

# SILENCE AND POSTMODERN COPYRIGHT ♦

MATT WILLIAMS\*

INTRODUCTION.....	47
I.THE EMERGENCE AND DEVELOPMENT OF POSTMODERN COPYRIGHT.....	53
A. From William Shakespeare to 2 Live Crew: Courts Move from Art Critics to Remix Recognizers in Fair Use Cases.....	55
1. Losing with “Low” Art.....	56
2. The Supreme Court’s Rejection of Appropriation Art Criticism.....	58
B. Lingering Modernism and Its Discontents.....	61
C. Examples of Postmodern Copyright in Action.....	66
II.REFOCUSING ON MEANINGFUL LEARNING: FOUCAULT AND BUDDHISM AS TOOLS OF SILENCE.....	73
III.CONCLUSION.....	81

## INTRODUCTION

For more than twenty years,<sup>1</sup> a slow struggle to use postmodern<sup>2</sup> recognitions to draw attention to ambiguities and

---

\* Permission is hereby granted for noncommercial reproduction of this Article in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

\* Practitioner-in-Residence, American University Washington College of Law. The author thanks Pam DeWeese, Peter DiCola, Peter Jaszi, Robert Kasunic, Ryan Lehning, Victoria Phillips, and Coriell Wright for their comments and support. Special gratitude is owed to Robert Rotstein, who vigorously challenged, questioned, and/or rejected many of the conclusions contained herein. All errors and omissions are the author’s alone. © 2011 Matt Williams.

<sup>1</sup> See, e.g., Peter Jaszi, *Who Cares Who Wrote ‘Shakespeare’?*, 37 AM. U. L. REV. 617 (1988) [hereinafter Jaszi, *Who Cares?*]; James D. A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988) [hereinafter Boyle, *Search*]; John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103 (1988) [hereinafter Carlin, *Culture*]; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L.J. 455 (1991) [hereinafter Jaszi, *Toward*]; David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992) [hereinafter Lange, *At Play*].

<sup>2</sup> See Christopher Norris, *Post-Modernism*, in THE OXFORD COMPANION TO PHILOSOPHY 708, 708 (Ted. Honderich, ed. 1995) (“In its broad usage, [post-modernism] is a family resemblance term deployed in a variety of contexts (architecture, painting, music, poetry,

assumptions regarding creativity has framed academic discourse regarding copyright theory.<sup>3</sup> The process has unmasked the author,<sup>4</sup> empowered the audience,<sup>5</sup> reconsidered the work,<sup>6</sup> supported generative technological networks,<sup>7</sup> and celebrated the remix.<sup>8</sup> The conversation has been so impactful that one of its most important participants, Peter Jaszi, has recently observed that judicial applications of copyright law may frequently now reflect postmodern notions.<sup>9</sup>

In *Is There Such a Thing As Postmodern Copyright?*, Professor

---

fiction, etc.) for things which seem to be related – if at all – by a laid-back pluralism of styles and a vague desire to have done with the pretensions of high-modernist culture.”); ROGER A. SOLERNO, *BEYOND THE ENLIGHTENMENT: LIVES AND THOUGHTS OF SOCIAL THEORISTS* 197 (2004) (“What makes something postmodern as opposed to modern is still debated in scholarly papers, but . . . postmodernism is a category reserved for the contemporary focus on the relativity of truth, the dismissal of wholism, the renunciation of humanism, and the rejection of grand narratives.”).

<sup>3</sup> Some may place the start of the struggle much earlier with Benjamin Kaplan’s *Unhurried View of Copyright*. See BENJAMIN KAPLAN ET AL., *AN UNHURRIED VIEW OF COPYRIGHT* REPUBLISHED WITH CONTRIBUTIONS FROM FRIENDS (Iris C. Geik et al. eds., LexisNexis 2005) (first published in 1967). Postmodernism has not entirely consumed the discourse. Liberal views, among others, have also played a large role. See Roy C. Weatherford, *Liberalism*, in *THE OXFORD COMPANION TO PHILOSOPHY* 483, 483 (Ted. Honderich, ed. 1995) (“[L]iberalism is distinguished by the importance it attaches to the civil and political rights of individuals”). However, they often incorporate postmodern notions. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) [hereinafter LESSIG, *FUTURE*]; JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996) [hereinafter BOYLE, *SHAMANS*]; WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT* (2004) [hereinafter FISHER, *PROMISES*]; YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) [hereinafter BENKLER, *WEALTH*]; NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (2008) [hereinafter NETANEL, *PARADOX*]. See also Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1161 (2007) [hereinafter Cohen, *Creativity*] (explaining why the “fit is imperfect” for copyright theorists that place themselves within the liberal tradition); Siva Vaidhyanathan, *The Anarchist in the Coffee House: A Brief Consideration of Local Culture, the Free Culture Movement, and Prospects for a Global Public Sphere*, 70 LAW & CONTEMP. PROBS. 205, 207 (2007) (calling the “free culture” movement “Habermasian”).

<sup>4</sup> See, e.g., Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 29 (Martha Woodmansee & Peter Jaszi, eds., 1994).

<sup>5</sup> See, e.g., Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 243 (1996); Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 461 (2006) [hereinafter Katyal, *Performance*].

<sup>6</sup> See, e.g., Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993).

<sup>7</sup> See, e.g., Susan P. Crawford, *Network Rules*, 70 LAW & CONTEMP. PROBS. 51 (2007).

<sup>8</sup> See, e.g., LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008) [hereinafter LESSIG, *REMIX*]. See also Robert P. Merges, *Locke Remixed*; -, 40 U.C. DAVIS L. REV. 1259, 1259 (2007) (“A remix (or mash-up) is a work created from one or more preexisting works – such as music, photos, videos, computer games, etc.”).

<sup>9</sup> Peter Jaszi, *Is There Such a Thing As Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 105-06 (2009) [hereinafter Jaszi, *Postmodern*]. Professor Jaszi does not claim that academic discussion directly led to shifts in judicial thinking. Instead, he asserts that “rather than being self-conscious trend followers, lawyers and judges who work on copyright are participants in a larger cultural conversation, and what they derive from it ends up influencing copyright discourse in various ways – for good and ill.” *Id.* at 106.

Jaszi describes how some cases, such as *Blanch v. Koons*,<sup>10</sup> “suggest[] that as old attitudes have been displaced or supplanted by new ones in the domain of culture, law is (however belatedly) beginning to follow suit.”<sup>11</sup> In *Blanch*, the Second Circuit held that artist Jeff Koons’ use of a portion of a fashion magazine photograph in a collage/painting constituted fair use because Koons intended to deliver a new message to his audience.<sup>12</sup> One of Professor Jaszi’s insights regarding the *Blanch* opinion is that it embodies a postmodern twist on a long ensconced copyright doctrine first pronounced by Justice Oliver Wendell Holmes in *Bleistein v. Donaldson Lithographing Co.*<sup>13</sup> In *Bleistein*, the Supreme Court held that advertisements and other arguably mundane works could be copyrighted alongside “fine art” because “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.”<sup>14</sup> Now, in *Blanch*, we have an acknowledgment (or admission) that judges are no more qualified to assess the merit of artistic uses of copyrighted material than they are to assess the merit of the underlying works themselves.<sup>15</sup>

Regardless of what motivated this move within the judiciary, it meshes nicely with academic discourse regarding copyright theory. Such discourse has persistently dwelled on the incoherent disparity between the powers/rights that copyright laws provide to authors and users of works.<sup>16</sup> Unjustified grants of control in the

---

<sup>10</sup> 467 F.3d 244 (2d Cir. 2006).

<sup>11</sup> Jaszi, *Postmodern*, *supra* note 9, at 116.

<sup>12</sup> See Matt Williams, *Recent Second Circuit Opinions Indicate That Google’s Library Project is Not Transformative*, 25 CARDOZO ARTS & ENT. L.J. 303, 325-30 (2007) [hereinafter Williams, *Recent*] (discussing the facts and holdings of *Blanch*).

<sup>13</sup> See Jaszi, *Postmodern*, *supra* note 9, at 112 (calling *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), “a gesture of premature postmodernism”).

<sup>14</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

<sup>15</sup> One could argue (see *infra* notes 79 through 86 and accompanying text) that this move actually occurred earlier, in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994), where Justice Souter stated: “The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.” See also *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964); *Fisher v. Dees*, 794 F.2d 432, 436-440 (9th Cir. 1986); *Mattel v. Walking Mountain Productions*, 353 F.3d 792, 801-02 (9th Cir. 2003). For a discussion of judges assessing art, see generally Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005).

