Social Semiotics in the Fair Use Analysis

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Introduction

Fair use is perhaps the most contested doctrine in all of copyright law; made all the more controversial by new technologies that not only enable increased audience engagement with cultural works, but also facilitate the use of these "raw materials" to produce new works. At another level, these technologies have made transparent an audience, not of passive content consumers, but of active participants in discourse around and about those works. We can now more readily perceive individuals and interpretive communities involved in a dynamic social process of making meaning around these artifacts; a process that technology has, in many cases, been laid bare.

This article attempts to meet these challenges to fair use, at least in part, but employing social semiotics as a process theory of meaning-making. The article presents an argument for an expansion of fair use, but not based on theories of authorship or rights of autonomy. It is, instead, a theory of the audience linked to social practice. The article asks, in essence, whether audiences determine the meaning, purpose, function, or social benefit of an allegedly infringing work, often regardless of what the work's creator did or intended. If so, does this matter for the purpose of a fair use analysis based on a claim of transformativeness?

Section one of the article sets the doctrinal groundwork for an exploration of social semiotic theory in the fair use inquiry by exploring a few of the more relevant points of controversy in that analysis; including commerciality, transformativeness, and cognizable market harm. Each of these inquiries is related — commerciality has an impact on transformativeness, which itself has a rather perplexing relationship with market harm, which is again linked to commerciality. These relationships have the tendency to muddle the four-factor analysis. Given that a full examination of these issues is well beyond the scope of this article, the goal here is simply to resolve them sufficiently to consider the potential insight provided by a social semiotic approach.

Section two of the article focuses on transformativeness, a concept at the heart of the factor one inquiry into the purpose and character of defendant's use of the copyrighted work. In this section we both explore the prevailing conception of transformativeness and propose an alternative. In practice, the transformativeness inquiry focuses on whether the defendant engaged in authorial purpose or activity. This focus on authorship, rather than the resulting work, reflects a tendency to conflate rights-based incentives to create new works, with the accommodation of certain works that use those protected works as raw materials in the creation of a new work. This creates an imbalance in the equilibrium between incentive and accommodation, such that the full social benefit of additional expression is not realized. Social semiotics offers an alternate conception of transformativeness in which social value is manifest in the process of meaning-making that occurs as individuals and interpretive communities engage the work. It is in this process of semiosis that copyright's commitment to the enrichment of society can be best evaluated, as a distinct question apart from the creation of new authorial rights. Finally, the pending case of *Shepard Fairey v. The Associated Press* is used to illustrate how social semiotic theories are applied.

Section three of the article looks at how social semiotic theory might be relevant in an analysis of the remaining fair use factors: the nature of the copyrighted work; the amount and substantiality used; and the effect on actual and potential markets. We conclude that social semiotics is most helpful in terms of factor two, the nature of the copyrighted work, with only limited application to the remaining factors.

I. Background

The starting point for a fair use analysis is a defendant's alleged infringement of a copyright holder's exclusive rights attendant to an original work, usually through unauthorized reproduction or the creation of a derivative work, both of which require the approval of the copyright holder. Fair use is thus an affirmative defense to the infringement charge.[2] This section of the article both sets out the substance of the fair use analysis and explores some of the more contentious points in its application.

A. Section 107 and the Fair Use Factors Analysis

It is generally agreed that fair use first appeared in American law as a common law concept, grounded in two mid-nineteenth century opinions by Justice Story.[3] The first, *Gary v. Russell*, discussed in dicta the difficulty of determining whether infringement of

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[2] *Campbell,* 510 U.S. at 590 ("fair use is an affirmative defense"). *But see* William F. Patry, *Patry on Copyright* 10:1.50 ("'limitations and exceptions to copyright,' a phrase much in current use, posits the issue backwards"). According to Patry, whereas before the statutory recognition of the doctrine, fair use was used by courts "to ensure that the objectives of copyrights . . . were not stifled by copyright owners bent on shuffling down all unauthorized uses or extracting license fees for conduct that should be uncompensated." *Id.* Further, Patry calls fair use "an important safety valve that acts as a bulwark against the monopoly power that inheres in an exclusive right and which leads owners of such rights to act in ways contrary to the public interest." *Id. See also* Mary W.S. Wong, *"Transformative" User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?*, 11 Vand. J. Ent. & Tech. L. 1075, 1109-1110 (2009)

[3] Early in its discussion of fair use, the *Campbell* Court turned to Justice Story, arguably the father of the fair use factors, in describing the importance of fair use: "For as Justice Story explained, '[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.'" *Campbell*, 510 U.S. at 575 (quoting *Emerson v. Davies*, 8 F. Cas 615, 619 (No. 4,436) (CCD Mass. 1845)). It is also broadly acknowledged, however, that American courts drew English law in developing our common law doctrine. *See, e.g., Campbell*, 510 U.S. at 575 (referencing cases brought under England's Statute of Anne, particularly involving "fair abridgements" of existing works).

a protected work might be excused where the subsequent work is in the form of a criticism or abridgement of the original.[4] This opinion was followed just two years later by *Folsom v. Marsh*,[5] in which Justice Story addressed and rejected defendants' affirmative assertion of fair use. "The real hinge of the whole controversy" was, Story observed, whether "the defendants had a right to abridge and select, and use the materials which they have taken for their work, which, though it embraces [a significant amount of the original work], is an original and new work…."[6] The defendants sought to justify their significant use of the original works by arguing that "only such materials as suited his own limited purpose as a biographer" had been selected.[7] Justice Story, although conceding both this point and that defendants had "produced an exceedingly valuable book," rejected this assertion of contextual "need" as dispositive of the question:

> It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*…. [It does not] necessarily depend upon the quantity taken…. It is often affected by other considerations, [such as] the value of the materials taken, and the importance of it to the sale of the original work…. In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[8]

Applying these principles to the case at bar, the defense was rejected.[9]

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4 10 F.Cas. 1035, No. 5728 (C.C.D. Mass. 1839). *See also* William F. Patry, *Patry on Fair Use* § 1:20 n.9 (2009) (discussing the *Gary v. Russell* decision).

5 9 F.Cas. 342, No. 4901 (C.C.D. Mass. 1941).

6 *Id.* at 347.

7 *Id.* at 348.

8 *Id.* at 348.

9 Patry describes the application of these principles as follows:

> Why did Upham lose? He had appropriated a mere 4.5% of the plaintiff's work, and had in the process produced an admittedly excellent work the enjoining of which prevented its use by the intended audience of schoolchildren. Justice Story's decision was based on his conclusion that Upham's use of the plaintiff's work was not the result of a "fair exercise of a mental operation." That this failure is what doomed Upham is established by the court's comment that this was not a case where "abbreviated or select passages are taken from particular

Fair use remained a common law doctrine until its codification in the Copyright Act of 1976.[10]

> [T]he fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[11]

In substance, statutory fair use leans heavily on considerations identified in *Folsom v. Marsh*.[12] The defense is framed by examples contained in the preamble, focusing on socially beneficial works promoting critical discourse, news, and education. These examples are followed by a list of four non-exclusive factors[13] to guide the resolution of

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> letters; but the entire letters are taken." Earlier, after remarking on the necessity of a "real [and] substantial condensation," Justice Story had condemned the "facile use of the scissors," which is apparently what he thought defendant had done by copying entire letters.

Patry, *supra* note __, at 1:20 (footnotes omitted).

10 Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§101-805 (2006)). It is generally agreed that "Section 107 is intended to restate the [common law] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. 1476, 94th Cong. (1976).

11 17 U.S.C. § 107.

12 *See Campbell v. Acuff-Rose, Inc.,* 510 U.S. 569, 576 (1994) (acknowledging the connection). *But see* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005,* 156 U. Pa. L. Rev. 549, 560 (2008) (agreeing that the "language of section 107's factors was largely drawn from" *Folsom v. Marsh*, but noting that it is "an opinion whose influence on American fair use case law up to the 1976 Act we have probably overestimated … but whose influence since is quite clear).

13 *But see* Beebe, *supra* note __, at 563 (finding that in fact "judges rarely explicitly considered factors beyond the four listed in section 107").

a particular case.[14] There are no *per se* cases of fair use; rather each factor should be considered against the specific facts of an individual case.[15]

Although not statutorily compelled, early Supreme Court cases applying Section 107 established the primacy of factor four, the effect on potential markets, in the fair use analysis. In *Harper & Row v. Nation Enterprises,* the Court referred to factor four as "undoubtedly the single most important element of fair use,"[16] a position it reaffirmed in *Stewart v. Abend*.[17] But, just four years later, in *Campbell v. Acuff-Rose*,[18] the Court appeared to reverse course, omitting the language from *Harper & Row* regarding the importance of factor four. Rather, *Campbell* instructed that "all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright,"[19] "[a]pparently abandoning the idea that any factor enjoys primacy."[20] Moreover, in discussing factor one — the purpose and character of the use — the Court noted that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[21] Based in part on this language, some have suggested that factor one is the "heart of the fair use

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14 *See, e.g.,* H.R. 1476, 94th Cong. (1976) (stating that "there is no disposition to freeze the doctrine in the statute … the courts must be free to adapt the doctrine to particular situations on a case-by-case basis").

15 *A.V. ex re. Vanderhye v. iParadigms, LLC,* 562 F.3d 630, 638 (4th Cir. 2009) ("Section 107 contemplates that the question of whether a given use of copyrighted material is 'fair' requires a case-by-case analysis in which the statutory factors are not treated in isolation but are weighed together, in light of the purposes of copyright."). Likewise, "[f]air use is a mixed question of law and fact that can be determined at summary judgment if no genuine issue of material fact exists." Jeannine M. Marques, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 Berkeley Tech. L.J. 331, 335 (2007). *See also Harper & Row Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 560 (1985) ("Fair use is a mixed question of law and fact").

16 *Harper & Row,* 471 U.S. at 566 (explicitly referencing Nimmer's assertion that "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied"). *See also, e.g., Monster Commc'ns, Inc. v. Turner Broad. System, Inc.,* 935 F.Supp. 490, 495 (1996) (citing *Harper & Row* for the proposition that "The final fair use factor, the effect of the infringing use on the market for the original copyrighted work, is the most important").

17 495 U.S. 207, 238 (1990) (calling the fourth factor the "most important, and indeed, central fair use factor," citing Nimmer).

18 *Campbell v. Acuff-Rose, Inc.,* 510 U.S. 569 (1994).

19 *Id.* at 578.

20 *American Geophysical Union v. Texaco Inc.*, 37 F.3d 881, 894 (2d Cir. 1994).

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

inquiry,"[22] not factor four. Although the picture remains muddled on this point,[23] at the very least there is general agreement that, although all four factors are generally considered,[24] factors one and four dominate the fair use analysis.[25] The primary points of contention within each factor and the interplay between the various factors, as well as the consequences of that interaction, are discussed in greater detail below.

B. Selected Pressure Points in the Fair Use Analysis

* *Commercial vs. Noncommercial Use*
* *Transformative vs. Nontransformative Use*
* *Cognizable vs. Noncognizable Harm*

1. Commercial vs. Noncommercial

One pressure point in the fair use analysis is the commerciality of defendant's use. In *Sony v. Universal City Studios*,[26] the Court created what came to be known as "the *Sony*

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22 *Davis v. Gap, Inc.,* 246 F.3d 152, 174 (2d Cir. 2001) (Leval, J.). Judge Leval had previously argued in his influential law review article, *Toward a Fair Use Standard*, that factor one is "the soul of fair use." 103 Harv. L. Rev. 1105, 1116 (1990). *See also* Beebe, *supra* note ___, at 597 (describing factor one as "correlated very strongly with the outcome of the overall fair use test," although the correlation with factor four was slightly stronger).

23 *See* Beebe, *supra* note ___, at 583 (discussing the various opinions of courts and commentators regarding the importance of each factor). *See also* Anne E. Forkner, James S. Heller, & Patrick F. Speice, *Pretty Woman Meets the Man Who Wears the Star: Fair Use After Campbell v. Acuff-Rose and American Geophysical Union v. Texaco*, 54 J. Copyright Soc'y U.S.A. 719, 726 (2007) (calling "troublesome … the fact that more than a decade after *Campbell*, some courts insist on … giving the four factor more weight than the others").

24 *See* Beebe, *supra* note ___, at 563-564 (finding that, "with the exception of the second factor, [courts] rarely failed to consider fewer than all four factors").

25 *Id.* at 583 (noting that "commentators tend to regard [factors two and three], if they regard them at all, as peripheral to the outcome of the test"); *id.* at __ (finding that factor two typically has "no significant effect on the overall outcome of the fair use test"). *But see id.* at ___ (finding that "the outcome of factor three [is] correlated strongly with the outcome of the overall test as well as with the outcomes of factors one and four," especially when "found to favor fair use").

26 *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that the time-shifting of free broadcast television shows constituted fair use, relying primarily on factor four).

presumption."[27] In applying factor one of the Section 107 analysis, the Court observed that "If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair," although "the contrary presumption" was to be applied to the "noncommercial, nonprofit activity" at issue in the case at bar.[28] Thus, "under factor one, a commercial 'purpose' is presumptively unfair and a noncommercial purpose presumptively fair."[29] Although the Court cast doubt on the *Sony* presumption in *Harper & Row* (1985),[30] it was apparently reaffirmed in *Stewart v. Abend* (1990).[31] During this period, and despite the confusion created by *Harper & Row,* the *Sony* presumption was readily applied by most lower courts. [32]

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27 *See, e.g.,* Pamela Samuelson*, The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 Fordham L. Rev. 1831, 1870-71 (2005) (discussing application of the "*Sony* presumption" in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.,* 964 F.2d 965 (9th Cir. 1992)); Stacey L. Dogan, *Comment: Sony, Fair Use, and File Sharing*, 55 Case W. Res. L. Rev. 971, 973-74 (discussing the applicability of the "*Sony* presumption" to cases involving peer-to-peer file-sharing networks) (2005); *Princeton Univ. Press v. Michigan Doc. Svcs., Inc.*, 99 F.3d 1381, 1386 (6th Cir. 1996) (discussing the continuing viability and substance of the "*Sony* presumption" after *Campbell v. Acuff-Rose*).

28 *Sony*, 464 U.S. at 449 (emphasizing the noncommercial nature of the consumers' use). Some commentators have criticized the Supreme Court for relying solely on the work of commentator Melville Nimmer for this proposition, without adequate explanation or citation to caselaw. *See* Patry, *supra* n.___ at § 6:5 (arguing that the "handful of cases cited by Professor Nimmer do not bear out this assertion").

29 *See* Beebe, *supra* note ___, at 599.

30 471 U.S. at 562. The *Harper & Row* court initially stated that "The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use," suggesting a certain equality among factors. *Id.* This was immediately followed, however, by quoting the presumptive language from *Sony* and weighing the "profit of exploitation" heavily against the defendant. *Id.*

31 495 U.S. at 237 (apparently rejecting any suggestion that *Harper & Row* had altered the landscape by invoking the *Sony* presumption without reference to *Harper & Row*).

32 *See, e.g.*, *Hustler Mag., Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (applying the presumption and extending it to factor four); *Cable/Home Comm. Corp. v. Network Prod., Inc.*, 902 F.2d 829, 844 (11th Cir. 1990) (applying the presumption in a factor one analysis and finding that defendant's "flagrant commercial purpose … cannot be disguised as fair use"). *But see, e.g., Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1261-62 (1986) (rejecting both plaintiff's assertion that the commercial nature of defendant's use mandated judgment against him or even that the *Sony* court "intended to attach heightened significance to the element of commerciality").

With its 1994 opinion in *Campbell*, the Supreme Court sought to settle the landscape regarding the effect of commerciality. It chided the Court of Appeals for "applying a presumption ostensibly culled from *Sony*" that commercial use is unfair,[33] calling commerciality just one element of the factor one analysis to be weighed in a "sensitive balancing of interests."[34] Liberally invoking *Harper & Row*, while all but ignoring *Stewart v. Abend*, the Court treated this as a settled question and the Court of Appeals as rather ignorant for not recognizing it as such:

> *Sony* itself called for no hard evidentiary presumption…. The Court of Appeals's elevation of one sentence from *Sony* to a *per se* rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication. Rather, as we explained in *Harper & Row*, *Sony* stands for the proposition that the fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. But that is all, and … even the force of that tendency will vary with the context….[35]

Campbell thus debunked the *Sony* presumption once and for all;[36] or so it seemed. The *Sony* presumption remains a stubborn fixture in fair use case law, appearing in and applied to some of even the most recent cases.[37] Indeed, Barton Beebe's empirical

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33 *Campbell*, 510 U.S. at 583-84.

34 *Id.* at 584 (quoting *Sony*).

35 *Id.* at 584-85 (quoting *Sony*). *See also, e.g., Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998) (recognizing that the *Campbell* court "abandoned" the *Sony* presumption).

36 Judge Leval described *Campbell* as having "fixed the rudder and restored the compass bearing" in fair use analysis by, *inter alia*, clearly eliminating the "pernicious 'commercial use' presumption." Pierre J. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 Cardozo Arts & Ent. L.J. 19, 22 (1994). *See also id.* at 19-22 (describing the evolutionary problems associated with the *Sony* presumption). *But see* Beebe, *supra* note ___, at 601 (invoking empirical data to "suggest that Judge Leval may have been overly pessimistic with respect to how judges used the *Sony* presumption before *Campbell*, but overly optimistic with respect to how they would use it after *Campbell*").

37 *See, e.g., Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 530 (9th Cir. 2008) (applying a rule gleaned from *Sony* that "commercial use of copyrighted material is "'presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright'"); *Thomas M. Gilbert Architects, P.C. v. Accent Builders and Developers, LLC*, 629 F.Supp.2d 526, 533 (E.D. Va. 2008) (similar). *See also* Forkner, et al., *supra* note __, at 726 (calling "troublesome … the fact that more than a decade after *Campbell*, some courts insist on applying the commercial presumption from *Sony*").

study of copyright fair use cases found a "renewal of interest in the presumption among some lower courts" applying factor one, calling the *Sony* presumption an "exceptionally tenacious meme[] in the fair use case law."[38]

Part of this tenaciousness can perhaps be explained by the relationship between factor one's "commercial use" inquiry and factor four's "market effect" analysis. In evaluating factor four, the *Sony* court recognized oppositional evidentiary presumptions arising from the commercial-noncommercial distinction. Commercial use should be treated as a "presumptively … unfair exploitation of the monopoly privilege" that inhibits the copyright holder's ability to capitalize on potential markets and thus the incentive to create.[39] Noncommercial use is comparatively less likely to have this effect.[40] Thus, noncommercial use would carry no presumption of market harm and instead require a showing of either actual harm or the likelihood of future harm caused by the challenged use.[41]

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[38] *See* Beebe, *supra* n.___, at 603. *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (stating that with commercial uses market harm can be assumed, citing *Sony*); *Elvis Presley Enters., Inc. v. Passport Video,* 349 F.3d 622 (9th Cir. 2003) (same, citing *A&M Records* and *Sony*). *Compare* Patry, *supra* n.___ at § 3:4 (observing that "so effective has *Campbell* been in purging fair use of the nest of presumptions and anticommercial prejudices that had grown up, that it is quite common for courts of appeals to describe a user's commercial purpose as virtually irrelevant"), *with id.* (stating that "Other panels, however, continue to characterize commercial uses negatively").

