Raw Materials, Creative Works, and Cultural Hierarchies
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In disputes involving creative works, courts increasingly ask whether a preexisting text, image or persona has been used as “raw material” for new authorship. If so, the accused infringer becomes shielded by the fair use doctrine under copyright law or a First Amendment defense under right of publicity law. Although copyright and right of publicity decisions have begun to rely heavily on the concept, neither the case law nor existing scholarship has explored what it actually means to use something as “raw material,” whether this inquiry adequately draws lines between infringing and non-infringing conduct, or how well it maps onto the expressive values that the fair use doctrine and the First Amendment defense aim to capture.

This Article reveals serious problems with the raw material inquiry. First, a survey of all decisions invoking raw materials uncovers troubling distributional patterns; in nearly every case the winner is the party in the more privileged class, race or gender position. Notwithstanding courts’ assurance that the inquiry is “straightforward,” distinctions between raw and “cooked” materials appear to be structured by a range of social hierarchies operating in the background. Second, these cases express ethically troubling messages about the use and reuse of text, image and likeness. The more offensive, callous and objectionable the appropriation, the more visibly “raw” the preexisting material is likely to be. Given the shortcomings of the raw material inquiry, this Article argues that courts should engage more directly with an accused infringer’s actual creative process and rely less on a formal comparison between the two works in dispute.

INTRODUCTION ......................................................................................................................... 2
I. THE RISE OF RAW MATERIALS .......................................................................................... 8
   A. RAW MATERIAL SCHOLARSHIP .................................................................................... 9
   B. RAW MATERIAL DOCTRINE .......................................................................................... 14
      1. Copyright, Fair Use, and Raw Materials ........................................................................... 14
      2. Right of Publicity, First Amendment, and Raw Materials ............................................. 21
II. A RAW DEAL? ..................................................................................................................... 27
   A. DISTRIBUTIVE CONCERNS ........................................................................................... 27
   B. THE RELATIONAL NATURE OF RAW MATERIALS ................................................... 35
   C. COOKING, SKEW(ER)ED .............................................................................................. 44
III. FROM RAW TO COOKED: A CREATIVE PROCESS APPROACH .................................. 50
CONCLUSION ................................................................................................................................ 65
Introduction

Visitors to the Whitney Museum in Manhattan this summer will encounter a tremendous range of iconic pop culture imagery: a granite statue of Popeye, a stainless steel Bob Hope, an Incredible Hulk piano organ, Jayne Mansfield embracing the Pink Panther, the Trix rabbit ogling a spoonful of whipped cream, a Cabbage Patch Kid in a bear costume, and a porcelain sculpture of Michael Jackson and his pet chimpanzee. Such imagery forms a substantial component of the Whitney’s largest-ever retrospective, dedicated to the controversial and wildly successful artist Jeff Koons. This 128-piece, three-and-a-half decade journey through Koons’ career provides visitors a kitschy, colorful, and astronomically expensive insight into the characters and imagery that form the “raw material” for much contemporary creative expression. And in doing so, the exhibition also provides a window into the recent history of fair use, IP, and creative expression.

Intellectual property law often has struggled to appreciate the relationship between cultural artifacts and creative expression. Hulk, M.J., Popeye and friends represent not just a rich source for Koons’ cultural commentary, but also a deep thicket of copyright, trademark and right of publicity protections. Indeed, one exhibition hall at the Whitney is dedicated to Koons’ 1988 “Banality” show, a series of porcelain and polychrome wood sculptures that produced three separate, successful copyright lawsuits against Koons by authors of the appropriated work. For many scholars, this trio of losses

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demonstrated the pressing need for intellectual property laws to better recognize and preserve the “raw materials” for creative expression. By locking up the use of preexisting films, books, photographs, and songs, IP protections made it significantly more difficult for artists to speak or otherwise comment on the ubiquitous images and texts they encountered on a daily basis.

In the past decade, the legal landscape for creative appropriation has shifted dramatically for Koons and other prominent artists. In disputes involving creative works, courts now explicitly ask whether a preexisting text, image or persona has been used as “raw material” for new authorship. If so, the accused infringer becomes shielded by the fair use doctrine under copyright law or a First Amendment defense under right of publicity law. Under this rapprochement, the Second Circuit allowed Koons to use a copyrighted photo of a woman’s legs as “raw material” for his “commentary on the social and aesthetic consequences of mass media.” Other recent examples of “raw materials” include photographs of Jamaican Rastafarians collaged into a series of paintings by famous artist Richard Prince, street art incorporated into a concert video montage for the band Green Day, and the persona of drug kingpin Ricky Ross adopted by the rapper Rick Ross.

Although “raw materials” have come to occupy a central position in recent case law and have figured prominently in IP scholarship, neither courts nor scholars have

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3 See literature discussed infra Part I(A).
4 Blanch v. Koons, 467 F.3d 244, 247 (2d Cir. 2006).
5 Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013).
6 Seltzer v. Green Day, 725 F.3d 1170 (9th Cir. 2013).
systematically addressed what it actually means to use a protected work or image as “raw material.” For instance, is “use as raw material” an appropriate concept around which to draw lines between infringing and non-infringing conduct? Does the raw material metaphor adequately map onto the expressive, creative activities that intellectual property scholars have sought to protect? Raw material doctrine may be good for famous artists like Jeff Koons and Richard Prince, but what does it do for everyone else?

This Article addresses these questions and reveals serious problems with protecting creative expression through a raw materials framework. First, a survey of the copyright and right of publicity cases that have actually searched for a raw/cooked relationship between plaintiff and defendant reveals troubling distributional problems. Although theses cases certainly broaden fair use and free speech rights for prominent artists like Koons and Prince, lesser-acclaimed defendants have not fared nearly as well. Moreover, the “raw materials” that have been sufficiently transformed consist largely of images of women and people of color. With very few exceptions, the winners in each of these cases—whether plaintiff or defendant—occupy a more privileged socioeconomic, race and/or gender position than do their opponents.

Second, these cases express ethically troubling—even if arguably lawful—messages about the use and reuse of text, image and likeness. The more offensive, callous and objectionable the appropriation, the more visibly “raw” the preexisting

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8 For example, courts have not recognized sufficient “use as raw materials” where two street artists painted over photographs of Sex Pistols front man Sid Vicious, see Morris v. Guetta, 2013 WL 440127 (C.D. Cal. Feb. 4, 2013 or where a portrait artist made charcoal drawings of the Three Stooges, see Comedy III Prods. V. Saderup, 25 Cal. 4th 387 (2001). See generally infra, notes [].
material is likely to be. This vision of appropriation, moreover, presents a distorted understanding of the cultural processes at hand. The defendants in these cases often comment on and incorporate preexisting images and texts not because they are “raw”—unworked objects awaiting cultural meaning—but precisely because they are so deeply infused with meaning that they can serve as a vehicle for personal development and/or broader culture dialogue.

This Article shows that recent defendant-friendly developments in copyright and right of publicity law have an overlooked dark side. The raw materials cases disproportionately privilege the ability of famous artists to freely use preexisting imagery as part of their creative processes, when it is comparatively poorer artists and authors that are least likely able to afford a license or court-ordered damages. Although a few scholars have acknowledged that analogizing intellectual products to physical raw materials might devalue those behind the seemingly “raw” and overprotect those who “cook” it, this Article is the first to examine the actual operation of raw materials in practice. As raw materials begin to occupy a prominent role within IP jurisprudence, it is vital to understand why the doctrine of raw materials may not achieve the speech-protective motivations behind it. This Article argues that courts should move away from trying to identify a formal raw/cooked relationship between two works and instead more directly focus on the artistic, creative and expressive processes that these doctrines are meant to capture.

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9 See, e.g., Rebecca Tushnet, My Fair Ladies: Sex, Gender, and Fair Use in Copyright, 15 AM. U. J. GENDER SOC. POL’Y & L. 273 (2007) (showing that a use is more likely to be fair where it sexualizes the preexisting content, in particular where it sexualizes women’s bodies)

Part I provides an overview of efforts by IP scholars to better protect the raw materials for artistic labor, creative expression and cultural participation. It will then show how courts increasingly have incorporated a “raw material” inquiry into key copyright and right of publicity defenses.

Part II will show the problems with both the application and conceptualization of these raw materials defenses. It argues that these problems can be attributed in large part to the mismatch between the purportedly “straightforward” inquiry about whether plaintiff’s work or likeness is a “raw material” and the inherently relational nature of a raw/cooked framework employed by the court. As scholars in a range of disciplines have shown, it is impossible to identify something as “raw” without some preconceived notion of the practices that “cook” it. The “raw” moniker calls forth some process of purification, progress or transformation into some higher cultural state, and it is therefore not terribly surprising that the results of the raw materials inquiry will correlate with a range of cultural hierarchies along the lines of class, race and gender. Moreover, calling material “raw” erases the often-considerable human labor and cultural meaning behind it, thereby eliding the ethical implications of mining and commodifying the cultural commons. Rather than viewing copying and transformation as rich practices of cultural dialogue and semiotic engagement, the courts appear to sanction a vision of appropriation that more closely resembles the heavily-criticized trope of the romantic, individual author who creates something from nothing.

12 See Madhavi Sunder, *The Invention of Traditional Knowledge*; see generally RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams, eds. 2005)
Part III provides some potential solutions. First, even just ditching the “raw material” metaphor stands to do some important work. By adopting alternate metaphors, IP courts, scholars and advocates can more directly speak about inspiration, dialogue and personal development without having to slot such practices into the structured hierarchies of raw and cooked. Second, this Part seeks to reorient the fair use and free speech inquiries away from a formal comparison of the works themselves and back towards an inquiry into both defendants’ motivations and the communities of practice in which their creative activities are situated. To do so, it puts forth a “creative process” test, which asks whether the defendant intended to comment directly on the copyrighted work, used the copyrighted work as a vehicle for broader social commentary, or otherwise used the work as a bona fide aspect of his or her creative process. To the extent older fair use decisions were criticized for requiring a very narrow, specific intent to comment on the preexisting work itself, a more expansive focus on the defendant’s intentions is both better suited to judicial competencies, less likely to chill artistic expression, and less prone to hinge on the social status of the parties. If a defendant ultimately is found liable for infringement, the creative process test better ensures that it is due to some foreseeable, significant harm to the plaintiff’s economic interests and not their failure to meet some unstated threshold of artistic merit.

The Koons retrospective at the Whitney both highlights how far fair use has come and captures the limits of its reach. Though clearing the way for grand, multi-million dollar displays of creative appropriation, recent expansions of defendant-friendly IP doctrines have produced troubling asymmetries in the process. Fair use and the First Amendment defense hold the potential to protect everyone’s ability to comment on,
critique and engage in sustained dialogue with their culture, but the search for “raw materials” channels their protections primarily to those creators who already occupy a privileged cultural position. Fully extricating social hierarchy and implicit biases from judicial decision-making is far beyond the scope of this Article, but it does show that social inequalities can be exacerbated by a judicial inquiry that poorly maps onto the normative values behind it. The Article seeks to head off the recent and accelerating embrace of a “raw materials” inquiry and to ask better questions about the diversity of creative processes that fair use and the First Amendment have the potential to protect.

I. The Rise of Raw Materials

The concept of “raw materials” has figured prominently in intellectual property scholarship and case law over the past three decades. As copyright protection dramatically expanded in length, scope, and available remedies, and as trademark, patent, trade secret and right of publicity laws all expanded in some significant manner, both scholars and courts have recognized the potential minefield that exists for downstream authors, inventors and investors trying to lawfully engage in innovative pursuits. For example, a documentary filmmaker looking to include video clips from the 1960’s civil rights movement, a visual artist looking to criticize the materialism of early

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13 See, e.g., Copyright Term Extension Act (extending the standard copyright term to life of the author plus seventy years)
14 See, e.g., Digital Millennium Copyright Act (prohibiting the circumvention of anti-copying and access protection technologies); Copyright Act of 1976 (eliminating registration as a prerequisite to copyright protection); Berne Convention Implementation Act (eliminating notice requirement as a prerequisite); Uruguay Rounds Agreement Act (restoring copyright protection to many foreign-authored works that had already entered the public domain in the United States).
15 See, e.g., Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 (raising the maximum statutory damages award for willful infringers to $150,000 per infringed work)
16 See [article/lawsuit on MLK estate; http://www.huffingtonpost.com/2013/08/28/i-have-a-dream-copyright_n_3829901.html]
1990s fashion magazines, or a young computer programmer looking to develop the next great app all face the uncertain prospect of the rights holder’s veto. In such circumstances, it is problematic to think of IP-protected subject matter solely as a rights holder’s “property” and not to simultaneously acknowledge that preexisting images, texts and ideas often serve as the broader public’s “raw materials” for creativity and innovation. Although scholars have invoked this “raw material” metaphor in all areas of IP, this Article will focus specifically on copyright and right of publicity law, where the metaphor has also emerged in recent years as an increasingly important doctrinal consideration. This section will first turn to raw material scholarship and then track the emergence of raw materials in recent copyright and right of publicity case law.

A. Raw Material Scholarship

A tremendous amount of IP scholarship in the last several decades has challenged the expansionist tendencies of the IP regimes; this has been particularly true in copyright scholarship. The dominant narrative underlying expansionist copyright legislation has

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17 See, e.g., Rogers v. Koons, Hoepker v. Kruger
18 See, e.g., http://www.theguardian.com/technology/appsblog/2011/jul/15/app-developers-withdraw-us-patents
19 Right of publicity is a creature of state statutes and/or common law and generally proscribes the use of a person’s name, image or likeness for purposes of trade or advertising without authorization. [See McCarthy]. Under federal trademark law, plaintiffs may also challenge the commercial use of their name or likeness, but such a claim requires additionally showing both a likelihood of confusion as to source, sponsorship or endorsement and that plaintiff’s identity has commercially significant “secondary meaning.”[See McCarthy]
20 There has been, however, a scattering of raw material analogies in trademark and patent law decisions. See, e.g., [CITE]. There have also been copyright decisions that use the phrase “raw material” in a more colloquial sense. See, e.g, Edward B. Marks Music Corp. v. Colorado Magnetics, Inc., 497 F.2d 285, 288 (10th Cir. 1974) (referring to musical compositions as the “raw material” for a sound recording); Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1097 (2d Cir. 1982) (referring to a collection of film clips as “raw material” for a biographical film about Charlie Chaplin).
21 Right of publicity scholarship, although far less extensive than copyright scholarship, has similarly critiqued the over-propertization of a person’s identity, questioning whether such a right is necessary to incentivize investment in one’s celebrity persona and arguing that the right can serve to undermine First Amendment protections for truthful speech. See, e.g., Eugene Volokh, Freedom of Speech and the Right of
been that more copyright protections financially incentivize more investment in creative activity, but scholars have attacked this more-is-better understanding through a number of different frameworks. The concept of “raw materials” has emerged in several of them.

For example, many scholars have argued that a narrow focus on financial incentives endangers a robust, unencumbered public domain from which all future creators can draw without seeking advance permission. Professor James Boyle, a leading proponent of “cultural environmentalism,” has frequently analogized the public domain to a supply of cultural raw materials:

> [I]nformation products are often made up of fragments of other information products; your information output is someone else’s information input. These inputs may be snippets of code, discoveries, prior research, images, genres of work, cultural references, or databases of single nucleotide polymorphisms—each is raw material for future innovation. Every increase in protection raises the cost of, or reduces access to, the raw material from which you might have built those future products.  