<sup>16</sup> See, e.g., Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 842, 842 (1993) (“From the point of view of moral justification, the most important thing about any property right is what it prohibits people from doing. . . . I shall look at the way we think about actual, potential and putative infringers of copyright, those whose freedom is or might be constrained by others’ ownership of songs, plays, words, images and stories.”); BENKLER, WEALTH, *supra* note 3, at 385 (“The battle over the institutional ecology of the digitally networked environment is waged precisely over how many individual users will continue to participate in making the networked information environment, and how much of the population of consumers will continue to sit on the couch and passively receive the finished goods of industrial information producers.”); Katyal, *Performance*, *supra* note 5, at 517-18 (“[A]nother world is certainly possible – it all depends on the power of the

name of romantic misunderstandings have been the academy's target.<sup>17</sup> Appropriation and remix, especially when communicated within technological networks, have been its cause célèbre.<sup>18</sup>

So, if the breadth of lawful uses of copyrighted material is approaching the scope of copyrightable expression due to postmodern recognitions (or behaviors) regarding the audience's role in the creation of artistic and cultural meaning, then there is reason for many to celebrate.<sup>19</sup> Scholars have worked hard to call attention to the importance of broad participation in the creation of meaningful culture and how copyright laws could be designed to enable such participation. But even if we assume that we now have a desirable trajectory with respect to the lawfulness of participatory creativity,<sup>20</sup> our task may be only beginning. Incentivizing, facilitating, and recognizing the legitimacy (or lack of a need thereof) of a diverse array of expressive products and participants may not be enough. Of course, we could trust that the invisible hand<sup>21</sup> will steer us toward a desirable future so long as we preserve free space for everyone to engage fully in cultural

---

audience and the power of participation.”).

<sup>17</sup> See, e.g., BOYLE, SHAMANS, *supra* note 3, at 169 (“My point is not that we always need *fewer* intellectual property rights, or that we always need *more* intellectual property rights. Rather, my point is [sic] that an author centered system has multiple blindnesses and that we should strive to rectify them.”). But see Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property: Shamans, Software, and Spleens: Law and the Construction of the Information Society* by James Boyle, 75 TEX. L. REV. 873 (1997) (objecting to the idea that romantic notions regarding authorship have driven copyright expansion); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 10 (2001) [hereinafter VAIDHYANATHAN, COPYRIGHTS] (agreeing with Lemley).

<sup>18</sup> See generally LESSIG, REMIX, *supra* note 8. Some scholars have also advocated the copying of entire works for consumptive purposes. 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 (2004).

<sup>19</sup> Some concerns have been expressed regarding this trend. See, e.g., Merges, *supra* note 8, at 1270 (“The story of the original content creator should affect how we think about remixing.”). I myself have some misgivings about relying on postmodernism to enable unauthorized and uncompensated copying in certain circumstances, such as commercial endeavors by technology companies. In that regard, I find Professor Jaszi’s postmodern interpretation of *Cartoon Network v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2008), troubling. See Jaszi, *Postmodern*, *supra* note 9, at 118-21. My concerns reflect, in part, concerns expressed by Professor Jane Ginsburg previously. See Jane C. Ginsburg, *Authors and Users In Copyright*, 45 J. COPYRIGHT SOC’Y USA 1, 20 (1997) (“Copyright is a law about creativity; it is not, and should not become, merely a law for the facilitation of consumption.”). I am also concerned about calls to weaken the notice-and-takedown system that enables copyright owners to police their rights, however ineffectively, online. See generally Matt Williams, *The Truth and the “Truthiness” About Knowing Material Misrepresentations*, 9 N.C.J.L. & TECH. 1 (2007).

<sup>20</sup> Many scholars would be unwilling to admit the current trajectory is acceptable or worthy of optimism. In fact, I would agree with that position in some respects. For example, sampling of sound recordings continues to be a problem area, at least within some existing precedents. See generally KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING (2011). Professor Jaszi himself still believes that “[t]his era’s version of copyright law is regrettably unbalanced in favor of current copyright holders, and against emergent culture of all kinds.” PATRICIA AUFDERHEIDE & PETER JASZI, FAIR IS FAIR: COPYRIGHT, CREATIVITY AND FAIR USE (forthcoming 2011).

<sup>21</sup> See ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 273 (3d ed. 1759) (describing an “Invisible Hand” that allegedly guides markets).

conversations.<sup>22</sup> But this essay argues that we should not do so.

People have asked “what is an author?”<sup>23</sup> and “what was an author?”<sup>24</sup> People have also debated how much power the author and the audience should wield vis-a-vis one another.<sup>25</sup> Perhaps we should now focus the discussion on what we want authors and audiences to become. If we accept as gospel that we want copyright laws to foster learning,<sup>26</sup> what then do we want our culture and laws to teach? How do we suspect that meaningful lives unfold?

Approaching these questions may prove quite difficult. And, of course, there may be myriad answers. Nevertheless, postmodernism continues to offer tools for our analyses.<sup>27</sup> In fact,

---

<sup>22</sup> Lawrence Lessig and Yochai Benkler, for examples, can be interpreted to favor empowering such an “invisible hand.” See, e.g., LESSIG, REMIX, *supra* note 8, at 49-50 (“[Adam] Smith’s *Wealth of Nations* teaches us about the phenomenal power of markets to adjust. But these markets adjust, as Yochai Benkler’s *The Wealth of Networks* powerfully teaches, in light of the baseline allocation of rights.”); *id.* at 132 (“The Long Tail enables a wider range of people to speak. Whatever they say, that is a very good thing. Speaking teaches the speaker even if it just makes noise.”). Nevertheless, Professors Lessig and Benkler see more need for regulation to make the market function than some scholars. See, e.g., DAVID G. POST, IN SEARCH OF JEFFERSON’S MOOSE: NOTES ON THE STATE OF CYBERSPACE (2009) (expressing a more libertarian view).

<sup>23</sup> See Michel Foucault, *What Is An Author?*, in AUTHORSHIP, FROM PLATO TO THE POSTMODERN 233, 233-46 (Sean Burke ed., 1995) [hereinafter Foucault, *Author*] (discussing, after Roland Barthe declared the “death of the author,” the various functions of the author construct, and how, especially within literary criticism, the construct was used to impose uniformity of meaning on texts).

<sup>24</sup> See Molly Nesbit, *What Was An Author?*, in AUTHORSHIP, FROM PLATO TO THE POSTMODERN 247, 260 (Sean Burke ed. 1995) (“By dissecting the authorial parts of a work, it is possible to cut into the illusion of seamlessness, so powerful around the rhetoric of new technologies and to propose roles for the individual subject. It is possible to plot a politics of cultural labor and possible to imagine a collective of authors, individuals who do not lose themselves when working with others.”); see also Roberta Rosenthal Kwall, *Authors In Disguise: Why the Visual Artists Rights Act Got it Wrong*, 2007 UTAH L. REV. 741, 742 (2007) (suggesting that the authorship construct does not need to be “reconfigured”); Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U.J. GENDER, SOC. POL’Y & L. 207, 238 (2007) (“[D]isaggregating the author is . . . a luxury that belongs to those whose identities are not already experienced as decentered and fragmented.”); Lionel Bently, *R. v. The Author: From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 91 (2008) (“I want to suggest that rather than ‘sentence the Romantic author’ to death, there is much to be said for the proposition that an ideology of authorship could be a valuable tool for limiting copyright.”); Tim Wu, *On Copyright’s Authorship Policy*, 2008 U. CHI. LEGAL F. 335, 335 (2008) (“Why have an authorial copyright – a copyright that vests rights in authors? Here I suggest a new defense of authorial copyright. The reason is to encourage not just writing, but the invention of new types of writing.”).

<sup>25</sup> See, e.g., Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROB. 135, 161 (2007) [hereinafter Tushnet, *Payment*] (“Texts invite interpretation, and making a text available to the public necessarily cedes some control over it, though copyright law has struggled to deal with this truism.”).

<sup>26</sup> See, e.g., WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 103 (2009) (“Copyright is not an end in itself, but instead an end to a social objective, furthering learning.”).

<sup>27</sup> See CLARE O’FARRELL, MICHEL FOUCAULT 50 (2005) (quoting Foucault regarding his desire for his books “to be a kind of tool-box which others can rummage through to find a tool they can use however they wish in their own area.”). Some may object to the notion that postmodernism can be used as a utilitarian tool. But I would suggest that even postmodern thinkers write with some sense of purpose.

the progression of ideas that emerged from broader postmodern philosophical conversations may in some ways track the development of our discourse regarding copyright theory. Postmodern thinkers discussed the historical development of power relations impacted/created by the romantic authorship construct,<sup>28</sup> and so has our legal academy.<sup>29</sup> But where did postmodernism go from there?

This essay posits that at least one postmodern thinker, Michel Foucault,<sup>30</sup> turned to the concept of silence<sup>31</sup> (which can be found, among other places, within Buddhist traditions),<sup>32</sup> after he examined and undermined inequitable power structures of domination and exploitation, and their relationships with subjugated individuals.<sup>33</sup> The essay also contends that silence is, ironically, an appropriate subject for new conversations regarding copyright theory.<sup>34</sup> Now that the legal groundwork is laid to enable millions of voices to contribute to the development of semiotic democracy,<sup>35</sup> we should consider what will inspire those

<sup>28</sup> See, e.g., Roland Barthes, *The Death of the Author*, in AUTHORSHIP, FROM PLATO TO THE POSTMODERN 125 (Sean Burke ed. 1995); Foucault, *Author*, *supra* note 23.

<sup>29</sup> See, e.g., BOYLE, SHAMANS, *supra* note 3, at xvi (“Postmodernists are . . . fond of references to the knowledge/power nexus, and it is hard to think of a more promising starting place for the analysis of an information age.”) (emphasis added).