[39] *Sony*, 464 U.S. at 450-51 (noting also that "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create").

[40] *Sony*, 464 U.S. at 450-51 (noting that "The prohibition of … noncommercial uses [with no demonstrable effect on the potential market] would merely inhibit access to ideas without any countervailing benefit").

[41] *Sony*, 464 U.S. at 451 (stressing that third-party copyright owners were already licensing their content to broadcasters, who were in turn providing it to consumers without charge). The Court imposed a preponderance-of-the-evidence standard on the showing of likely future harm, including harm arising from a use,that, "should [it] become widespread, … would adversely affect the potential market." *Id.* In *Harper & Row*, the Court added to this framework as regards actual harm, providing that "once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression." 471 U.S. at 567 (finding actual harm of at least $25,000 based on the cancellation of a first-publication licensing agreement).

In *Campbell*, however, the Court significantly modified this factor-four framework by sharply limiting application of a market-harm presumption to cases in which the defendant engaged in "mere duplication for commercial purposes."[42] Reaching back to Justice Story's *Folsom* decision, the Court found that such duplication "clearly 'supercede[s] the objects' of the original" and thus "serves as a market replacement for it."[43] Market harm to the original is therefore likely.[44] Absent "mere duplication for commercial purposes," however, no such presumption of market replacement and market harm is supported.[45]

In narrowing the effect of the commercial/noncommercial distinction — premised on the distinction between mere duplication and alteration — *Campbell* circled back to factor one and the newly recognized doctrine of "transformative use." Setting mere duplication and transformative use in opposition, the Court concluded that "when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."[46] This leads to a second pressure point in the fair use analysis, the transformativeness of defendant's use.

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[42] *Campbell*, 510 U.S. at 591 (noting, *inter alia*, that *Sony* involved the verbatim copying of television shows). *See also* Christina Mitakis, *The E-Rated Industry: Fair Use Sheep or Infringing Goat*, 6 Vand. J. Ent. L. & Prac. 291, 300 (2004) (Describing *Campbell's* reworking of the market-harm presumption). The *Campbell* decision arguably called into question the very existence of a market-harm presumption, even under these limited circumstances, by saying only that it "might find support in *Sony*." *Campbell*, 510 U.S. at 591.

[43] *Campbell*, 510 U.S. at 591.

[44] *Id.* (stating that this conclusion "simply makes common sense").

[45] Not all courts have applied this more subtle and limited market-harm presumption. *See Los Angeles News Serv. v. KCAL-TV Channel*, 108 F.3d 1119, 1122-23 (9th Cir. 1997) (admitting that only a small amount of an entire videotape was used and concluding that such use "without a license, would destroy [plaintiff's] original and primary market" but then relying on *Sony*, not *Campbell*, stating "*Sony* suggests that this kind of duplication for commercial use may give rise to a presumption or inference of harm); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (liberally quoting from *Sony* regarding the market harm presumption and adding emphasis to the line *"[i]f the intended use is for commercial gain, that likelihood [of market harm] may be presumed*"); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003) (again relying solely on *Sony* when it says "[plaintiff's] use is commercial in nature, and thus we can assume market harm").

[46] *Campbell*, 510 U.S. at 591.

2. Transformative vs. Nontransformative

The emergence of transformativeness is framed by the evolution of the commerciality inquiry, a process that produced the following principles. First, there are no *per se* cases of fair use. Instead, each of the four Section 107 factors should be considered on a case-by-case basis, focusing on the specific facts of each individual situation. Second, the commercial purpose of a subsequent work does not create a presumption of unfair use. Likewise, such a purpose does not create a presumption of market harm under factor four, unless the subsequent work constitutes "mere duplication for commercial purposes." In all other cases, commerciality is treated as merely one aspect of the factor-one analysis. Moreover, although a finding of commerciality tends to weigh against a finding of fair use, the force of that tendency varies depending on the factual context, particularly the degree of transformativeness in the subsequent use.[47]

In moderating the commerciality inquiry relative to transformativeness, the *Campbell* court sought to more firmly anchor fair use analysis to what it termed the principal goals of copyright:

> Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.[48]

As this passage from *Campbell* suggests, the goal of copyright is, in general terms, to provide a public benefit by expanding the available body of "new" expression. In the context of factor one, the "purpose and character" of the subsequent work, the Court framed the analysis as a determination of "whether the new work merely supersedes

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[47] *Id.* (holding that the proper focus of a factor one analysis is "whether and to what extent the new work is 'transformative'"). The transformativeness standard set forth in *Campbell* was drawn from Judge Leval's now-famous 1990 law review article, *Toward a Fair Use Standard, supra* note __.

[48] *Campbell*, 510 U.S. at 578-79 (citations omitted). *See also, e.g., iParadigms,* 562 F.3d at 639 (embracing the district court's determination "that the commercial aspect of the subsequent work was not significant in light of [its] transformative nature"). *Campbell* notes, however, "an obvious statutory exception to this focus on transformative uses [in] the straight reproduction of multiple copies for classroom distribution." 510 U.S. at 579 n.11. This is precisely the point on which the dissent in *Princeton Univ. Press v. Mich. Document Servs., Inc.,* thought the majority erred, holding that a copy house could not serve as a money-making middle man between professors and students in printing and selling coursepacks, despite their blatantly educational nature. 99 F.3d 1381, 1400 (6th Cir. 1996) (Ryan, J., dissenting).

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."[49] The transformative nature of a subsequent work is, in most cases, significantly more probative of this question than its commerciality.

The perceived probative value of the transformativeness inquiry hinges on the interplay between two mechanisms adopted to further the goal of copyright by promoting the creation of new works. One method of accomplishing this goal (some would say the "primary" method) is to economically incentivize authors by providing an artificially limited monopoly in new works, thereby facilitating a market in which to exploit their value.[50] These are the Section 106 rights.[51] Another is to secure space for others to use those protected works as raw materials in the production of new works.[52] This is the Section 107 fair use defense.[53] Fair use not only serves the goal of copyright by permitting the creation of new works, but also attends First Amendment concerns regarding restrictions on free expression.[54] The fair use analysis thus seeks a point of equilibrium between the grant of substantive rights of exploitation in the original work and the accommodation of subsequent works that draw from that protected expression, so as to maximize public benefit.[55]

The transformativeness inquiry is often at the core of both concerns, and thus can appear to dominate the fair use analysis. First, more transformative works further the purposes of copyright by adding something new — "a further purpose or different character … new expression, meaning, or message."[56] Second, although the market harm analysis is distinct from that of purpose-and-character, as a descriptive matter more transformative works are clearly less likely to serve as a market substitute for the original work upon which they draw and thereby deincentivize the first author by usurping a copyright holder's market. This explains both the tendency towards a direct

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[49] *Campbell*, 510 U.S. at 578-79 (referencing *Folsom v. Marsh* and *Harper & Row*) (quotation marks and citations omitted).

[50] *INSERT CITATION*

[51] 17 U.S.C. § 106.

[52] This raises the question of whether the subsequent creator should himself be incentivized through the provision of substantive rights in the new work. This implicates not only those substantive standards, but also the difficult intersection between transformativeness and the derivative work right.

[53] 17 U.S.C. § 107.

[54] *INSERT CITATION*

[55] *See, e.g.,* Marques, *supra* n.___, at 335 ("a use is usually fair if it can serve the dual purpose of stimulating the publics wealth of knowledge without diminishing incentives for creativity")..

[56] *Campbell*, 510 U.S. at 579.

relationship between factor-one and factor-four,[57] and why the highly transformative nature of a subsequent work can appear to exert prevailing influence in the fair use analysis. It is important to note, however, that transformativeness is an operative consideration in the factor one inquiry, whereas the relationship between transformativeness and substitutive market harm is merely an observed inverse correlation.

This distinction is illustrated by looking back to the relationship between transformativeness and commercialism. Transformativeness exists on a sliding scale. The more transformative the subsequent work, the less significant the other factors — including commercialism. Thus, a commercial work that is highly transformative is likely to add new and original work to the marketplace, serving the goals of copyright, without regard to its commercial nature.[58] This oppositional relationship between transformativeness and the other fair use factors helps to explain the *Campbell* court's rather drastic contraction of *Sony*'s broad presumption of market harm. The *Campbell* court limited the market harm presumption to commercial works of "mere duplication" not because of their commercial purpose, but because identical or verbatim copies are significantly more likely to serve as a substitute in the market for the original goods. Outside of this singular circumstance, however, the Court declined to recognize any operative market harm presumption or factor grounded in transformativeness,[59] but

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[57] *See* Wong, *supra* n.___, at 1129 (observing that there is an "uncertain relationship between transformativeness (and more generally, the first fair use factor) and the fourth factor of market harm").

[58] *See id.* at 579. *See also, e.g.,* Pamela Samuelson & Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 I/S: J. L. & Pol'y for Info. Soc'y 67, 82-83 (2010) (discussing the link between transformativeness and the goals of copyright).

[59] Some courts have found a reverse presumption of transformativeness when the use in question is of the type specifically listed in the preamble to the fair use doctrine. *See NXIVM Corp. v. The Ross Inst.*, 364 F.3d 471, 477 (2nd Cir. 2004) ("[w]here the defendants' use is for the purposes of 'criticism, comment . . . scholarship, or research,' [internal citation omitted] factor one will normally tilt in the defendants' favor"); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2nd Cir. 1991) ("strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in Section 107"). There is some evidence that any presumption is based, at least in part, on the idea that those uses listed in the preamble are more in line with the ideals protected by the First Amendment. *See, e.g., Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) ("[b]y developing and transforming associations with Mattel's Barbie doll, [defendant] has created the sort of social criticism and parodic speech protected by the First Amendment and promoted by the Copyright Act"); *Dr. Seuss,* 109 F.3d at 1400 ("[p]arody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment"); *Los Angeles News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121 (9th Cir. 1997) (noting that the

instead maintained the analytical distinction between these parallel but discrete inquiries.

Although framed by the goals of copyright and the social benefit sought to be achieved, it bears noting here one prominent view that transformativeness can essentially subsume more expansive conceptions of social benefit.[60] As one commentator observes, "While transformative uses do typically benefit the public, the primary question is whether a use is sufficiently different from the copyright owner's use of the work that it is unlikely to cause the copyright owner economic harm."[61] Thus, in certain contexts, socially beneficial but nontransformative uses — including the statutorily recognized[62] activities of news reporting[63] and research[64] — may not constitute fair

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videotape in question was used for news reporting purposes and that "First Amendment considerations reinforce the conclusion that [defendant]'s use was fair").

60 *See, e.g.,* Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use,* 85 Wash. U. L. Rev. 969, 1007 (2007) (asserting that "a use has to be transformative relative to the copyright owner's use, not just socially beneficial in the abstract"). *But see* Patry, *supra* n.___, at § 3:9 (arguing that transformativeness is "necessarily the most important factor," but rather that "The key issue in every case is whether the use is beneficial to society"). *Cf. Sega Enters. Ltd. v. Accolade, Inc.,* 977 F.2d 1510, 1523 (9th Cir. 1993) (noting that courts could "consider the public benefit resulting from a particular use notwithstanding the fact that the alleged infringer may gain commercially"); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) ("parody has an obvious claim to transformative value . . . . Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an early work, and, in the process, creating a new one"); *Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994) ("scope of the fair use doctrine is wider when the use relates to issues of public concern"); *Field v. Google,* 412 F.Supp.2d 1106 (D.Nev. 2006) (emphasizing the public benefit of having archived, or "cached" copies available); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007) (casting the public benefit of search engine functionality as transformative).

61 Bohannan, *supra* n.__, at 1007.

62 17 U.S.C. § 107 (referencing "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" as examples of common fair use purposes).

63 *See Harper & Row,* 471 U.S. at _568-69. (finding news reporting of copyrighted materials could not be "excused by the public's interest in the subject matter" where such use results in substitutive market harm).

64 *See American Geophysical Union*, 37 F.3d at 892-92 (rejecting a claim of fair use and finding that "the concept of a "transformative" use would be extended beyond recognition if it was applied to [defendants'] copying simply because he acted in the

uses because they serve as market substitutes for the original works. This harm-based focus suggests the further diminution of "productive use" as indicative of fair use.[65] Although the distinction between productive and transformative use has not always been clear, some have proposed transformative use as a subset of productive use, with the latter trending toward a more generalized consideration of social benefit.[66] By reinforcing the dominance of the transformativeness inquiry, particularly as a measure of potential market harm, the more aspirational and overtly subjective goals of copyright are constrained and the individual copyright owner's interest may be elevated over a generalized public interest.[67] As discussed below, such underinclusiveness should be avoided by maintaining the distinction between a transformativeness analysis and the market harm analysis, particularly in terms of market substitution.

3. Cognizable vs. Noncognizable Harm

Casting transformativeness, commerciality, and even social benefit in terms of market harm highlights a third pressure point in the fair use analysis, the distinction between cognizable and noncognizable harm to markets for the copyrighted work. Factor four of the fair use inquiry is "the effect of the use upon the potential market for or value of the copyrighted work."[68] This factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would

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course of doing research). *See also Princeton Univ. Press v. Mich. Document Servs., Inc.,* 99 F.3d 1381, 1389 (6th Cir. 1996) (dismissing the argument that a copy house was engaged in educational copying on behalf of professors and students in light of the fact that the copy house profited from the venture without paying the appropriate fees). That court even went so far as to suggest that "the proposition that it would be fair use for the students or professors to make their own copies . . . is by no means free from doubt." *Id.*

[65] *INSERT CITATION*

[66] *But see* Patry, *supra* n.___, at § 3:9 (stating that "productive use is effectively indistinguishable from transformative use"). Other courts have employed entirely different terms. *See e.g. Ty, Inc. v. Publications Int'l Ltd.,* 292 F.3d 512, 517 (7th Cir. 2002) (distinguishing "complementary" and "substitutional" copying). *But see* Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 Vanderbilt J. Ent. & Tech. L. ___, [12-16] (2010) (criticizing *Ty, Inc.*'s complementary copying approach).

[67] *Cf.* Bohannan, *supra* note __, at 1008 (noting that "a court's finding of 'transformativeness' will often be equivalent to a finding of 'no-harm,' because the defendant's changes to the meaning or purpose of the copyrighted work render it a poor substitute for the copyright owner's work").

[68] 17 U.S.C. § 107(4).

result in a substantially adverse impact on the potential market for the original."[69] This includes both harm to the original and harm to the market for derivative works.[70]

The market harm analysis recognizes that true market substitutes "cause[] the greatest harm to copyright owners,"[71] whether the copy serves as a substitute for the original work or a derivative work.[72] However, just as transformativeness exists on a spectrum, so too does market substitution and the resulting market harm.[73] Determining the degree of substitutive effect requires a comparative examination of the copyright holder's actual or potential markets and markets for defendant's work. At one extreme are works that are mere duplicates of the copyrighted work and are created for commercial purposes. In such cases, substitutive effect and the resulting market harm are presumed.[74] At the other extreme are parodies and other critical works that

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69 *Campbell*, 510 U.S. at 590. *See also* Brandon Grzandziel, *A New Argument for Fair Use Under the Digital Millennium Copyright Act*, 16 U. Miami Bus. L. Rev. 171, 195 (2008) ("*Campbell*'s formulation imposes a higher burden of proof on the party alleging infringement. Because of this 'substantially' higher burden, *Campbell* effectively enlarges the scope of fair use by giving to those claiming it more room to act before they 'substantially' affect the market.").

70 *See id.*

71 Sara K. Stadler, *Relevant Markets for Copyrighted Works*, 34 J. Corp. L. 1059, 1059-60 (2009). *Sundeman v. Seajay Society, Inc.* 142 F.3d 194, 206-207 (4th Cir. 1998), structures the market harm analysis into three categories: (1) impairment of marketability; (2) market substitution; and (3) derivative or potential markets. In *Sundeman*, impairment of marketability focuses on the effect of defendant's limited use on the value of or potential markets for an unpublished work. Market substitution considers the question of transformativeness and implicates the distinction between adverse market effects arising from various forms of republication (substitution) and those resulting from criticism (suppression). The derivative or potential market analysis again focuses on substitution, but is limited to market harms in "uses that the copyright holder of the original work would [potentially] develop or license others to develop." *Id.* at 207. *Cf. Mattel,* 353 F.3d at 805-806 (considering plaintiff's argument that defendant's work could lead to market harm by impairing the value of the original work, derivatives of that work, and/or licensing of the work or its derivatives). *But see* Patry, *supra* n.___, at § 3:10 (noting "[r]egrettably," that the proper purposes and goals of fair use analysis are "occasionally lost in favor of economic tests centering around the presence of an ill-defined concept of 'market failure'").

72 *Id.,* at 1066 (referencing *Harper & Row* and *Ty, Inc.*).

73 *See Campbell*, 510 U.S. at 590 n.21.

74 It should be noted that mere duplication is not *per se* harmful. "[N]ot all harm to the market caused by unauthorized uses may be weighed under the fourth factor (or, indeed, considered at all)." Patry, *supra* n.___, at 6:6. For instance, some material

comment on the copyrighted work, for which "the law recognizes no derivative market"[75] and thus no cognizable harm in substitution.

This final point turns on the distinction between usurpation of market demand (substitution) and suppression of market demand. Generally speaking, usurpation resulting from the availability of market substitutes is a cognizable harm under copyright law,[76] whereas suppression resulting from criticism or comparison is not.[77] This point was made in *Campbell* in regards to the market effect of parody:

> We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.[78]

Applying this distinction to the potential market for derivative works, *Campbell* holds that "the law recognizes no derivative market for critical works, including parody," because it is overwhelmingly "unlikel[y] that creators of imaginative works will license critical reviews or lampoons of their own productions."[79] The Court allows, however,

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from the original may by nonprotectable or the use of protected material *de minimus*. *Id*. *See also, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340, 363-64 (1991) (holding that the "names, towns, and telephone numbers" in the white pages were "not original to [plaintiff] and therefore were not protected by [its] copyright" and therefore "[defendant]'s use of the listings [did not] constitute infringement").

75 *Campbell*, 510 U.S. at 592.

76 *See* Patry, *supra* n.___, at 6:6 (stating that "It is only harm arising from the ability of defendant's use to act as a substitute for plaintiff's work in the marketplace that may disqualify one from successfully asserting fair use").

77 *See id.* (stating that "Indirect harm cause to the value of the work by criticism or comment may … be eliminated from consideration").