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*Publicity, 40 Hous. L. Rev. 903 (2003); Diane Leenheer Zimmerman, Money as a Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights, 50 B.C. L. Rev. 1503 (2009); Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 81 Cal. L. Rev. 125 (1993). To the extent discussion of “raw materials” emerge in right of publicity scholarship, however, it has generally been confined to commentary on the cases discussed in Part II(B).


Professor Jessica Litman has similarly emphasized, “the public domain is the law’s primary safeguard of the raw material that make authorship possible.” Jessica Litman, The Public Domain, 39 Emory L.J. 965, 967 (1990); see also Niels B. Schaumann, An Artist’s Privilege, 15 Cardozo Arts & Entm’t L.J. 249 (1999) (“The principal copyright difficulty posed by art is that art sometimes uses (and in the case of appropriation art, always uses), as its raw material, images "works"-already in existence.”); Maureen A. O’Rourke, Property Rights and Competition on the Internet: In Search of an Appropriate Analogy, 16 Berkeley Tech. L.J. 561, 584 (2001) (“The Copyright Act seeks to solve the public goods problem inherent in the provision of information by granting authors certain exclusive rights in their "original works of authorship." These rights are not absolute, however, because further progress depends on the ability of second generation creators to utilize raw material without incurring liability for infringement.”); Dawn C. Nunziato, Justice Between Authors, 9 J. Intell. Prop. L. 219, 269 (2002) (“By means of limitations on the term and scope of copyright protection, and the exceptions to authors’ copyright monopoly carved out by the fair use doctrine, copyright law preserves for future authors the raw materials necessary to facilitate the creative enterprise in the long run.”); RICHARD A. POSNER, LAW AND LITERATURE 394 (1988) (“[A]s ideas in literature . . . comprise a quite limited stock of situations, narratives, and character types, to recognize property rights in them would . . . deplete the stock of literary raw material available for later writers without a fee.”); Elizabeth L. Rosenblatt, A Theory of IP's Negative Space, 34 Colum. J.L. & Arts 317, 335 (2011) (observing that carve-outs from IP protection presume that “intellectual property protection not
Copyright ensures the supply of such raw materials not just by denying protection to abstract ideas and historical facts but also by permitting reuse of completed works of authorship via the fair use doctrine. Boyle argues that “one important purpose of ‘fair use’ law is to make sure that future creators have available to them an adequate supply of raw materials,” and warns that “too many ‘incentives’ could convert the public domain into a fallow landscape of private plots.”

Another group of scholars have gone farther and argued that mass culture images, videos and music provide the lingua franca for today’s networked society and that copyright law often impedes meaningful cultural participation through proscribing sharing and reuse of creative works. As explained by Professor Jack Balkin, “[m]ass media products—popular movies, popular music, trademarks, commercial slogans, and commercial iconography—have become the common reference points of popular culture . . . they have become the raw materials of the bricolage that characterizes the Internet.”

24 JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLLENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 38 (1996); see also James Boyle, A Politics of Intellectual Property: Environmentalism for the Net?, 47 DUKE L.J. 87, 106 (1997) (“Future creators need some raw material to work with, after all. Fair use is one important method of providing that raw material.”). Another way of approaching these public domain concerns would be to think of creative raw materials as a form of “intellectual infrastructure” whose widespread availability enables later productive use; later creators work from an infrastructure of “raw” materials to produce “cooked” creations that might themselves be eligible for IP protection. See Peter Lee, The Evolution of Intellectual Infrastructure, 83 WASH. L. REV. 39, 44 (2008) (“The process of drawing from ‘raw’ infrastructure to produce refined applications can be analogized to ‘cooking’—value enhancement through human manipulation.”).
25 Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. REV. 1, 12 (2004) (emphasis added); see also Peter Jaszi, Is There Such a Thing as Postmodern Copyright?, 12 Tul. J. Tech. & Intell. Prop. 105, 112-13 (2009) (“Conventionally, copyright law has given a special place of pride to work that originates . . . as a result of that mind’s interaction with the raw materials of nature. The result, of course, is that merely ‘derivative works’—those that take preexisting culture for their material—have been systematically undervalued in the copyright scheme.”); Julie Cohen, Copyright Property in a Post-Industrial Economy: A Research Agenda, 2011 Wis. L. Rev. 141, 148 (2011) (“Today, mass culture provides much of the raw material for cultural
Balkin puts forth a vision of democratic culture in which “everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture,” and one of the key ways for individuals to do so involves “appropriating from mass media, commenting on them, criticizing, them, and above all, producing and constructing things with them: using them as building blocks or raw materials for innovation and commentary.” Strong intellectual property protections, however, threaten to give mass media the power to veto such robust engagement with pop cultural raw materials.

Raw materials have also figured in discussions of John Locke’s labor theory of property and how it should be understood in the context of intellectual property. Locke’s argument that a property right inheres in the exercise of labor has long been cited as a justification for granting copyright to authors as recognition for their annexation of facts, ideas, stories and imagery from the public domain. According to Professor Robert Merges, “for IP the public domain serves the same function as the state of nature in experimentation and self-definition that myths, legends, and other public-domain subject materials formerly provided.”

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26 Id. at 4.
27 Id. at 10-11.
28 Id. at 16-18. For similar concerns, see in particular LAWRENCE LESSIG, FREE CULTURE (2004) and LAWRENCE LESSIG, FUTURE OF IDEAS (2001).
30 See generally, e.g., Carys J. Craig, Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright, 28 QUEEN’S L.J. 1 (2002); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993) [cite more for background]
Locke’s property theory. It supplies the raw material, the thick scattering of unowned resources, that surrounds the individual creator.” Although Locke’s theory has often been invoked to support strong authorial rights, Locke himself recognized that overly protecting the fruits of one author’s labors can impede the labor of future authors. According to Professor Lior Zemer, Locke rejected the notion that new value “can be created in a vacuum, without any mental or intellectual raw materials.” Although not expressly using the term “raw,” Professor Wendy Gordon has similarly observed in relation to Locke’s sufficiency proviso, “Barring audiences from using the works they encounter can leave them without a key condition needed for their own creative expression . . . [and] risks leaving a new creator without ‘enough, and as good’ access to the material of her life.”

Within each of these three frameworks, the raw material concept has been invoked to limit the scope of copyright protection and to serve as a proxy for the interests of future users and re-users of copyrighted works. Understanding copyrighted works as raw materials emphasizes the costs that copyright imposes on future cultural participants.

31 ROBERT MERGES, JUSTIFYING INTELLECTUAL PROPERTY 36 (2011). Michael Madow has critiqued this the labor theory justification in the context of the right of publicity. See Madow, supra note [], at 191 (“The work of ‘fashioning the star out of the raw material of the person’ is done not only by the star herself, but by an army of specialists -- consultants, mentors, coaches, advisors, agents, photographers, and publicists.” (quoting RICHARD DYER, HEAVENLY BODIES at 5))

32 Lior Zemer, The Making of a New Copyright Lockean, 29 HARV. J. L. & PUB. POL’Y 891, 936 (2006); see also id. at 942 (“What [the mind] does, Locke claims, is join together ideas that are already in its possession separately, so as to make a single new idea of out of them: the former serve as raw material or data for the latter…”); see also William Fisher, Theories of Intellectual Property, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 186 (Stephen R. Munzer ed., 2001) (suggesting that one potential category of “raw materials” envisioned by Locke included “our cultural heritage—the set of artifacts (novels, paintings, musical compositions, movies, etc.) that we ‘share’ and that gives our culture meaning and coherence”).

33 See Locke, Two Treatises, book II, § 27 (“[N]o man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.”).

and recognizes that the publication of a book, movie, song, or photograph is just one step in an ongoing process of cultural activity. Invoking “raw materials” underscores that creative works are not just goods; they are resources. Ultimately, by understanding new creative works as nascent raw materials, IP scholars envision a copyright system that is more balanced, democratic, and ideologically pluralistic than the system we have inherited. As the following sections will demonstrate, however, the doctrine of raw materials is only a partial step in this direction.

B. Raw Material Doctrine

Just as copyright scholars invoked the concept of raw materials in order to highlight often-overlooked values of free speech and cultural engagement within the copyright system, courts addressing copyright and right of publicity claims have increasingly employed “raw materials” as a heuristic for better calibrating financial incentives against the expressive interests of the broader public. Raw materials transitioned from scholarship to doctrine first as a consideration in copyright’s fair use defense before occupying a central place in right of publicity law’s First Amendment defense. The following subsections will survey the recent case law that expressly incorporates the search for “raw materials” into these defenses.

1. Copyright, Fair Use, and Raw Materials

Copyright’s fair use doctrine, codified at Section 107 of the Copyright Act, is an express limitation on the copyright owner’s exclusive rights to reproduce, distribute, publicly perform, publicly display, and prepare derivatives of their original works of authorship. When someone makes an unauthorized use of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or
research,” such use may be exempted from liability upon a case-by-case consideration of four factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the potential market for the copyrighted work. Despite the rather murky, open-ended nature of these factors and the fact-specific nature of the inquiry, the Supreme Court has referred to the fair use doctrine as one of copyright law’s “built-in First Amendment accommodations” due to its “latitude for scholarship and comment.”

After facing repeated difficulty applying the four fair use factors, in 1990 then-district judge Pierre Leval published an influential law review article proposing a “cogent set of governing principles” to help guide the fair use inquiry. Of greatest relevance here, Judge Leval viewed the first fair use factor—the purpose and character of use—as presenting the question of whether the accused infringer’s had an adequate justification for his or her use. This question “lies at the heart of the fair user’s case”; it is “the soul of fair use.” To decide whether a use was sufficiently justified, Judge Leval proposed asking “whether, and to what extent, the challenged use is transformative.”

According to Judge Leval:

If . . . the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

37 Id. at 1111.
38 Id. at 1116.
39 Id. at 1111.
40 Id. (emphasis added).
Assessing transformative use—i.e. “use as raw material”—ultimately involves asking whether the use “advances knowledge and the progress of the arts or whether it merely repackages, free riding on another’s creations.” Judge Leval listed several among “innumerable” types of uses that might satisfy the transformative use inquiry: criticizing the quoted work, exposing the character of the original author, proving a fact, summarizing an idea argued in the original, parody, symbolism, and “aesthetic declarations.”

Four years later, the U.S. Supreme Court in *Campbell v. Acuff-Rose* expressly adopted Judge Leval’s transformative use test in a decision that has largely been hailed as an important expansion of the fair use defense. Although the Court did not use the “raw materials” phrase, it cited to Judge Leval for the following observation:

> The central purpose of this investigation [under the first fair use factor] is to see . . . 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.”

The Court further noted that a finding of transformative use under the first factor would likely drive the analysis of the remaining fair use factors. On the facts before it, the

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41 Id. at 1116.
42 Id. at 1111.
43 [cite]
45 The second factor, which generally gives greater protection to expressive works, would generally be unhelpful in addressing parodic uses. Id. at 586. The third factor, which assesses the amount and substantiality of the portion used, must be assessed in relation to the defendant’s parodic purpose and the amount of material that needs to be borrowed in order to sufficiently convey the parodic message. Id. at 588 (“When parody takes aim at a particular original work, the parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable.”). The fourth factor, which assesses the effect on the market for the original work, recognizes that a copyright owner does not have a monopoly right over criticism and commentary about their works. Id. at 592 (“[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes
Court held that the popular rap group 2 Live Crew had asserted a viable fair use defense where it had made a transformative, parodic use of the Roy Orbison song “Oh, Pretty Woman.” 2 Live Crew replaced many of the naïve and wholesome lyrics of the original with “degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.” The 2 Live Crew song “was clearly intended to ridicule the white-bread original” and “reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences.”

The Supreme Court did not mention “raw materials,” but a number of subsequent decisions in Judge Leval’s home circuit expressly linked “raw materials” to the new doctrine of transformative use. Although in the years following Campbell a number of defendants successfully asserted transformative use defenses, several courts strictly limited transformative use to instances where the defendant directly commented on or parodied the copyrighted work, notwithstanding Judge Leval’s broader set of envisioned uses. For instance, in Castle Rock Entertainment v. Carol Publishing, the Second Circuit held that the Seinfeld Aptitude Test—a trivia quiz book devoted exclusively to testing its readers’ recollection of scenes and events from the fictional television series

such uses from the very notion of a potential licensing market.”). In other words, it doesn’t consider transformative markets.

46 Id. at 583.
47 Id. at 582.
49 See also Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (“Although The Cat NOT in the Hat! does broadly mimic Dr. Seuss' characteristic style, it does not hold his style up to ridicule. The stanzas have “no critical bearing on the substance or style of” The Cat in the Hat. Katz and Wrinn merely use the Cat's stove-pipe hat, the narrator (“Dr.Juice”), and the title (The Cat NOT in the Hat!) “to get attention” or maybe even “to avoid the drudgery in working up something fresh.” (quoting Campbell, 510 U.S. at 580)). For criticism on this distinction between parody and other potential transformative uses, such as satire, see Bruce P. Keller & Rebecca Tushnet, Even More Parodic Than the Real Thing: Parody Lawsuits Revisited, 94 Trademark Rep. 979 (2004).
Seinfeld”—was not a transformative use. According to the court, “[t]he book does not contain commentary or analysis about Seinfeld, nor does it suggest how The SAT can be used to research Seinfeld; rather, the book simply poses trivia questions.” Even though the defendant had authored 643 trivia questions, drawn from 84 of the 86 episodes that had aired, these scenes, episodes and dialogue apparently were not “used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.”

The major turning point for “raw material” copyright doctrine arrived with the Second Circuit’s 2006 decision in Blanch v. Koons, which embraced an understanding of commentary that was more capacious than just intent to parody or direct commentary on the original. In Blanch, the court held that Jeff Koons had made a fair, transformative use of a photograph in Allure magazine depicting a woman’s legs and sandals. In his piece “Niagara,” Koons collaged this photograph together with three other sets of women’s legs, dangling over a plate of pastries, against a landscape background. According to the court, “When, as here, the copyrighted work is used as “raw material,” . . . in the furtherance of distinct creative or communicative objectives, the use is transformative.” Koons employed Blanch’s image “as fodder for his commentary on the social and aesthetic consequences of mass media” and not to merely “repackage” it for similar purposes as Blanch.