<sup>30</sup> Some may object to describing Foucault as a postmodernist. Some call him a structuralist or a poststructuralist. See, e.g., SALERNO, *supra* note 2, at 161. Foucault himself resisted labels. See HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS xi-xiii (2d ed. 1993) [hereinafter DREYFUS & RABINOW] (discussing the effort of two Foucault scholars to describe Foucault’s work); JAMES E. MILLER, THE PASSION OF MICHEL FOUCAULT 6 (1993) (“Consider . . . the dilemma of trying to write a narrative account of someone who questioned, repeatedly and systematically, the value of old-fashioned ideas about the ‘author’; someone who raised the gravest of doubts about the character of personal identity as such . . .”). However, he did refer to himself as a “Nietzschean” in the last interview he gave before his death in 1984. See FOUCAULT, POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984, 251 (L.D. Krizman ed. 1988) [hereinafter FOUCAULT, POLITICS].

<sup>31</sup> See FOUCAULT, POLITICS, *supra* note 30, at 4 (“I think silence is one of those things that has unfortunately been dropped from our culture. We don’t have a culture of silence. . . . I’m in favor of developing silence as a cultural ethos.”).

<sup>32</sup> See JIN Y. PARK, BUDDHISM AND POSTMODERNITY: ZEN, HUAYAN, AND THE POSSIBILITY OF BUDDHIST POSTMODERN ETHICS 2 (2008) (discussing the “silence of the Buddha”); see also Uta Liebmann Schaub, *Foucault’s Oriental Subtext*, 104 PMLA 306, 313 (1989) (suggesting that Foucault sought to describe a “language of silence” that was derived in part from Buddhist notions).

<sup>33</sup> See Michel Foucault, *The Subject and Power*, in DREYFUS & RABINOW, *supra* note 30, at 208 [hereinafter Foucault, *Subject*] (describing three phases of his work); see also Cohen, *Creativity*, *supra* note 3, at 1166 (placing Foucault within a tradition that “seeks to understand the evolution of systems of knowledge and the ways in which knowledge both undergirds and is shaped by assertions of power”).

<sup>34</sup> I am not only speaking here of “expression conveyed without the use of words,” such as paintings or musical arrangements. Robert Kasunic has recently published an interesting analysis of how the fair use doctrine might address those activities. See Robert Kasunic, *The Problem of Meaning in Non-Discursive Expression*, 57 J. COPYRIGHT SOC’Y USA 399, 401 (2010) [hereinafter Kasunic, *Problem*]. I am targeting lack of expression, to the extent that is feasible.

<sup>35</sup> See JOHN FISKE, TELEVISION CULTURE 76 (1987) (members of a semiotic democracy are “equipped with the discursive competencies to make meanings and motivated by pleasure to want to participate in the process”); see also FISHER, PROMISES, *supra* note 3, at 30-31

voices. We should concentrate on what those voices are likely to say. We should ask when speaking is desirable and undesirable; what can it achieve and undermine?

Part I of this essay briefly describes the development of postmodern critiques of copyright law as well as arguments for broader freedom to participate in cultural production. Part I also discusses the evolving equity that appears to be emerging between the rights of authors and the rights of their audiences, and attempts to highlight two postmodern twists presented in the Second Circuit's recent opinion in *Salinger v. Colting*.<sup>36</sup> Part II suggests that this emerging equity offers an opportunity to look beyond basic power struggles toward the goal of copyright laws; fostering learning. Part II also contends that incorporating more thoroughly into our discourse postmodern and Buddhist recognitions regarding the limits of language, the delusion of self, and the potential of timely silence, may help us steer toward progress.<sup>37</sup> Part III concludes by proposing a question regarding the constitutionality of proactively encouraging silence through copyright laws. Part III also suggests that incorporating silence into discourse regarding copyright theory is problematic because it highlights assumptions regarding a premise underlying copyright laws: that creating access to more works generates more meaningful experiences.

#### I. THE EMERGENCE AND DEVELOPMENT OF POSTMODERN COPYRIGHT

In the 1970s and the 1980s, photocopying and home recording dominated copyright discussions.<sup>38</sup> Cases like *Williams*

---

("[T]he power to make cultural meanings in most Western countries has become ever more concentrated. . . . Reversing the concentration of semiotic power would benefit us all. People would be more engaged, less alienated, if they had more voice in the construction of their cultural environment. And the environment itself . . . would be more variegated and stimulating.")

<sup>36</sup> See generally 607 F.3d 68 (2010) (rejecting defendant's fair use argument related to an adaptation of *The Catcher in the Rye* while remanding for application of more strenuous standard for granting injunctive relief).

<sup>37</sup> See U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have the Power To . . . promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."); see also Margaret Chon, *Postmodern "Progress": Considering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 124 (1993) ("Postmodern 'Progress,' unlike modern 'Progress,' lacks the latter's knee-jerk faith in the emancipatory potential of progress per se, but not just because the negative effects of progress have been revealed. It does so because that Enlightenment view of progress is insufficiently attentive to the everyday acts, which may or may not be emancipatory, of the decentered individual."); Cohen, *Creativity*, *supra* note 3, at 1168 ("[W]hat is most important [for postmodernists] is that settled modes of knowing not become entrenched and calcified. This concern resonates deeply with copyright law's imperative to foster progress . . .").

<sup>38</sup> See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 64-133 (2003) (describing cases and legislation involving photocopying and private copying); see generally JAMES LARDNER, *FAST FORWARD: A MACHINE AND THE*

© *Wilkins Co. v. U.S.*<sup>39</sup> and *Sony Corp. of America v. Universal City Studios, Inc.*<sup>40</sup> questioned when it was acceptable for users of copyrighted works to make unauthorized copies; when it was lawful for technology companies to distribute tools designed to make unauthorized copying possible; and whether the “copy” right really had any tangible meaning. Alongside these cases, comprehensive copyright reform took place<sup>41</sup> and proposals to bring the United States within the framework of international agreements regarding copyright law percolated and eventually passed.<sup>42</sup> The architecture and the aims of U.S. copyright laws changed dramatically. In addition, several cases related to quoting from unpublished materials grabbed the nation’s attention,<sup>43</sup> and caused one prominent periodical to ask whether strict application of copyright law would lead to *The End of History?*<sup>44</sup>

All of these significant developments set the stage for the emergence of postmodernism within discourse regarding copyright theory. It soon became clear that emerging artistic trends in appropriation art and parody, as well as the ability to disseminate such art forms over the Internet, would clash with the newly designed copyright system. This clash generated vibrant scholarship that helped push the law in a direction that should facilitate more participatory freedom. Over time, courts have recognized that basing fair use decisions on conclusions regarding “high” and “low” forms of art is as inappropriate as withholding copyright protection from circus posters.<sup>45</sup>

---

COMMOTION IT CAUSED (2002).

<sup>39</sup> 420 U.S. 436 (1975) (involving infringement suit over photocopying of journals by U.S. government).

<sup>40</sup> 464 U.S. 417 (1984) (involving infringement suit regarding distribution of home video recorders).

<sup>41</sup> See MARYBETH PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, U.S. COPYRIGHT OFFICE (1977) (describing history of copyright revision and changes made thereby).

<sup>42</sup> See Jane Ginsburg and Robert Kernochan, *One Hundred and Two Years Later: The US Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1 (1988) (describing Berne Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853).

<sup>43</sup> See, e.g., *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); *New Era Publ'ns Int'l v. Henry Holt Co.*, 873 F.2d 576 (2d Cir. 1989), *reh'g denied*, 884 F.2d 659 (2d Cir. 1989).

<sup>44</sup> David A. Kaplan, *The End of History?*, NEWSWEEK, Dec. 25, 1989, at 80.

<sup>45</sup> See Jaszi, *Postmodern*, *supra* note 9, at 112 (discussing *Bleistein v. Donaldson Lithographing Co.*, 118 U.S. 239 (1903), the Supreme Court case that established that copyrightability is not determined by artistic merit).



A. *From William Shakespeare to 2 Live Crew: Courts Move from Art Critics to Remix Recognizers in Fair Use Cases*<sup>46</sup>

In 1988, the *American University Law Review* published a symposium issue containing works related to a 1987 conference entitled *In re Shakespeare: The Authorship of Shakespeare on Trial*.<sup>47</sup> At the conference, Peter Jaszi and James Boyle played opposing counsel in a case meant to decide who actually authored the works of William Shakespeare: Was it William Shakespeare himself or was it Edward de Vere, the Seventeenth Earl of Oxford?<sup>48</sup> Supreme Court Justices Brennan, Blackmun, and Stevens heard the professors' arguments, and ruled in favor of Shakespeare.<sup>49</sup> However, intriguing questions regarding the nature of authorship and how the concept of authorship is treated within constitutional interpretation and copyright law emerged in two essays by Professors Jaszi and Boyle.<sup>50</sup> Both essays relied on postmodern sources to expose the ways that the notion of a single author of a text imposed limitations on the meanings of the text, and therefore on the audience of the text and the culture more broadly.