78 *Campbell*, 510 U.S. at 591-92 (quotation marks and citations omitted). It is interesting to note the Court's language here, which suggests that works that suppress demand (such as parody and other forms of criticism) are not copyright infringement. This can be read as contradicting the idea of fair use as an affirmative defense. *INSERT ADDITIONAL CITATIONS*

79 *Id.*, at 592-93. *But see Am. Geophyisical Union v. Texaco, Inc.,* 60 F.3d 913, 938 (2nd Cir. 1994) (Jacobs, J., dissenting) (arguing that the majority's reliance on the existence of a "ready market" for licensing fees as a sole basis for finding harm in an area otherwise protected as scholarly research is flawed in part because "[t]here is no technological or commercial impediment to imposing a fee for use of a work in a

that such a rule applies only to the critical aspects of a work and its "effects … in the arena of criticism."[80] Works with "a more complex character" may also have effects "in protectable markets for derivative works," and the court must therefore determine whether these effects would produce substantial harm through market substitution.[81]

Outside of this rather precise distinction between market usurpation and market suppression — confined to works of parody and criticism of the original work[82] — the question of market substitution becomes more nuanced, unstructured, and unpredictable. What about works that are neither mere duplicates of the copyrighted work, nor parody or criticism of the original?[83] As the very phrasing of that question suggests, this middle ground tends to be described in terms of the allegedly infringing work rather than the markets for the original, usually focusing on the degree of transformativeness. For instance, Sara Stadler describes cases "involving accused works that exist in significant part to enable new uses … [where] the defendant has taken something from the plaintiff, added something, and given the copyrighted expression (which emerges largely intact) a different purpose than the one served by the original."[84] Likewise, Christina Bohannan describes cases in which "the defendant might copy less from the copyrighted work, add to or transform the work, or exploit the work in markets that are more remote from the copyright owner's foreseeable markets."[85]

As these descriptions suggests, an analysis of substitutive market harm can rather easily become focused on the transformative nature of defendant's work, rather than the markets themselves. This tendency can be traced back to *Campbell.* As part of its effort to eliminate the *Sony* presumption, the *Campbell* court drew a distinction

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parody, or for the quotation of a paragraph in a review or biography. . . . publishers could probably unite to fund a bureaucracy that could collect such fees").

80 *Id*. (holding that "the only harm to derivatives that need concern us … is the harm of market substitution").`

81 *Id*. (applying this distinction find that "2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry," and remanding on the issue of harm to that market). *See also Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274 (2001) (11th Cir. 2001) (discussing and applying the *Campbell* approach).

82 *See* Stadler, *supra* n.___, at 1068-69 (describing parody and criticism as the "only two types of 'transformative' works that reliably reside outside the territory reserved to the copyright owner").

83 As previously discussed, there is no presumption of market harm absent mere duplication of the original work for commercial purposes. *Supra* Part I(B)(2).

84 Stadler, *supra* n.___, at 1073.

85 Christina Bohannan, C*opyright Harm, Foreseeability, and Fair Use*, 85 Wash. U. L. Rev. 969, 1019-20 (2007).

between mere duplication and transformative works, noting that while market harm may be proper as regards the former, no such presumption was proper for transformative works. This distinction was based on the inherently substitutive nature of verbatim copies, which the court found strong enough to justify a limited evidentiary presumption.[86] The court also recognized that transformative works are less likely to serve as market substitutes.[87] However, a significant number of courts have distorted this observation, asserting instead that transformativeness is a primary factor in the market effect analysis.[88] Certainly, transformative works are less likely to serve as a market substitute for the original but, as previously discussed, this is merely a statement of inverse correlation and not an operative factor in the market harm analysis.[89]

Focusing the market substitution analysis on transformativeness dilutes both the market comparison and the transformativeness inquiry.[90] Transformativeness is in essence subsumed into the question of market substitution and, in most cases, the determination of market harm. Maintaining the distinction between market harm analysis and transformativeness allows the fair use analysis to seek that point of equilibrium previously discussed: between the incentives provided by the copyright holder's substantive right to exploit the original work, and the public benefit derived

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86 510 U.S. at 591.

87 *Id*. *See also Suntrust Bank*, 268 F.3d at 1274 n.28.

88 *See, e.g., A.V. ex re. Vanderhye v. iParadigms, LLC,* 562 F.3d 630, 643 (4th Cir. 2009) (stating that "regardless of whether the defendant used the original work to critique or parody it, the transformative nature of the use is relevant to the market effect factor"); *Davis v. Gap, Inc.,* 246 F.3d 152, 176 (2d Cir. 2001) (asserting that "market effect must be evaluated in light of whether the secondary use is transformative")

89 *INSERT CITATIONS.*

90 As part of its effort to eliminate the *Sony* presumption, the *Campbell* court drew a distinction between mere duplication and transformative works, noting that while market harm may be proper as regards the former, no such presumption was proper for transformative works because they are less likely to serve as market substitutes. 510 U.S. at 591. *See also Suntrust Bank*, 268 F.3d at 1274 n.28. However, a significant number of courts have distorted this observation of inverse correlation into an assertion of transformativeness as a factor in the market effect analysis. *See, e.g., A.V. ex re. Vanderhye v. iParadigms, LLC,* 562 F.3d 630, 643 (4th Cir. 2009) (stating that "regardless of whether the defendant used the original work to critique or parody it, the transformative nature of the use is relevant to the market effect factor"); *Davis v. Gap, Inc.,* 246 F.3d 152, 176 (2d Cir. 2001) (asserting that "market effect must be evaluated in light of whether the secondary use is transformative").

from accommodating the creation of new works that draw from that protected expression.[91]

Market substitution analysis properly compares the copyright holder's actual or potential markets to markets for defendant's work. Market definition is key to this determination, particularly in terms of the copyright holder's interests.[92] Yet courts seldom engage this question[93] and there is little in the way of guidance.[94] One approach is to define the market in terms of the Section 106 exclusive rights. But this creates a problem of circularity — if infringement requires a violation of plaintiff's Section 106 rights, and the market substitution analysis claims all such markets for the plaintiff, then all infringing uses are substitutional and necessarily inflict the "greatest harm" on copyright holders.[95] This is particularly true where the concept of a derivative work is constantly expanding[96] and that which might be licensed is classified as a potential market ripe for usurpation.[97]

Further complicating the circularity problem is the "widespread use" or "aggregated harm" principle set out in *Sony*.[98] In reference to "noncommercial use of a copyrighted work," *Sony* held that the market harm analysis "requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."[99] This view was reaffirmed in

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[91] INSERT INTERAL REFERENCE

[92] *See, e.g.,* Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 Nw. U. L. Rev. 1607, 1653 (2009) ("The first step in ascertaining the market effect of an unauthorized use is to define the relevant market.").

[93] *See* Stadler, *supra* n.___, at 1060.

[94] *See* Anna F. Kingsbury, *Market Definition in Intellectual Property Law: Should Intellectual Property Courts Use an Antitrust Approach to Market Definition?*, 8 Marq. Intell. Prop. L. Rev. 63, 85 (observing that it "is unclear is how the courts identify and define the market for a work or a license for a work" or how the courts *should* do so).

[95] *Supra* n.___.

[96] *See* Sag, *supra* n.___, at 1653 ("copyright owners frequently claim that almost any new use of their work--either in whole or in part--is part of an unexplored derivative market").

[97] *See* Bohannan, *supra* n.___, at 1019-20. *See also* Sag, *supra* n.___, at 1653 ("If the market is defined purely in terms of that which might be licensed if the law says that it must be licensed, then the fair use ruling collapses into circularity.").

[98] *See Sony*, 464 U.S. at 451. *See also* S.Rep. No. 94-473, p. 65 (1975) (using the term "aggregate").

[99] *Sony*, 464 U.S. at 451. *See, e.g., Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 966 F.2d 1366, 1374, 1377 (2nd Cir. 1993) (acknowledging that the use at issue served "one

Harper & Row, in which the Court embraced language from a Senate Report indicating that "[i]solated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.'"[100] The *Harper & Row* court, took this idea one step further, however, by creating a "slippery slope presumption."[101] As Matthew Sag describes it:

> The concept of market effect becomes even more elusive if a trial judge adopts the *Harper & Row* Court's slippery slope presumption. In *Harper & Row*, the Court announced that "to negate fair use one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work." The aggregation of any harm that is likely to result from widespread use is reasonable in evaluating the fourth factor. The Court, however, offers no particular reason to presume that all uses will become widespread.[102]

This presumption — that relatively minor infringements will spread, aggregating into a substantially cognizable market harm — is difficult to overcome, particularly where

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or more of the non-exclusive purposes that section 107 identifies as example" but still rejecting the fair use defense because the work was a mere abridgment and "compete[d] in markets in which [plaintiff] ha[d] a legitimate interest"); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 628, 631 (9th Cir. 2003) (admitting not only that defendant's use of clips was transformative, but also that the nature of biographical works generally weighs in favor of fair use, but still using the commercial nature of the film to presume harm as well as stating that "[i]f this type of use became widespread, it would likely undermine the market for selling Plaintiff's copyrighted material," a market, which in this case, the plaintiff had charged licensing fees for in the past).

[100] *Harper & Row*, 471 U.S. at 569 (citing S.Rep. No. 94-473, p. 65 (1975)). *See also* Patry, *supra* n.___, at 6:10 ("Although insubstantial uses by themselves are insufficient to tip the fourth factor in the copyright owner's favor, if the use is of a type which, if widespread, would result in substantial harm, this fact should be taken into account."). *Campbell v. Acuff-Rose* likewise adopted the "widespread use" standard. 510 U.S. at 590 (quoting 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][4] (1993); citing also *Harper & Row,* 471 U.S., at 569; S.Rep. No. 94-473, p. 65 (1975); *Folsom v. Marsh,* 9 F.Cas., at 349)). *See also* Grzandziel, *supra* n.___, at 195 ("*Campbell* held that courts are required to consider not only the extent of market harm caused by the particular actions of the alleged infringer but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original.").

[101] Sag, *supra* n.___, at 1653 (citing *Harper & Row,* 471 U.S. at 568).

[102] *Id.*

recognition of derivative works, potential markets, and licensing possibilities, are all expanding.

Courts and commentators have offered several alternatives to stem this circularity. A particularly restrictive approach is to limit the relevant markets to those already in existence or for which a license is currently being negotiated.[103] A less restrictive approach was adopted by the Second Circuit in *American Geophysical*, in which the court limited the market harm analysis to "only traditional, reasonable, or likely to be developed markets" for the original or derivative works.[104] This standard has been criticized, however, as both pro-market[105] and ineffective, as it is rather easily avoided by the adoption of wide-ranging licensing programs.[106]

One particularly interesting alternative is a so-called "harm-based approach" based on foreseeability. Christina Bohannan describes it as follows:

> [This approach defines] copyright harm as the uncompensated violation of an exclusive right that would be likely to have a material effect on a reasonable copyright owner's *ex ante* decision to create or distribute the work. This definition of harm is an objective one that infers harm from foreseeable uses and requires proof of harm for less foreseeable ones.[107]

Under Bohannan's formulation, foreseeability is confined by the reasonable-person standard. Thus, "courts should presume harm only where the defendant's use usurps

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[103] *See* Patry, *supra* n.___, at 6:7 (collecting cases adopting an analogous approach). *But see id.* (cautioning that this approach can create an undesirable "rush" to market).

[104] 37 F.3d at 929-30. Patry observes that ""where licensing is available for uses which copyright owners reasonably and traditionally license, ignoring such fees impermissibly turns a blind eye toward classic market harm." However, "the quotation of exorbitant fees, or fees for uses that are at the margin of copyright owners' traditional markets, should fall outside of fourth-factor analysis." Patry, *supra* n.___, at 6:8.

[105] *See, e.g.,* Melissa A. Kern, *Paradigm Shifts and Access to Controls: An Economic Analysis of the Anticircumvention Provisions of the Digital Millennium Copyright Act*, 35 U. Mich. J.L. Reform 891, 914-15 (2002).

[106] *See, e.g.,* Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70-SPG Law & Contemp. Probs. 185, 190-91 (2007). *See also* Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 Mich. Telecomm. & Tech. L. Rev. 381, 394 (2005) ("[d]etermining whether a market is 'traditional, reasonable, or likely' is indistinguishable from determining the scope of the copyright holder's rights: both require court to make an a priori assumption and then compare that assumption to the conduct of the defendant").

[107] *See* Bohannan, *supra* n.___, at 973-74.

the copyright holder's most foreseeable markets, or those markets which a reasonable copyright owner would have taken into account in deciding whether to create or distribute the copyrighted work."[108] "[M]arkets that are remote from or unrelated to the copyright owner's intended markets" are less likely to be foreseeable.[109] By focusing *ex ante* on reasonably foreseeable markets, the market-harm approach serves the incentive structure embodied in the grant of copyright,[110] but largely avoids speculative monopolies that impede the production of new works.

A potential problem with a harm-based approach is the temptation to elevate market harm to a dominant position, even to the point of being outcome determinant. For instance, Thomas Cotter has proposed that:

> [T]he overarching question that courts should be asking in resolving fair use disputes is whether the use at issue threatens the plaintiff with harm of the type the copyright laws were intended to prevent, i.e., cognizable harm. Transformativeness as to content or purpose may be relevant to this question, but it should not be the focus of the inquiry.[111]

Cotter ultimately leaves the precise form of cognizable harm unanswered,[112] but is clear that "transformative use should play only a subsidiary role" in the fair use analysis.[113] Moreover, transformativeness is subsumed into the market harm inquiry.

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[108] *Id.* at 973-74.

[109] *Id.* at 989. Some courts have addressed this issue from an intended audience or different function standpoint. *See e.g., Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 (2nd Cir. 1986) ("it is unthinkable that potential customers for a series of sympathetic interviews on abortion and adoption would withdraw their requests because a small portion of the work was used in an essay sharply critical of abortion. . . . [T]he two works served fundamentally different functions"); *Mattel*, 353 F.3d at 805 (noting that the parodic nature of the defendant's art rendered it unlikely that "[plaintiff] would license an artist to create a work that is so critical of Barbie" and that defendant's art "depict[ed] nude and often sexualized figures, a category of artistic photography that [plaintiff] is highly unlikely to license").

[110] *But see* Cotter, *supra* n.___, at [40-41] (identifying two potential problems with Bohannan's approach, including the malleability of the "slippery concept" of foreseeability and the potential of "gut[ting] at least some of what the Copyright Act appears to promise copyright owners").

[111] Cotter, *supra* n.___, at [24-25]. *See also id.* at [33] (arguing that "the question of whether the use at issue threatens cognizable harm should be the most important aspect of the fair use analysis").

[112] *Id.* at [33-39, 47-48] (sketching out general considerations, the relationship between cognizable harm and transformativeness, and several points to be considered in problem areas, but leaving open, *inter alia*, the work of "delineat[ing] the relevant

Cotter's criticisms of transformativeness are three-fold. First, he points to the difficulties in defining the concept. Second, he argues that transformativeness is underinclusive of fair uses. Finally, and related to these first two concerns, transformativeness has come to improperly dominate the fair use analysis. Cotter is, of course, correct that some conceptions of transformativeness can be underinclusive and should not, therefore, dominate the analysis. The answer is not, however, to avoid the desired equilibrium between incentive and accommodation by elevating market harm to a position of dominance in the fair use analysis.[114]

To that end, a presumption of harm should arise only after plaintiff's foreseeable and intended markets have been identified and compared to markets for the defendant's work. Otherwise, actual harm must be shown. Moreover, the transformative nature of defendant's work should not be a factor in identifying cognizable markets for the plaintiff's work or assessing market substitution, although transformativeness may be probative of markets for the defendant's work.[115] Indeed, courts should be alert to the danger of allowing market harm analysis to collapse into the transformativeness inquiry. Finally, a presumption of market harm is not dispositive on the question of fair use, but remains just one factor to be considered and weighed in light of the goals of copyrights.

Bohannan's harm-based approach, a loose approximation of which I adopt here, would require multiple steps to determine the scope of cognizable markets. As a starting

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factors in evaluating whether remedying a purported harm would be consistent with copyright policy").

[113] *Id.* at [33].

[114] INSERT INTERAL REFERENCE

[115] This danger is apparent in one portion of Christina Bohannan's work. Bohannan describes *Perfect 10 v. Amazon.com,* 487 F.3d 701 (9th Cir.), amended on reh'g, 508 F.3d 1146 (9th Cir. 2007), as a good illustration of a proper approach to the harm analysis:

> [I]f the defendant changes the meaning or message of the work or uses it in markets that are remote from or unrelated to the copyright owner's intended markets, then the use is not very foreseeable. In these cases, a court is less likely to presume harm and more likely to require proof of actual harm.

Bohannan, *supra* n.___, at 973-74. This suggests, however, that the market harm analysis is properly focused on the defendant's work, specifically the presence and/or degree of transformativeness, rather than a comparative identification of markets and market substitution.

point, all legitimate existing markets — both for the core work and derivative works,[116] whether through direct sale or licensing — are fully cognizable. The more difficult issue is potential markets. These are measured at two points. First, cognizable potential markets are limited *ex ante* to those that were reasonably foreseeable at the time the copyright holder chose to create and distribute the core work. Second, that universe of reasonably foreseeable markets can itself be limited by conditions existing at the point the defendant chose to create and distribute the allegedly infringing work. Such conditions may include the copyright holder's intent,[117] refusal,[118] or apparent inability

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[116] For purposes of this discussion, we assume that these are protectable derivative works.

[117] *See* Patry, *supra* n.___, at 6:7 (asserting that potential markets should not include those which "plaintiff has no interest in entering"). *But see id.* ("To the extent, however, that the reason for a plaintiff's decision not to exploit a market is a judgment that the economic value of the copyrighted work will be greater without such use, that market should be included"). *See also* Ryan M. Seidemann, *Authorship and Control: Ethical and Legal Issues of Student Research in Archaeology*, 14 ALB. L.J. SCI. & TECH 451, 476 (2004) (stating that the first three fair-use factors are considered to determine whether the author has been preempted from exploiting his or her intended markets); *Images Audio Visual Prods., Inc. v. Perini Bldg. Co.*, 91 F. Supp. 2d 1075, 1086 (E.D. Mich. 2000) (finding the defendant's unauthorized reproduction of plaintiff's photos to be an infringement that substantially impaired an intended market of plaintiff). *But see Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 550 (S.D.N.Y. 2008) ("[n]otwithstanding [plaintiff]'s public statements of her intention to publish her own encyclopedia, the market for reference guides to the [original] works is not exclusively hers to exploit or licence . . . [t]he market for reference guides does not become derivative simply because the copyright holder seeks to produce or license one").