50 Castle Rock Entm’t, Inc. v. Carol Pub. Grp., Inc., 150 F.3d 132, 135 (2d Cir. 1998). A number of courts interpreted Campbell to require a direct parody of the copyrighted work and rejected a fair use defense where the defendant made a broader, satirical use of the copyrighted work. See, e.g., Dr. Seuss; Keller & Tushnet
51 Id. at 143.
52 Id. at 135.
53 Id. at 142.
Just in the past year, both the Second and Ninth Circuits have found other artistic, appropriative uses to be use “as raw material.” In *Cariou v. Prince*, acclaimed visual artist Richard Prince incorporated photos taken by Patrick Cariou of Jamaican Rastafarians into a series of thirty paintings, titled Canal Zone, which was exhibited in 2008 at the Gagosian Gallery in Manhattan.\(^{54}\) The district court rejected Prince’s argument that Cariou’s photos were sufficient “raw ingredients” for a finding of fair use; according to Judge Batts, “Prince did not intend to comment on any aspects of the original works or on the broader culture.”\(^{55}\) On appeal, however, the Second Circuit emphasized, “The law imposes no requirement that a work comment on the original or its author in order to be considered transformative.”\(^{56}\) What matters instead is whether the original work “is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding.”\(^{57}\) Even though Prince did not “go to great lengths to explain and defend his use as transformative,” that fact was “not dispositive. What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”\(^{58}\) Accordingly, after “looking at the artworks and the photographs side-by-side,” the court concluded that at least twenty-five of Prince’s paintings “manifest[ed] an entirely different aesthetic from Cariou’s photographs” and were “transformative as a matter of law.”\(^{59}\) The court, however, remanded as to the remaining five paintings, which the

\(^{54}\) 714 F.3d 694 (2d Cir. 2013). Some of the paintings took enlarged, cropped, and tinted versions of Cariou’s photographs and collaged and painted elements on top of them. Other paintings used the photographs as collage elements alongside other appropriated photos. See id. at 669 n 2.


\(^{56}\) Cariou, 714 F.3d at 706.

\(^{57}\) Id.

\(^{58}\) Id. at 707.

\(^{59}\) Id. at 706-707.
court found “do not sufficiently differ” from the originals to make a finding of fair use as a matter of law.\textsuperscript{60}

Four months later, the Ninth Circuit held that the popular rock group Green Day also had made a transformative use of a preexisting image. In \textit{Seltzer v. Green Day}, Green Day featured plaintiff’s drawing of a screaming, contorted face—called \textit{Scream Icon}—in a backdrop video for its 2009-2010 concert tour.\textsuperscript{61} During the song “East Jesus Nowhere,” the video depicted the accelerated appearance and disappearance of various images on a graffiti-filled wall, including three defaced images of Jesus Christ. Throughout the song, the \textit{Scream Icon} remained unmoved at the center of the wall, unmodified except for a large, red spray-painted cross over the center of the screaming face. According to the court, “Green Day used the original as ‘raw material’ in the construction of the four-minute video backdrop. It is not simply a quotation or a republication; although Scream Icon is prominent, it remains only a component of what is essentially a street-art focused music video about religion and especially about Christianity.”\textsuperscript{62}

Although courts have become more willing to recognize that world famous visual and recording artists use copyrighted works as raw materials, not all secondary creators have benefited from this shift. In \textit{Warner Bros. Entertainment v. RDR Books}, for example, J.K. Rowling overcame a fair use defense asserted by the author of the “Harry Potter Lexicon”—an exhaustive encyclopedia of the spells, characters and creatures in

\textsuperscript{60} Id. at 710-11.
\textsuperscript{61} 725 F.3d 1170 (9th Cir. 2013).
\textsuperscript{62} Id. at 1176.
the Harry Potter books. Although creating an encyclopedia was a “transformative purpose,” it was not “consistently transformative” and “often lacking restraint” in using Rowling’s original expression. In two 2013 district court cases, photographer Dennis Morris overcame fair use defenses asserted by artists that had manipulated his photographs of the punk rock band the Sex Pistols. In *Morris v. Guetta*, street artist Thierry Guetta, a.k.a. “Mr. Brainwash,” created seven artworks based on a photograph of front man Sid Vicious, in which he altered the photo’s colors, added bright splashes of paint, and/or inserted sunglasses, backdrops, moles and wigs. Unlike in *Blanch*, where “Koons took raw material and used it for a new purpose,” Guetta’s artworks “remain at their core pictures of Sid Vicious.” The court reached a similar conclusion in *Morris v. Young*, where the artist Russell Young made a series of prints that altered the color, texture and “grittiness” of a concert photo he found online. In all but one of the prints, the defendant added “only marginal artistic innovation” to the photos. In all these cases, copyrighted expression was the starting point for the defendants’ works, but the defendants nonetheless failed to do enough to allow courts to treat them as raw materials.

2. Right of Publicity, First Amendment, and Raw Materials

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63 575 F.Supp.2d 513 (S.D.N.Y. 2008)
64 Id. at 551 (“[Secondary authors] should not be permitted to “plunder” the works of original authors without paying the customary price, lest original authors lose incentive to create new works that will also benefit the public interest.” (internal citations omitted)).
66 Id. at *6.
67 Id. at *8.
69 In one print “White Riot + Sex Pistols,” Young juxtaposed a Union Pacific logo and the words “White Riot” in graffiti over the copyrighted photo. The court found a triable issue as to whether this work was transformative.
Right of publicity laws generally prohibit the use of a person’s name, voice, or likeness for purposes of trade or advertising without authorization. Just as copyright protections can butt up against the ability of downstream authors’ ability to incorporate preexisting materials into creative works, the right of publicity on its face would appear to prohibit using someone’s likeness in, for example, a truthful documentary or in comedic parodies like The Simpsons, Family Guy, South Park or Saturday Night Live. Recognizing the potential clash with free speech principles, courts have developed various First Amendment defenses to right of publicity claims.

In 2001, the California Supreme expressly adopted copyright law’s transformative use test, including the “raw materials” concept, in order to help courts resolve the tension between the right of publicity and the First Amendment. In Comedy III, the registered owner of all rights related to the Three Stooges asserted a right of publicity claim against portrait artist Gary Saderup, who had sold prints and t-shirts featuring his charcoal

70 The right of publicity largely is a creature of state common law and/or statutory law, depending on the jurisdiction, and the specific elements vary somewhat from state-to-state. See generally McCarthy at [cite]. Section 43(a) of the federal Lanham Act does allow a variant of the right of publicity, if the plaintiff can show that his or her identity has commercially significant meaning and that the challenged use is likely to cause confusion as to source, sponsorship or endorsement. See McCarthy at [cite]. These “secondary meaning” and confusion requirements—derived from trademark law—are generally absent from state right of publicity laws.
71 Howell, Huskey, Candelaria v. Spurlock
72 See, e.g., Burnett v. Twentieth Century
73 The U.S. Supreme Court has held that right of publicity laws are not prohibited by the First Amendment, at least where an individual’s entire performance is rebroadcast without authorization. See Zacchini v. Scripps.
74 Some states look at whether defendant’s “predominant purpose” in using plaintiff’s likeness was expressive or whether it was to gain a commercial advantage. See, e.g., Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003). Other states impose more categorical exemptions for expressive or “newsworthy” activities so long as there is a legitimate connection to plaintiff’s likeness and the use is not an advertisement in disguise, see, e.g., Montgomery v. Montgomery, 60 S.W.2d 524 (Ky. 2001); Messenger v. Gruner + Jahr Publ’g (N.Y. 2000). Claims brought under the Lanham Act are generally barred where the use of a celebrity’s likeness bears some “artistic relevance” to the underlying expressive use and is not explicitly misleading as to source or sponsorship. See, e.g., Brown v. Electronic Arts, Inc., 724 F.3d 1235 (9th Cir. 2013); Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003).
75 Comedy III Prods. v. Saderup, 21 P.3d 797 (Cal. 2001). At least one prior decision, however, had used the “raw material” concept more colloquially. [Cardtoons (1996)]
The court observed that the Stooges invested years of “creative labor” in order to “create considerable commercial value” in their distinctive identities, but it acknowledged that celebrity images can serve as “important expressive and communicative resources.” The court recognized that copyright law faced similar tensions and, after discussing *Campbell*, concluded that the “inquiry into whether a work is “transformative” appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment.” It formulated the transformative use inquiry as follows:

[T]he inquiry is whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.

Under this test, Saderup’s drawings contained “no significant transformative or creative contribution” and were “literal, conventional depictions” whose value derived primarily from the fame of the Three Stooges. The court contrasted Saderup’s drawings with Andy Warhol’s silkscreens of Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. According to the court, “Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself.”

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76 Id. at 805.
77 Id. at 803 (quoting Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128 (1993)).
78 Id. at 809.
79 Id. at 811.
80 Id.
A number of defendants have successfully shown that they have used a plaintiff’s likeness as one of the “raw materials” of their creative work.\textsuperscript{81} Two years after \textit{Comedy III}, the California Supreme Court held that the creators of the comic book “Jonah Hex” were shielded by the First Amendment against a right of publicity claim by Johnny and Edgar Winter, identical twin blues singers born with albinism. Several issues of the comic featured “brothers Johnny and Edgar Autumn, depicted as villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature that had escaped from a hole in the ground.”\textsuperscript{82} According to the court, “Application of the [transformative use] test to this case is not difficult.” The depictions of the Winter brothers were “not just conventional depictions”; instead, plaintiffs were “merely part of the raw materials from which the comic books were synthesized.”\textsuperscript{83}

The California Court of Appeal has similarly found the search for raw materials “straightforward.”\textsuperscript{84} In \textit{Kirby v. Sega}, it held that any imitation of plaintiff Lady Kier—the lead singer of the band Dee-Lite—was “part of the raw material” from which a video game character named Ulala was synthesized.\textsuperscript{85} It similarly held that a backup singer for the group Cypress Hill was “raw material” for a character in the video game \textit{Grand Theft Auto: San Andreas}.\textsuperscript{86} More recently, the court held that the persona of an infamous

\begin{footnotes}
\footnote{81}{See also \textit{ETW v. Jireh}, 332 F.3d 915 (6th Cir. 2003) (finding painting and lithographs of Tiger Woods in three different poses to be protected by transformative use defense).}
\footnote{82}{\textit{Winter v. DC Comics}, 69 P.3d 473, 476 (Cal. 2003).}
\footnote{83}{Id. at 479. Unlike in \textit{Comedy III}, it was “irrelevant” that “defendants were trading on plaintiffs’ likenesses and reputations to generate interest in the comic book series and increase sales.” Id.}
\footnote{84}{\textit{Kirby v. Sega of America, Inc.}, 144 Cal. App. 4th 47, 59 (2006).}
\footnote{85}{Id. at 61. According to plaintiff, her signature phrase from Dee-Lite’s hit song “Groove is in the Heart” was “ooh-la-la.” Id. at 51.}
\end{footnotes}
cocaine kingpin, Ricky Ross, was part of the “raw material” from which the rapper Rick Ross synthesized his own professional identity.\(^{87}\)

A number of public figures, however, have not been recognized as “raw materials.”\(^{88}\) In \textit{No Doubt v. Activision}, the band No Doubt brought a right of publicity and breach of contract claim where players of the video game “Band Hero” could make avatars of band members perform any song included in the game.\(^{89}\) Although the court acknowledged that placing a celebrity in a new context might, as in \textit{Kirby} and \textit{Winter}, qualify for First Amendment protection, the defendants in \textit{No Doubt} did not sufficiently re-contextualize Gwen Stefani et al. “[T]he No Doubt avatars . . . perform rock songs, the same activity by which the band achieved and maintains its fame . . . That the avatars can be manipulated to perform at fanciful venues including outer space . . . or that the avatars appear in the context of a video game that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.”

Similarly in \textit{Hilton v. Hallmark}, the Ninth Circuit refused to strike Paris Hilton’s right of publicity claim, where Hallmark sold a birthday card featuring a cartoon waitress, with a photo of Paris Hilton’s head on top, serving a plate of food to a customer and warning him, “That’s Hot.”\(^{90}\) Hilton argued that this was a “rip-off” of a scene from her reality show, “Simple Life,” and her key catchphrase therein. Despite a number of

\(^{88}\) See also Estate of Fuller v. Maxfield & Oberton Holdings, LLC, 906 F. Supp. 2d 997 (N.D. Cal. 2012) (rejecting transformative use defense by the maker of the desk toys “Buckyballs,” which were named after the “renowned” architectural engineer Richard Buckminster Fuller, developer of the geodesic dome); Hart; Keller; Davis. These cases are discussed in further detail, infra Part II(A).
\(^{89}\) No Doubt v. Activision Publ’g, Inc., 192 Cal. App. 4th 1018 (2011). No Doubt had licensed Activision only to allow their avatars to sing three No Doubt songs.
\(^{90}\) Hilton v. Hallmark Cards, 599 F.3d 894, 899 (9th Cir. 2009).
differences between the birthday card and the show—and the cartoon scene in which Hilton’s head was placed—“the basic setting is the same: we see Paris Hilton, born to privilege, working as a waitress.” 91 “Hot,” perhaps; “cooked,” apparently not.

In sum, in both the right of publicity and copyright contexts, courts have turned to transformative use—with its attendant search for raw materials—in order to better harmonize intellectual property protections with the expressive, First Amendment-protected activities they risk over-inhibiting. This inquiry has successfully shielded a wide variety of contemporary expressive practices, including appropriation art, comic books, video games, and rap music. But at the same time, the expansion of fair use and the First Amendment defense has been rather uneven—permitting liability even in the face of significant new expression and modification of preexisting materials. The remaining sections will examine these asymmetries in further detail and argue that the judicial embrace of “raw materials” risks undermining the normative appeal of transformative use.

91 Id. at 911.
II. A Raw Deal?

Courts have embraced “raw materials” as a fair and “straightforward” vehicle for balancing the interests of the rights holder against the potentially significant free speech interests of subsequent creators. Although comparing creative works with their sources and looking for the presence of raw materials might seem to be a simple and workable inquiry, judicial efforts at doing so have produced troublingly unequal distributions of fair use and free speech rights within IP regimes. This section will highlight these distributive problems and explain why the concept of “raw material” risks drawing from and perpetuating a range of social hierarchies between “raw” and “cooked.” It will then highlight the potential ethical ramifications of encouraging creators to treat preexisting materials as “merely” the raw materials for their artistic endeavors.

A. Distributive Concerns

The most noticeable trend in the cases discussed above is that the winners and losers largely divide along the lines of wealth and fame. In other words, courts seem more able to perceive “use as raw material” where there is a big name defendant appropriating material from a smaller name plaintiff. As Tim Greene and I have suggested elsewhere, these recent cases seem to disproportionately benefit the “rich and

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92 See David Tan, Political Recoding of the Contemporary Celebrity and the First Amendment, 2 HARV. J. SPORTS & ENT. L. 1, 25-26 (2011) (observing that the transformative use test’s “lack of clear guidelines can encourage judges to be art critics or base decisions on external factors like the fame of the artist.”). For another take on the potential socioeconomic inequalities impacted by copyright law, see Molly Shaffer Van Houweling, Distributive Values in Copyright, 83 TEX. L. REV. 1535, 1539 (2005) (“[T]he burdens that copyright imposes on creativity weigh more heavily on poorly financed creators than they have in the past.”).
Particularly when the plaintiff is relatively unknown, courts are willing to find a sufficiently transformative use where the defendant is a prominent artist like Jeff Koons, Richard Prince, Andy Warhol or Barbara Kruger; a successful recording artist like Green Day or Rick Ross; or a well-known corporate creator like Sega or DC Comics. When serving as plaintiffs, big name celebrities such as No Doubt, Paris Hilton, Jerry Seinfeld and J.K. Rowling are better able to shield themselves from the “raw material” moniker than are those on the so-called D-List: the lead singer from Deee-Lite, a backup singer from Cypress Hill, and Johnny and Edgar Winter. Similarly, smaller name artists like Mr. Brainwash, Russell Young, and Gary Saderup are less able to use famous imagery as “raw materials.”

