 224 (emphasis omitted).

109. Indeed, "[w]hat difference does it make who is speaking?" Foucault, *supra* note 43, at 160.