[118] *See* Patry, *supra* n.___, at 6:7 (arguing that the "market must … be one the copyright owner would have licensed, not just could of licensed, and certainly should not include uses that the plaintiff refuses to license"). *See also Campbell*, 510 U.S. at 592 (discussing the likely refusal of a copyright holder to license critical reviews or lampoons of their own productions). *But compare Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.,* 150 F.3d 132, 145-46 (2d Cir.1998) (respecting the copyright holder's refusal to enter a potential market for fear that it will saturate a market already filled with many derivative works), *with Warren Pub. Co. v. Spurlock*, 645 F.Supp.2d 402, 425-26 (distinguishing *Castle Rock* based on this copyright holder's utter failure to expand into derivative works markets). In a 2006 case, the District Court of Colorado relied implicitly on a moral-rights approach to sanction plaintiffs' refusal to enter a potential market. *Clean Flicks of Colorado, LLC v. Soderbergh,* 433 F.Supp.2d 1236 (D.Colo. 2006). Discussing factor four's market harm analysis, the court held:

> The argument [against market harm] … ignores the intrinsic value of the right to control the content of the copyrighted work which is the

to enter a potential market,[119] whether by direct sale or licensing; any of which may be evidenced by a significant delay in doing so.[120]

This last point can be complicated by the question of licensing in potential markets. In *American Geophysical*, for instance, the Second Circuit found it appropriate to consider a potential market in licensing where a workable market for such licenses had been established.[121] The dissent strongly attacked the circularity of this conclusion, however, arguing that it would swallow the market harm analysis. Although the majority opinion had recited a "traditional, reasonable, or likely to be developed" limitation on cognizable licensing markets, the dissent claimed that the alleged licensing scheme at issue in that case was itself not traditional, reasonable, or even "real" in any practical sense.[122] The Sixth Circuit took a similar approach in *Princeton University Press*,[123] and was again criticized in dissent: "Simply because the publishers have managed to make licensing fees a significant source of income … does not make the income from the licensing a factor on which we must rely in our analysis."[124] Mark Lemley explains the circularity problem this way:

> The "lost licensing revenue" theory is ultimately circular. Whether a use is fair depends on whether the copyright owner loses anything from the use, but under *Texaco*, whether the copyright owner loses anything from

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> essence of the law of copyright. [I]t is a question of what audience the copyright owner wants to reach.
>
> [T]he equitable doctrine of fair use… is predicated on a theory of an author's implied consent to reasonable and customary use when he releases his work for public consumption. [However,] [t]hat theory is not applicable here because the infringing parties are exploiting a market for movies that is different from what the Studios have released into and for an audience the Studios have not sought to reach.

Id. at 1242. *But see* Melville B. Nimmer & David Nimmer, 4-13 *Nimmer on Copyright* § 13.05 (criticizing the decision for ignoring precedent "favoring fair use to the extent defendant's work fills a market niche that plaintiff has no interest in occupying," and arguing that "[the studio's] market (as opposed to their desire to control their target audience) was not adversely impacted").

[119] *See* Patry, *supra* n.___, at 6:7 (asserting that potential markets should not include those which plaintiff "has not been able to exploit").

[120] *See* Patry, *supra* n.___, at 6:7 (stating that "At some point, however, delay becomes a decision to leave the market untapped").

[121] 60 F.3d at 930.

[122] *Id.* at 937-38 (Jacobs, J., dissenting).

[123] 99 F.3d at 1387-88.

[124] *Id.* at 1397 (Merritt, J., dissenting).

> the use depends on whether the use is deemed fair; only if it is not a fair use would there be licensing revenue to lose. The result is to unmoor fair use from the traditional rationale of market loss and to potentially make any use for which the user could afford to pay into a use for which they must pay.[125]

As discussed, *supra*, the "traditional, reasonable, or likely to be developed" limitation is unlikely to stem this circularity because it is too easy to manipulate through the creation of wide-ranging licensing programs.[126] "The result," Lemley observes, "has been to contract the doctrine of fair use to a few protected categories, with the baseline assumption being that any use requires permission and a licensing fee."[127] A full exploration of this issue is beyond the scope of this article, but it is worth noting that it may be possible to mitigate the problem somewhat by reference to the *ex ante* foreseeability standard, such that cognizable potential licensing markets are limited to those that were traditional, reasonable, or likely to be developed at the time the copyright holder chose to create and distribute the core work.[128]

Newly emerging markets created by changing circumstances external to the work itself, such as advancements in technology (e.g., thumbnail images for cell phones[129]) or public events (e.g., controversial images of a recently-crowned pageant winner[130]), can pose additional difficulties for this analysis, but these are not insurmountable. It might be most logical, for instance, to treat these markets as if they were foreseeable — in the sense that the development of *some* newly emerging markets is itself foreseeable, if only in the abstract — but to apply those limits based on conditions existing at the point the defendant chose to create and distribute the allegedly infringing work.**[131]** Thus, the copyright holder's intent, refusal, or apparent inability to enter a newly emerging

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125 *See* Lemley, *supra* n.___, at 190.

126 *See supra* at ___.

127 *See* Lemley, *supra* n.___, at 190-91. *See also* Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 Hastings L.J. 433, 458 (2007) (writing that "by making it easy to take a license in [a broad variety of derivative] markets, copyright owners increasingly have redefined an 'unfair use' as an unlicensed one").

128 Copyright holders might respond that the very establishment of a licensing program should evidence an existing market rather than a potential market, and should thus be fully cognizable. Resolving this question is likewise well beyond the scope of this article.

129 *Perfect 10,* 487 F.3d at ___; *Kelly v. Arriba Soft Corporation,* 280 F.3d 934 (9th Cir. 2002), *withdrawn*, re-filed at 336 F.3d 811 (9th Cir. 2003).

130 *Nuñez v. Caribbean Int'l News, Corp.*, 235 F.3d 18 (1st Cir. 2000).

131 *Cf.* Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. Intell. Prop. 1, 39 (2005) (creating a continuum for fair use protection based on market foreseeability and substitution effects).

market in a timely manner will, in certain contexts, mitigate the likelihood of market harm.

This raises one final point: Not all cognizable markets carry equal weight in the market harm analysis, but rather exist on a spectrum. At one end are existing markets, as described above. Substitution in these markets is likely to cause significant market harm. At the other end are potential markets that were only somewhat foreseeable at the time the copyright holder chose to create and distribute the core work, and which the copyright holder has failed to enter in a timely manner. Substitutive market harm is significantly less likely in such cases and will therefore carry less weight in the ultimate fair use analysis.

One notable exception to this general approach to potential markets is the recognition of material impairment of marketability[132] as a cognizable harm. This species of harm is grounded in the public distribution rights set forth in Section 106(3), which are based in and have the effect of continuing the copyright holder's common law right of first publication.[133] As the Supreme Court emphasized in *Harper & Row*, this right of first publication is "an important marketable subsidiary right," the value of which "lies primarily in exclusivity."[134] Thus, the unpublished "nature" of the original work tends to negate a claim of fair use,[135] because the likelihood of market harm arising from preemptive publication is considered to be so great.[136] As Section 107 makes clear,

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[132] This rather circumscribed conception of "material impairment of marketability" comes from its specific application in the Supreme Court's *Harper & Row* decision. It should be noted, however, that this same term is sometimes employed broadly to describe the entire market harm inquiry. *See, e.g*. *N.A.D.A. Svcs. Corp. v. Business Data of Virginia, Inc.*, 651 F.Supp. 44 (E.D.Va. 1986) (stating a general rule applicable to factor four that uses "which does not materially impair the marketability of the copyrighted work will be deemed fair").

[133] *Harper & Row,* 471 U.S. at 548-49 (stating that Section 106(3) "recognized for the first time a distinct statutory right of first publication, which had previously been an element of the common-law protections afforded unpublished works"). *See also id.* at 564 (stating that "the right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work"). *Id.* at 564.

[134] *Id*. at 548-49, 553.

[135] *Id*. at 554.

[136] Although arguably rather benign as originally set forth, subsequent application of the *Harper & Row* analysis evidenced significant uncertainty. The most problematic in this regard was the Second Circuit's decision in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2nd Cir. 1987). Purporting to follow *Harper & Row*, the court indicated that its analysis would "place special emphasis on the unpublished nature of" the original works — personal letters written by Salinger to friends and associates. *Id.* at 96. This was particularly true in the court's consideration of market effect.

however, "the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."[137] Instead, the "impairment of marketability" harm treats the potential market for first publication of the original work as essentially perpetual, and thus not to be undermined by the usual limiting conditions existing at the creation of the allegedly infringing work; e.g., delay, intent, refusal, or inability to enter a potential market. The first-publication market may, like other potential markets, be either usurped or suppressed by a third party. This market is somewhat distinct, however, because the copyright holder's decision to hold back first publication of the original work, as opposed to a derivative, should not be treated as foregoing a market. Rather, that market endures until the copyright holder exercises the right to control first publication. Thus, the market itself would be presumed, but market harm would not. Any alleged infringement and corresponding claim of fair use would instead by analyzed as any other such claim.

II. Social Semiotics and Transformative Use

- *Prevailing conceptions of transformativeness*
  - *Expressive purposes and the assertion of authorial presence*
  - *Imbalances between incentive and accommodation*

Although recognizing that the author had "disavowed any intention to publish" the letters, the court reached past this simple concession to hold that Salinger "has the right to change his mind" and that this alone was sufficient to establish potential harm in the market for first-publication. *Id.* at 99. Perhaps not surprisingly, the *Salinger* decision suggested to many a *per se* rule against the fair use of unpublished works. *See, e.g.,* Sonali R. Kolhatkar, *Yesterday's Love Letters are Today's Best Sellers: Fair Use and the War Among Authors*, 18 J. Marshall J. Computer & Info. L. 141, 143 (1999) (describing the *Salinger* decision as a "near per se ruling"). *But see* Harold A. Ellis, *Fair Use of Unpublished Works: An Interim Report and a Modest Proposal*, 69 Wash. U. L.Q. 1231 (1991) (arguing that "not even *Salinger's* restrictive rule … may be described as a *per se* rule against fair use of unpublished sources"); Wright *v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991) (rejecting plaintiff's argument in favor of a *per se* rule). This generated significant confusion over the scope of the *Harper & Row* decision. *See, e.g.,* Kate O'Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 Cal. L. Rev. 369, 441 (2001) (noting "the confusion wrought by *Harper & Row* and *Salinger*" as to whether the unpublished status of an original work is determinative in the fair use inquiry). In response, Congress amended Section 107 to clarify that "the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C. § 107. *See also* Timothy Hill, *Entropy and Atrophy: The Still Uncertain Status of the Fair use of Unpublished Works and the Implications for Scholarly Criticism*, 51 J. Copyright Soc'y U.S.A. 79, 83 (2003) (linking the 1992 statutory amendments to confusion created by *Salinger* and other cases).

[137] 17 U.S.C. § 107.

- *An alternate conception of transformativeness*
  - *Meaning as social value*
  - *Transformativeness as social value*
  - *Example: Shepard Fairey v. The Associated Press*

A. Prevailing Conceptions of Transformativeness

Although drawn from prior sources, the concept of "transformative use" was most famously articulated in Judge Leval's 1990 law review article, *Toward a Fair Use Standard.*[138] Linking transformativeness to the purposes of copyright and the justification of fair use accommodation, Leval offered:

> The use must be *productive* and must employ the quoted matter in a *different manner* or for a *different purpose* from the original. A quotation or copyrighted material that merely repackages or republishes the original is unlikely to pass the test…. If, on the other hand, the secondary use adds *value* to the original—if the quoted matter is used as raw material, transformed into the creation of [1] *new* information, [2] *new* aesthetics, [3] *new* insights and understanding, this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[139]

Several years later, the Supreme Court's *Campbell* decision employed Leval's transformative use standard, albeit in adapted form. Laying out the basic principles attendant to factor one of the fair use inquiry, the Court stated that:

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[138] 103 Harv. L. Rev. 1105 (1990).

> Factor One's direction that we "consider[] . . . the purpose and character of the use"' raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user's case. Recent judicial opinions have not sufficiently recognized its importance.
>
> In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.
>
> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.

Id. at 1111.

[139] Leval, *supra* n.__, at 1111 (emphasis added).

> This factor draws on Justice Story's formulation, "the nature and objects of the selections made." The enquiry here may be guided by the examples given in the preamble to § 107…. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." [citing Leval]. Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright….[140]

From this point, the Court cuts straight to a rather lengthy discussion of the elements and effectiveness of parody, offering that a work of this type has "an obvious claim to transformative value…. [I]t can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[141] The Court then evaluates parodical nature of the infringing work,[142] but offers little more on the concept of transformativeness itself.

1. Expressive Purposes and the Assertion of Authorial Presence

Laura Heymann observes a crucial shift between Judge Leval's articulation of transformative use and that of the Supreme Court in *Campbell.*[143] Omitted from *Campbell* is Leval's reference to "productive" use, as well as to "secondary use [that] adds value to the original."[144] Likewise, *Campbell* does not include the use of the original work as "raw materials" to create "new information, new aesthetics, new insights and understanding."[145] Instead, *Campbell* looks at the extent to which a

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[140] *Campbell*, 510 U.S. at 578-79 (citations omitted).

[141] *Id.* at 579.

[142] *Id.* at 580-83..

[143] Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 Colum. J.L. & Arts 445, 452 (2008).

[144] *Id.* ("[W]hen the Court incorporated this language into its opinion in *Campbell*, it engaged in a bit of subtle, but important, transformation itself. No longer was the focus on whether the use of the copyrighted work was 'productive' or 'add[ed] value to the original'").

[145] *Id.* (in *Campbell,* the focus was no longer "whether the use yielded 'new information, new aesthetics, [or] new insights and understandings.'"). *See Campbell*, 510 U.S. at 579.

subsequent work alters the original work through the "add[ition] of something new," in the form of new expression, new meaning, or a new message.[146]

Heymann interprets this shift as encouraging courts to focus the transformativeness inquiry on "authorial presence" and the degree to which the defendant has engaged in "authorial activity."[147]

> This language represents a subtle shift, to be sure, but one that — at least on its face — seems to encourage courts to focus on whether the second artist has added material to the first work to the exclusion of consideration of whether the artist has recontextualized the copyrighted work. In other words, *Campbell* suggests that the focus should be not on whether the defendant has transformed the meaning of the work but on what the defendant has done to the work — a shift in focus from reader interpretation to authorial activity.[148]

Beyond an isolated comparison of the two standards, the claim is a bit difficult to assess because the analysis in *Campbell* itself is so myopically focused on parody as a singular category of use. There is, indeed, no mention of productive use,[149] new information,

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[146] *Campbell*, 510 U.S. at 579.

[147] Heymann, *supra* n.___, at 452.

[148] *Id*. *See also id.* (*Campbell* "suggests that 'transformativeness' depends to a significant extent on evaluating the second artist's creative activity: when and how strongly he asserts his own authorial presence"). *See, e.g., Mattel*, 353 F.3d at 801 ("We decline to consider Mattel's survey in assessing whether Forsythe's work can be reasonably perceived as a parody. Parody is an objectively defined rhetorical device."); *Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.,* 809 F.Supp. 267, 280 (noting that disagreement regarding the "success" of a parody is not relevant fair use protection, where author has employed parodic elements).

[149] Some commentators have argued that, by citing to Justice Blackmun's dissent in *Sony*, the *Campbell* court implicitly incorporated "productive use" as part of the transformativeness standard. For instance, Stephen Wilson has argued:

> In *Campbell v. Acuff-Rose* the Supreme Court enthusiastically embraced productive use. The Court stated that the primary inquiry under the first fair use factor is whether the secondary use supersedes the original work or adds something new, thereby incorporating a new meaning or message. By placing an emphasis on determining whether the secondary use was productive, the Court effectively embraced Justice Blackmun's definition of productive use, which he articulated in his *Sony* dissent. Furthermore, *Campbell* adopted Justice Blackmun's inquiry into whether the secondary work incorporated some 'added benefit to the public beyond that produced by the first author's work.'

aesthetics, insights or understandings, all concepts invoked by Leval to describe transformative use.[150] *Campbell* does use the word "value" — both in terms of "transformative value"[151] and "social value"[152] — but without clear reference to a "secondary use [that] adds value of the original," as Leval contextualizes the term.[153] Indeed, in the case of parody, its social value generally lies in criticism of and commentary on the original work,[154] often lessening the economic value of its target by suppressing demand.[155] Whether criticism and commentary on the original work can add social value to that underlying work seems a highly subjective and rather ephemeral question. In this context, the social value of the parodical work is consistent with Heymann's characterization of *Campbell*; viewing transformative use through the lens of authorial activity.

Given *Campbell*'s rather truncated treatment of transformative use, perhaps the more useful sources for evaluating Heymann's interpretation are the fair use decisions

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Stephen R. Wilson, *Rewarding Creativity: Transformative Use in the Jazz Idiom,* 4 U. Pitt. J. Tech. L. Pol'y 2 (2003) (no pin-point cite available). This conclusion requires a rather broad leap, particularly in its reliance on the Court's citation to Blackmun's *Sony* dissent. Nevertheless, there is some evidence that Leval considered *Campbell* to have reaffirmed a place for productive use in the fair use inquiry: "[*Sony*] was generally taken to mean that productivity was no longer a useful or important standard…. Having been deprived of its most important compass bearing, the doctrine then drifted aimlessly without a governing standard for ten years" until the *Campbell* decision. Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 Cardozo Arts & Ent. L.J. 19, 20 (1994). Perhaps the more difficult question is the relationship between transformative use and productive use, which Leval himself has struggled to articulate. *See, e.g.,* Leval, *supra* n.___, at 1121, 1121 (referring to transformative and productive as distinct); *id.* at 1111, 1127 (using productive to describe or define transformative).

[150] Leval, *supra* n.__, at 1111.

[151] *Campbell*, 510 U.S. at 579 ("Suffice it to say now that parody has an obvious claim to transformative value").

[152] *Id.* at 599.

[153] Leval, *supra* n.__, at 1111.

[154] *Id.* at 579 ("Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."); *Id.* at 599 ("Factor four thus underscores the importance of ensuring that the parody is in fact an independent creative work, which is why the parody must 'make some critical comment or statement about the original work which reflects the original perspective of the parodist-thereby giving the parody social value beyond its entertainment function.' *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.,* 479 F.Supp. 351, 357 (ND Ga.1979).").

[155] *INSERT INTERAL REFERENCE*

applying the transformativeness standard after that decision. A number of commentators have attempted to bring structure to these cases by organizing transformative use into categories, types, clusters, and so on. William Patry, for instance, defines transformative uses as those "that employ the original for a different objective from the original."[156] He then breaks transformative use into three descriptive categories: "(1) an alteration of the authorial content, (2) no change in the form of the original, but a use that performs a valuable purpose; or (3) no change or alteration, but rather the presentation of the original intact in a new context or with new insights."[157]

Anthony Reese begins by distinguishing between two types of transformativeness: (1) transforming a work's content, and (2) using a work for a transformative purpose,[158] "serv[ing] a different function than the original work."[159] Evaluating appellate court decisions involving fair use, he then divides the courts' opinions into four categories:

> [1] The defendant has transformed the content of the plaintiff's copyrighted work and is using it for a transformative purpose,
> [2] The defendant has transformed the content of the plaintiff's copyrighted work but is not using it for a transformative purpose,
> [3] The defendant has not transformed the content of the plaintiff's copyrighted work but is using the copyrighted work for a transformative purpose,

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156 *See* Patry, *supra* n.___, at 3:9.

157 *Id.*

158 *See* R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 32 Colum. J.L. & Arts 467, 484-85 (2008).

159 *Id.* at 485 (quoting *Perfect 10,* 487 F.3d. at 1165). In further describing transformative purpose, Reese discusses four cases in which "the court's conclusion as to transformativeness rested on its view of the defendant's transformative purpose, even in the absence of any transformation of the content of the plaintiff's work." *Id.* at 488-89. *See Nunez v. Carribean Int'l News Corp*., 235 F.3d 18, 23 (1st Cir. 2000) ("plaintiff's photographs were originally intended to appear in modeling portfolios, not in the newspaper; the former use, not the latter, motivated the creation of the work"); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) ("DK's purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. Originally, each of BGA's images fulfilled the dual purposes of artistic expression and promotion [of live concerts] . . . In contrast, DK used each of BGA's images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on Illustrated Trip's timeline."); *Kelly,* 280 F.3d at 818-19 (the use "serves a different function than [the copyright owner's] use — improving access to information on the internet versus artistic expression"); *Perfect 10,* 508 F.3d at 1165 (similar).