Different classes of creators, moreover, are often subjected to entirely different burdens in justifying their choice of raw materials. In cases like Seltzer, Kirby, Winter, and Ross, the defendants were able to raise successful defenses almost entirely based

94 A few scholars have suggested that the shift in the Second Circuit’s treatment of Jeff Koons’ work between 1992 and 2006 might be attributed to the widespread institutional acceptance of his work as legitimate and valuable. See, e.g., Peter Jaszi, *supra* note 25, at 114 (“Now, he’s claimed that privileged status with work in the collection of the Metropolitan and a solo (!) exhibition in the summer of 2008 at the Palace of Versailles. Koons has become fully credentialed as a creative genius.”); see also Gilden & Greene, *supra* note 93, at 102.
95 Anthony R. Enriquez, *The Destructive Impulse of Fair Use After Cariou v. Prince*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 45 (2013) (“Given Prince's particular fame as a leading exponent of the appropriation art movement, it is plausible that a similarly perverse outcome would not take place in the case of a lesser-known artist. After all, much of the attention given to the suit no doubt stemmed from the fact that a relatively unknown photographer had taken on a wildly successful contemporary artist whose name would be instantly recognizable to media consumers.”).
96 See also [Estate of Fuller] (rejecting argument that “renowned inventor” Buckminster Fuller was the raw material for Buckyball desk toy)
97 This is not to say that these defendants are not successful artists; just nowhere near as wildly rich and famous as Koons or Prince. Mr. Brainwash, in particular, has launched to fame (and infamy) since 2010, when he appeared in a documentary by the elusive, famous street artist Banksy. In the wake of that film, and Mr. Brainwash’s subsequent successful gallery shows in NY, LA and London, some art critics posited that he was actually an actor hired by Banksy—that he was the “Borat” of street artists. See Logan Hill, *Is Banksy’s Mr. Brainwash an Art-world Borat?*, Vulture.com (Apr. 14, 2010), http://www.vulture.com/2010/04/banksy_mr_brainwash.html.
upon their addition of new visual material to the plaintiff’s likeness or work. It was of no import that the defendants either sought out plaintiff’s participation or sought to explicitly use the plaintiff’s likeness or work to their own economic advantage. By contrast, in cases like Castle Rock, Warner Bros., Comedy III, No Doubt, and the two Morris cases, the courts rejected a transformative use claim notwithstanding a considerable amount of new material. Moreover, these defendants were not permitted to derive a significant amount of economic value from the fame of the underlying work, and they were required to use “restraint” in their otherwise transformative endeavors. Additionally, they were given a narrower range of mediums through which they could sell their work. An artist like Barbara Kruger, for example, is free to sell her transformative work on posters, coffee mugs and t-shirts, but similar merchandising was used to demonstrate the free-riding motivations of Gary Saderup. Given that lesser-known artists are more likely to rely on income from a large number of sales at low prices than are artists who can ask five, six or seven figures for a single painting, this

98 See, e.g., Kirby, Washington, Seltzer [cites]
99 See Winter, Ross, 222 Cal. App. 4th at 688 (“Although it is possible that Roberts initially gained some exposure through use of the name Rick Ross and the reputation it carried, the value of Roberts's work does not derive primarily from plaintiff's fame . . . The economic value of Roberts's work is reflected to a large extent by the number of CD's and records he sells.”).
100 Comedy III, Guetta, Young.
101 Warner Bros. v RDR
102 See Volokh, supra note 21, at 924 (“Protecting celebrities’ exclusive rights to control images of themselves may not always affect ‘whether conventional celebrity images are produced’; but it will affect which conventional celebrity images are produced.”).
103 [cites]. This is not to say that courts find mass merchandising, such as t-shirt designs, to be per se unfair. See, e.g., Kleintiz v. Sconnie Nation, 965 F. Supp. 2d 1042 (W.D. Wis. 2013). Some scholars have, however, supported this division between traditional “art” and mass merchandising. See, e.g., William M. Landes, Copyright, Borrowed Images and Appropriation Art: An Economic Approach, 9 Geo. Mason L. Rev. 1, 18 (2000) (“It might seem unreasonable to draw a bright line between a one-time use of an image lawfully acquired and reproducing that same image in multiple copies. That distinction, however, goes to the heart of the economic rationale for copyright.”); Jane C. Ginsburg, Exploiting the Artist’s Commercial Identity: The Merchantizing of Art Images, 19 Colum.-VLA J.L. & Arts 1, 21 (1995) (“Where the context of the item’s sale or exhibition remains within the ‘art’ world, that may suffice to insulate the borrowing or imitation of the image from challenge under the intellectual property laws . . . But where the context is more clearly mass commercial, the item’s affinities with ‘merchandise’ dominate . . .”).
disparity is troubling. Less-affluent artists by definition are less able to obtain licenses and more likely to rely on fair use and the First Amendment defense, yet the nature of their commercial efforts is cited as a reason to keep such protections elusive.

A passage from the Second Circuit’s decision in Cariou is particularly telling about the role that fame and social status have come to play in the fair use inquiry. In order to emphasize that Richard Prince’s Canal Zone painting—eight of which sold for over $10 million—would have little market effect on Patrick Cariou’s book of photographs—which only garnered $8,000 in royalties from 5,791 sales—the court provided a sampling of the “invitation list” for the opening dinner at the Gagosian gallery:

Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, Vanity Fair editor Graydon Carter, Vogue editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt.

Richard Prince had access to some of the most elite figures within both popular culture and the art world, allowing the court to place the defendants in an entirely different class of artists and buyers than Patrick Cariou. This separation of markets, combined with the willingness of the court to see Cariou’s work as “raw materials” suggests that social status can register significant advantages within contemporary fair use jurisprudence even apart from the ability to hire an expensive team of lawyers.

This division between the fair use haves and have-nots is directly at odds with why scholars have advocated thinking about popular culture as “raw material.” Recall, for example, Balkin’s observation that images in mass media are the common reference

104 [cite]
105 [cite-Van Houweling: Jaszi/Aufderheide]
106 Cariou, 714 F.3d at 709.
points necessary for individuals to both comment on and contribute to the culture in which they are situated. As expressed by Rebecca Tushnet:

People define themselves by what they know and what they love (and sometimes by what they hate). Making a creative work, especially a creative work that comments on an artifact that other people will know and have opinions about, gives people their own answers to that question, and empowers them to keep talking.\(^\text{107}\)

Mediated by cultural icons like Seinfeld, Three Stooges, Harry Potter, No Doubt and the Sex Pistols, innumerable communities of fans and critics have come together to share perspectives on the music, television and literature that inspires them.\(^\text{108}\) Moreover, individuals express their views about, and in relation to, these cultural icons often through merchandise like t-shirts, posters, coffee mugs and not just through “higher” artistic formats like paintings and literature.\(^\text{109}\) Popular culture—and the celebrities that infuse it—indeed serves as “raw material” for subsequent creativity and commentary, yet copyright law and the right of publicity repeatedly render such materials off-limits, or at least artificially expensive.

In addition to socioeconomic divisions, there are less obvious, but similarly troubling gender and race implications in the cases surveyed above. In particular, courts repeatedly see the bodies of women and people of color as “raw material.”\(^\text{110}\) In discussing Campbell and Judge Leval’s transformative use test, Professor Rebecca

\(^\text{107}\) Rebecca Tushnet, Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters, 6 I/S: J.L. & POL’Y FOR INFO. SOC’Y 1, 11 (2010).

\(^\text{108}\) For extensive commentary on fan communities and “participatory culture,” see, e.g., Tushnet, Rosemary Coombe, Madhavi Sunder.

\(^\text{109}\) Professor Eugene Volokh has observed, “First Amendment law has also never distinguished “high information content” works such as books or movie from “low information content” works, a category into which some might place sculptures, prints and T-shirts.” Volokh, supra note 21, at 909.

\(^\text{110}\) Cf. Anupam Chander & Madhavi Sunder, The Romance of the Public Domain, 92 CAL. L. REV. 1331, 1335 (2004) “[F]or centuries the public domain has been a source for exploiting the labor and bodies of the disempowered—namely, people of color, the poor, women, and people from the global South.”.)
Tushnet has observed, “Such divisions between raw material and finished product, natural and cultural, resources and results have strong gender implications.”¹¹¹ For instance, she observed that 2 Live Crew successfully comments on the naivety of Roy Orbison’s song by remarking upon and sexualizing the bodies of the female passerbys—described in the opinion as “streetwalkers.”¹¹² Similarly in Blanch, Jeff Koons referred to the female model’s legs as “anonymous,” “a fact in the world” and “not anyone’s legs in particular”; they were, accordingly, “free for him to use.”¹¹³ In Cariou, Richard Prince’s Canal Zone series—which collaged the plaintiff’s photographs with photographs of nude women—related to a “post-apocalyptic screenplay” that highlighted (among many other things) “the three relationships in the world, which are men and women, men and men, and women and women.”¹¹⁴ Furthermore, to the extent that authors of fan works are unable to (as discussed above) capitalize on raw material doctrine, this burden falls particularly hard on women authors, who predominate fan communities.¹¹⁵

These cases also have racial implications.¹¹⁶ In a significant number of these cases, black men’s bodies are “used as raw materials” for the defendant’s creative reworking. Again, Richard Prince’s use of Cariou’s photographs is illustrative: he

¹¹¹ Tushnet, supra note 9, at 276; see also infra notes []; Kathryn Pauley Morgan, Women and the Knife: Cosmetic Surgery and the Colonization of Women’s Bodies, 6 Hypatia 25 (1991) (“What I see as particularly alarming in this project is that what comes to have primary significance is not the real given existing woman but her body viewed as a "primitive entity" that is seen only as potential, as a kind of raw material to be exploited in terms of appearance, eroticism, nurturance, and fertility as defined by the colonizing culture.”).
¹¹² Id. at 277.
¹¹³ Id. at 284. In Tushnet’s view, fair use is more likely where some subtext in the original work invites criticism or commentary; in other words, “the original text asked for it.” Id. at 276.
¹¹⁴ Cariou, 714 F.3d at 707.
¹¹⁵ See, e.g., Rebecca Tushnet, Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters, 6 I/S: J.L. & Pol’y for Info. Soc’y 1, 2 (2010).
distorted the faces of lightly clothed Jamaican men, collaged colorful “lozenges” and electric guitars over photographs of them, and juxtaposed them with similarly-altered photographs of nude women. According to the Second Circuit, Cariou’s photographs present “a human being in his natural habitat . . . comfortably at home in nature”; Prince’s alterations “create the impression that the subject is not quite human.”\textsuperscript{117} In the \textit{Washington} case, even though the plaintiff was interviewed by Rockstar games in the development stage of Grand Theft Auto: San Andreas, the court emphasized that the character in the final game was “a black male with a completely generic and somewhat variable appearance.”\textsuperscript{118} In the absence of “distinctive tattoos, birthmarks or other physical features . . . that appearance is so generic that it necessarily includes hundreds of other black males.”\textsuperscript{119} Moreover, echoing Tushnet’s observation about Koons’ appropriation of women’s bodies, these cases also emphasize the malleability of the bodies appropriated by the defendant. In \textit{Washington}, again, the appearance of the Grand Theft Auto character in dispute “can be altered by dressing him differently and even by making his body heavier or thinner.”\textsuperscript{120}

Amidst “anonymous” women’s bodies and “generic” black men, it is important to note just how racially and gender-imbalanced the outcomes are in the “raw material” cases. The right of publicity context is particularly striking. In almost every single case in which the court found “raw materials,” the source persona was a woman or a racial minority: Charlotte Dabney, Tiger Woods, Lady Kier, Michael Washington, and Ricky

\textsuperscript{117} Cariou, 714 F.3d at 711.
\textsuperscript{118} Washington, at *5.
\textsuperscript{119} Id.
\textsuperscript{120} Id.; see also Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757, 785 (D.N.J. 2011) rev’d, 717 F.3d 141 (3d Cir. 2013) (in finding a transformative use, noting that \textit{NCAA Football} “permits the user to alter the virtual player’s physical characteristics, including the player’s height, weight, hairstyle, face shape, body size, muscle size, and complexion.”).
Ross. The only potential exceptions are Johnny and Edgar Winter, who, while technically not a racial minority, were identical twins born with albinism, and it was apparently their unusual un-pigmented skin and hair that served as the link between the blues singers and the pale, long white haired, “half-worm, half-human” villains appearing in the Jonah Hex comic books.

This is not to say that the intersection of class, gender and race is without complications, that every “raw materials” case raises such concerns, or that identifying the respective social position of the parties is always straightforward. Female celebrities like Paris Hilton and Gwen Stefani have prevailed as plaintiffs, wealthy celebrities like Tiger Woods and Major League Baseball players have lost, and occasionally the (relatively) little guys win. Most notably, panels on both the Third and Ninth Circuit recently ruled that Electronic Arts had not made a transformative use of the likenesses of college football players in the NCAA Football video game series. Both courts observed that EA created realistic depictions of actual NCAA football players and sought to capitalize on the fan bases of the various college teams. The players themselves were the “sum and substance” of the digital avatars. Notably, however, both opinions featured dissents contending that the college athletes’ likenesses were the “raw material” from which the video games were synthesized and that allowing users to

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121 For instance, courts have sometimes used the “raw material” concept in disputes between commercial publishers [Williamson; Bill Graham; Meltwater], or political speech without any explicit race, class or gender overtones, [Nader, Kleinitz]

122 Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir. 2013); In re NCAA Student-Athlete Name and Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013). Identifying the racial dimension here is particularly difficult in the Ninth Circuit case, which was a putative class action with nine named-plaintiffs of seemingly different racial and ethnic backgrounds.

123 Hart, 717 F.3d at 166; In re NCAA, 724 F.3d at 1276.

124 Hart, 717 F.3d at 166-68; In re NCAA, 724 F.3d at 1276-78.
direct, control, and interact with the avatars was a transformative use.\textsuperscript{125} The respective district courts also split on this question.\textsuperscript{126} In the (especially college\textsuperscript{127}) sports context,\textsuperscript{128} where fame, wealth, race, class and gender often do not bear their typical correlations,\textsuperscript{129} it is perhaps not surprising that teasing out cultural raw materials has proven particularly difficult and contentious.