Although the *In re Shakespeare* symposium issue may have contained the first law review articles to reference postmodernism while questioning the solidity of copyright's authorship construct,<sup>51</sup> literary critics, communications scholars, and French philosophers had preceded them.<sup>52</sup> Moreover, postmodern "appropriation" art and rap music – which often incorporated

---

<sup>46</sup> This sub-heading admittedly benefitted from previous titles/headings. See Urs Gasser & Silke Ernst, *From Shakespeare to D.J. Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age*, Berkman Center Research Publication No. 2006-005, June 2006, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=909223](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909223); VAIDHYANATHAN, COPYRIGHTS, *supra* note 17, at 12 (using heading "From Twain to 2 Live Crew").

<sup>47</sup> 37 AM. U. L. REV. 609 (1988).

<sup>48</sup> For information on the debate regarding who authored the works attributed to Shakespeare see SHAKESPEARE OXFORD SOCIETY, <http://www.shakespeare-oxford.com/> (last visited Mar. 13, 2011).

<sup>49</sup> See *Opinions of the Justices*, 37 AM. U. L. REV. 819 (1988).

<sup>50</sup> See generally Jaszi, *Who Cares?*, *supra* note 1; Boyle, *The Search*, *supra* note 1.

<sup>51</sup> John Carlin published a law review article that fits that description in 1988 as well. See generally Carlin, *Culture*, *supra* note 1. Prior to that, Jack Balkin introduced deconstruction to U.S. law professors. See generally Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); see also Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719 (2005).

<sup>52</sup> See, e.g., Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. (SPECIAL ISSUE) 425 (1984) (example of literary criticism); Mark Rose, *The Author As Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS, Summer 1988, at 51; see also MARSHALL McLuhan & QUENTIN Fiore, THE MEDIUM IS THE MESSAGE: AN INVENTORY OF EFFECTS 122-23 (1967) (discussing impact of the "ditto device" on copyright notions); Nesbitt, *supra* note 24 (discussing activities of Jacques Derrida and others related to 1982 French copyright legislation).

samples from preexisting works – were catching fire in the U.S. In fact, in the same year that *In re Shakespeare* was published, Jeff Koons' *Banalities* exhibition appeared at the Sonnabend Gallery in New York.<sup>53</sup> The following year, in 1989, 2 Live Crew released the rap album *As Nasty As They Want To Be*.<sup>54</sup> Over time, these artists would change the face of fair use.<sup>55</sup>

### 1. Losing with “Low” Art

The *Banalities* exhibition included a sculpture called *String of Puppies* that Koons based on a photograph of a litter of German Shepherd puppies previously published by Art Rogers.<sup>56</sup> Shortly thereafter, a friend of Rogers' saw a picture of Koons' sculpture hanging in the Los Angeles Museum of Contemporary Art, and Rogers filed a complaint against Koons for copyright infringement.<sup>57</sup> Rogers won the case at the district court level, where Judge Charles Haight rejected Koons' argument that changing the medium of the work rendered his conduct lawful with an implicit slap in the face to Marshall McLuhan: “In copyright law the medium is not the message.”<sup>58</sup>

On appeal, the Second Circuit affirmed the district court ruling.<sup>59</sup> Koons explained where he saw himself and his work within the contemporary art scene,<sup>60</sup> but the Second Circuit did not embrace Koons' argument that copyright law should develop alongside artistic moves. Instead, Judge Cardamone wrote:

If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use - without insuring public awareness of the original work - there would be no practicable boundary to the fair use defense. Koons' claim that his

---

<sup>53</sup> See JEFF KOONS, PICTURES 1980-2002 53 (2002) [hereinafter Koons, *Pictures*] (describing *Banalities* exhibit as put on by an artist “armed with the insignia of popular culture and kitsch, his purpose to storm the traditional bastions of art . . .”).

<sup>54</sup> *As Nasty As They Want To Be* was declared obscene by the Southern District of Florida, whose ruling was later overturned by the Eleventh Circuit. Compare *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), with *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). During this time Tipper Gore, Al Gore, and the Parents Music Resource Center were leading a crusade against lewd music.

<sup>55</sup> Although the connection may not be immediately apparent, rap and hip-hop music fits nicely within the postmodern art space. See generally David Sanjek, *Don't Have to DJ No More: Sampling and the “Autonomous Creator,”* in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 342 (Martha Woodmansee & Peter Jaszi eds., 1994).

<sup>56</sup> *Rogers v. Koons*, 71 F. Supp. 474, 474 (S.D.N.Y. 1990).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 474, 477-78 (invoking Marshall McLuhan's statement that “the medium is the message” without citing to McLuhan's work). See also MCLUHAN & FIORE, *supra* note 52.

<sup>59</sup> *Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992).

<sup>60</sup> See *Rogers*, 751 F. Supp. at 475-76 (S.D.N.Y. 1990) (quoting Koons: “[T]he subject for the show would be Banality but the message would be a spiritual one. And while being uplifting, the also work would be [sic] critical commentary on conspicuous consumption, greed, and self indulgence”).

infringement of Rogers' work is fair use solely because he is acting within an artistic tradition of commenting upon the commonplace thus cannot be accepted. The rule's function is to insure that credit is given where credit is due. By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist.<sup>61</sup>

Thus, the Second Circuit was unwilling to embrace postmodern repurposing of artistic works, especially without attribution.<sup>62</sup>

Almost simultaneously, in the Middle District of Tennessee, a case was winding its way through the courts that involved a similar, although perhaps a less consciously postmodern, use of Roy Orbison's rock n' roll song *Oh, Pretty Woman*. In 1989, Luther Campbell and his Miami-based rap group 2 Live Crew released a record entitled *As Clean As They Want To Be*, which included a repurposed version of *Oh, Pretty Woman*.<sup>63</sup> The music publisher that controlled the rights in Orbison's song, Acuff-Rose Music, filed a complaint against Campbell, his group, and his record company. Judge Wiseman ruled in favor of Campbell on the basis of fair use in 1991:

[B]ased on a comparison of the two songs and the affidavits provided to the Court, it is apparent that 2 Live Crew has created a comic parody of *Oh, Pretty Woman*. The theme, content and style of the new version are different than the original. In his affidavit, Luther Campbell, also known as Luke Skywalker, states that his version of *Oh, Pretty Woman* was written as a parody designed "through comic lyrics, to satirize the original work." He acknowledges that he purposefully copied selected music and lyrics from *Oh, Pretty Woman* as a device to help listeners identify the parody with the original version. Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody.<sup>64</sup>

Unfortunately, the Sixth Circuit reversed Judge Wiseman's ruling the following year. The appellate court determined that the commercial nature of the recording undermined Campbell's

---

<sup>61</sup> *Id.* at 310.

<sup>62</sup> Some in the art world also rejected Koons' efforts. See KOONS, PICTURES, *supra* note 53, at 59 ("When Banality was shown, voices were heard protesting that the infiltration of art into the seemingly intact world of intellectual discourse should be stopped."). Koons also lost two subsequent cases, see *Campbell v. Koons*, No. 91 Civ. 6055, 1993 U.S. Dist. LEXIS 3957, at \*9 (S.D.N.Y. Apr. 1, 1993) and *United Feature Syndicate v. Koons*, 817 F. Supp. 370, 385 (S.D.N.Y. 1993).

<sup>63</sup> *As Clean As They Want To Be* was an edited version of *As Nasty As They Want To Be*, which did not include the version of *Oh, Pretty Woman*. See *supra* note 54.

<sup>64</sup> *Acuff-Rose Music v. Campbell*, 754 F. Supp. 1150, 1154-55 (M.D. Tenn. 1991).

fair use defense.<sup>65</sup> The Sixth Circuit also cited the Second Circuit's *Rogers* opinion repeatedly, and stated that it agreed with the Second Circuit's misgivings about allowing too much space for parodic creative products.<sup>66</sup>

## 2. The Supreme Court's Rejection of Appropriation Art Criticism

Although both Jeff Koons and Luther Campbell lost at the appellate level, their cases spurred significant commentary within law journals.<sup>67</sup> In addition, popular periodicals were latching onto Koons and Campbell and the difficult legal and conceptual challenges that their works created.<sup>68</sup> Moreover, postmodern art and rap music were at the epicenter of the U.S. art and pop-culture world. For example, a showcase of postmodern art, *High and Low: Popular Culture and Modern Art*, was displayed at the Museum of Modern Art in New York in 1990<sup>69</sup> and Dr. Dre's *The Chronic*, which focused America's eyes on the "street life" of Los Angeles ghettos, went platinum in 1992.<sup>70</sup>

In the meantime, discourse in the legal academy regarding postmodern views of copyright concepts blossomed.<sup>71</sup> For example, *The Cardozo Arts & Entertainment Law Journal* published a symposium issue in 1992 containing papers submitted for a meeting of the Society for Critical Exchange.<sup>72</sup> The issue was turned into a book, *The Construction of Authorship: Textual Appropriation in Law and Literature*, edited by Peter Jaszi and Martha Woodmansee, and published by Duke University Press in

<sup>65</sup> See *Acuff-Rose Music v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984)).

<sup>66</sup> *Id.* at 1436, n.8.

<sup>67</sup> See, e.g., Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1 (1992); E. Kenly Ames, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473 (1993); Willajeanne F. McLean, *All's Not Fair In Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 BROOK. L. REV. 373 (1993).