> [4] The defendant has not transformed the content of the plaintiff's copyrighted work and is not using the copyrighted work for a transformative purpose.[160]

Categories one and four — what Reese termed "double or nothing" transformativeness — produced "relatively straightforward" results, with transformativeness weighing in favor of fair use in the former cases and against fair use in the latter cases.[161] In the "either-or" cases captured in categories two and three, a defendant's transformative purpose was far more likely to produce a finding of transformativeness than alterations to the work's content.[162]

Pamela Samuelson attempts to build on the empirical work of Barton Beebe by organizing fair use cases into "clusters."[163] Under Samuelson's approach, transformative use is classified as a subset of fair use cases implicating First Amendment interests. Transformative uses include (1) parodies, (2) other transformative criticism of the original work, and (3) transformative adaptions of the original work as an expression of artistic imagination.[164] Two additional clusters among those implicating First Amendment interests are classified as nontransformative, although they might well fit within those transformative uses identified by Patry and Reese. The first, "productive uses in critical commentary," includes "iterative copie[s] … of another's copyrighted work [used] in preparing a new work critical of the first author's work."[165] The second, "iterative copying for orthogonal speech-related purposes," is defined by the "necess[ity], in order to make an effective critical commentary, to make or publish iterative copies of the whole or significant parts of a copyrighted work for a different (i.e., orthogonal) speech-related purpose than the original."[166] Other uses that may be thought of as transformative are categorized as clusters implicating the productive use of other authors' works, rather than First Amendment Interests. This includes use in social or cultural commentary, use to set historical context, and use in a reference work.[167]

The various categories of use identified by Patry, Reese, and Samuelson are largely consistent with Heymann's interpretation of transformative use post-*Campbell*.

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160 *See* Reese, *supra* n.___, at 486.

161 *Id.* at 486-87.

162 *Id.*

163 Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L. Rev. 2537, 2542-43 (2009).

164 *Id.* at 2546-55. Although this presents a narrower conception of transformative use, Samuelson's overall treatment of fair use is rather broad.

165 *Id.* at 2555-56.

166 *Id.* at 2557-59.

167 *Id.* at 2570-75 (Samuelson does not classify these as transformative uses, but, as discussed, *infra*, courts have treated them as such).

Expressive authorial activity is most clearly evidenced where the transformative purpose[168] of the subsequent use is to ground criticism of the original work, including parody.[169] Likewise, expressive authorial activity can be found where the original work is used for the transformative purpose of commenting on some general characteristic or aspect of that work, or the class of works to which it belongs.[170] Finally, expressive authorial activity has been found in some cases where the transformative purpose is to comment both on the original and on some aspect of society at large.[171]

A second group of transformative purpose cases[172] require a bit more exploration. In these cases, the defendant's transformative purpose is not to criticize the original work,

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[168] As Reese observes, using a work for a transformative purpose that "serves a different function than the original work"[168] is more likely to produce a finding of transformativeness than alterations to the content of the underlying work. Reese, *supra* n.___, at 484-85, 486-87.

[169] *INSERT CITATIONS. See also Savage v. Council on American-Islamic Relations, Inc.,* 2008 WL 2951281, pin-point (July 25, 2008) (finding the transformative purpose of defendants' use to be "to criticize and comment on plaintiff's statements and views"); *See* Samuelson, *supra* n.___ (citing *Savage* as an example of "iterative copying for orthonogal speech-related purposes").

[170] *See, e.g., Hofheinz v. A&E Television*, 146 F.Supp.2d 442, 447 (S.D.N.Y. 2001) (involving the use of original video footage); *Hofheinz v. AMC Productions, Inc.,* 147 F.Supp.2d 127, 137 (E.D.N.Y. 2001) (same); *Hofheinz v. Discovery Communications, Inc.*, 2001 WL 1111970, at *12 (S.D.N.Y. Sept. 20, 2001).

[171] *Lennon v. Premise Media Corp.,* 556 F.Supp.2d 310, 322-24 (S.D.N.Y. 2008) (finding the defendants' use to be criticism of the original song, of John Lennon's naïve views, and of anti-religious views in society); *Blanch v. Koons,* 467 F.3d 244 (S.D.N.Y. 2006) (finding the defendant's use to be "commentary on the social and aesthetic consequences of mass media"). *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986), decided pre-*Campbell,* implicates similar transformative purposes, although accomplished primarily through a change in context and audeince. Hustler had produced a parody critical of the Moral Majority and its leader, Jerry Falwell. *Id.* at ___. Defendant's responded with a mailer to their constituents that included copies of the parody in its entirety, but seeking "to rebut the personal attack upon Falwell and make a political commentary about pornography." *Id.* at 1153. Thus, the new purpose is primarily expressive of the defendant's views. *See* Samuelson, *supra* n.___ (citing *Hustler* as an example of "iterative copying for orthonogal speech-related purposes"). It should be noted that defendants' mailer also included a plea for donations, however this fundraising purpose was considered as tertiary to the works critical purposes and instead relevant to the critical nature of the subsequent use. *Huster,* 796 F.2d at 1152-53.

[172] *INSERT CITATION*

the class of works to which it belongs, or even society at large. Rather, defendant uses these works as referential objects within an authorial work. For instance, in *Bill Graham Archives v. Dorling Kindersley Ltd.*,[173] the author of a book on the Grateful Dead used unadulterated concert posters to set the historical context for his commentary.[174] In this new context, the original works were no longer used primarily for artistic expression and promotion purposes, but had been transformed into historical artifacts.[175] Likewise, in *Warner Bros. Entertainment Inc. v. RDR Books,* portions of the original were used in creating a guide to the underlying original works of fiction,[176] transforming its purpose from entertainment to referential.[177] Finally, in *Nunez v. Caribbean International News Corp.,* the defendant used an unaltered photograph intended to appear in a modeling portfolio in a newspaper story concerning the model and her appearance in that photo.[178] The use of these works as referential objects, although not within the universe of those more archetypal transformativeness cases, nevertheless evidences authorial activity through the expressive nature of their use.

2. Imbalances Between Incentive and Accommodation

By focusing the transformative use analysis so narrowly on the degree to which a defendant has engaged in authorial activity, courts reflect and reinforce an imbalance in the equilibrium between incentive and accommodation, thereby failing to maximize the public benefit at the heart of copyright.[179] This analysis of authorial activity is centered primarily on a defendant's process, intent, and purpose;[180] whether in terms of bad faith, willingness to engage in creative work, how readers are to use the work, the

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[173] 448 F.3d 605, 611?? (2d Cir. 2006) ___

[174] *Id.* at ___.

[175] *Id.* at ___. *See also* Samuelson, *supra* n.___ (citing *Graham* as an example of use to set historical context); Reese, *supra* n.___ (citing *Graham* as an example of use for a transformative purpose).

[176] 575 F.Supp.2d 513, ___ (S.D.N.Y. 2008).

[177] *Id.* at 541-44 (comparing the original entertainment and aesthetic purposes with the referential purposes of the subsequent work). *See also* Samuelson, *supra* n.___ (citing *RDR Books* as an example of use in a reference work).

[178] 235 F.3d 18, 23 (1st Cir. 2000). *See also* Reese, *supra* n.___ (citing *Nunez* as an example of use for a transformative purpose).

[179] *INSERT INTERAL REFERENCE*

[180] *See* Heymann, *supra* n.___, at 448-49 ("[C]ourts often, as the word 'purpose' suggests, focus their analysis on the creator of the second work. The question then becomes not how the work is perceived or interpreted but what the author intended or hoped to achieve."). *See also* Wong, *supra* n.___, at 1109-1110 (after *Campbell*, "courts … have tended to focus largely on the purpose of the defendant's use, rather than the result thereof").

impact or effect of the work, or the markets to be served. This emphasis on the relationship between the defendant and the work she has produced reflects the dominant roles of authorship and originality in copyright law,[181] as well as the system of incentives and protections that rewards these activities or characteristics.[182] As a result, fair use analysis — although premised on finding "breathing space"[183] within the tangle of existing protections — tends towards these dominant attributes of protection, rather than space and accommodation.[184] This accounts, in significant part, for the ongoing conflict between transformative fair use and derivative work rights, whether accruing to the original author or to the subsequent user. [185]

Mary Wong, addressing the law's treatment of user-generated content,[186] argues that copyright law should focus less on the defendant's purpose and more on the resulting work as it exists in society.[187] With the rise of participatory culture, she argues, the audience has evolved from a passive consumer of content into an empowered active participant, even to the point of co-creation or collaboration.[188] Copyright law should adapt to this development, she argues, by reconceptualizing the fair use analysis:

> It may be more useful … and better serve the understanding of the integral role of users in copyright law to approach the transformativeness question by instead asking what the plaintiff's work has become *as a*

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[181] *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 Fordham L. Rev. 347, 348 (2005) ("copyright is first and foremost a law of authors' rights").

[182] *See* Wong, *supra* n.___, at 1097 ("copyright law in policy and practice … has emphasized … the importance of incentives and protection for the author/publisher").

[183] *Campbell*, 510 U.S. at 579.

[184] *See, e.g.,* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535, 562 (2004) (describing the narrowing of fair use that results from attempts to fit transformativeness into our traditional conceptions of authorship and originality).

[185] *See* Wong, *supra* n.___, at 1105 ("It seems patently unnecessary to contradict the statement that 'only authors, but not copycats, should be entitled to fair use privilege,' but the evolution … of a fair use test that relies heavily on the transformative nature of the use raises the further question of whether transformativeness equals authorship in the derivative work context.").

[186] Wong, *supra* n.___. *See also* Deborah Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User Generated Rights*, 11 Vand. J. Ent. & Tech. L. 921 (2009); Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 Colum. J.L. & Arts 497 (2008).

[187] *See* Wong, *supra* n.___, at 1109, 1110.

[188] *Id.* at 1097.

> *result of the defendant's additions and changes*…. Requiring the court to also look at *the result of the defendant's actions,* and not just the substance and purpose of those actions, would … underscore the objective of the transformativeness inquiry … namely, to evaluate whether the defendant did ultimately transform the plaintiff's work by *giving* it a new meaning, information, or expression and thereby adding to progress and the advancement of learning.[189]

This approach stands in contrast to the general tendency of copyright law to undervalue the audience[190] by "highlight[ing] the vital part played by the user – in many respects as much as an 'author' as the original creator – in copyright and in contributing to a vibrant culture of knowledge creation."[191] And in the context of user-generated content it makes a great deal of sense.

Yet, despite turning the focus away from what the defendant did and why, and towards the resulting work, Wong maintains the emphasis on authorship, incentive, and protection.[192] She focuses on the defendant's authorial activity, whether by addition or alteration — as someone who "gives" the work "new meaning, information, or expression."[193] By focusing on the degree to which the defendant has engaged in authorial activity, Wong's approach to the transformativeness inquiry raises two related substantive challenges. The first challenge is to determine whether "the emphasis that *Campbell* placed on transformativeness in fair use analysis will affect the scope of the copyright owner's derivative work right to control forms in which her work is transformed."[194] The second challenge is to determine whether a work constituting transformative fair use, and therefore not infringing, will qualify for

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189 *Id.* at 1109 (emphasis added) (arguing that this would come closer to the objective standard from *Folsom* and *Campbell*).

190 *Id.* at 1097. *See also* Cohen, *supra* n.___, at 347 ("Copyright doctrine … is characterized by the absence of the user").

191 *Id.* at 1111. *See also* Halbert, *supra* n.___, at 924 ("User-generated content is in reality authorship and creative work").

192 Wong does argue that the originality requirement should be modified in these situations. *Id.* at 1090-91, 1115.

193 *Id.* at 1109.

194 Reese, *supra* n.___, at 468. *See also* Cotter, *supra* n.___, at [3] ("courts have struggled … to distinguish the sort of transformation that counts for fair use analysis from the sort of transformation that violates the exclusive right to prepare derivative works"); Wilson, *supra* n.___, [no pin-point available] (stating the fundamental question as "whether creating a new work based on an existing work falls within the definition of a derivative work or under the transformative use component of the fair use doctrine").

copyright protection in its own right.[195] Wong therefore undertakes to define a standard that not only "secur[es] justifiable secondary markets for the initial author, but also … encourag[es] creativity — and thereby progress — through protection of derivative creations that represent a substantive change from the initial work."[196] By conceptualizing the issue as one of authorship, however, the fair use inquiry becomes hopelessly mired in the reconciliation of competing claims of protection.

This approach asks too much, and indeed more than necessary, from fair use. The fair use doctrine is not, after all, concerned with *incentivizing* the creation of new works. Rather, the heart of the fair use doctrine is its "guarantee of *breathing space* within the confines of copyright."[197] Indeed, the value of the transformativeness inquiry hinges on the interplay between incentive and accommodation, seeking a point of equilibrium between these two mechanisms rather than some line of demarcation or shared axis such as authorship and protection. Wong's work is important because it properly shifts the focus of the transformativeness inquiry away from what the defendant did and what she intended, and toward the resulting work in its relationship with the audience or user. But in making this shift, it is unnecessary to take that next step — seeking to tie the concept of transformative fair use to the authorial requirement for copyright protection in the subsequent work.

B. An Alternate Conception of Transformativeness

* *Meaning as social value*
* *Transformativeness as a social semiotic process*
* *Example: Shepard Fairey v. The Associated Press*

1. Meaning as Social Value

The goal of copyright law is to promote social value by expanding the available body of new expression. This can be accomplished, in part, by incentivizing the creation of new works of authorship through the provision of economic rights. This approach is consistent with the two dominant conceptions at the foundation of U.S. copyright law. The first is a romantic ideal of the author as a wellspring of art and originality, to be rewarded for sharing her gifts with the public.[198] The second is a Lockean theory,

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[195] *INSERT CITATION*

[196] *Id.* at 1116.

[197] *Campbell*, 510 U.S. at 579 (emphasis added).

[198] *See, e.g.,* Fiona Macmillan, "Artistic Practice and the Integrity of Copyright Law," in *Art and Law: The Copyright Debate* 71-72 (Morten Rosenmeier & Stina Teilmann, eds.), 2005, DJOF Publishing, Copenhagen (describing personality right justifications for copyright protection as "based on the argument that a work is the embodiment of the personality of the creator and, therefore, should be subject to the creator's

closely allied with natural law, in which authorship-as-labor is justly rewarded with property-like rights of exclusive exploitation.[199]

Fair use likewise promotes the social value of new expression, but through a limitation on the author's exclusive economic rights — an accommodation for certain new works that use a protected work as raw material. Yet, this limitation-through-accommodation remains grounded in these same dominant conceptions of authorship. As discussed, *supra*, the transformativeness inquiry is primarily focused on the degree to which the defendant has engaged in an authorial purpose or activity.[200] Thus, the creation of new works of commentary and criticism are at the core of fair use jurisprudence. Likewise, using the original work as a referential object in the creation of a new work may also be recognized as fair use.

Given this parallel focus on authorial purpose or activity and the creation of new works, it is not surprising that Wong and others are forced to wrestle with competing claims to economic incentives and exclusive rights. The question of social value is no longer whether the allegedly infringing work has expanded the available body of new expression, but rather whether the defendant satisfies our conceptions of a worthy

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ownership and/or control"); Halbert, *supra* n.___, at 928 (discussing "the myth of the romantic or original author").

[199] *Id.* at 71 ("copyright provides an economic incentive to creators and exploiters of copyright work, thus encouraging the creation and dissemination of cultural works with consequent cultural development"); *id.* (describing a natural rights justification of copyright protection "said to spring from Lockean theories of property and involve the proposition that the author is entitled to a reward for the creation of the work in question").

[200] One group of cases is more difficult to categorize, as the use itself was not expressive or authorial, but it enabled that result through intermediate copying for the ultimate purpose of creating new, non-infringing works. *National Rifle Association of America v. Handgun Control Federation of Ohio*, 15 F.3d 559 (6th Cir. 1994), is one example. Plaintiff mailed its members a list of state legislators, urging them to contact those legislators to voice their opposition to pending gun-control legislation. Defendant photocopied plaintiff's list and sent it to its members, urging them to contact those same legislators in support of the legislation. Although this pre-*Campbell* decision did not address the transformativeness standard, it found that the underlying list ultimately facilitated the distribution of new, non-infringing educational material to a different audience. Thus, although the general purpose was similar — to inform and garner support — the work ultimately created was entirely distinct. *Sega Enterprises Ltd. v. Accolade, Inc.,* 977 F.2d 1510 (9th Cir. 1993), another pre-*Campbell* decision, found fair use where the purpose of the intermediate copy was "solely … to discover the functional requirements for compatibility" with plaintiff's gaming system. *Id.* at 1522. Thus, the copying was essentially for learning purposes and ultimately to produce new, non-infringing works. *Id.*

author. From this perspective, social value is measured in the creation of new content, new markets, new efficiencies, or new functionality; regardless of whether that assessment is formally one of incentive or accommodation.

This is a mistake. As Heymann observes, "Copyright is not a reward for creative production as such; it is an incentive to ensure that that the public has access to works that would not otherwise exist."[201] Certainly, incentivizing authors to create new and derivative works can produce social value. But social value can also be found more generally in the accommodation new expression, whether or not the form and physical substance of that expression is itself new or different, and regardless of authorial pedigree.

Wong was entirely correct to suggest that the transformativeness inquiry should focus not on what the defendant did or intended, but rather on the resulting work. The question is not, however, whether that resulting work evidences the type of authorial social value to be rewarded with copyright protection. Instead, the proper inquiry is whether the resulting work ultimately produced additional value by "yield[ing] 'new information, new aesthetics, [or] new insights and understandings.'"[202] Ultimately, the question is whether the resulting work "is transformative in its meaning — that is, whether the reader perceives the second copy as signifying something different from the first."[203] Heymann summarizes the point this way:

> What the fair use doctrine should be concerned with, then, is not what an author does when she creates — whether the second author changes the first author's expression in some ascertainable or substantial way — but rather whether the reader perceives an interpretive distance between one copy and another (in other words, a lack of similitude). If distinct discursive communities can be identified surrounding each copy, that fact should lead us to think that the meaning of the expression has been transformed, even if the expression itself has not.[204]

This suggests at least two strands to Heymann's analysis. One includes cases in which the defendant has taken affirmative steps to recontextualize the original work and the courts assesses audience engagement and interpretation with the work as part of its transformativeness analysis.[205] *Blanch v. Koons* is one such example, with the court citing Koons' recontextualization as indicative of his "sharply different" purposes in

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[201] Heymann, *supra* n.___, at 453.

[202] *Id.* at 452.

[203] *Id.* at 455.

[204] *Id.*

[205] *Id.* at 453.

using the original,[206] and "highlighting Koons's efforts to engage viewers in a different interpretive discourse from that of Blanch."[207] These cases generally fit comfortably within the universe of expressive authorial activity, discussed *supra*,[208] although Heymann's work provides an important and more constructive frame for the analysis.