B. The Relational Nature of Raw Materials

Although the above disparities might be attributed to a certain degree of outcome-oriented judging\textsuperscript{130} or some form of implicit racism, sexism and classism,\textsuperscript{131} the raw materials cases do not reveal a judiciary overtly hostile towards free expression and overly protective of dominant institutions. This does not diminish the unfairness of the disparate outcomes above, but the judges in these cases nonetheless do genuinely appear

\begin{enumerate}
\item Hart, 717 F.3d at 175 (Ambro, J., dissenting); In re NCAA, 724 F.3d at 1285 (Thomas, J., dissenting) (“At its essence, EA’s NCAA Football is a work of interactive historical fiction.”).
\item An important backdrop to these decisions is the alleged financial exploitation of college athletes. Although college athletes are forbidden under NCAA rules from receiving any economic reward from their fame, the NCAA and third parties like Electronic Arts often reap huge financial benefits from such fame. See Hart, 717 F.3d at 153 n.4 (“If anything, the policy considerations in this case weigh in favor of Appellant . . . . Despite all of his achievements, it should be noted that Ryan Hart was among the roughly ninety-nine percent who were not drafted after graduation.”); In re NCAA, 724 F.3d at 1289 n. 5 (Thomas, J., dissenting) (“The issue of whether this structure is fair to the student athlete is beyond the scope of this appeal, but forms a significant backdrop to the discussion.”).
\item See also Cardtoons, L.C. v. Major League Baseball Players Ass’n, 95 F.3d 959 (10th Cir. 1996) (“Underprotection of intellectual property reduces the incentive to create; overprotection creates a monopoly over the raw material of creative expression. The application of the Oklahoma publicity rights statute to Cardtoons’ trading cards presents a classic case of overprotection.”); Davis v. Electronic Arts, Inc, 2012 WL 3860819 (N.D. Cal. Mar. 29, 2012) (rejecting EA’s argument on motion to dismiss that former NFL players were “raw materials” for the videogame Madden NFL)
\item See generally READING SPORT: CRITICAL ESSAYS ON POWER AND REPRESENTATION (Susan Birrell & Mary G. McDonald, eds. 2000); CRITICAL READING: SPORT, CULTURE AND THE MEDIA (David Rowe, ed. 2003).
\item Cf. David Nimmer, “Fairest of them All” and Other Fairy Tales of Fair Use, 66 L. & Contemp. Probs. 263, 281 (2003) (“Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.”).
\item See generally Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. REV. 1124 (2012).
\end{enumerate}
to be looking for ways to protect speech and expression while at the same time respecting the rights that have been granted to plaintiffs. In first settling on transformative use and more recently focusing on “raw materials,” courts have latched on to concepts that have had tremendous rhetorical appeal for the many scholars who have tried to reorient the normative values of our intellectual property system. But in the shift from scholarship to jurisprudence, from rhetoric to doctrine, courts and scholars have largely overlooked the hierarchical structures built into the very concept of “raw materials.”

Courts present their search for raw materials as if it can occur purely on the surface of the works themselves. By making a straightforward, “side-by-side” comparison of the original work and likeness and the visible aesthetic qualities shared between them, courts seem confident in their abilities to discern sufficient transformation without having to look deeper into the motivations of the defendant or the broader social value and meaning of the parties’ respective endeavors.132 The Second Circuit in Cariou asserted, “our observation of Prince’s artworks themselves convinces us of the transformative nature” of twenty-five of his works.133 In Kirby, the court rejected the plaintiff’s contention that the transformative use test was confusing or uncertain134: “The test simply requires the court to examine and compare the allegedly expressive work with

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132 This is not to imply that courts must always have a highly developed record on these issues, see infra Part III, but instead merely to identify the deceptive ease of finding “raw materials.” Certain forms of transformation, such as ubiquitous television parodies, often will not require much under-the-hood scrutiny. See Brownmark Films, 682 F.3d at 692 (finding an episode of South Park to be “clearly a parody” of the viral video “What What (In the Butt)”).

133 Cariou v. Prince, 714 F.3d at 706 (“Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.”); see also id. at 707 (“[O]ur infringement analysis is primarily on the Prince artworks themselves.”).

the images of the plaintiff to discern if the defendant's work contributes significantly
distinctive and expressive content.”

Yet “raw materials” is an inherently relational concept. It is impossible to
identify anything as “raw”—whether art, food, or data—without some preconceived
notion of the processes that can move it into some higher, more refined state. “Raw
materials” are defined by Merriam-Webster as (a) “crude or processed material that can
be converted by manufacture, processing, or combination into a new and useful product”
and (b) “something with a potential for improvement, development, or elaboration.”
Under the first definition, harvested wheat is raw material for the flourmill; under the
second, the scribbles in a diary are the raw material for a sonnet, song or screenplay. But
in both cases, the “raw material” moniker is tied up in some notion of progress, either
through physical purification and human processing or through social elevation from
“crudeness” into some better, more sophisticated form. Raw materials cannot be
identified in isolation or in the abstract; they require the inquirer to have a sense of what
purification or sophistication entail, and these qualities are inextricable from the social
context in which he or she is situated. In other words, you can’t have the “raw” without
some theory of the “cooked.”

135 144 Cal. App. 4th at 61.
136 [Cite food and culture literature]
137 The raw/cooked distinction is most famously associated with the work of anthropologist Claude Lévi-Strauss, who posited that all societies draw some fundamental, conceptual distinction between the “raw” and the “cooked,” which map onto other binary pairs such as “nature” and “culture” or “female” and “male.” See generally CLAUDE LEVI-Strauss, THE RAW AND THE COOKED; CLAUDE LEVI-Strauss, THE SAVAGE MIND. These theories came under considerable scrutiny, particularly from feminist anthropologists, who challenged the universality of this women-nature-“raw” connection and emphasized the contingency and instability of these nature/culture distinctions. See, e.g., CAROL MCCORMACK & MARILYN STRATHERN, NATURE, CULTURE & GENDER; Gayle Rubin, Traffic in Women. To the extent that this literature highlights the stubborn tendency to associate women with “raw”-ness and demonstrates the instability of raw/cooked distinctions, it exhibits useful synergies with my analysis here. For example, the nature/culture distinction appears very much in play in the Cariou decision. See 714 F.3d at 694 (“Where
Science and technology scholars have observed this dynamic surrounding the ubiquitous phrase “raw data.” Whether dealing with online advertising, public health or financial management, data in its “raw” form is collected, compiled, stored, processed, mined and interpreted in myriad ways, and this notion of rawness presents information as existing “before the fact,” as “self-evident” and conveying some “fundamental stuff of truth itself.” But scholars have observed that data does not simply exist in some stable, pre-interpretive space, awaiting the right technologies to come along and cook it in a unique way. ¹³⁸ Instead, “data are already always ‘cooked’ . . . Data need to be imagined as data to exist and function as such, and the imagination of data entails an interpretive base.”¹³⁹ The emergence of, for example, GPS navigation software or social media advertising creates the needs for a set of inputs about real-time traffic conditions on Highway 101 or someone’s strong penchant for cat videos,¹⁴⁰ and the interpretive processes built into each technology posits these informational inputs as “raw data.” In other words, it takes a particular information consumer to perceive particular data as “raw.”¹⁴¹ At the same time, however, thinking of data in its “raw” form conveys some

Cariou’s serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince’s crude and jarring works, on the other hand, are hectic and provocative.”¹³⁸ See David Ribes & Steven J. Jackson, Data Bite Man, in “RAW DATA” IS AN OXYMORON 164 (2013) (“We tell ourselves that we live in an era of aggregation and automation. From this perspective, raw data patiently await assembly: potable water, environmental damage, or climate change? Click.”).¹³⁹ Lisa Gitelman & Virginia Jackson, Introduction to “RAW DATA” IS AN OXYMORON 2-3 (2013). Another way of making this point might be to say that data analysis is “performative”—it produces the raw data it appears to merely interpret. I have discussed this notion of performativity extensively in previous work. See [W&M; GM articles]¹⁴⁰ http://www.nytimes.com/2014/07/23/upshot/what-the-internet-can-see-from-your-cat-pictures.html?ref=upshot&_r=0¹⁴¹ See Ribes & Jackson, supra note 138, at 149. Ribes & Jackson analogize the processing and perception of raw data to Michael Pollan’s exposé of the lengthy, circuitous industrial paths that place supposedly “raw” ears of corn at our grocery store. See id. at 149. As Pollan argues, “it takes a certain kind of eater—and industrial eater—to consume those fractions of corn, and we are, or have evolved into, that supremely adapted creature: the eater of processed food.” Michael Pollan, THE Omnivore’S DILEMMA 90 (2006).
notion of informational transparency and objectivity—the processing of raw data is “mechanical,” restrained and lacks the human agency that would feed into an otherwise biased, subjective presentation of the world around us.\textsuperscript{142} Although raw data are produced through context-specific needs and decision-making, the high value placed on objectivity seems to insist on contextualizing data “according to a mythology of their own supposed decontextualization.”\textsuperscript{143}

In other areas of intellectual property, some scholars have acknowledged the instability of the “raw” and the “cooked.” In discussing Boyle’s cultural environmentalism movement and its preservation of the public domain as the “raw material” for creativity, Professor Madhavi Sunder notes, “the line between what law considers ‘raw material’ versus ‘intellectual property’ is less stable and more fraught with bias than the binary approach would acknowledge.”\textsuperscript{144} Although an emphasis on the importance of “raw materials” has laudably highlighted the cumulative and derivative nature of all creativity and created sui generis protections for “traditional knowledge,” she argues that cultural environmentalism has too often posited poor people around the world as “offering up raw materials for others to transform” instead of as purveying knowledge and creativity in their own right.\textsuperscript{145} Similarly, Professor Keith Aoki contended that agricultural knowledge exported from the “third world” often provided “the so-called ‘raw’ materials for ‘free’ to Promethean inventors and corporations investing in their

\textsuperscript{142} Gitelman & Jackson, \textit{supra} note 139, at 5.
\textsuperscript{143} Gitelman & Jackson, \textit{supra} note 139, at 5-6.
\textsuperscript{144} Madhavi Sunder, \textit{The Invention of Traditional Knowledge}, 70 L. & Contemp. Prosbs. 97, 101 (2007).
\textsuperscript{145} Id. at 103; cf. Rosemary Coombe, The Cultural Life of Intellectual Properties 201 (1998) (in discussing p.r. and marketing of “Crazy Horse Original Malt Liquor,” observing that “Indians are included here . . . more as features of landscape than as living people with historical memory”).
Moreover, he attributed the perceived rawness of traditional agricultural knowledge to patent law’s preference for a “very particular form of human agency” associated with the industrialized countries of North America and Europe.\(^\text{147}\)

In the fair use and right of publicity context, the emergent raw material doctrine seems to hold the promise of an objective, unbiased search for the preexisting materials that have been processed and interpreted by the defendant. But as with data, creative inputs can only be imagined as inputs according to an interpretive approach that sees particular types of users—some particular types of author-defendants—as building upon the raw materials around them.\(^\text{148}\) And, as observed by Professors Sunder and Aoki, conceptual distinctions between the raw and the cooked have tended to congeal around divisions between the poor and the rich. Accordingly, it is perhaps inevitable that the explicit judicial search for raw materials within creative disputes is tied up in a range of social hierarchies in which the parties are situated.\(^\text{149}\) As much as judges might wish to divorce themselves from the class, race and gender hierarchies that surround them,\(^\text{150}\) an inquiry that hinges upon processing, purification and betterment forces them to pull from

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\(^\text{147}\) Id. at 258, 287.

\(^\text{148}\) A related observation has surrounded discussion of the California Supreme Court’s decision in *Moore v. Regents of Univ. of Cal.* [CITE]. With the development of technology that could produce a line of cells with genetic information from Moore’s surgically removed spleen, his spleen became recognizable as the “raw materials” from which the patented cell line was synthesized. See Boyle, *supra* note [], at [].


some underlying intuitions about what those practices look like. Again, the recent acceleration of raw material doctrine appears largely motivated by an effort to make intellectual property law more democratic and more sensitive to diversity within our creative culture, but at the same time the language of rawness masks and draws attention away from the subjectivity of the inquiry. Although raw materials seem to hold out some promise of greater objectivity within recent fair use and right of publicity decision-making, the “cooked” ultimately remains in the eye of the culturally situated beholder.

Using raw materials as a doctrinal heuristic for progress may make more sense in other contexts where the immediate concern is in fact spurring widespread innovation and the expansion of scientific knowledge. For example, patent law excludes laws of nature, natural phenomena, and abstract ideas to ensure that one entity’s patent doesn’t preempt wide swaths of innovation by cutting off competitors’ access to the raw


152 The apparent objectivity of the raw material inquiry may be related to the largely visual nature of the works at issue in these cases—the language of “raw materials” rarely appears in cases that do not involve visual transformation. A few scholars have observed that when confronted with visual imagery (as opposed to music or text), judges often act as if no theory of interpretation is needed to assess the text; it’s meaning is transparent; it’s “worth a thousand words”; they know it when they see it. See Jessica Silbey, Images in/of Law, 57 N.Y.L. SCH. L. REV. 171, 183 (2013) (“It is remarkable how much of intellectual property is about the visual sense and yet how little intellectual property law considers the epistemology of the image.”); Rebecca Tushnet, Worth a Thousand Words: The Images of Copyright, 125 HARV. L. REV. 683 (2012); see also Zahr Said, Only Part of the Picture: A Response to Professor Tushnet’s Worth a Thousand Words, 16 STAN. TECH. L. REV. 349-68 (2013) (arguing that such problems of interpretation are raised by all texts—visual and non-visual).

153 The search for raw materials accordingly appears to be an example of what Professor Christine Farley has referred to as an “avoidance technique of displacement,” whereby judges mask their own subjective views on art by shifting attention to a somewhat tangential question, such as whether a work is a parody. Christine Haight Farley, Judging Art, 79 TUL. L. REV. 805, 855 (2005).

154 This is certainly not to say that scientific knowledge is free of cultural power or that it is does not perpetuate and/or produce social hierarchy. See Foucault; Latour; Haraway; See generally Laura Foster, Situating Feminism, Patent Law, and the Public Domain, 20 COLUM. J. L. & GENDER 262 (2011); Margaret Chon, Postmodern “Progress”: Reconsidering the Copyright and Patent Power, 43 DEPAUL L. REV. 97 (1993).
In the trademark context, we also may want to ensure that one commercial entity does not lock up widely used words and numbers that do serve as the raw material for oral and written communication. And similarly in the context of copyrightable subject matter, we may want to exclude from protection words, phrases, general ideas, facts and stock story elements so that they remain “raw materials” for anyone engaged in a creative process. Each of these

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155 Indeed, patentable subject matter cases have expressly drawn distinctions between patentable articles of manufacture and their raw materials. See, e.g., Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980) (defining “manufacture” as “the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery”).

156 See, e.g., In re Bilski, 545 F.3d 943, 962 (Fed. Cir. 2008) aff’d but criticized sub nom. Bilski v. Kappos, 561 U.S. 593 (2010) (“The raw materials of many information-age processes, however, are electronic signals and electronically-manipulated data. And some so-called business methods, such as that claimed in the present case, involve the manipulation of even more abstract constructs such as legal obligations, organizational relationships, and business risks.”).

The Supreme Court has employed similar metaphors to stand in for its concern with preemption. See Ass’n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2116 (2013) (describing Laws of nature, natural phenomena, and abstract ideas as “the basic tools of scientific and technological work”); Alice Corp. v. CLS Bank Int’l, slip op. at 6 (U.S. Jun. 19, 2014) (“In applying the §101 exception, we must distinguish between patents that claim the ‘building block[s]’ of human ingenuity and those that integrate the building blocks into something more.” (quoting Mayo v. Prometheus Labs, 566 U.S at [])).