<sup>68</sup> See, e.g., Constance L. Hays, *A Picture, a Sculpture and a Lawsuit*, N.Y. TIMES, Sept. 19, 1991, at B2; Linda Greenhouse, *Supreme Court Wrap Up: Court Enters New Era In Rap Copyright Case*, N.Y. TIMES, Mar. 30, 1993, at A16.

<sup>69</sup> See KIRK VARNEDOE & ADAM GOPNICK, *HIGH AND LOW: MODERN ART AND POPULAR CULTURE* (1990).

<sup>70</sup> See Toure, *Snoop-Dogg's Gentle Hip-Hip Growl*, N.Y. TIMES, Nov. 21, 1993, <http://www.nytimes.com/1993/11/21/arts/pop-music-snoop-dogg-s-gentle-hip-hop-growl.html> ("With its collagist ethic, hip-hop pulls from all of popular culture, from old television shows to up-to-the-minute slang, to inform the rapper's often autobiographical presentation."); see also *id.* (stating that *The Chronic* sold 3 million albums by 1993).

<sup>71</sup> Alongside scholarship that explicitly made reference to postmodern thinkers and sources, scholars like Jessica Litman and Pamela Samuelson published pieces that advanced arguably postmodern undertakings without explicit reliance on postmodernism. See, e.g., Jessica Litman, *Copyright As Myth*, 53 U. PITT. L. REV. 235 (1991); Pamela Samuelson, *Some New Kinds Of Authorship Made Possible By Computers and Some Intellectual Property Questions They Raise*, 53 U. PITT. L. REV. 685 (1992).

<sup>72</sup> Symposium, *Intellectual Property and the Construction of Authorship*, 10 CARDOZO ARTS & ENT. L.J. 277 (1992).

1994. In addition, David Lange and James Boyle both published influential articles in 1992, in *Law and Contemporary Problems*<sup>73</sup> and *The California Law Review*,<sup>74</sup> respectively.

Much of the copyright discourse began to focus on the emerging Internet.<sup>75</sup> Building on insights from Benjamin Kaplan's 1967 book *An Unhurried View of Copyright*,<sup>76</sup> scholars were asking how restrictions on copying with roots in thoroughly modern concepts could function in a world on the verge of universal accessibility to digital interaction with cultural products. Some saw copyright disintegrating almost completely,<sup>77</sup> while others saw some continued purpose for a well thought-out system.<sup>78</sup>

However, before the Internet almost completely took center stage, in 1994 the Supreme Court reviewed, reversed, and remanded the Sixth Circuit's *Campbell* opinion.<sup>79</sup> The decision came on the heels of a Congressional amendment<sup>80</sup> to the Copyright Act's fair use provision, 17 U.S.C. § 107, which clarified that fair use could be made of unpublished works, such as letters.<sup>81</sup> During debates regarding this amendment, Judge Pierre Leval (then of the Southern District of New York, and now of the Second Circuit) published an article in *The Harvard Law Review* titled *Toward a Fair Use Standard*.<sup>82</sup> In the article, Judge Leval proposed a formulation of the fair use analysis based, in part, on determining whether a use was "transformative." In an opinion by Justice Souter, the Court adopted, at least in name and perhaps almost completely in substance,<sup>83</sup> Judge Leval's proposal. Rather

<sup>73</sup> See Lange, *At Play*, *supra* note 1.

<sup>74</sup> See James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1413 (1992). Boyle later reformatted this article in the impactful 1996 book *Shamans, Software and Spleens*. See BOYLE, SHAMANS *supra* note 3.

<sup>75</sup> Postmodern literature often includes technology-focused stories, so this move makes sense. See, e.g., WILLIAM GIBSON, *NEUROMANCER* (1984).

<sup>76</sup> See, e.g., Kaplan, *supra* note 1, at 118 ("[T]he introduction of machines into the very creative process – computer-made music and poetry are crude examples of this development – will affect attitudes throughout copyright, besides raising difficult questions about copyrightability and infringement of particular works. . . . [I]n full scale 'on-line' operations with computers, the distinction between the author or producer of stored material and the user of the material tends to be blurred.").

<sup>77</sup> See, e.g., Lange, *At Play*, *supra* note 1, at 151 ("In the post-literate millennium . . . I believe, technology finally will sweep away all resistance to meaning, and all constraints beyond the individual. And authorship in the form of creative play will flourish in that time, not in the anonymity of a murmur, but as if in moments between lovers exchanging gifts.").

<sup>78</sup> See, e.g., Jaszi, *supra* note 4, at 56 ("There will certainly be some need for regulation as the network environment evolves, and copyright will most definitely have a role to play.").

<sup>79</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>80</sup> See Pub. L. No. 102-492 (1992) (amending 17 U.S.C. § 107 to include the following sentence: "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.").

<sup>81</sup> But see Kate O'Neil, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication*, 89 CALIF. L. REV. 369 (2001) (questioning the efficacy of the amendment).

<sup>82</sup> 103 HARV. L. REV. 1105 (1990).

<sup>83</sup> See Williams, *Recent*, *supra* note 12, at 315 n.67 (discussing how Judge Leval's writings

than emphasizing the commercial nature of 2 Live Crew's recording, as the Sixth Circuit had, the Court focused on "whether the new work 'merely supersede[d] the objects' of the original creation, or instead add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . ."<sup>84</sup>

The Court also quoted Justice Holmes' opinion from *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), where the Supreme Court refused to deny commercial artists copyright protection, in order to set aside the crass content of 2 Live Crew's work:

[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.<sup>85</sup>

With this sentiment in mind, the *Campbell* Court went on to call 2 Live Crew's song a fair use parody because:

It [was] fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtapose[d] the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.<sup>86</sup>

One month after the Supreme Court's decision, *The Cardozo Arts & Entertainment Law Journal* sponsored a new symposium, entitled *Copyright in the Twenty-First Century*, which was later published in two issues of the journal.<sup>87</sup> In one issue, Judge Leval wrote that Justice Souter's *Campbell* opinion "rescued" fair use by "reorient[ing] the doctrine of fair use to serve the central goal of copyright – to promote the growth and dissemination of knowledge."<sup>88</sup> However, Judge Leval admitted that "[t]he 2 Live Crew opinion [did] not ensure perfect answers to all future

---

could be read to differ from the articulation of the transformative standard contained in *Campbell*.

<sup>84</sup> *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)) (other internal citations omitted).

<sup>85</sup> *Id.* at 582-83.

<sup>86</sup> *Id.* at 583.

<sup>87</sup> See 13(1)&(2) CARDOZO ARTS & ENT. L.J. (1994).

<sup>88</sup> Judge Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 26 (1994).

disputes.”<sup>89</sup> After all, Justice Kennedy contributed a concurring opinion in *Campbell* that included an unfortunately narrow rendition of a “fair use exception for parody” as well as a warning to lower courts not to accept “post hoc” parody explanations by creators of alleged transformative works.<sup>90</sup> Justice Kennedy stated: “The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).”<sup>91</sup> Thus, some scholars questioned whether *Campbell* was a thoroughly romantic and unhelpful opinion, rather than the aerating roots<sup>92</sup> of postmodern copyright beginning to show themselves.<sup>93</sup>

The other pieces published from the Cardozo symposium reflected these concerns, as well as other complaints regarding copyright’s expansive protections.<sup>94</sup> The papers included in the symposium were broken down into four sections: (1) The Role of the Copyright Office; (2) Virtual Reality, Appropriation and Property Rights in Art; (3) The Information Superhighway; and (4) Formalities and the Future.<sup>95</sup> In the coming years, all of these topics would gain widespread attention while the reduction of formalities (including Copyright Office registration) as obstacles to copyright protection clashed with the technological copying “explosion”<sup>96</sup> embodied by the Internet and other digital tools, as well as the dramatic increase in amateur creativity and artistic repurposing that those tools enabled.<sup>97</sup>

### B. *Lingering Modernism and Its Discontents*

During the decade following the *Campbell* opinion, Congress

<sup>89</sup> *Id.* at 23.

<sup>90</sup> See *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring).

<sup>91</sup> *Id.*

<sup>92</sup> See Cypress Knee, Wikipedia, [http://en.wikipedia.org/wiki/Cypress\\_knee](http://en.wikipedia.org/wiki/Cypress_knee) (last modified Sept. 25, 2010) (explaining that scientists believe that aerating roots, or Cypress Knees, “help in providing oxygen to the tree and assist in anchoring the tree in the soft, muddy soil” of, for example, swamps).

<sup>93</sup> See, e.g., Martha Woodmansee & Peter Jaszi, *The Law of Texts: Copyright in the Academy*, 57 COLLEGE ENG. 769, 774 (1995) (“[T]he Supreme Court’s affirmation of the parodist’s interest in access invokes an equally Romantic notion – that of ‘transformative’ appropriation.”); see also Peter Jaszi, *Getting to Best Practices – A Personal Voyage Around Fair Use*, 57 J. COPYRIGHT SOC’Y USA 315, 322 (2010) (describing his early views regarding the transformative standard).