The second strand is perhaps more difficult to capture. What about those cases in which evidence of authorial purpose and activity —through physical alteration, recontextualization, and/or change in function — is more muddled, unconvincing, or even contradictory to transformative use? Can audience engagement with the work matter? What if audience interaction with and about the work triggers unexpected social responses, cultivating new and expansive cultural meanings, messages, and insights? Does accommodating this work, as a necessary constituent of this interpretive engagement, further copyright's goal of promoting the social value of new expression?

If fair use is taken seriously as a doctrine of accommodation, rather than incentives, then the answer is clearly, yes. From this perspective, the courts' narrow focus on authorial purpose and activity is unsupported. As the recontextualization cases suggest, "facilitating the dissemination of multiple meanings of the same work can achieve [the goals of copyright] as well as the dissemination of multiple works."[209] This allows us to move towards the idea that audience engagement can itself create social value[210] —

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[206] *Blanch*, 467 F.3d at 252 ("Koons asserts—and Blanch does not deny—that his purposes in using Blanch's image are sharply different from Blanch's goals in creating it.").

[207] Heymann, *supra* n.___, at 461. *See also id.* at 461 (describing the court's approach, "which, although still adhering to notions of authorial intent, adopted language indicating a focus on interpretation").

[208] INSERT INTERAL REFERENCE. It is worth noting a distinct group of cases in which, as in *Blanch v. Koons*, the original is used for an entirely different purpose, but in these cases with no significant authorial activity. In *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003), for instance, the original purpose of the work was entertainment or information. The subsequent purpose was the use of that same work, entirely without change, as evidence. Of course, these are entirely different functions, with the subsequent use being non-expressive with no authorial activity. Likewise, in *A.V. ex rel. Vanderhye v. iParadigms, LLC,* the court found defendant's use to be "transformative in nature" because "iParadigms … uses the [students' term] papers for an entirely different purpose, namely, to prevent plagiarism and protect the students' written works from plagiarism ... by archiving the students' works as digital code." 562 F.3d 630, 638 (4th Cir. 2009).

[209] Heymann, *supra* n.___, at 466.

[210] Two relatively recent decisions may well suggest certain situations in which audience engagement is key to the creation of social value. In both *Kelly v. Arriba Soft Corp.,* 336 F.3d 811 (9th Cir. 2003), and *Perfect 10, Inc. v. Amazon.com, Inc.,* 508 F.3d 1146 (9th Cir. 2007), the original purpose of plaintiffs' photographs was largely

whether cultural, creative, political, or otherwise. Indeed, all expressive works have the potential for meaning, but that meaning cannot be transmitted from author to audience. It can only be actualized in concrete social contexts, outside the author's control. This is where true social value is realized.

2. Transformativeness as a Social Semiotic Process

By reframing the fair use analysis as a doctrine of accommodation, rather than incentive, we shift the point of inquiry away from authorial purpose or activity. The focus is instead properly on the resulting work, not as evidence of authorship, but as a potential source of social value. That value, viewed through the goals of copyright, is realized in the production of expression. From the very inception of the term, the Supreme Court has recognized the transformative value of expression to include not just new forms, but also new messages and meanings. Courts have come to assume, however, that those messages and meanings reside in the mind and intentions of the "author," that those messages and meanings are transmitted from the author to the audience, and that certain segments of the audience either "get it" or don't. But this assumed scenario entirely misconceives the process by which "meaning" is realized. Meaning is not controlled, transmitted, or even consistent. It is, instead, negotiated and actualized in engagement with the audience; or, more appropriately, audiences.

Media studies provide a useful starting point for exploring this idea.[211] The literature offers three general conceptions of the audience: audience-as-mass, audience-as-

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aesthetic. Defendants' subsequent use served an entirely different function than the original work, using these images as part of an electronic search engine that facilitated users' access to the underlying work. *See Kelly,* 336 F.3d at 819; *Perfect 10*, 508 F.3d at 1165. Indeed, the court found, "a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work." *Perfect 10*, 508 F.3d at 1165. Here, the distinction in function was itself enough to find transformative use, even without authorial purpose or activity, but the social value of that function hinged on audience engagement with the copies. *See also Field,* 412 F.Supp.2d at 1118-19 ("[Plaintiff] intended his copyrighted works to serve an artistic function to enrich and entertain others…. Google's presentation of 'Cached' links to the copyrighted works at issue here does not serve the same functions … [but instead] enables users to access content when the original page is inaccessible … allows Internet users to detect changes that have been made to a particular Web page over time … [and] allows users to understand why a page was responsive to their original query.").

211 *See, e.g.,* Victor Costello & Barbara Moore, *Cultural Outlaws: An Examination of Audience Activity and Online Television Fandom*, 8(2) Television & New Media 124, 124 (2007) ("One of the more persistent debates in mass communication research centers on the question, Is the audience active or passive? In other words, are

outcome, and audience-as-agent.[212] As a mass, "the audience is seen as a large collection of people scattered across time and space who act anonymously."[213] The audience–as-outcome paradigm invokes "a 'transmission' model of communication,"[214] that conceives of people as "passive receiver(s) of the information contained in [a] message."[215] The third conception, audience-as-agent, characterizes audience members as "free agents choosing what media they will consume, bringing their own interpretive skills to the texts they encounter, [and] making their own meanings…."[216] This does not mean, however, that audience exists in a vacuum, entirely free of outside influences. Rather, audience members are both "individual agents [and] participants in the larger dynamics of social and institutional structure."[217] This conception of the "active audience" has, in its most general terms, largely come to dominate our understanding of the engagement between reader and text.[218]

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viewers or listeners capable of making their own meaning out of message content or are they merely helpless victims of media producers?" (citations omitted)).

[212] James G. Webster, *The Audience*, 42 J. Broad. & Elec. Media, 190, 191 (1998).

[213] *Id.* at 192 (describing the audience-as-mass model as an entity defined by their common exposure to the media).

[214] *Id.* at 194.

[215] *Id.* at 193 (describing this perspective as focused on the often detrimental power of the media, and the audience as unaware of how the media is acting upon them).

[216] Webster, *supra* n.___, at 194-95.

[217] *Id.* at 202-03.

[218] *See, e.g.,* Leah A. Lievrouw & Sonia Livingstone, *Handbook of New Media: Social Shaping and Social Consequences* 8, (2006) (SAGE Pubs., London, UK) ("As the dominance of mass communications began to unravel at the end of the twentieth century, audience researchers were already seeking different terms for understanding the power of the media – moving away from the language of effects or impacts, towards a conception of the active audience, the diffused, embedded audience, or more broadly, towards 'new audience studies.'" (citations omitted)); Oshua Meyrowitz, *Power, Pleasure, Patterns: Intersecting Narratives of Media Influence*, 58 J. Comm. 641, 655 (2008) ("Indeed, if one stands apart from the defended research turfs that have grown from the distinct narratives, multiple intersections become apparent. As critical/cultural studies researchers have embraced and explored the notion of active audiences engaged in creating oppositional and negotiated ''readings'' of dominant texts, they have moved away, through ''reception studies,'' from the no-escape ''culture industry'' model of the Frankfurt School and closer to the view of the active audience of the uses and gratifications perspective…."). It is worth noting that this conception is with Wong's view of an "audience [that] has evolved from a passive consumer of content into an empowered active participant, even to the point of co-creation or collaboration." Wong, *supra* n.___, at 1097.

This model of the active but socially-situated audience finds significant parallels in the field of social semiotics. Like the more formalistic general semiotics, social semiotics is a theory of the production and interpretation of meaning. Rather than emphasizing structures and relationships among signs, however, social semiotics is primarily about process[219] — "the social aspect of signification … where meaning is construed as semantic value produced though culturally-shared codes."[220] Social semiotics emphasizes that "[m]eaning is not 'transmitted' to us — we actively create it" through social practice in engagement with the work.[221]

The foundations of the meaning-making process are semiotic resources, defined as "the actions, materials and artifacts we use for communicative purposes."[222] These "semiotic resources have a meaning potential, based on their past uses, and a set of affordances based on their possible uses."[223] Of course, the sign-maker is motivated in her use and transformation of those semiotic resources, but their potential for meaning is not realized in that use. It is instead "actualized in concrete social contexts where their use is subject to some form of semiotic regime."[224] "In different contexts people make different choices from the same overall semiotic potential and make different meanings with these choices."[225]

This process of meaning-making is the heart of social semiotic theory. It is also the link between social semiotics and a conception of transformative fair use that conceives of

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[219] See Robert Hodge & Gunther Kress, *Social Semiotics* 1 (Cornell University Press 1988) ("'Mainstream semiotics' emphasizes structures and codes, at the expense of functions and social uses of semiotic systems, the complex interrelations of semiotic systems in social practice….").

[220] Pamela Nilan, *Applying Semiotic Analysis to Social Data in Media Studies*, 1(1) Jurnal Komunikasi Massa 60, 67 (2007). *See also id.* (stating that, unlike general semiotics, in the frame of social semiotics meaning is actively created "according to a complex interplay of codes or conventions."). *Cf.* Hodge & Kress, *supra* n.___, at 6 ("Mainstream semiotics has developed the notion of a system of signs as an abstract structure which is realized or instantiated in text. It tends to teat such systems as static, as a social fact….").

[221] Nilan, *supra* n.___, at 67.

[222] Theo Van Leeuwen, *Introducing Social Semiotics* 285 (Routledge 2005).

[223] *Id. See also id.* at 4 (stating that the semiotic potential of a semiotic resource is its "potential for making meaning"); *id.* at 273 ("Affordances … are the potential uses of a given object, stemming from the perceivable properties of the object."); *id.* ("Because perception is selective, depending on the needs and interests of the perceivers, different perceivers will notice different affordances.").

[224] Van Leeuwen, *supra* n.___, at 285.

[225] *Id.* at 14.

the resulting work as a text with *potential* meanings, rather than merely as evidence of authorial purpose or activity. This parallel is evident in the way that social semiotic theory comprehends the relationship between text, discourse, audience, authors, and meaning:

> The notion of text needs to be retained and contrasted to the notion of discourse as process, precisely because a text is so limited and partial an object of analysis.
> . . . .
> [Social semiotics] acknowledges the importance of the flow of discourse in constructing meanings around texts…. Meaning is always negotiated in the semiotic process, never simply imposed inexorably from above by an omnipotent author through an absolute code…. [We] cannot assume that texts produce exactly the meanings and effects that their authors hope for: it is precisely the struggles and their uncertain outcomes that must be studied at the level of social action, and their effects in the production of meaning.[226]

Viewed through this social semiotic frame, the transformativeness inquiry occurs in the context of audience interaction with and about the work, rather than in "the meanings and effects that [its] authors hope for."[227] Social value is manifest in interpretive communities, and through the cultivation of new and expansive cultural meanings, messages, and insights. It is in this process of semiosis that copyright's commitment to the enrichment of society can be best evaluated, as a distinct question apart from the creation of new authorial rights.

This approach opens additional lines of inquiry for determining the transformativeness of the subsequent work. Certainly, authorial efforts matter. But even where these efforts fall short, the social value of new expression may still be present. As audiences engage and interact with and about the work, divergent and unexpected social responses may cultivate a multitude of different meanings. In these circumstances, the promotion of science and the arts is best served by maintaining what *Campbell* called "the fair use doctrine's guarantee of breathing space within the confines of copyright."[228] It is in this space that interpretive engagement and the process of meaning-making truly occurs.

This approach is also consistent with First Amendment principles, at which modern copyright seems so consistently at odds. Although a full exploration of the conflict is well beyond the scope of this article, it is sufficient to note that a significant number of fair use cases have recognized the difficult relationship between fair use and the values

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[226] Hodge & Kress, *supra* n.___, at 12.

[227] *Id.*

[228] *Campbell*, 510 U.S. at 578-79.

of free expression, particularly in terms of censorship and "the public interest in airing divergent points of view."[229] As the court in *Suntrust Bank* recognized, "[f]reedom of speech … requires the preservation of a meaningful public or democratic dialogue."[230] This is true "whether one understands the First Amendment as protecting political speech, promoting democracy or self-government, furthering the search for truth, or enhancing autonomy and enabling self-expression."[231]

Social semiotic theory recognizes that the process of meaning-making is in many respects an exercise in power, as we struggle to define social reality.[232] It glimpses into a moment of unsettled authority, dominance, and control. The larger point of the theory is thus the question of whose realities are privileged and whose are suppressed. Audience engagement with a work is not entirely unconstrained; rather, "[t]exts have certain encoded meanings, but individuals are capable of negotiating those meanings."[233] In this process of negotiation, both the sign-maker and the audience are pressured by the constant limitations of social conformity.[234] "Convention does not [however] negate new making; it attempts to limit and constrain the semiotic

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[229] Samuelson, *supra* n.___, at 5565-66. As discussed, *supra* at ___, Samuelson categorizes transformative uses as "free speech and expression fair uses."

[230] *Suntrust Bank*, 268 F.3d at 1263 (citations omitted). *See also Mattel*, 353 F.3d at 801 ("because parody is 'a form of social and literary criticism,' it has 'socially significant value as free speech under the First Amendment,'" citing *Dr. Seuss,* 109 F.3d at 1400)*; Yankee Publ'g, Inc. v. News Am. Publ'g, Inc.,* 809 F.Supp. 267, 280 (S.D.N.Y.1992) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.").

[231] Tushnet, *supra* n.___, at 538. *See also id.* at 538-47 (discussing "The First Amendment, Copyright, and the Conflict Between Them").

[232] *See* Nilan, *supra* n.___, at 67 (asserting that social semiotics "can assist us to become more aware of social reality as a construction and of the roles played by ourselves and others in constructing it").

[233] Webster, *supra* n.___, at 285.

[234] *See* Gunther Kress & Theo Van Leeuwen, *Reading Images* ___ (Routledge 2006) ("The effect of convention is to place the pressure of constant limitations of conformity on sign-making; that is, the way signifiers have been combined with signifieds in the history of the culture, acts as a constantly present constraint on how far one might move in combining signifiers with signifieds. Kress, G. & Van Leeuwen, T. (2006). Reading images. New York: Routledge."). Of course, it takes work to create meaning outside of dominant conventions. Work by the sign-maker and by the audience; laboring in opposition to and rejection of social convention. This suggests a certain connection between the process of meaning-making and dominant natural law and Lockean theories of authorship-as-labor. *See supra* at ___ (discussing these theories).

scope…."[235] It is nevertheless implicit in the social semiotic model that social conventions made by people can be changed by people, but these processes are governed by social relations of power[236] and "[t]o be able to change the rules you need power."[237]

Tying fair use to First Amendment jurisprudence undoubtedly carries its own pitfalls.[238] At the very least, however, values of free expression embrace the freedom to participate in shaping culture. This participation is not limited to dissent, commentary, and criticism, although these are certainly valued. It is, as *Suntrust Bank* suggests, the value of the dialogue itself.[239] Social semiotics recognizes that constraints on the process of making meaning are manifestations of the power relations embedded in expressive communication. This process of negotiated meanings is essentially a struggle for power. By providing "breathing space" for that process, fair use facilitates the value of expressive dialogue.

3. Example: *Shepard Fairey v. The Associated Press*

In 2008, Shepard Fairey created two now-iconic posters for the Obama campaign, "Obama Progress" and "Obama Hope" (together, the "posters"), each a variation on a single image.[240] Fairey used a reference photo in creating the image; a photo later determined to have been taken by Manny Garcia at a 2006 National Press Club Event.[241]

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[235] *Id.*

[236] *Id.*

[237] Van Leeuwen, *supra* n.___, at 47-48.

[238] *See, e.g.,* Tushnet, *supra* n.___, at 47-48 (arguing that "the risk is that courts and others may conclude that fair use doesn't protect anything more than the First Amendment requires").

[239] *See also Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n of Ohio,* 15 F.3d 559, 562 (6th Cir. 1994) (holding that more weight should be given to the defendant's claim of fair use because it was directly related to defendant organization's "First Amendment speech rights to comment on public issues and to petition the government regarding legislation"). "[Defendant]'s use of the list, if it did anything, helped *create* a market for [plaintiff], as citizens on one side of a controversial issue presumably feel more need to engage in political activity if citizens on the other side of the issue are active." *Id.*

[240] Complaint at 1, Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press (S.D.N.Y. Feb. 9, 2009) (No. 09 CIV 01123, Hellerstein, J.) (hereinafter, "Complaint")..

[241] Complaint at 1, 7. *See also* Joseph Scott Miller, *Hoisting Originality*, 31 Cardozo L. Rev. 451, 455 (2009) (discussing the lawsuit); Jo-Na Williams, *The New Symbol of "Hope" for Fair Use: Shepard Fairey v. The Associated Press*, 2 No. 1 Landslide 55, 55-56 (2009) (same). Fairey originally asserted that the reference photograph was one of Obama and actor George Clooney. Complaint at 8.

Garcia was hired by the AP to photograph the event, thus the AP claims copyright in the photo.[242] When the AP contacted Fairey claiming both ownership[243] and infringement, he refused the AP's demand to pay both a licensing fee and a royalty on revenues associated with the posters.[244] Instead, Fairey filed a declaratory judgment action against the AP, seeking a finding of fair use and injunctive relief.[245] The heart of Fairey's fair use claim is his assertion of transformative use of the Garcia photo,[246] that "altered the original with new meaning, new expression and new message."[247] Fairey also claims to have altered the purpose of the work, moving from a work intended to document events to a work intended "to inspire, convince and convey the power of Obama's ideals, as well as his potential as a leader, through graphic metaphor."[248]

The AP filed counterclaims against Fairey alleging, *inter alia*, copyright infringement.[249] The AP alleges that Fairey copied "the most 'distinctive characteristics [of Garcia's photo] in their entirety … without giving credit to The AP.'"[250] Refusing to acknowledge

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[242] Complaint at 9.

[243] Rights in the photograph are disputed in the lawsuit. *See* Memorandum of Law in Support of Intervenor Mannie Garcia's Motion to Intervene at 1-2, Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press (S.D.N.Y. July 8, 2009) (hereinafter "Motion to Intervene").

[244] Complaint at 9.

[245] *Id.*

[246] *Id.* at 4-5 ("Fairey transformed the literal depiction contained in the Garcia Photograph into a stunning, abstracted and idealized visual image that creates powerful new meaning and conveys a radically different message that has no analogue in the original photograph.").

[247] *Id.*

[248] *Id.* at 5.

[249] Answer, Affirmative Defenses and Counterclaims at 37, Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press (S.D.N.Y. March 11, 2009) (hereinafter "Answer").