Several scholars have observed that in drawing divisions between unpatentable “nature” and patentable “culture,” patent law privileges industrial or “Promethean” invention over collaborative or incremental forms of innovation often associated with developing nations or pre-industrial economies. See, e.g., Keith Aoki, Weeds, Seeds and Deed: Recent Skirmishes in the Seed Wars, 11 Cardozo J. Int’t & Comp. L. 247 (2003); Anupam Chander & Madhavi Sunder, The Romance of the Public Domain, 92 Cal. L. Rev. 1331 (2004). This privileging of wealthy innovators within the nature/culture distinction bears strong resemblances to the wealth disparities in the raw materials cases and certainly raises substantial questions about whether it is ultimately a fair proxy for patent law’s preemption concerns. That question, however, is ultimately beyond the scope of this paper.

157 See, e.g., Kelly-Brown v. Winfrey, 717 F.3d 295, 316 (2013) (Sack, J., concurring) (“The stock in trade of those engaged in publishing, in the broadest sense of that term, includes turns of phrase and imagery; words are their raw materials. It would cripple publishers’ effectiveness if trademark holders could obtain exclusive rights to parts of the language for use as language.”).

158 See, e.g., Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 132 (2d Cir. 2003) (“All creative works draw on the common wellspring that is the public domain . . . [including] elemental ‘raw materials,’ like colors, letters, descriptive facts, and the catalogue of standard geometric forms). This is not to say that the line between copyrightable and non-copyrightable subject matters is easily defined or entirely free from distributional concerns. See, e.g., Wendy Gordon, Reality as Artifact: From Feist to Fair Use, 55 L. & CONTEMP. PROBS. 93 (1992) (observing that many non-copyrightable facts—like telephone numbers—are man-made and that copyrightable expression—like songs, speeches, and cartoons—often become social “facts”); Justin Hughes, Created Facts and the Flawed Ontology of
conceptions of “raw materials” seeks to preserve the cultural commons by placing limits on a single entity’s ability to lock up social, infrastructural resources with respect to an entire universe of third party innovators.

But where the matters before the court concern two very particular parties’ respective abilities to exercise free speech, creative autonomy, artistic expression, and cultural participation, it is highly problematic for the court to apply distinctions between raw/cooked, high/low, unrefined/pure, etc. The constitutionally protected rights to engage in such activities are not—and for many reasons should not—be contingent upon where a defendant slots in the social hierarchy in relation to the copyright owner. If fair use and the First Amendment defense are truly meant to provide meaningful safeguards for free speech, judges should endeavor to make them equally available to all speakers. Yet there is nothing in the rather surface-level search for raw materials that

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*Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007); Dan Burk, *Feminism and Dualism in Intellectual Property*, 15 Am. U. J. Gender, Soc. Pol’y & L. 182 (2007); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 COLUM.-VLA J.L. & ARTS 1, 39 (1993) (“Despite the fact that the Court placed unauthored, unoriginal “facts” in the public domain as potential “raw materials” or “sources” for future creators to freely draw upon, the Court failed to recognize the complex social processes and circumstances whereby such “facts” are created, circulated, used, and in some cases, re-used.”).

159 See, e.g., Brown v. Entm’t Merchants Ass’n, 131 S. Ct. 2729, 2737 n.4 (2011) (“Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny.”).

160 Wendy Gordon has connected this concern with an elegant observation by Salman Rushdie: “Those who do not have the power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts.” See Gordon, *supra* note 158, at 102 (quoting Lessons, Harsh and Difficult from 1,000 Days ‘Trapped Inside a Metaphor,’ NY Times B8 (Dec. 12, 1991)).

161 See, e.g., Zimmerman, *supra* note 21, at 1522 (“In short, money is important, and we take seriously protecting people's ability to make it. Wealth-maximization and efficient exploitation of assets, though, are not the values that the Bill of Rights holds most dear.”); Van Houweling, *supra* note 92, at 1548 (“[I]f speech is necessary for individual autonomy and well-being, then like other life necessities (food, health care, housing) it should ideally be available to everyone who needed it, not just to those who can pay for it.”); Balkin, *supra* note 25, at 35 (“A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them.”); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 36 (2002) (“Britney Spears is constitutionally protected regardless of her talent and
moors free speech protection to those values or extricates it from the frequent tendency to associate progress with a range of social privileges. Entirely extricating social inequalities from the process of judicial decision-making may ultimately be impossible, but such inequalities are exacerbated by doctrinal toolkits that poorly map onto the set of values that the law is trying to express.

C. Cooking, Skew(ered)

In addition to the distributive and conceptual troubles with the raw material inquiry, there are serious normative questions raised by channeling fair use and free speech protections towards defendants that treat their sources as “raw.” In a substantial number of the cases surveyed above, “use as raw material” signals a use that is particularly controversial, insulting or objectionable to its subject matter. Johnny and Edgar Winter were used as raw material where they were “depicted as villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature that had escaped from a hole in the ground.”

Patrick Cariou’s photos were used as raw material where his subjects’ faces were heavily distorted and juxtaposed with similarly mangled photos of naked women. Dereck Seltzer’s Scream Icon was used as raw material where it was covered by a spray-painted cross and surrounded by several defaced images of Jesus Christ. There is of course potentially significant social value in dissent and provocative art, but it goes without saying that there is also significant cultural value in artwork that celebrates or more subtly reflects on the people, places and...

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regardless of what people say about her . . . The freedom of speech protects J.K. Rowling whether her works count as junk, art, both, or neither.”).

162 Winter, 30 Cal. 4th at 886.
things that the artist encounters. Nonetheless, if artists wish to incorporate or depict such source materials into their work and avoid six-figure statutory damages, punitive damages and/or attorneys’ fees, recent case law strongly encourages them to ruffle at least a few feathers in the process. This is not to say that *Winter, Cariou, and Seltzer* in particular reached the wrong result, or that it is IP law’s role to morally police relations between authors, but as a whole this body of case law expresses a normative view of cultural appropriation that places little value on empathy towards its subjects.

Many scholars have critiqued copyright law’s insistence on a purely “original” form of authorship, showing that creativity does not occur in a vacuum and invariably requires authors to borrow, rip, and re-mix from the stories, images, and characters that saturate their lives. Nonetheless, intellectual property law protects defendants who

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163 See Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 I/S: J.L. & POL’Y FOR INFO. SOCY 1, 8 (2010) (“Many fanworks don't fit the prototypical fair use of biting, mocking criticism that targets aspects of the original in order to reject them. And this is a strength, not a weakness: approaching a mass media work with an understanding of what makes it attractive makes it much easier to communicate with other people who like it as well. Those people are the ones most in need of commentary on it.”); ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 271(1998) (warning against “elevating relations of antagonism over those of ironic appreciation, complicitous critique, affectionate annoyance, sympathetic intervention, and grudgingly respectful grievances.”). Tushnet on dissent trope, copying; Bezanson.

164 Cf. Tehranian, *supra* note [], at 1280 (“With a broader reading of fair use, a court can open the floodgates for the work's use and abuse.”).

165 See, e.g., Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2738 (2011) (“[D]isgust is not a valid basis for restricting expression.”).

166 At least in the United States, where copyright provides limited protections for the “moral rights” of authors. Other countries provide a more robust set of protections. [CITE]

167 See Coombe, *supra* note 163, at 211 (“[T]he writer is represented in Romantic terms as an autonomous individual who creates fictions with an imagination free of all constraint . . . everything in the world must be made available and accessible as an ‘idea’ that can be transformed into his ‘expression’…”); see also [Wendy Gordon on Gifts/Receipt?!].

For a fuller academic discussion of these ethical issues, see generally THE ETHICS OF CULTURAL APPROPRIATION (James O. Young & Conrad G. Brunk, eds. 2012); CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW (Kembrew McLeod & Rudolf Kuenzli, eds. 2011); JAMES O. YOUNG, CULTURAL APPROPRIATION AND THE ARTS (2010).

168 See, e.g., Jaszi; Coombe; Lessig; Litman, *supra* note 22, at 965 (“[T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.”); Lior Zemer, *The Copyright Moment*, 43 San Diego L. Rev. 247, 282 (2006) (“Meaning-making is not an internal process. People are engaged in meaning-making, they do not create from nothing and the
engage in such cumulative, appropriative activity under a framework that sees them as creating something out of thin air, aided by nothing besides their raw materials. As Anthony Enriquez observed, Richard Prince’s lawyers referred to Cariou’s photographs as “akin to the paint Prince had applied to some of the images or the canvases to which he had squeegeed them.” This analogy may have successfully expanded defendant-friendly copyright and right of publicity doctrine for Prince, but at the same time it strips the borrowed imagery of its human and cultural context and masks the cultural dialogue embedded in the appropriative use. As Rosemary Coombe has argued, “Dialogue is the activity in which people create their selves and their communities—texts and contexts. The interactive conditions for dialogue need to be fostered if we are to give tangible meaning to democracy.” Fair use may protect artists when they are directly talking about the source material (e.g. through a parody), but when they are speaking in response to or in conversation with that material, copyright and right of publicity
law fail to recognize both the potential cultural contribution of the earlier works or the cultural dialogue often built into the creative process.175

In the absence of explicit, directly critical commentary on the imagery they appropriate, the raw material inquiry encourages artists to downplay their personal connection to the imagery they employ. Jeff Koons, for example, repeatedly speaks about some connection or attraction to the imagery he incorporates into this work.176 Richard Prince, too, has recounted in interviews how he began to appropriate commercial imagery after working at the tear sheets department at Time-Life, ripping up magazines like People, Fortune, Sports Illustrated. In Prince’s words, “I started looking at the ads very carefully. These images of happy couples were supposed to represent something, but they didn’t really mean anything to me.”177 Despite the comfort and familiarity such commercial images were supposed to convey, they instead felt “alien” to Prince, and his work sought to convey this “unrealness.”178 By contrast, in asserting his fair use defense
in the *Cariou* case, Prince’s attorneys presents his source materials solely as a means to an end:

Prince, in the tradition of other acclaimed appropriation artists, used raw materials appropriated from many sources, including pages torn from Yes Rasta . . . to convey new insights with a wholly new expressive meaning and message, the redemptive value of music and equality between the sexes . . . In doing so, Prince achieved his goal of using only what was needed to transform the raw elements into a beautiful, completely new and contemporary take on the music scene having nothing to do with Rastafarians in their Jamaican landscape.\textsuperscript{179}

The “tradition” of appropriation art may certainly contain elements of the instrumentalism deployed in this passage,\textsuperscript{180} but at the same time this copyright-tailored narrative leaves little room for the cultural conversations that do occur among artists and audiences with—and through—the various layers of imagery they confront.\textsuperscript{181} To be fair, Prince’s summary judgment briefs do recount his initial reaction to encountering Cariou’s photographs in a bookstore (“It’s that notion of when worlds collide”), but ultimately he either needed to tell a story about directly commenting on those photographs—which he either couldn’t or refused to do—or tell a story that entirely sidelines the form, subject and origin of those photographs in aid of some superseding artistic endeavor.\textsuperscript{182}

\textsuperscript{179} Memorandum of Law in Support Defendants’ Joint Motion for Summary Judgment, Cariou v. Prince, 2010 WL 3054515 (S.D.N.Y., filed May 14, 2010).

\textsuperscript{180} [CITE]

\textsuperscript{181} Coombe, *supra* note 163, at 106 (“Mass-media imagery allows people who share similar social experiences to simultaneously express their similarity by emotionally investing in a range of cultural referents to which media communications have afforded them shared access. It also enables them to author(ize) their difference by appropriating and improvising with these images to make them relevant to their social experiences and aspirations.”); Balkin, *supra* note 25, at 34 (“Freedom of speech is part of an interactive cycle of social exchange, social participation, and self-formation. We speak and listen, we send out and we take in.”).

\textsuperscript{182} Stacey Lantagne, *Sherlock Holmes and the Case of the Lucrative Fandom: Recognizing the Economic Power of Fanworks and Reimagining Fair Use in Copyright, 20* MICH. TELECOMM. & TECH. L. REV. (forthcoming 2014) (“Contributing to the problem is that the transformative use factor has developed in such a way as to force works into narrow categories, shoehorning what could be cultural dialogue into preexisting expectations.”).
By insisting that source materials be “raw,” the raw material inquiry drives a wedge between real-world creative practices and the doctrines that are trying to protect them. And this disconnect has real consequences. Not only does it privilege those users who are in a position to make their sources appear raw, as discussed above, but in doing so it also masks the similarities between the endeavors of world-famous artists like Jeff Koons and Richard Prince and lesser known artists like Gary Saderup, Russell Young and Mr. Brainwash. Despite large disparities in wealth and acclaim, all are involved in artistic activities that engage with the commercial and pop cultural imagery that surrounds them. Russell Young focused on celebrity imagery after wrapping up his own career as a celebrity photographer—his work, both through its selection and treatment of the photographs, explores the “fame and shame” of celebrity. Mr. Brainwash “wanted to show different faces of people—just normal people—who ended up with extraordinary things because they believed in what they wanted to do.” Gary Saderup wants his audience to “see into the hearts” of the subjects he draws. Although the raw material metaphor is meant to unearth an inherently cumulative aspect of contemporary creative practices, the doctrine it inspired nonetheless draws troubling lines

183 See Cohen, supra note 169, at 366 (“The romantic user . . . is poorly positioned to explain the processes by which access and use become transformation.”).
184 See Lantagne, supra note 184, at 34 (“Hearing people talk about fanworks in this way sounds remarkably like the testimony of artist Jeff Koons in his successful fair use defense case.”); Tushnet?
185 See Coombe, supra note 163; Cohen, supra note 169, at 371 (arguing that a more complete understanding of a culturally-situated user recognizes that she “appropriates preexisting cultural goods as an inevitable part of the process of self-development”); Joseph P. Liu, Copyright Law’s Theory of the Consumer, 44 B.C. L. Rev. 397, 407 (arguing that some degree of freedom of copyrighted works enables “richer and more complex” interactions with cultural goods).
187 Rebecca McQuiggi Rigal, Everything Has Meaning: A Q&A with Mr. Brainwash, Good Magazine (Apr. 10, 2010), http://magazine.good.is/articles/everything-has-meaning-a-q-a-with-mr-brainwash
188 http://www.garysaderup.com/AboutArtist.html
between artists, resulting in sustained under-appreciation of a tremendous amount of creative activity.

III. From Raw to Cooked: A Creative Process Approach

Underlying all of the concerns raised above is a missing theory of why, how and by what means secondary users express themselves through preexisting text and imagery. By comparing the aesthetic impact of defendant’s work with plaintiff’s work or likeness, judges focus on whether that work or likeness strikes them as sufficiently “raw” without expressly addressing the types of processes that would actually enable the transformation from raw to cooked. And without such a judicial theory of creative cooking, extant hierarchies and privileges appear to do much of the normative work. Moreover, by largely ignoring the processes of transformation, raw materials become “abstractions”; the cases provide little hint as to ethics, origin and social meaning of their use. As Professor Julie Cohen has observed, fair use cases rarely discuss the “process” of transformation, and the user herself “remains hazy” even if particular “uses” are not. Within the search for raw materials, the defendant’s creative process is implied but not discussed, and this absence makes it difficult for judges to determine whether the defendant’s actions align with those that fair use and the First Amendment are meant to insulate.