<sup>94</sup> Important articles include: Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345 (1994); Barbara Friedman, *From Deontology to Dialogue: The Cultural Consequences of Copyright*, 13 CARDOZO ARTS & ENT. L.J. 157 (1994); and Marci A. Hamilton, *Four Questions About Art*, 13 CARDOZO ARTS & ENT. L.J. 119 (1994).

<sup>95</sup> Marci A. Hamilton, *Copyright in the Twenty-First Century: Introduction*, 13 CARDOZO ARTS & ENT. L.J. 9, 11 (1994).

<sup>96</sup> *Id.* at 9.

<sup>97</sup> See generally LESSIG, REMIX, *supra* note 8.

passed new laws<sup>98</sup> designed to protect authors and copyright owners in the emerging digital environment discussed at the Cardozo symposium, and academic objections to the direction copyright law was taking grew louder.<sup>99</sup> Scholars frequently critiqued copyright law's impact on the development of technology and cultural exchanges.<sup>100</sup> Many of these critiques utilized and/or played off of arguments derived from communications scholarship regarding the importance of media,<sup>101</sup> growing concentrations within mass media markets,<sup>102</sup> and the negative consequences of television consumption.<sup>103</sup> Much of this scholarship was in-itself influenced by works by postmodern thinkers,<sup>104</sup> as well as theories of liberty articulated by philosophers such as John Stuart Mill.<sup>105</sup> Over time, a movement formed around James Boyle's notion of "cultural environmentalism,"<sup>106</sup> and postmodern concepts regarding

<sup>98</sup> See, e.g., Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Sonny Bono Copyright term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998); No Electronic Theft Act, Publ. L. No. 105-147, 11 Stat. 2678 (1998).

<sup>99</sup> See, e.g., Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1995-1996); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997-1998); ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* (1998); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); David Nimmer, *A Riff On Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001); VAIDHYANATHAN, *COPYRIGHTS*, *supra* note 17; Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001).

<sup>100</sup> See, e.g., LESSIG, *FUTURE*, *supra* note 3; LAWRENCE LESSIG, *FREE CULTURE, HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

<sup>101</sup> See, e.g., McLuhan, *supra* note 52; Jerome Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

<sup>102</sup> See, e.g., BEN BAGDIKIAN, *THE MEDIA MONOPOLY* (6th ed. 2000); ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999); C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (2002).

<sup>103</sup> See, e.g., JOHN FISKE, *TELEVISION CULTURE* (1987); NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* (1985).

<sup>104</sup> John Fiske relied heavily on Roland Barthes in *Television Culture*, for example. See, e.g., FISKE, *supra* note 103, at 43.

<sup>105</sup> In *Amusing Ourselves to Death*, Neil Postman cited a paragraph from John Stuart Mill's autobiography as an example of a hopeful view of what typography could allow; a hope that never came true. POSTMAN, *supra* note 103, at 52. Mills' most prominent articulation of his theory of liberty is found in his 1859 essay, *On Liberty*. JOHN STUART MILL ON LIBERTY AND OTHER ESSAYS 1- 128 (John Gray ed., Oxford World's Classics 1991) (1859). In *Promises to Keep*, Professor Fisher suggests that "the radical expansion of the range of readily available entertainment options that the new technology makes possible could move us closer to Mill's utopia." FISHER, *supra* note 3, at 28.

<sup>106</sup> James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87 (1997) [hereinafter Boyle, *Environmentalism*]. See also CULTURAL ENVIRONMENTALISM @ 10, 70(2) LAW & CONTEMP. PROBS. (2007) (containing multiple articles regarding the movement that utilized Boyle's concept); AUFDERHEIDE & JASZI, *supra* note 20 (describing the movement).



audience freedom to remix the meanings of the “raw materials”<sup>107</sup> of mass media culture remained at the forefront of the discussion.<sup>108</sup>

This discussion produced eloquent descriptions of a possible future in “a networked information environment.”<sup>109</sup> In this future, “[d]igital technology could enable an extraordinary range of ordinary people to become part of a creative process. To move from the life of a ‘consumer’ . . . to a life where one can individually and collectively participate in making something new.”<sup>110</sup> In this future, “anyone, using widely available equipment, can take from the existing cultural universe more or less whatever they want, cut it, paste it, mix it, and make it their own – equally as well expressing their adoration as their disgust, their embrace of certain images as their rejection of them.”<sup>111</sup> In other words, technology should enable individuals to “author their own lives” by facilitating “a proliferation of strands of stories and of means of scanning the universe of potential stories about how the world is and how it might become, leaving individuals with much greater leeway to choose and therefore a much greater role in weaving their own life tapestry.”<sup>112</sup>

Although these descriptions tend to, consciously or unconsciously, bleed into rather romantic individualism,<sup>113</sup> as James Boyle has said, “if one is going to be romantic about something, our ability radically to transform culture, self, and society is a pretty good candidate.”<sup>114</sup> Moreover, most of the scholars participating in the discussion regarding a potentially vibrant future believed that the future they realistically hoped for was under attack, and certainly not inevitable.<sup>115</sup> They saw

---

<sup>107</sup> Boyle, *Environmentalism*, *supra* note 106, at 98.

<sup>108</sup> See, e.g., Tushnet, *Payment*, *supra* note 25.

<sup>109</sup> BENKLER, WEALTH, *supra* note 3, at 277.

<sup>110</sup> LESSIG, FUTURE, *supra* note 3, at 9.

<sup>111</sup> See BENKLER, WEALTH, *supra* note 3, at 276 (also describing the work of Niva Elkin Koren, William Fisher, Jack Balkin and Lawrence Lessig).

<sup>112</sup> *Id.* at 175.

<sup>113</sup> See LESSIG, REMIX, *supra* note 8, at 132 (admitting he romanticizes the “yeoman creator”); AUFDERHEIDE & JASZI, *supra* note 20, at 106 (stating that some of the scholars who contributed to the cultural environmentalism movement “participated in the Romantic ethos of the heroic creator breaking free of convention”); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1338 (2004) (discussing a “romantic conception of the public domain”); Julie E. Cohen, *Network Stories*, 70 LAW & CONTEMP. PROBS. 91, 93 (2007) [hereinafter Cohen, *Network*] (“What we need now is to dispense with the equally abstract romanticism of cyberspace exceptionalism and emphasize all of the concrete, everyday ways in which the open Internet enables the creation of meaning by and for real people in real spaces.”); see also Merges, *supra* note 8, at 1269 (referring to “the romantic narrative of rebellion”).

<sup>114</sup> BOYLE, SHAMANS, *supra* note 3, at 163-64.

<sup>115</sup> See, e.g., LESSIG, FUTURE, *supra* note 3, at 217 (“our greatest fear should be of dinosaurs stopping evolution”); BENKLER, WEALTH, *supra* note 3, at 386 (“I suggest that the heightened activity is, in fact, a battle in the domain of law and policy, over the shape of the social settlement that will emerge around the digital computation and

themselves as participants in a political “war,”<sup>116</sup> in which “[w]hat matters is the extent to which a particular configuration of material, social, and institutional conditions allow an individual to be the author of his or her life, and to what extent these conditions allow others to act upon the individual as an object of manipulation.”<sup>117</sup> As the saying goes, when a war ensues, all is fair,<sup>118</sup> including using the enemy’s own weapons against him.<sup>119</sup>

And there were good reasons to believe that copyright law, as a power structure, was in some circumstances continuing to thwart creative endeavors even after *Campbell v. Acuff-Rose*.<sup>120</sup> For example, in 1995, Penguin Books USA published a book by author Alan Katz and illustrator Chris Wrinn called *The Cat NOT in the Hat! A Parody by Dr. Juice*.<sup>121</sup> The book poked fun at the highly publicized trial of O.J. Simpson for the murders of his ex-wife, Nicole Brown, and her boyfriend, Ron Goldman, in a style reminiscent of the children’s book *The Cat In the Hat by Dr. Seuss*, which was written and illustrated by Theodor Geisel in 1957.<sup>122</sup> The company that controlled the copyrights in *The Cat in the Hat* sought a preliminary injunction in the Southern District of California.<sup>123</sup> Judge Napoleon Jones granted the injunction and rejected the defendant’s fair use defense.<sup>124</sup>

The defendants argued that Katz:

felt that, by evoking the world of *The Cat in the Hat*, he could:

---

communications revolution.”).

<sup>116</sup> See PATRY, *supra* note 26, at 1 (“The intensity of the debates over copyright has reached the point where the term the ‘Copyright Wars’ need not be explained; it is now part of our common cultural language.”).

<sup>117</sup> BENKLER, WEALTH, *supra* note 3, at 141.

<sup>118</sup> See MIGUEL DE CERVANTES, DON QUIXOTE DE LA MANCHA, vol. 2 (1615) (“[p]ray consider that love and war are exactly alike; and as in war it is customary to use cunning and strategy to defeat the enemy”).

<sup>119</sup> I personally believe that using rhetoric regarding the “copyright wars” exaggerates the nature of the circumstances that we face in copyright policy debates. It also divides participants in debates into factions in an overly simplistic manner that does not allow us to see points of agreement or acknowledge the good intentions of nearly everyone involved.