[250] *Id. See also id.* at 10 ("The Infringing Works copy all the distinctive and unequivocally recognizable elements of the Obama Photo in their entire detail, retaining the heart and essence of The AP's photo, including but not limited to its patriotic theme."); *id.* at 13 ("The Infringing Works do not alter any of the distinctive characteristics that make the Obama Photo so striking…."); *id.* ("All of the recognizable elements remain completely and unmistakably intact in the Infringing Works, including the angle and slant of President Obama's head, and his gaze and expression; the contrast, focus, and depth of field of the photograph; as well as the shadow lines created by the lighting in the original photo. Fairey even used the red, white and blue flag imagery that Mr. Garcia worked to capture in the background of The AP's photos."); *id.* Interestingly "Garcia admitted that he did not recognize his

that Fairey made any artistic contribution to Garcia's photo, the AP characterizes Fairey's work as "nothing more than a computerized version of 'paint by numbers.'"[251] The AP also alleges that both the Garcia photo and the Fairey image "serve exactly the same character and purpose in communicating evocative themes."[252] Finally, the AP condemns Fairey's unapproved use of the Garcia photo as "'utter disregard for the AP's long-established licensing program.'"[253]

Both Fairey's transformativeness claim and the AP's opposing arguments proceed along familiar routes, focusing on authorial purpose or activity, including physical alteration of the original. A social semiotic analysis of transformativeness would, as described above, take an entirely different perspective. The point of inquiry is shifted to the resulting works — here, the posters — as potential sources of social value in the production and interpretation of new meanings and messages. In making this assessment, the focus is on engagement with the work and about the work. It is a process of negotiation in which meanings are constructed in the context of social practice and convention. The remainder of this section undertakes an analysis of that social semiotic process, looking at (a) the work, (b) the semiotic resources represented in the work, (c) the motivations of the sign-maker, (d) the discourse and negotiation taking place around the work in various interpretive communities, and (e) the role of social convention and power in this process. This analysis is then applied to the transformativeness inquiry.

The Work

The image was created using what Fairey terms a *reference photograph*. The image is closely cropped, with Obama as the sole represented participant. Obama is seen from a low angle, with the degree of elevation somewhat exaggerated by close proximity. He is looking to his left, slightly up and off into the distance at someone or something out of the frame. This has the effect of elevating Obama's chin. Obama appears serious; perhaps as though he is listening. His eyes are slightly narrowed, as though focusing.

The image is composed using three bright, primary colors – red, white, and blue (in two shades). Color is used to create both vertical and horizontal divisions. The image incorporates geometric shapes in the design, some more explicit and others more

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photograph of Obama as the photograph Fairey referenced to create his works." Answer, Affirmative Defenses and Counterclaims of Plaintiffs and Counterclaim Defendants at 20, Shepard Fairey and Obey Giant Art, Inc. v. The Associated Press (S.D.N.Y. August 14, 2009).

251 Answer at 38.

252 *Id.*. The AP also alleged that Fairey's work "cannot be characterized as commenting on or criticizing the Obama Photo." *Id.* at 38-39.

253 *Id.* at 12-14.

abstract. A one-word slogan — either "HOPE" or "PROGRESS" — appears at the bottom of the image.

Semiotic Resources Represented in the Work

Fairey's work is intended to be subversive, not only in imagery, but also in medium (graffiti, posters, stickers, etc.) and the environment in which it is encountered.[254] Bold colors and striking geometric shapes are used to draw attention in crowded streets. Iconic images are often re-appropriated and manipulated so as to invoke irony. It is also intended to be mass-produced.

The Fairey posters draw aesthetically from the constructivist movement in Russia between 1919 and the mid- to late-1930s. Constructivism was overtly political, rejecting the concept of art *qua* art in favor of a functional, utilitarian conception of art for social purposes. Constructivism tends towards angular, geometric design elements, bold and bright colors, and thick lettering. The second readily identifiable influence is the Bauhaus school, which was itself influenced both by Constructivism and the Dutch artistic movement known as De Stijl. De Stijl emphasized the use of straight lines, horizontal/vertical orientations, the use of geometric shapes and primary colors, and the combination of oppositional elements. The Bauhaus school was, like Constructivism, overtly political in its leftist orientation. Americans were exposed to Bauhaus-influenced designs in the 1930s and early 1940s through the Federal Art Project (FAP) of the Work Progress/Projects Administration (WPA).

In addition to the aesthetic design elements just described, the image of Obama in these posters invokes the depiction of Soviet, Chinese, and German leaders from early-to mid-twentieth century propaganda posters. There are, however, clear distinctions. For instance, Stalin was usually depicted in a distinct body position and was not cropped as closely. He was also seldom depicted as the sole participant.[255] Mao was usually

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[254] Complaint at 2 (describing Fairey's work); *Id.* at 3 ("A large body of Fairey's work questons and criticizes Presidents, politicians and world leaders, past and present."); *id.* (describing his "Obey" campaign as work that "urges the observer to question obedience to social commands and the political status quo"); *id.* ("The content of Fairey's work is a call to action about hierarchies and abuses of power, politics and the commodification of culture").

[255] Stalin is often pictured as surrounded by but separate from a large crowd, towering above them. The crowd looks either reverently at Stalin or toward the same distant point to which he is looking. This incorporation of the crowd was a point of controversy. "Critics … devoted a good deal of attention to" the issue of "Stalin's relationship to the masses" in these posters. V.E. Bonnell, *Iconography of Power* (Berkeley: University of California Press, 1997). In one review, a critic took the artists to task for showing Stalin "full-face … held aloft by five arms [with] flags and industrial scenes filling the background." *Id.* "In order to show Comrade Stalin as the *vozhd'* of the masses, as the genius leader, as the active participant in socialist

depicted as proximate to the viewer, but was made to appear as though hovering over an earthen landscapes or crowds of small people. Many of Mao posters are horizontally oriented to capture this landscape effect. Moreover, although Mao is often pictured from a similar low, oblique angle perspective, he is often looking directly at the viewer and smiling. Finally, Mao is often depicted as framed by the sun, with beams of light radiating from his countenance. Hitler was portrayed from a greater distance, but with similar head and body positions. Unlike Obama, however, Hitler is generally viewed either from above or at approximately eye level. Interestingly, it is the citizens that are pictured from the same low angle as Obama. Like Obama, Hitler is generally portrayed as gazing out into the distance.

The Fairey posters also draw on key and consistent elements found in many domestic campaign posters. As in the Fairey posters, U.S. presidential candidates have traditionally been presented as the sole represented participant, with a significantly fewer number of images portraying the candidate with his running mate. Likewise, the close degree of proximity employed in the Obama poster is nearly identical to that of nearly every presidential candidate over the past century. Moreover, presidential candidates are generally seen from a low, oblique angle, often with the chin slightly elevated. It is exceedingly difficult to find any images of the candidate in which there is eye-to-eye contact with the viewer. Instead, he is portrayed as looking slightly up and off into the distance at someone or something out of the frame. Although the aesthetic composition of U.S. campaign posters is generally more varied, multiple candidates have utilized elements similar to those found in Stalin, Mao, and Hitler propaganda pieces. This includes the use of bright, primary colors that appear as colorized photograph, and the use of color and geometric shapes to create vertical and horizontal divisions. Other candidates have incorporated elements that, although not incorporated in the Obama poster, have clear reference in the Soviet, Chinese, and German propaganda posters. For instance, Willkie used a design strikingly reminiscent of the beams of radiating light used in images of Mao; Reagan imposed his larger-than-life image over a landscape of American icons, linking himself to the national mythology; Nixon utilized bold colors in an image of himself surrounded by but separate from a large crowd of advisers, celebrities, and citizens; and McCain used an oversized image of his head, floating in the sky, with his face illuminated and illuminating the clouds around him.

The commonalities of these compositions are unsurprising in the context of a presidential campaign. Low angles are said to make the subject "look imposing and awesome … an impression of superiority, exaltation and triumph."[256] Oblique angles create a sense of other-worldliness. Proximity has religious overtones, serving "a dramatic function, allowing the subtlest of emotional relationships with a minimum of

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construction … the artists raise him above the masses and juxtapose them. The masses are deprived of class character, depersonalized in the direct sense of the word." *Id.*

[256] Kress & Van Leeuwen, *supra* n.___, at ___.

dramatic scenery."[257] This relationship between subject and viewer is reinforced by the unsmiling expression indicative of a "demand image … that realizes a particular social relation."[258] A certain type of charismatic authority is established.

Motivations of the Sign-Maker

Fairey's interest in the object guided his selection of Obama's criterial aspects – young, smart, hip, progressive. According to Fairey, the posters were "designed to capture the optimism and inspiration created by Obama's candidacy."[259] The forms chosen to signify these criterial aspects are those that Fairey considers apt for the intended meaning. Here, Fairey's chose a certain aesthetic; e.g., communist chic, although he might not term it as such.

Like Andy Worhol and many of the other pop artists preceding him, Fairey takes the existing and often iconic semiotic resources and places them in a different context, creating new meanings.[260] His work includes elements of "Soviet-era propaganda, paintings from Works Progress Administration campaigns, and '60s-era psychedelic rock poster art."[261] His use of these symbols is intended as ironic, rather than

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[257] *Id.* at ___.

[258] *Id.* at ___.

[259] Complaint at 3.

[260] At least since Andy Warhol, artists have taken the existing semiotic materials of communism and placed them in a capitalist context, creating new meanings. According Christie's auction house, Warhol's 1976 work, "Hammer and Sickle," was inspired by graffiti he saw on a trip to Italy. Critics saw the adoption of this now-pop image by a "hyper-Capitalist, super-consumer artist" as a devaluation of Communism itself:

> This Communist symbol has become the theme, as Mao had a few years earlier, for a luxury item, a painting by one of the world's most recognized artists. Suddenly, on the walls of the homes of art patrons, magnates, tycoons and industrialists, all of whom would have been considered the taboo exploiters of the masses by most Communist regimes, the hammer and sickle could appear in safety, without denunciation or suspicion, with impunity and a good dose of irony. This was a minor example of the relentless victory of Capitalism -- the world of commerce has taken the apparatus of its adversary, absorbed it and turned it against itself.

Christie's Auction House, *Hammer and Sickle, Lot Notes.* Retrieved May 8, 2009. Web site: http://www.christies.com/LotFinder/lot_details.aspx?intObjectID=4978852.

[261] G. Edgers, Shepard the Giant. *The Boston Globe* (Feb. 2, 2009). See also M. Ryzik, The Street Artist Shepard Fairey Moves Closer to the Mainstream But is Still Rebellious, *New York Times* (Jan. 10, 2008) (noting that Fairey, who admits to the label "pop

traditionally political.[262]

In Fairey's social context – that of a pop artist inspired by others who have used such symbols and in a network of others who comprehend those symbols in a similar way – these symbols, elements, and aesthetics are available to create meaning. Traditional cultural symbols are revered not as static or unassailable, but rather elements to be played with. Irony and sarcasm are appreciated. Capitalism is not rejected, but rather refined and reconfigured in the context of other interests and values.[263] "By evoking stylized propaganda posters more often associated with autocrats and dictators, Fairey at once portrays the inevitability of Obama's triumph, while suggesting qualities of wisdom and vision that pull viewers willingly into Obama's message of hope, progress, and change."[264] He intended the work to represent the "visual embodiment of the unprecedented grassroots support Obama had harnessed."[265]

Discourse, Negotiation, and Interpretive Communities

The posters were a huge success with Obama supporters.[266] Reaction from other quarters was quite different. Two themes were dominant. The first accused Obama of

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artist" and cites Warhol as an influence, "has always toyed with ideas of commercialism, advertising and appropriation").

262 Fairey claims to reject the underlying politics of the symbols:

> I'm very much an integrationist and I believe that creative people that are maybe somewhat more radical still need to work within what's realistic, not pie-in-the-sky, "Yeah, let's rip it all down!" Look at the people who do that, like Castro and Che Guevara: They failed. Lenin failed. But I'm about working within capitalism even though I'm critiquing it and working within our two-party system of democracy but trying to make it better. I think people get the wrong idea sometimes; they think that if you've got some complaint that you're anti-everything. I'm definitely not. I'd be a hypocrite to sell art work if I was anti-capitalist.

J. Del Signore, Interview: Shepard Fairey, Street Artist, T*he Gothamist* (June 21, 2007).

263 See Answer at 46 (referencing Fairey as a "self-described 'captial-embracing entrepreneur'").

264 Complaint at 5.

265 Complaint at 6. *See also* Complaint at 1 (describing the works as "powerful symbols of Obama's grassroots support").

266 *See, e.g.,* B. Van Siclen, The Man Behind the Obama Poster, *The Providence Journal* (Feb. 1 2009) ("The poster … was an instant hit, selling more than 10,000 copies in the first week. By the end of the campaign, versions of the image had appeared on

invoking the imagery of Socialism, Communism, and/or Fascism. This meme encompassed at least three underlying assertions: The imposition of an alternate, non-capitalist economic system; the rise of a dominant, totalitarian government that would threaten basic liberties; and the elevation of Obama as a leader of cult-like status. The second theme, in some ways related to the first, accused Obama and his supporters (including the media) of equating him to the messiah or a messiah-like figure.

The fall of the Berlin wall ushered in a new era of "Soviet chic," "Communist Chic," and the resurgent "cult of Che."[267] Conservatives, particularly those tending towards libertarianism, were intensely critical, terming it a foolish trend among Hollywood elites, urban hipsters, and privileged college students. The growing popularity of the KGB Bar in New York was a touch point. The conservative press ridiculed not only the bar, but the complicity of elite intellectuals and of the *New York Times*' in promoting the venue's popularity.

The skirmish took on a more serious tone around the turn of the century, although it is unclear whether the elites and hipsters were aware of the change. It began in earnest during the first term of George W. Bush, after 9/11 and the invocation of the axis of evil, during the revitalization of Russia under Putin and around the time of Reagan's death, against the backdrop of David Horowitz's campus campaign against dangerous liberal professors. *The Weekly Standard* warned that "what starts as Commie chic easily grows into full-fledged intellectual Stalinism."[268] Nevertheless, by 2004, the elements of

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everything from T-shirts and coffee mugs to the covers of Time and Esquire. Fairey says the Obama poster alone has sold more than 300,000 copies.").

[267] The so-called "cult of Che" is not a new phenomenon. In 1968, shortly after Che's execution by Bolivian soldiers, *Time* magazine published an article with that title, deriding described students wearing Che-style berets and "handkerchiefs, sweatshirts and blouses decorated with his shaggy countenance" — "a new source for profits for composers, poster makers and book publishers." The Cult of Che, *Time* (May 17, 1968,), *available at* http://www.time.com/time/magazine/article/0,9171,838357-1,00.html.

[268] J. Wilson, Communist Chic: Hoisting a Few to the Ghost of Stalin, *The Weekly Standard* (Feb. 15, 1999).

> It is easy to see how this happens. American intellectuals still reserve their highest accolades for the "subversive," and the best way to get noticed is still to take a truism and invert it. So, after the meltdown of the Soviet Union, the hip move is to propose an intellectual history in which the prescient thinkers, the ones on whom we should model ourselves, are Communists.

Id.

Communist chic were a force in fashion, art, music, and intellectual discourse, both in the United States and Europe.[269]

All the while, discourse in the conservative and libertarian community grew more critical, even angry.[270] Communist chic was linked to intellectualism and academia, elitism, arrogance, and certain conceptions of class distinction (primarily educated/uneducated).[271] *National Review* blamed "liberals" and "namby-pamby liberals" who are not "real men." Libertarian commentator Radley Balko admitted, "I just wanna' smack 'em a few times."[272]

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[269] In Europe, the 2003 release of the film "Goodbye, Lenin!" became a "cult sensation, rejuvenating the retro, Communist-chic style among East and West Germans." N. Fitzgerald, Berlin's Wall is Down, But Try to Keep Mom from Finding Out, *The New York Times* (April 2, 2003). The largest exhibit of East German art followed shortly thereafter. By 2004, the elements of Communist chic were a force in fashion, art, music, and intellectual discourse, both in the United States and Europe. A *Newsweek* article observed: "Eastern Europe is the new cool in the same downbeat intellectual subculture way that Paris in the 1950s gave us existentialism and the black turtleneck, that kind of coffeehouse undercurrent that is the antithesis of the establishment."[269] G. Brownell, Coming Fashion, *Newsweek* (Sept. 9, 2005). Much of the press found it "ironic," "retro-groovy" and "amusing."[269] G. Collett, Posters Recall Cult of Mao, *The Press* (April 23, 2007).

[270] Commentators immediately launched a "counter-revolution," attacking what conservative columnist Jeff Jacoby called "totalitarian fashion." J. Jacoby, Communist Chic, *The Boston Globe* (April 30, 2006). Its primary adherents were again identified as privileged college students and lefty professors, "teenagers who have too much to read and not enough,"[270] and Hollywood elites like Cameron Diaz, who was vilified for wearing a handbag with Maoist slogans while touring Machu Picchu. S. Marche, Capitalism Taking Scalps, *The Toronto Star* (April 12, 2008).

[271] J. Nordlinger, Che Chic. *National Review* (Dec. 31, 2004) ("It's unlikely that all the pseudo-hipsters who buy their Che T-shirts at Urban Outfitters will stop wearing them. No. These T-shirts send a message, which effectively boils down to this: I have vague left-wing sympathies but don't read history. I am educated enough to want nonconformity but not intelligent enough to avoid conformity. I believe in supporting the wretched of the earth but happily purchase products from multinational corporations.").

[272] R. Balko, Soviet Chic, Blog: The Agitator (April 30, 2004), *available at* http://www.theagitator.com/2005/06/06/soviet-chic-4/. *See also id.* ('There's something really aggravating about these middle class kids born into the most privileged conditions in all of human history suddenly finding it trendy to carry water for a belief system that murdered hundreds of millions of people, and enslaved billions more.").

A second strand of conservatism, what Bill O'Reilly calls the "culture warriors," sounded a similar theme. "America is in the midst of a fierce culture war between those who embrace traditional values and those who want to change America into a 'secular-progressive' country."[273] Populists echoed much of this sentiment, setting "government, big business and special interests groups" against the American Dream.[274] The imagery is both fierce and desperate — it is a war.

As these various interpretive communities encountered the posters as a contextual text drawing on semiotic resources, the divergent flows of discourse around those texts produced multiple distinct and often contradictory meanings and effects. For Shepard Fairey and others — those interpretive communities sharing similar semiotic regimes — the aesthetic of the poster was interpreted through social conventions of the young, smart, and hip. In this context, the semiotic resources employed in creating the text were drawn from pop artists commenting on the "relentless victory of capitalism" over communism. The allusion to socialist, communist, and fascist dictators was not *serious*. It was radical, ironic, and idealistic, but not anti-capitalist.

For many with libertarian leanings, the aesthetic was interpreted through a convention of counter-revolution: naïveté, intellectualism and academia, elitism, arrogance, and certain conceptions of class distinction. The semiotic resources employed were interpreted as metaphors for alternative forms of governance and economic organization.[275] The dominant convention was to see communist chic as truly dangerous; a real call to political conversion.[276] The dominant meaning was not that

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[273] http://www.billoreilly.com/culturewarrior.

[274] http://loudobbs.tv.cnn.com.