189 Michael Pollan has argued that inattention to cooking as a social ritual has resulted in an industrialized food economy in which food itself has become an abstraction—widely treated as just another commodity. MICHAEL POLLAN, COOKED [] (2013).

190 See Olufunmilayo B. Arewa, The Freedom to Copy: Copyright, Creation, and Context, 41 U.C. DAVIS L. REV. 477, 494 (2007) (“[C]ases involving artistic works generally do not reflect detailed analysis of the creative process or context of creation of the works being considered. Rather such cases are more likely to be permeated with generalized and often unsupported assumptions about authorship, ideas, expression, and transmission that often do not sufficiently reflect the reality of how many works are actually created.”).

191 Cohen, Place of the User, supra note [], at 362.
A number of copyright scholars in recent years have argued that intellectual property law lacks a robust understanding of creative processes—i.e. why and how people create art, music and literature—and how the law influences such processes—i.e. whether exclusive rights actually incentivize individual creation or otherwise provide stability for artistic investment.192 Accordingly, there is a burgeoning body of empirical IP scholarship seeking to better evaluate the dominant “incentives” rationale for intellectual and perhaps refocus IP law and policy towards those particular sectors where it is actually doing real good.193 In the wake of this much-needed recent empirical turn, a contemporaneous judicial turn towards raw materials may make it difficult to situate richer understandings of creative processes within the actual strictures of fair use doctrine. If all that matters are the appearance and circulation of creative products themselves, there would seem little need to inquire into the actual human beings who engage in the creativity that IP claims to promote, let alone the cultural mechanisms by which they accumulate meaning. This article will conclude by arguing for a shift away from the fraught judicial search for raw materials and proposing a better doctrinal “hook” for bringing together fair use, free speech and knowledge about creative processes.

One potential step forward would focus on the rhetoric of transformation; in other words, using different metaphors to frame the relationship between artists and their sources. By demoting the phrase “raw materials” within the fair use lexicon, judges might be better able to approach creative appropriation without triggering the inequalities embedded within the raw/cooked dichotomy. By speaking about appropriation differently, judges might think about appropriation differently, and ultimately this could

192 E.g., Cohen, Zimmerman
193 E.g., Silbey, Sprigman/Raustiala, Buccafusco, Fromer
meaningfully improve their ultimate decision and reasoning. Speaking of the preexisting image or text, for example, as being a “resource,” providing “inspiration,” or fostering “conversation” would communicate that there is something in that image or text that the defendant is using as a springboard for their own creative pursuits—e.g. artists like Mr. Brainwash or Gary Saderup—or that the defendant’s work stands in dialogue with the plaintiff’s work in a manner that falls outside the plaintiff’s likely economic purview—e.g. Koons or Young. Inspiration and conversation might sometimes be readily apparent on the “surface” of the works, as arguably with 2 Live Crew’s parody of “Oh, Pretty Woman,” but it also invites the possibility of going a bit deeper, allowing the defendant to discuss their creative processes in a manner that the raw materials inquiry otherwise might ignore. Moreover, inspiration and conversation do not necessarily imply some hierarchical relationship between plaintiff and defendant in the way that raw materials do.

This is not say that the defendant or the court should not be permitted to speak in terms of raw materials, only that they should not be forced or strongly nudged to do so. If, for example, a defendant like Richard Prince in fact views preexisting materials as a means to his creative ends, as an element of composition akin to oil paint or charcoal, then the raw material metaphor might remain appropriate (although Balkin’s “building blocks” metaphor might do the trick in a less pernicious way). But a broader range of narratives would enable a court to recognize the “transformative” value of appropriations

194 See James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1523 (1992) (“During the process of typing issues as public or private, analogies and metaphors play a vital role. In some cases, however, we become the prisoners of our metaphors.”). On the relationship between rhetoric and the development of legal doctrine more broadly, see, e.g., White, Bruner, Berger, Edwards.
that take a far less destructive form than in cases like Cariou or Winter. And within this expanded vocabulary of transformation, the targeted deployment of raw material rhetoric might actually surface, instead of obscure, the ethical issues at play in those cases.

The other potential shift would be doctrinal. The analysis above suggests that many of the distributional problems with the raw material inquiry arise from judges’ formal comparison of the works at issue in an effort to find some “reasonably perceived” transformative quality. Rather than require a defendant to come forward with a clear statement of her intent to directly comment on the original work, the Second Circuit in Cariou shifted the fair use inquiry away from the subjective views of the defendant and towards a seemingly more capacious focus on how the work would objectively be received by the target audience. This shift from the “author” to the “audience” has been embraced among copyright scholars in order to recognize the values of transformation beyond mere “commentary,” situate the putative fair use within a particular set of artistic and literary traditions, and emphasize the role of the audience in developing the ultimate meaning of a creative work.\(^\text{195}\) But the raw materials cases suggest some serious drawbacks from prioritizing the seemingly more objective views of judges, juries, experts and the art world. These views are certainly relevant and important, but the analysis above suggests that the defendant’s purposes and processes need to remain at the center of an inquiry into whether she should face crippling financial liabilities for the artistic decisions she makes.

\(^\text{195}\) See, e.g., Laura A. Heymann, Everything is Transformative: Fair Use and Reader Response, 31 Colum. J.L. & Arts 445 (2008) (“[T]he better test of whether a second work has contributed a “new expression, meaning, or message” to the first is to turn to the reader.”); Rebecca Tushnet, Judges as Bad Reviewers: Fair Use and Epistemological Humility, 25 L. & Lit. 20, 28 (2013) (“I propose that when reasonable audience members could discern commentary on the original work, a court should find favored ‘parody,’ even when other reasonable audience members could disagree.”).
Rather than do away with the subjective intent of the defendant in favor of broader, audience-oriented search for raw materials, courts might instead embrace a more robust understanding of why and how defendants incorporate preexisting materials into their creative processes. Accordingly, I propose a test that would both allow courts to quickly identify established transformative uses, such as parody, while providing protection to those defendants who engage in creative appropriation for other reasons, such as inspiration, dialogue, personal connection, social commentary, or purely for their formal qualities. Under this “creative process” test, a use is transformative (under either “the purpose and character of use” fair use factor or the right of publicity First Amendment defense) where the defendant (1) comments directly on the earlier work or likeness, (2) uses the work or likeness as a vehicle for broader social commentary, or (3) otherwise uses the work or likeness as a bona fide aspect of his or her creative process.

There are a number of advantages to this test. The first prong enables courts to quickly dispose of obvious parodic or critical uses of a work that “comment directly” on the original, and the second prong provides an explicit hook for those cases where defendants comment on some aspect of society associated with the work—e.g. Jeff Koons’ commentary on commercialism in *Blanch* —or where the preexisting material

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196 See Heymann, *supra* note [], at 466 (“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.”).
199 Other cases that fall under this umbrella would include *Mastercard v. Nader* and biographical or historical uses of a work, e.g. *Bill Graham*; *SOFA*
is used purely instrumentally to convey some message unrelated to the original—e.g. Richard Prince’s use of the Yes, Rasta photos or Green Day’s use of the Scream Icon.\textsuperscript{200} Notice that under this prong, the defendant need not subordinate or hide the meaning and/or appeal of the original under the “raw material” moniker and may speak more frankly and honestly about the “purpose and character” of their use, the term expressly used in Section 107 of the Copyright Act. The third prong provides a safety valve for where defendants cannot—or cannot clearly—slot their appropriation within the first two notions of commentary by allowing them to show they are engaged in a practice they believe in good faith to fall within the sphere of constitutionally-protected speech, art, and expression. Importantly, because all three prongs are oriented towards how the defendant approaches his or her source materials, courts assess direct commentary, broader social commentary, and bona fide creative use based on what the defendant was trying to do as opposed to whether the court or third parties believe he or she did it well.\textsuperscript{201} Accordingly, this approach should allow defendants like Young, Guetta, and

\begin{footnotes}
\item[200] This might also protect highly-criticized decisions such as Dr. Seuss, where the defendant criticized the O.J. Simpson trial by presenting it in the style of Dr. Seuss’s The Cat in the Hat.
\item[201] I note that the creative process test, although subjective in its focus, is distinct from the “predominant purpose” test adopted by the Missouri Supreme Court in \textit{Doe v. TCI Cablevision}, 110 S.W.3d 363, 374 (Mo. 2003), where it held that the authors of the comic book Spawn unlawfully appropriated the name of hockey player Tony Twist for one of their villains. According to the court:

\begin{quote}
[T]he use was not a parody or other expressive comment or a fictionalized account of the real Twist. As such, the metaphorical reference to Twist, though a literary device, has very little literary value compared to its commercial value. On the record here, the use and identity of Twist’s name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity.

Id. The creative process test doesn’t ask whether the defendant’s use lacked a substantial commercial motive or whether the use was “purely” creative; much of today’s most acclaimed art, entertainment and literature is mix of commercial and creative motive, and teasing out the “predominant purpose” would be both arbitrary and dangerously subjective. See Hart v. Elec. Arts, Inc., 717 F.3d 141, 154 (3d Cir. 2013) (“By our reading, the Predominant Use Test is subjective at best, arbitrary at worst, and in either case calls upon judges to act as both impartial jurists and discerning art critics. These two roles cannot co-exist.”). To
\end{quote}
\end{footnotes}
Saderup to have a more level playing field than under the more “objective” raw material approach.

This approach allows courts to somewhat sidestep the philosophically vexing tasks of determining whether something is art, deciding whether art is good, and definitively pinpointing what art means.\(^{202}\) Although a number of scholars have argued that such aesthetic judgments are inevitable in copyright decisions,\(^{203}\) the creative process test doesn’t require the court to itself weigh in on these questions in the context of fair use. The court instead asks whether the defendant credibly believes that what he or she is doing transforms the underlying work in a creative way, i.e. whether the defendant sees herself engaging in a creative pursuit.\(^{204}\) Although other copyright inquiries, e.g. whether a work is sufficiently “original” to merit copyright protection or whether two works are “substantially similar,” may require courts to weigh in on aesthetic questions more

extent that a plaintiff can show that a creative use inflicts a significant commercial harm, then he or she would have a stronger claim that the First Amendment does not protect the use. See infra notes [].

\(^{202}\) Accordingly, the goal of the creative process test is not to revitalize or re-romanticize the role of the author in setting the ultimate meaning of a work, see, e.g., Heymann, supra note [] (discussing Barthes, Foucault, and the “death of the author”). Its goal instead is to provide a better understanding of the defendant’s experience within a wider web of meaning-making including (but not limited to) the copyright owner, the defendant, and the audience for the defendant’s work. In shifting from a focus on the “works” at hand to the “processes” involved, the approach here should also reinforce the insight that claimed works often function as open-ended “texts” for their readers, including putative fair users. See Robert H. Rotstein, Beyond Metaphor: Copyright Infringement and the Fiction of the Work, 68 CHI.-KENT L. REV. 725, 727 (1993) (“Unlike the stable and autonomous “work,” which the law treats as akin to an object, the text is a process— an act of speech that occurs when a member of an audience (a reader, viewer, listener, computer operator) interacts with the textual artifact (that is, the book, motion picture, song, or computer program.”)).


\(^{204}\) This focus on the defendant’s purpose ultimately might not be a dramatic shift in what courts are already doing in fair use cases more broadly. See, e.g., Michael D. Murray, What Is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law, 11 CHI.-KENT J. INTELL. PROP. 260, 261 (2012) (“It is evident from the record of cases that the courts take the “purpose” part of the analysis very seriously, for all of the approved fair uses in the appellate cases involved a change in the predominant purpose for the use of the work.”). Moreover, courts already need to assess, in the context of copyrightability, whether plaintiff’s work exhibits some “creative spark.” See Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991).
directly, the particular question before the court in the fair use inquiry is whether the defendant should be held liable for infringement and subject to the substantial financial penalties that come with that determination.\textsuperscript{205} In tort and criminal law, the imposition of such penalties is typically assessed by looking at some combination of the defendant’s state of mind and the harms inflicted by his or her actions (more on the latter shortly).\textsuperscript{206} Rather than subjecting the defendant to life-changing penalties based on an abstract, third party moral and aesthetical judgment, the creative process test moors the consequences of infringement to the defendant’s own volition. Even if this subjective inquiry risks countenancing some overly broad notion of art from the perspective of aesthetic theory,\textsuperscript{207} or fails to provide an authoritative definition of creativity itself,\textsuperscript{208} the additional protections for defendants likely outweighs any epistemic shortcomings.

This is not to say that the views of third parties are irrelevant or that the judge and jury must automatically defer to some self-serving statement proffered by the defendant. The views of potential or target audiences—e.g., art historians, critics, collectors or other experts—could certainly be one way to verify that there is some artistic tradition or “community of practice” in which the defendant seeks to situate herself,\textsuperscript{209} and courts

\textsuperscript{205} The proposal here might arguably fall within what Professor Farley calls “avoidance techniques,” whereby courts avoid directly addressing the question, “what is art?” The creative process test certainly acknowledges the subjectivity and relativism of this question, and it is precisely this reason why fine line distinctions regarding sufficient transformation cannot serve as a predictable, stable foundation for determining whether an appropriation is infringing. The creative process test intentionally casts a wide net (consistent with the First Amendment’s similarly wide net) and then asks whether there is a real, foreseeable harm to the plaintiff’s economic interests from the use.
\textsuperscript{206} See Wendy Gordon on Torts/harms parallels.
\textsuperscript{207} See Yen, \textit{supra} note [] at 258 (“[T]he emphasis on intent raises the possibility that the definition of art will become too broad. If someone tries to create art but fails miserably, the inclusion of the result in ‘art’ cheapens the meaning of the term.”)
\textsuperscript{208} See Madison, Cohen, Arewa, Fishman, Subotnik
\textsuperscript{209} See Tushnet; Heymann; see also McKenzie, \textit{supra} note [], at 104 (“Allowing parties to introduce evidence from art experts on historical and contemporary customs and traditions in the art world may promote a broader understanding of the artistic process and the prevalence of borrowing, copying, and
certainly need not ignore the formal similarities and differences between the defendant’s work and preexisting imagery. But the difference is that these analyses come in ultimately as a credibility check, not to show that defendant actually succeeded in her artistic endeavor or pleased a particular audience. And although a well-crafted artist statement might certainly be good evidence of subjective intent, it would not be strictly required in order to demonstrate that the defendant was engaged in creative pursuit so long as the other available evidence points in that direction. Richard Prince, for instance, would not necessarily need to come forward with an affidavit about the specific justifications for his work and could rely on a combination of first-person narrative and third-party evidence about the “where, what, who and how” of their particular creative process. Such evidence of course remains open to the normal rules of evidence and impeachment. Moreover, the creative process test does not eliminate the use of judicial common sense or related checks on plausibility; it just seeks to tether those checks are tethered to the defendant’s potential expressive interests in the activity at hand.

reinterpretation in art, as a whole. By showing the history of cultural borrowing and significance of appropriation in the history of art—even from universally well-regarded artists—defendant in art appropriation cases may be better able to contextualize their sources of inspiration, the work of their predecessors, and how their work builds upon or comments on their predecessors.”).