<sup>120</sup> See John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. REV. 1201, 1213 (2005) (“in its unyielding restraint of transformative uses, especially at a time when technology is radically expanding the palette of artistic possibilities, the modern copyright regime limits the artistic vocabulary and therefore serves to suppress significant expressive interests”); see also Jeremy Kudon, Note, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579 (2000); Matthew D. Bunker, *Eroding Fair Use: The ‘Transformative’ Use Doctrine After Campbell*, 7 COMM. L. & POL’Y 1 (2002). Some cases exemplify that courts allowed creative transformative uses as often as they disallowed them. See, e.g., *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (finding fair use of photograph in movie poster).

<sup>121</sup> *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1396 (9th Cir. 1997).

<sup>122</sup> *Id.*

<sup>123</sup> *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 924 F. Supp. 1559, 1559 (S.D. Cal. 1996).

<sup>124</sup> *Id.* at 1575-76. The district court did find a fair use parody with respect to one work at issue, *Horton Hatches the Egg*. *Id.* at 1570.

(1) comment on the mix of frivolousness and moral gravity that characterized the culture's reaction to the events surrounding the Brown/Goldman murders, (2) parody the mix of whimsy and moral dilemma created by Seuss works such as *The Cat in the Hat* in a way that implied that the work was too limited to conceive the possibility of a *real* trickster "cat" who creates mayhem along with his friends . . . and then magically cleans it up at the end, leaving a moral dilemma in his wake.<sup>125</sup>

However, Judge Jones found that *The Cat NOT in the Hat!* could not fit within the *Campbell* opinion's definition of "parody," and that as a result the book constituted an infringement.<sup>126</sup> Judge Jones stated that "[s]uggesting limits to the Seussian imagination is simply inadequate: that statement could be made about *any* satire, that the new work seeks to 'suggest the limits of the prior author's imagination' by deploying the essence of the prior work in a new setting."<sup>127</sup>

On appeal, the Ninth Circuit affirmed the lower court's ruling.<sup>128</sup> Although the appellate court gave lip service to the *Campbell* Court's reference to *Bleistein*, and claimed that the affirmance was not based on "whether *The Cat NOT in the Hat!* [was] in good or bad taste,"<sup>129</sup> the opinion counsels otherwise. After reciting the defendant's fair use argument, the Ninth Circuit said that it found the defendant's description of its parody to be "pure shtick" that was concocted "post-hoc" for the purposes of litigation.<sup>130</sup> In other words, the court demanded that an acceptable explanation for copying must exist before copying takes place. This demand was inspired by Justice Kennedy's concurrence in *Campbell*, which warned lower courts against being misled by "post-hoc" explanations.<sup>131</sup>

Opinions like *Dr. Seuss* indicate that further efforts to expand freedoms to remix copyrighted works are required.<sup>132</sup> The law still sometimes stands in the way of "culture . . . becoming more

<sup>125</sup> *Penguin Books*, 109 F.3d at 1402-03 (emphasis in original).

<sup>126</sup> *Dr. Seuss*, 924 F. Supp. at 1569.

<sup>127</sup> *Id.*

<sup>128</sup> *Penguin Books*, 109 F.3d at 1406.

<sup>129</sup> *Id.* at 1400 n.8.

<sup>130</sup> *Id.* at 1403. It is unclear whether the court was consciously playing off of the fact that postmodern artists aim to turn "shtick" items into "fine art" in order to draw attention to the juxtaposition. See also Ken Johnson, *The Meaning, Beauty and Humor of Ordinary Things*, N.Y. TIMES, Apr. 23, 2004, at E29.

<sup>131</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 600 (1994) (Kennedy, J., concurring) ("As future courts apply our fair use analysis, they must take care to ensure that not just any commercial takeoff is rationalized *post hoc* as a parody.").

<sup>132</sup> Other troubling cases exist as well. See, e.g., *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009) (rejecting fair use argument for sampling of musical composition). For a discussion of the role of the romantic authorship construct in sampling cases see generally Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C.L. REV. 547 (2006).

democratic: self-reflective and participatory.”<sup>133</sup> However, as discussed below, a clear trend against restricting transformative uses that enable audience participation in semiotic democracy has emerged; *Dr. Seuss* notwithstanding.

### C. Examples of Postmodern Copyright in Action

Examples of a postmodern fair use trend exist in many court opinions,<sup>134</sup> including opinions from within the Ninth Circuit subsequent to *Dr. Seuss*. One such example is *Mattel, Inc. v. Walking Mountain Productions*.<sup>135</sup> There, the Ninth Circuit considered the work of Thomas Forsythe, “a self-taught photographer who . . . developed a series of 78 photographs entitled ‘Food Chain Barbie,’ in which he depicted Barbie in various absurd and often sexualized positions. . . . While his works vary, Forsythe generally depicts one or more nude Barbie dolls juxtaposed with vintage kitchen appliances.”<sup>136</sup> Forsythe told the court that “the message behind his photographic series [wa]s an attempt to ‘critique[] the objectification of women associated with [Barbie], and . . . [to] lambast[] the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies.’”<sup>137</sup> He also explained that “he chose to parody Barbie in his photographs because he believes that ‘Barbie is the most enduring of those products that feed on the insecurities of our beauty and perfection-obsessed consumer culture.’”<sup>138</sup>

Although “Forsythe’s market success was limited,”<sup>139</sup> he did succeed in convincing both Judge Ronald Lew of the Central District of California<sup>140</sup> and the Ninth Circuit<sup>141</sup> that his photographs constituted fair use when Mattel, the owner of copyrights in *Barbie*, filed suit. Mattel argued “that Forsythe’s work [was] not parody because he could have made his statements about consumerism, gender roles, and sexuality without using *Barbie*.”<sup>142</sup> This argument was an attempt to use the *Dr. Seuss*

<sup>133</sup> BENKLER, WEALTH, *supra* note 3, at 15.

<sup>134</sup> See, e.g., *Abilene Music, Inc. v. Sony Music Entm’t, Inc.*, 320 F. Supp. 2d 84 (S.D.N.Y. 2003) (fair use of *What a Wonderful World* by rapper Ghostface Killah); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008) (fair use of *Imagine* by documentary filmmakers).

<sup>135</sup> 353 F.3d 792 (9th Cir. 2003). See also *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) (rejecting trademark and unfair competition claims against record label that distributed a song that parodied Barbie).

<sup>136</sup> *Id.* at 796.

<sup>137</sup> *Id.* (alteration in original).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Mattel, Inc. v. Walking Mountain Prods.*, No. 99-08543 RSWL (RZx), 2000 U.S. Dist. LEXIS 15293 (C.D. Cal. 2000), *aff’d*, 353 F.3d 792 (9th Cir. 2003).

<sup>141</sup> *Walking Mountain*, 353 F.3d at 806.

<sup>142</sup> *Id.* at 802 n.7.

opinion to undermine Forsythe's work. However, after citing *Bleistein*,<sup>143</sup> Judge O'Scannlain's Ninth Circuit opinion refused to "make judgments about what objects an artist should choose for [his] art."<sup>144</sup> The opinion also clarified that, in the Ninth Circuit, "[p]arody only requires that 'the plaintiff's copyrighted work is at least in part the target of the defendant's satire,' not that the plaintiff's work be the irreplaceable object for its form of social commentary."<sup>145</sup> Thus, the court implicitly broadened the scope of acceptable transformative works by accepting Forsythe's rationale regarding *Barbie* as an example of a broader societal ailment. The court explained its conclusion as follows:

However one may feel about his message - whether he is wrong or right, whether his methods are powerful or banal - his photographs parody Barbie and everything Mattel's doll has come to signify. Undoubtedly, one could make similar statements through other means about society, gender roles, sexuality, and perhaps even social class. But Barbie, and all the associations she has acquired through Mattel's impressive marketing success, conveys these messages in a particular way that is ripe for social comment.<sup>146</sup>

Three years later, in *Blanch v. Koons*,<sup>147</sup> the Second Circuit reached a similar, although arguably even broader, decision. *Blanch* involved a painting called *Niagara* that the (by now) extremely successful<sup>148</sup> painter Jeff Koons included in a collection entitled *Easyfun-Ethereal*.<sup>149</sup> The Second Circuit, in an opinion by Judge Sack, described the painting as follows:

Like the other paintings in the series, *Niagara* consist[s] of fragmentary images collaged against the backdrop of a landscape. The painting depicts four pairs of women's feet and lower legs dangling prominently over images of confections - a large chocolate fudge brownie topped with ice cream, a tray of donuts, and a tray of apple Danish pastries - with a grassy field and Niagara Falls in the background.<sup>150</sup>

Koons took one of the pairs of feet and lower legs from a photograph entitled *Silk Sandals by Gucci*, which photographer Andrea Blanch published in *Allure* magazine.<sup>151</sup> Koons cut the image out of the magazine, scanned it into a computer, and superimposed part of it onto the painting described above, which

---

<sup>143</sup> 188 U.S. 239 (1903).

<sup>144</sup> *Walking Mountain*, 353 F.3d at 802 n.7.

<sup>145</sup> *Id.* (quoting *Dr. Seuss Enter. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997)).

<sup>146</sup> *Id.* at 802.

<sup>147</sup> 467 F.3d 244 (2d Cir. 2006).