[275] *See, e.g.,* P. Shapiro, *Obama's Posters: Message in the Image*, *available at* http://ww.americanthinker.com/blog/2008/04/obamas_posters_message_in_the.html ("[The poster] image appropriates the graphic style of totalitarian Soviet propaganda. It recalls the idealized portraits and personality cult of the "Beloved leader" such as Stalin and Lenin."); S.D. Akers, *Obama's Henchmen and the Rise of Commufascism, available at* http://www.brookesnews.com/081310obamacensorship.html ("Scattered around the nation are tri-colored campaign posters of Mr. Obama, bearing a striking resemblance to the larger than life representations of Lenin, Marx, and Engels used by soviet propagandists in the glory days of Mother Russia."); L.G. Williams, *Obama's Public Image Speaks Volumes*, Press Release (Sept. 8, 2008) ("Obama's 2008 Presidential poster actually conveys, to the learned viewer, an arbitrary red, white and blue façade placed over an old Communist authority…. Underlying this familiar face one can also recognize the template of political ruthlessness, suppressed freedoms, and an uncompromising authoritarian.").

[276] *See, e.g.,* P. Shapiro, *supra* n.___ ("What is then unsettling about the Obama poster campaign is that it may be perfectly suited for a man whose candidacy is based on a personality cult….").

Obama was cool, or hip, but rather that the Obama movement was actually dangerous as a threat to capitalist culture.

Culture warriors seemed to pick up the communist/socialist convention proffered by the libertarians and then mold or extrapolate its meaning according to the conventions of their social context: traditional but fading power and hemogeneic values/beliefs. The central threat of communism/socialism is godlessness, which itself is indicative of Christian persecution. The Fairey posters were said to portray Obama as a messiah-like false god.[277] From this position, a dominant narrative emerged: Obama the Muslim; Obama the Black Liberation theologist; Obama the foreigner, not really born in this country; Obama the mixed-race child; Obama the terrorist sympathizer. This fed into the immigration debate and the simmering anger that split the country over the Iraq war.

A third meaning common to both conventions is elitism, which is often linked to the communist/socialist charge. Obama critics have called him elitist, pompous, arrogant, snobbish, (negatively) intellectual, and professorial.[278] One aspect of this convention is class conflict, but it also suggests another convention — that arrogant is the new uppity. The trope of middle class destruction is often code for the perception of threats to *real* white Americans. These threats come from blacks, Hispanics, and immigrants. These groups steal the jobs of *real* Americans because of affirmative action. They steal the wages of *real* Americans through taxes to support welfare entitlements. Illegal immigrants do both, simultaneously stealing jobs and living on the dole. In this

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[277] *See, e.g.,* Shapiro, *supra* n.___ (describing the posters: "The leader, face illuminated by a 'holy' light, looks off into the horizon and sees the truth that is not available to his mere mortal followers, who must look up to his image"); W.T. Huston, *Obama's propagandist iconography: The Making of a Messiah, available at* http://www.stoptheaclu.com/archives/20008/06/23/obama's -propagandistic-iconography-the-making-of-a-messiah/The overblown, obscenely reverential posters featuring Obama's upturned face in Jesus-like poses…."); G.C. Lawrence, *Messiah Chic in the White House*, *available at* http://www.meridianmagazine.com/ideas/090313messiah.html ("The halos and streaming rays of sunlight emanating from Obama's chin-forward visage, first in pop art, then campaign posters, and then on the covers of magazines"); *id.* ("The ubiquitous pictures from low camera angles looking upward into his face"); *id.* ("One has but to view a few communist posters meant to keep the people reminded of the god-like status of their communist dictators and oppressors to see the stunning similarity that the Obama posters reveal with their communist progenitors").

[278] *See, e.g.,* D. Lightman & M. Taley, Can Obama Win Over Those Voters Who Find Him Pompous?, *McClatchy Newspapers* (Aug. 21, 2008)(quoting one voter as saying that there is "something about Barack Obama's manner bothers" her. "There's something egotistical about him," the Sheridan, Colo., retiree said. "It's the way he struts around.").

convention, many see elitism as a euphemism for race. "Elitism, said [an Obama supporter], 'is code for the N-word. . . . If he's a white guy no one's saying he's elitist; he's doing what everybody else is doing.'"[279]

This last point highlights the struggle and uncertainty surrounding the employment of semiotic resources. As discussed previously, the Fairey posters draw upon certain elements that consistently appear in portrayals of U.S. presidential candidates. Comparing these portrayals side-by-side with the Obama image, the similarities are striking. Indeed, Fairey indicated that part of his purpose in creating the image was to convey Obama's potential as a leader; i.e., to portray him as presidential. In many interpretive communities, however, the discourse either ignored or rejected these past uses and associated affordances in favor of a different semiotic regime. The text, once released into a multitude of social contexts, was out of the author's control. In many of these contexts, the author's hoped for meanings and effects were rejected.

Social Convention and Power

It is tempting to interpret Obama's election victory as a shift in the social relations of power; to conclude that the metaphors and classification that guided Shepard Fairey's process of sign-making have somehow prevailed in the semiotic system. It is impossible, however, to say that these metaphors and classifications have moved beyond this situational context and "passed into the semiotic system as conventional and … naturalized."[280] The social relations of power seem much more unsettled. There is also the question of what it means to be conventional and naturalized in this environment. The Obama poster had the effect of "othering" certain groups who decoded the aesthetic as threatening, arrogant, and exclusionary. In response, many sought to "other" Obama as outside the core of *real* America and as a threat to traditional values and interests. Perhaps one set of conventions has proven dominant, but they have also proven divisive.

There is remarkable evidence of this struggle for power through control of social convention. The Fairey posters themselves served as raw material for countless mash-ups both by supporters and detractors. Obama is variously portrayed as a communist or socialist, as Hitler or Che, as a false messiah, as a fraud or a snob. This led to mash-ups of other propaganda posters, with Obama's face superimposed on iconic posters from the Soviet Union, Maoist China, and Nazi Germany. Literally hundreds of these appropriated and repurposed images can be found online.

The Transformativeness Inquiry

Undertaken from a social semiotic perspective, the transformativeness inquiry requires an analysis entirely distinct from that of authorial purpose or activity. The analysis is instead focused is on the resulting work as a potential source of social value. Thus, the

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[279] *Id.*

[280] Kress & Van Leeuwen, *supra* n.___, at ___.

court is not required to compare Garcia's photo and Fairey's image in search of intended creative distinctions and assessments of what constitutes the "heart" of the work. Likewise, Fairey's purpose in creating the work and his success in doing so is not controlling. As applied to works of appropriation art, such as Fairey's, this shift from intent to result may help to defuse the moral and ethical suspicion that seems to accompany the act of borrowing or recycling existing texts to create of new works

In the context of fair use, social value is realized in the production of expression, primarily in the form of new messages and meanings. The social semiotic approach recognizes that the meaning of a text is not controlled, transmitted, or even consistent. Instead, the sign-maker employs semiotic resources to create a text with meaning potential based on past and possible uses. Here, Fairey drew upon resources that, in the situated social context of his artistic community, held certain positive potential meanings. His use and transformation of those resources was motivated by his desire and intent to portray Obama as a young, hip, smart, and idealistic leader.

As previously discussed, however, the meaning potential of semiotic resources is realized only when active, socially-situated audiences engage the work in a discourse around culturally-shared codes. Meaning-making is thus a process of social interaction and response. When audience engagement with the subsequent text (here, Fairey's posters) promotes divergent and unexpected social responses in the form of discourse around the text, there is the potential for social value in the promotion of new and multiple meanings or messages. Where that discourse is entirely distinct from that surrounding the prior work (here, Garcia's photo), the new work is transformative. In this case, Fairey's work is highly transformative. The semiotic resources employed by Fairey in his creation of the Obama image proved to be more powerful and more ambiguous than he imagined, engaging multiple and distinct semiotic regimes, and producing multiple meanings from the same text. There is no evidence that Garcia's photo produced discourse or meaning beyond that intended by the AP; recording and conveying a campaign event. The evidence of meaning-making around the Fairey image is vast by comparison. Indeed, the various mash-ups of the Fairey posters are a testament to the contested nature of the semiotic resources employed.

It might be argued that Garcia's photo, rather than merely conveying a factual event, has the purpose and effect of conveying Obama as a legitimate candidate. Hence, Garcia in taking the photo and the AP in publishing the photo intended to invoke classic elements of prior and more traditional (white, male) presidential candidates. If Fairey's similar purpose in creating his image is all that is to be considered, this would be problematic for a claim of fair use. The social semiotic analysis allows us to move away from competing claims and conceptions of purpose, however, and to focus instead on comparison of the actual meaning of the work. In essence, Fairey's inability to control the meaning of his work, to have audiences choose the potential meaning he intended, ultimately supports a finding of fair use.

III. Social Semiotics and the Remaining Fair Use Factors

Section 107 identifies four primary factors to be considered in the fair use analysis, one of which is the nature and character of defendant's use, including whether that use was transformative. The remaining factors include the nature of the copyrighted work (factor two), the amount and substantiality of the portion used (factor three), and the effect of that use on the potential market for or value of the original (factor four). This section of the article explores these factors from a social semiotic perspective to determine if this theory provides any insight into how they might be applied.

A. Nature of the Copyrighted Work

Factor two "calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[281] In practice, this is often presented as a binary dichotomy between works that are primarily creative, and thus closer to the core of protection, and works that are primarily factual, and thus further from the core.[282] Works may contain both creative and factual elements, with the relative strength affecting the weight given this factor.[283] Courts seldomly engage in an intensive analysis of this point,[284] although it may, in some cases, carry particular significance.[285] Commentators have noted that, while the distinction between factual and creative elements may be more apparent in certain classes of works, others are more difficult to classify. Robert Kasunic has made this point in regard to literary and visual works:

> [A] photograph or pictorial work may be assumed to be purely creative. But some pictorial works are primarily factual. Consider a photograph of the Mai Lai massacre or the Sandinista 1979 uprising. While there may certainly have been selection, coordination, and arrangement involved, the subject matter of these works is unquestionably factual…. An impressionistic photograph of a factual event would be more creative, whereas a photographic manipulation of light and color might be viewed as purely creative. The analysis must be based on the facts; but it is important to understand that there is a

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[281] *Campbell*, 510 U.S. at 586.

[282] Robert Kasunic, *Is that All There Is? Reflctions on the Nature of the Second Fair Use Factor*, 31 Colum. J.L. & Arts 529, 544 (2008).

[283] Patry, *supra* n.___, at § 4:1.

[284] Kasunic, *supra* n.___, at 544.

[285] *See, e.g., Harper & Row*, 471 U.S. at 563-64 (focusing on The Nation's use, not only of the factual aspects of the work, but "focusing on the expressive elements of the work").

> spectrum between fact and creative expression for many types of works other than literary works, and potentially relevant distinctions should be made when analyzing the nature of the work.[286]

As this suggests, the distinction between factual and creative works is closely tied to the concept of original authorship and eligibility for copyright protection.[287] Thus, the tendency to view the question as a binary (protectable/nonprotectable). In the context of fair use, however, the distinction allows for a more nuanced characterization.

Social semiotics is potentially useful in this regard. Semiotic resources are at the heart of the meaning-making process. Those "semiotic resources have a meaning potential, based on their past uses, and a set of affordances based on their possible uses."[288] The sign-maker is motivated to draw upon this potential by transforming existing semiotic resources in an attempt to produce a particular meaning and effect.[289] From this perspective, creativity is found not in the constituent elements of the text but in their context, combination, etc. — almost as one would view a compilation work under copyright law.[290] Attempts to dissect the various elements of a work as proof of creativity are therefore suspect as divorced from the text.

The Fairey case presents an interesting example of this idea. As discussed *supra*,[291] Garcia's photograph employs semiotic resources with powerful encoded meanings, tightly constrained by social convention; close proximity, upward angle, elevated chin, sideways gaze into the distance, and patriotic symbolism. These encoded meanings are reinforced by Garcia's use and transformation of these semiotic resources. It is a classic presidential pose. Likewise, Garcia has done nothing to recontextualize the semiotic resources or the social context in which the audience encounters and engages the text. The image appears in newspapers, accompanying a report about a presidential candidate at a campaign event.

Fairey argues that, looking at work in its entirety, "The Garcia Photograph … is a factual, not fictional or highly creative, work," relying primarily on the AP's purpose in creating

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[286] Kasunic, *supra* n.___, at 554.

[287] *See Feist Publications, Inc. v. Rural Telephone Svcs. Co., Inc.*, 499 U.S. 340 (1991) ("To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

[288] Van Leeuwen, *supra* n.___, at 285.

[289] *See* Kress & Van Leeuwen, *supra* n.___, at ___.

[290] 17 U.S.C. § 101.

[291] INSERT INTERAL REFERENCE

the work to document an event.[292] The AP responds by invoking Garcia's "distinctive … creative and artistic input," as embodied in various aspects of the photo-making process — "including (1) his deliberate selection of a specific moment in time to capture President Obama's expression; (2) his choice in using a particular type of lens and light for optimal impact; and (3) his careful and unique composition of the photograph."[293] This evidence of "creative and artistic input" is sharply recast through the lens of social semiotic processes, such that Garcia's efforts are more accurately described as an attempt to capture unremarkable semiotic resources with powerful encoded meanings, to combine those resources and present the text in an unremarkable way, and to do so for purposes of conveying conventional meanings. From this perspective, there is little creativity in either the image or its constituent elements. There is labor, but with minimal originality.

B. The Amount and Substantiality Used

Factor three looks at the proportion of the plaintiff's work used by the defendant, both quantitatively and qualitatively.[294] This "factor favors copyright holders where the portion used by the alleged infringer is a significant percentage of the copyrighted work, or where the portion used is essentially the heart of the copyrighted work."[295] Applying this standard in *Harper & Row,* for example, the court found that the defendant had taken the heart of plaintiff's work by copying "dramatic focal points" of great "expressive value," that played a "key role in the infringing work."[296] This application suggests a certain connection between factor two and factor three, with more creative aspects of the text tending towards the heart of the work.[297]

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[292] Complaint at 11.

[293] *Id.* at 13 ("These facts, combined with Mr. Garcia's experience, skill and judgment, resulted in the creation of a distinctive image of a unique moment and expression of President Obama."). *See also id.* at 25 (describing the unique characteristics of the Garcia photo and the associated artistic choices); *id.* at 26 (quoting interview with Garcia describing the process of taking the photo); *id.* at 20 (describing the various artistic decisions associated with photography).

[294] 17 U.S.C. § 107. *See also Campbell*, 510 U.S. at 587-88 ("this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too").

[295] *Lennon*, 556 F.Supp.2d at 325.

[296] *Harper & Row,* 471 U.S. at 566. *But see* Patry, *supra* n.___, at §5:1 (collecting cases in which courts have "rejected fair use claims when defendant copied a small but qualitatively important part, including the 'heart of the work.'").

[297] Although *Campbell* draws a potential correlative connection between factor three and factors one and four, no such connection is expressly drawn with factor two. 510 U.S. at 587-88 ("whether 'a substantial portion of the infringing work was copied verbatim' from the copyrighted work is a relevant question, for it may reveal

From a social semiotic perspective, this analysis implicates similar concerns about Garcia's choice and use of semiotic resources. The AP argues that Fairey selected Garcia's "distinctive image" as a reference because of its "unique qualities,"[298] but it is equally likely that Fairey chose Garcia's image because of its almost generic nature and powerful encoded messages. As discussed, *supra*, the photo is essentially a compilation of semiotic resources with strictly limited meaning potential, the power of which is reinforced by standard transformation and contextualization. It is difficult, then, to characterize the text itself as having significant expressive value beyond that of the dominant social conventions constraining the semiotic resources employed. The work has little "heart" (or soul, for that matter) for Fairey to take.

C. Effect on Actual and Potential Markets

The factor-four inquiry is primarily focused on harm arising from market substitution. That analysis begins by identifying relevant markets for plaintiff's work and derivatives, both actual and potential. These are then compared to markets for the defendant's work. If potential markets are defined using the harm-based approach, they are limited in scope to those that were reasonably foreseeable at the time the copyright holder chose to create and distribute the core work. The copyright holder's intent, refusal, or apparent inability to enter an existing or newly emerging market in a timely manner may, however, mitigate the likelihood of market harm.

The relevance of social semiotics to this analysis is limited if, as suggested *supra*, the distinction between transformativeness and market harm is maintained. Nevertheless, social semiotics may provide some insight into market differentiation on the basis of audience engagement, although broad licensing programs can undermine these distinctions. The Fairey case presents an interesting illustration of both the promise and limitations of this approach. Direct markets for the Garcia photo include the AP itself, newspapers and other media outlets. The direct market for Fairey's work would likely include art collectors and Obama supporters. The AP might argue that Obama supporters are a potential market for the Garcia photo, but there appears to be limited evidence to support that assertion. The more difficult issue is what might be called indirect markets, where the AP licenses an image to a third-party producers of "advertising, artistic works and merchandise, including … tote bags, T-shirts, posters, prints, banners and the like."[299] The AP argues vehemently that its "long-established

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a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.").

[298] Complaint at 13.

[299] Answer at 24.

licensing program … is fundamental to The AP's existence."[300] According to the AP, "[Fairey's] unauthorized use of the Obama Photo has caused substantial impairment to the potential market for the original photo, namely, The AP's ability to license its use…."[301]

If the *ex ante* foreseeability standard is applied to limit the apparent circularity of the potential licensing argument, social semiotics may be useful in differentiating among relevant markets. In terms of plaintiff's work, social conventions and culturally-shared codes could help identify those interpretive communities reasonably likely to engage the work in the process of meaning-making. These can be seen as foreseeable markets. Likewise, when the flow of discourse around the subsequent work moves significantly outside these dominant structures and constraints, these markets are less foreseeable. In the latter instance, the effect of substitutive market harm carries less weight.

The Fairey case raises two questions in this regard. The first is whether Fairey's engagement with the work, as a semiotic resource transformed from an almost generic or iconical image into a stylized expression of inspirational "difference," represents a foreseeable market for that photo. The second is whether the unexpected cultural flows that developed around the Fairey posters — in terms of mash-ups of the posters themselves, mash-ups of other propaganda posters, and the fervent political and cultural dialog surrounding these images — constitute foreseeable (or even possible) markets for Garcia's photo. Remembering that substitutive market harm exists on a scale, rather than as an either-or, the question is not whether Fairey *could have* licensed the photo but rather the likelihood of a substantial effect on these potential markets. Part of that question is the likelihood that these licensing markets, as well as the markets that emerged because of Fairey's use, would have ever existed. Given the power relations embedded in expressive communications, that is highly unlikely in this case.

Still, it is clear that this approach to the market harm question runs the risk of either subsuming the transformativeness inquiry or, on the other end of the spectrum, double-counting the transformative nature of the subsequent work. Both results should be

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[300] *Id.* at 14. *See also id.* at 24 ("The talent, skill and effort required to create compelling still images has fostered a vibrant market for professional photography, one on which many photographers have come to rely for their livelihoods. In addition, many content providers, whether news or entertainment in nature, rely on this revenue to support their activities. The AP's licensing program not only allows it to continue operating its full scale, robust and dependable newsgathering services worldwide, but it enables The AP to pursue efforts protecting the First Amendment and guaranteeing public access to open government on the local, state and federal levels.").

[301] *Id.* at 39. Fairey responds that his use of the photo "imposed no significant or cognizable harm to the value of the Garcia Photograph or any market for it or any derivatives…." Complaint at 11.

avoided. Thus, social semiotics theory should be applied with care in determining foreseeable potential markets.

Conclusion

* *To be written*