210 Compare with Heymann, supra note [] (arguing that similar evidence should be introduced for the ultimate purpose of proving that a distinct discursive community has been created around the work). To the extent that courts are relying on personal narrative and a comparison of the works at issue, the proposed inquiry aligns with the creativity proxies employed by courts in determining whether a work is sufficiently original. See Eva E. Subotnik, Originality Proxies: Toward a Theory of Copyright and Creativity, 76 Brook. L. Rev. 1487 (2011) (describing the proxies of “narrative” and “comparison”).

211 See Julie Cohen, Copyright as Property in the Post-Industrial Economy: A Research Agenda, 2011 Wis. L. Rev. 141 (2011) (“Artists may not be able to tell us why they create, but they can tell us a great deal about the where, what, who, and how of particular creative processes: where they were situated in space and time; what they were seeing, reading, and hearing; who they were talking to; and how those contextual factors became reflected in their creative practice.”).

212 This should not be taken, however, as a broad defense of Twombly/Iqbal, which have been shown to evince their own forms of judicial bias. [CITE]
Another appeal of focusing on the creative process is that stands to lessen the distributive concerns raised by the raw materials cases. To the extent that fair use and the First Amendment defense are meant to protect interests in free speech and protection, these rights are supposed to be available to everyone whether or not their expression is popular, innovative, or even particularly well executed. But to the extent that the protections of fair use and the First Amendment defense hinge upon defendant’s work being favorably received and/or easily deciphered by a third party, these protections are more likely to benefit celebrities and cultural elites whose endeavors are most easily recognized as “art” and who generally are in a better position to mine the raw materials of their cultural environment.

Moreover, the uncertainty around whether a third party will deem a particular appropriation “successful”—and the large financial liabilities if it ultimately fails—creates the risk of a substantial chilling effect on artistic speech. Elsewhere in First Amendment law, where the Supreme Court has fashioned rules designed to punish unprotected speech without unduly chilling protected speech, it has frequently imposed a subjective intent requirement to ensure that the speaker can foresee that his or her speech will result in negative legal consequences. For example, defamation law often imposes

213 See, e.g., Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2737 n.4 (2011) (Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not constitutional ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny.”); Winters v. New York, 333 U.S. 507, 510 (1948) (“Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.”); Rubenfeld Freedom of Imagination, supra note [] at []; Blocher, Nonsense

214 See, e.g., Han on Audience Tests; Liz Glazer, When Obscenity Discriminates [cite to chilling effects, e.g. Seltzer, Urban]; see also Han on Audience Tests.

an “actual malice” standard;\(^{217}\) political advocacy can only be punished if the speaker specifically intends to incite or produce lawless action;\(^{218}\) and threats can only be punished “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”\(^{219}\) In each case, the line between protected and unprotected speech is potentially difficult to enforce, and the focus on the speaker’s state of mind provides an important measure of reassurance that news reporting, political protest and aggressive music lyrics won’t result in liability or punishment.\(^{220}\) In the intellectual property context, where the line between First Amendment-protected transformative uses\(^{221}\) and largely unprotected verbatim copying\(^{222}\) is highly unpredictable ex ante,\(^{223}\) a creative process inquiry tied to the subjective intent of the speaker should provide some additional measure of foreseeability about whether an appropriation will result in liability.

Lastly, the creative process test better aligns the raw materials/creative appropriation cases with other branches of transformative use. In its shift from a tight comparison of the end products at issue to deeper engagement with why and how


\(^{218}\) Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (per curiam)

\(^{219}\) Virginia v. Black, 538 U.S. 343, 359 (2003). This coming term, however, the Supreme Court will clarify whether the Black decision imposes a subjective intent requirement or whether the “means to communicate” standard can be assessed from an objective, reasonable person standard. See United States v. Elonis.

\(^{220}\) See, e.g., United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring) (“[T]he Court emphasizes mens rea requirements that provide “breathing room” for more valuable speech by reducing an honest speaker’s fear that he may accidentally incur liability for speaking.”).

\(^{221}\) See Suntrust

\(^{222}\) See Eldred (no right to make other people’s speech)

\(^{223}\) Historically, however, there have been some consistent patterns in what uses are considered fair. See Neil Weinstock Netanel, Making Sense of Fair Use, 15 LEWIS & CLARK L. REV. 715 (2011); Matthew Sag; Samuelson, Unbundling Fair Use
defendant used the material at issue, the creative process test dovetails with the “transformative purpose” line of fair use cases. In these cases, featuring databases like Google Books or search tools like Google Image Search, the defendants do relatively little to transform the texts or images themselves, but they use them for markedly different reasons than their authors—e.g., facilitating research, preservation, and access for persons with disability.224 I do not propose that courts directly apply the creative process test to the rather different interests at stake in transformative purpose cases, as the defendants there are not copying for some expressive, artistic reason but in order to enable third-party socially beneficial activity.225 Nonetheless, those cases do highlight the importance more broadly of at least accounting for the context in which a challenged appropriation takes place, and they underscore the actual statutory language the first fair use factor: the purpose and character of the use.

To summarize, the creative process approach carries a number of benefits over the “raw materials” standard that has come into favor with copyright and right of publicity courts. It doesn’t draw distinctions between high/low, pure/unrefined in the same way implied by the search for raw materials, and compared with formal comparison of the works and response by audience of experts, less prone to dominant or elitist tastes. It asks the question, “what is the defendant doing?” rather than “what is the relationship

224 See, e.g., See Authors Guild, Inc. v. HathiTrust, 2014 WL 2576342 (2d Cir. Jun. 10, 2014); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); Authors Guild, Inc. v. Google, Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013);
225 Some scholars and advocates have seized upon this distinction between appropriation art cases and database cases in order to call into question the wisdom of the transformative purpose reasoning. [Ginsburg; Besek]. Although it is important to keep in mind the often distinct interests of Google and individual users of copyrighted works, it is also important to recognize that a range of important values coexist under the “transformative” umbrella. A full discussion of how to prioritize these interests (if there is indeed a need to prioritize them) is beyond the scope of this article.
between these two works?,”226 and to extent that artists like Mr. Brainwash or Russell Young are commenting on celebrity in the tradition of Andy Warhol, they come to the fair use inquiry on more equal playing field. The rich and famous may inevitably have a more formidable litigation arsenal—e.g. ability to hire prominent lawyers and experts—but a focus on creative process doesn’t inherently skew in their favor.

Embracing a wider range of creative processes admittedly makes it more difficult for the concept of “transformative use” to decisively draw lines between infringing and non-infringing uses.227 It is important to remember, though, that “transformative use” is only one part of the inquiry into whether an appropriative use is infringing. If a bona fide artistic use ultimately does have a foreseeable,228 substantively negative impact upon the ability of the copyright owner to sell or license its work, or if it substantially interferes with an individual’s ability to control the commercial exploitation of his or her identity, a showing of such harms might ultimately justify liability for a defendant who otherwise

226 By deprioritizing a work-by-work comparison, the creative process test may avoid arbitrarily breaking up unified series of works, like Richard Prince’s Canal Zone, into those works that are “clearly transformative” and those that are not. See Cariou v. Prince, 714 F.3d 694, 713 (2d Cir. 2013) (Wallace, J., dissenting in part) (“I fail to see how the majority in its appellate role can ‘confidently’ draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination.”).

227 See Michael Madison, Beyond Creativity: Copyright as Knowledge Law, 12 VAND. J. ENT. & TECH. L. 817, 823-24 (2010) (“Creativity, as a way to assess the strengths and weaknesses of this system and particular acts within it, and as a basis for the social organization constructed in part by copyright, cannot carry the weight it has been assigned.”).

228 As David Han has argued, when assessing the potential harms from low-value speech, courts should focus “on the question of actual foreseeability” of harms to the targeted audience. In order to avoid the chilling of speech based upon how a potential idiosyncratic audience actually responds, “a court should measure the social harm resulting from the audience’s processing of particular speech based on what the speaker should have reasonably foreseen under the circumstances.” David S. Han, The Mechanics of First Amendment Audience Analysis, 55 WM. & MARY L. REV. 1647, 1697 (2014). Although a full discussion of market effects is outside the scope of this project, some similar measure of foreseeability makes sense. See David Fagundes, Market Harm, Market Help, and Fair Use, 17 Stan. Tech. L. Rev. 359 (2014); Christina Bohannan, Copyright Harm, Foreseeability, and Fair Use, 85 WASH. U. L. REV. 969 (2007); see also Shyamkrishna Balganesh, Foreseeability and Copyright Incentives, 122 HARV. L. REV. 1569, 1571 (2009) (proposing “a test of ‘foreseeable copying’ to limit copyright’s grant of exclusivity to situations where a copier’s use was reasonably foreseeable at the time of creation—the point when the incentive is meant to operate”).
exhibits creativity in the challenged use. For example, if Russell Young’s prints actually stand to interfere with Dennis Morris’s ability to exhibit, sell or license his photographs, this might ultimately weigh against fair use. Notice, however, that under this approach liability would be premised upon some showing of likely harm to the plaintiff as opposed to the defendant’s failure to add sufficient artistic value to the original. Again, consistent with other areas of free speech law, a defendant can be held liable not just because his or her expression is morally objectionable to third parties, but because there has been a showing of actual or likely harm as a result of that speech.

A properly calibrated free speech defense—whether via fair use or the First Amendment defense to right of publicity—requires a robust understanding of both the social benefits of appropriative uses (e.g. political & cultural participation, community formation, individual autonomy and identity development) as well as its potential consequences to others. The creative process test highlights a range of values implicated by the challenged use, but it also emphasizes the need for courts, scholars and policy-makers to set clearer boundaries around the cognizable harms of copying. As several

229 Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2733 (2011) (“Under our Constitution, ‘esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.’”) (quoting United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 818 (2000)).

230 See, e.g., U.S. v. Alvarez, 132 S. Ct. 2537, 2547-48 (2012)(plurality)(“Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”); id. at 2555 (Breyer J., concurring) (“[I]n virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.”); see generally Christina Bohannon, Copyright Infringement and Harmless Speech, 61 HASTINGS L.J. 1083 (2010).

231 Several scholars have pointed out the murkiness of the markets that fall within the copyright owner’s purview and the snowballing effect that has arisen for the scope of copyright. See, e.g., James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 YALE L.J. 882 (2007); Jennifer Rothman,
scholars have observed, the heavy focus on the “meta-consideration” of transformative use has shifted copyright (and to a certain extent right of publicity law) away from meaningfully scrutinizing how the challenged use actually impacts the authors and celebrities who are supposed to be its beneficiaries. A finding of transformative use under the first fair use factor virtually guarantees victory under the remaining three factors, and the California Supreme Court in Comedy III expressly declined to import any of the other fair use factors into its transformative use test. Although a finding that the defendant parodied, critiqued or substantially altered the preexisting material certainly casts doubt on whether the defendant unfairly “usurped” the plaintiff’s market as opposed to legitimately “suppressed or destroyed it,” an approach that conflates value to defendant with harm to plaintiffs makes it extremely difficult to identify where copyright is actually needed to protect the economic interests of upstream authors. If we continue to regard copyright protections as important sources of creative incentives or economic stability, we must develop a clearer sense of the harms we are trying to


Jaszi, supra note 25, at 115 (“Today, transformativeness figures as a kind of metaconsideration arching over fair use analysis. The determination whether a use is transformative or not strongly inflects (if not dictates the outcomes of at least three, if not all four, of the statutory factors…”); see also Netanel, supra note 223, at 740 (“[R]ecent decisions that unequivocally characterize the defendant’s use as transformative almost universally find fair use.”).

See, e.g., Lantagne, supra note []; Thomas F. Cotter, Transformative Use and Cognizable Harm, 12 VAND. J. ENT. & TECH. L. 701, 704 (2010) (“[I]n overemphasizing the role of transformative use, courts have tied themselves up in unnecessary doctrinal knots while obscuring or ignoring the underlying policy choices. I contend instead that the fundamental issue surrounding fair use is whether the use at issue threatens the copyright owner with cognizable harm.”);


Comedy III at []. California courts will, however, consider the challenged use’s effect on the plaintiff’s economic incentives as one of the subsidiary questions within the transformative use inquiry.

See Cariou at [].

Compare Lemley, IP Without Scarcity draft (“The world of democratized, disaggregated production may simply not be one well-suited to the creation of artificial scarcity through law. [And] even if we could
protect and try to avoid prohibiting or chilling a broad swath of activities that do not trigger those concerns.

This focus on purpose-plus-harm may affect the ultimate outcome of some of the cases discussed above. It might shield, for instance, creative endeavors like Saderup’s charcoal drawings or Mr. Brainwash’s Warhol-esque street art, whose “raw materials” eluded their respective courts. By contrast, it may become difficult to distinguish the lawful use of Lady Kier’s image in the Kirby case from the unlawful videogame avatars in No Doubt or the two NCAA Football cases. Under a creative process approach, these cases are more likely to rise or fall together.\textsuperscript{238} And for a case like Winter, it would recognize and likely still protect the creative process at issue while more explicitly surfacing (without celebrating) the decision to turn unusual looking people into sexually deviant half-worm creatures. Ultimately, by focusing on the defendant’s creative process instead of searching for a raw/cooked relationship between two works, courts can both acknowledge the iterative, cumulative aspects of creativity and uphold IP protections in a manner that more fully transcends the social hierarchies among the parties.

\textbf{Conclusion}

Narrative can be an extremely valuable tool for shifting the views of courts, legislators and the general public, but even the most successful narratives can operate in unexpected ways as they make their way into legal doctrine. A familiar set of myths and metaphors can convey to an audience that there is something profoundly wrong with the

\textsuperscript{238} The trial court in Kirby found “the existence of material factual issues as to whether, by creating Ulala, respondents misappropriated Kirby's likeness and identity,” but it found Sega’s use transformative as a matter of law. 144 Cal. App. 4th at 55. If the court were to resolve the question of whether Ulala “was” Kirby in Kirby’s favor, it is unclear from the available facts how Kirby and No Doubt are different.
status quo, but these narrative devices have their own internal structures and cultural baggage that may ultimately prove ill-suited to resolving disputes among actual parties. Even when the law shifts in what appears to be a normatively desirable direction, it is crucial for scholars and advocates to maintain a critical eye, as the devil sometimes remains buried in the very specific linguistic details. The most ubiquitous, seemingly innocuous phrase, can have profound effects on the lives of the people to whom it is applied.

“Raw materials” has provided a unifying concept around which a diverse range of scholars have acknowledged the cumulative nature of much seemingly original creation and emphasized the importance of meaningful limits on intellectual property protections. But as this concept has made its way into courts, the built-in hierarchy between the “raw” and those who cook it has protected the creative processes of only a particular subset of celebrated artists. Courts do seem increasingly sensitive to the expressive values espoused by raw materials scholarship, and it is important that the evolving doctrines of transformative use remain moored to such values—and not just the words associated with them. No judicial inquiry into art, speech and expression will be entirely free of ideology and subjectivity, but we can and should try to align our legal doctrine and rhetoric as best we can with the people, institutions and practices that we seek to protect.