<sup>148</sup> See Jaszi, *Postmodern*, *supra* note 9, at 112 (describing Koons' successes).

<sup>149</sup> JEFF KOONS, *EASYFUN-ETHEREAL* (2000) [hereinafter KOONS, *EASY FUN*].

<sup>150</sup> *Blanch*, 467 F.3d at 247.

<sup>151</sup> *Id.* at 247-48.

his assistants helped him paint.<sup>152</sup>

Koons claimed that he intended the painting to “comment on the ways in which some of our most basic appetites – for food, play and sex – are mediated by popular images.”<sup>153</sup> He also wanted to “compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media.”<sup>154</sup> “[T]o Koons, certain physical features of the legs [in [Blanch’s] photograph] represented . . . a particular type of woman frequently presented in advertising. He considered this typicality to further his purpose of commenting on the ‘commercial images . . . in our consumer culture.’”<sup>155</sup>

The Second Circuit embraced Koon’s fair use right to repurpose Blanch’s photograph in this manner. Taking a page out of James Boyle’s book,<sup>156</sup> the court held that “[w]hen [a] copyrighted work is used as ‘raw material,’ in the furtherance of distinct creative or communicative objectives, the use is transformative.”<sup>157</sup> The court also directly took-on the rigid distinction between parodies and satires that emerged primarily from Justice Kennedy’s *Campbell* concurrence and the *Dr. Seuss* opinion, and explained that even though *Niagara* “appears to target the genre of which *Silk Sandals* is typical, rather than the individual photograph itself ‘the broad principles of *Campbell* are not limited to cases involving parody.’”<sup>158</sup> In this statement, the court implicitly acknowledged that its earlier *Rogers v. Koons*<sup>159</sup> opinion is no longer good law to the extent that the opinion could be read to hold that satires, as opposed to parodies, cannot be fair. The court also reiterated that it is not “[the court’s] job to judge the merits of *Niagara*, or of Koons’s approach to art.”<sup>160</sup> The court instead directed its focus to “whether Koons had a genuine creative rationale for borrowing Blanch’s image.”<sup>161</sup> Thus, the court concluded that “[w]hether or not Koons could have created *Niagara* without reference to *Silk Sandals*, [there was] no reason to question his statement that the use of an existing image advanced his artistic purposes.”<sup>162</sup>

---

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 247 (quoting Koons’ Affidavit at ¶ 10, *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 248 (quoting Koons’ Affidavit at ¶ 10, *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006)).

<sup>156</sup> See Boyle, *Environmentalism*, *supra* note 106, and accompanying text.

<sup>157</sup> *Blanch*, 467 F.3d at 253.

<sup>158</sup> *Id.* at 254. See Williams, *Recent*, *supra* note 12, at 329 (arguing that under *Campbell* satires never should have been considered unfair per se).

<sup>159</sup> *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

<sup>160</sup> *Blanch*, 467 F.3d at 255.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

As Robert Kasunic has explained, the Second Circuit's focus on Koons' "artistic purposes," and the meaning that Koons intended to convey in his painting, is ironic given that Koons emphasized that "the meaning of his work was explicitly framed as an absence of authorial meaning."<sup>163</sup> According to professor Kasunic:

Koons expressed the purpose of allowing the viewer to create the meaning from his or her own 'personal experience with these objects, products, and images and at the same time gain new [and unspecified] insight into how these affect our lives. In a sense, Koons carefully refused to infuse particular meaning to the work, but rather empowered the viewer with establishing his or her own relative meaning."<sup>164</sup>

This extremely perceptive reading of the *Blanch* opinion is consistent with statements made by Koons prior to the litigation. For example, in a book about the *Easyfun-Ethereal* exhibition, Koons stated that "[t]he *Easyfun-Ethereal* paintings are very layered. My interest [was] to create art that [could] change with any culture or society viewing it. When I look at the paintings and realize all the historical references, it's as if, for a moment, all ego is lost to meaning."<sup>165</sup>

Professor Kasunic's insight regarding the *Blanch* opinion is also consistent with Peter Jaszi's view of the opinion as an example of "postmodern copyright."<sup>166</sup> In *Is There Such a Thing as Postmodern Copyright?*, Professor Jaszi describes the opinion as "a rejection of the grand narrative of authorship and 'author-ity,' in favor of an approach that distributes attention and concern across the full range of participants in the process of cultural production and consumption."<sup>167</sup> He also suggests that *Blanch* "may signal a general loosening of authors' and owners' authority over, by now, not quite so auratic works, allowing greater space for the free play of meaning on the part of audience members and follow-up users who bring new interpretations."<sup>168</sup>

Thus, after *Walking Mountain* and *Blanch* (among other cases),<sup>169</sup> we are very close to reaching a "space within the confines of copyright"<sup>170</sup> law where semiotic democracy may be lawfully

<sup>163</sup> Kasunic, *Problem*, *supra* note 34, at 421.

<sup>164</sup> *Id.*

<sup>165</sup> KOONS, *EASYFUN*, *supra* note 149, at 49.

<sup>166</sup> Jaszi, *Postmodern*, *supra* note 9, at 113-17.

<sup>167</sup> *Id.* at 116.

<sup>168</sup> *Id.*

<sup>169</sup> See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (excusing copying of whole concert posters in coffee-table book containing commentary about *The Grateful Dead*).

<sup>170</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). See also Julie E. Cohen, *Cyberspace As/And Space*, 107 COLUM. L. REV. 210, 213 (2008) ("To say that humans reason spatially is not to say that we are placebound, or property-bound, but simply to say that we

developed by participants of all shapes and sizes. Whether the creator of a transformative work is an unsuccessful artist on a shoestring budget like Forsythe<sup>171</sup> or a hugely successful public figure with funding from Deutsche Bank and the Solomon R. Guggenheim Foundation like Koons,<sup>172</sup> fair use allows artists to further the generation of new meaning through repurposing preexisting works.<sup>173</sup> Moreover, courts seem to recognize that they are no more qualified to assess the merit of transformative works than they are qualified to assess the merit of works for the purposes of copyrightability.

A recent decision by the Second Circuit in *Salinger v. Colting*<sup>174</sup> demonstrates, in a rather round-about way, the extent to which *Bleistein*<sup>175</sup> has come full circle. At the district court level in *Colting*,<sup>176</sup> Judge Deborah Batts of the Southern District of New York considered whether a book infringed the copyright in J.D. Salinger's *Catcher in the Rye*.<sup>177</sup> The defendants' book, *60 Years Later: Coming Through the Rye*, portrayed Salinger's protagonist, Holden Caulfield, at the age of 76.<sup>178</sup> Although Holden was 60 years older than he was when Salinger chronicled the youth's escape from boarding school to the streets of New York,<sup>179</sup> *60 Years Later* posited that the character remained alienated and unhappy in his old age.<sup>180</sup> The author of *60 Years Later*, Fredrick Colting (pka John David California), also inserted J.D. Salinger himself into the story and explored Salinger's relationship with his character in a manner that focused on Salinger's notorious reclusiveness.<sup>181</sup> Judge Batts admitted that this twist was "novel,"<sup>182</sup>

---

are embodied, situated beings, who comprehend even disembodied communications through the filter of embodied, situated experience.”).

<sup>171</sup> See *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 797 (9th Cir. 2003) (“The ‘Food Chain Barbie’ series earned Forsythe the total gross income of \$3,659.”).

<sup>172</sup> See Dr. Rolf-E. Breuer, *Foreword* to KOONS, EASY-FUN, *supra* note 149, at 8-9 (providing a foreword and preface by representatives of the funders); see also Thomas Krens, *Preface and Acknowledgments* to KOONS, EASY-FUN, *supra* note 149, at 10-11.

<sup>173</sup> In *Is There Such a Thing as Postmodern Copyright?*, Peter Jaszi questioned whether the *Blanch* opinion could be read to “represent the persistence of Romantic authorship rather than hinting at its senescence.” Jaszi, *Postmodern*, *supra* note 9, at 114. In other words, Jaszi concedes that one interpretation of *Blanch* is that Koons succeeded due to his elevated status as an artist who more fully embodies traditional notions of authorship. However, Jaszi doubts the viability of this reading – as I do – and this reading is hard to impose upon the *Walking Mountain* opinion, due to Forsythe’s relative obscurity at the time of the litigation.

<sup>174</sup> 607 F.3d 68 (2d Cir. 2010).

<sup>175</sup> 188 U.S. 239 (1903).

<sup>176</sup> 641 F. Supp. 2d 250 (S.D.N.Y. 2009).

<sup>177</sup> J.D. SALINGER, *THE CATCHER IN THE RYE* (1951).

<sup>178</sup> *Colting*, 607 F.3d at 71.

<sup>179</sup> See *Colting*, 641 F. Supp. 2d at 258 (explaining that, in *The Catcher In the Rye*, Holden “wander[s] the streets of New York City alone for several days . . . and ultimately . . . become[s] a patient in a psychiatric hospital”).

<sup>180</sup> *Id.* at 258-59.

<sup>181</sup> *Id.* at 260-61.

<sup>182</sup> *Id.* at 261.



but she nevertheless concluded that Colting invented a post hoc parodic explanation for his book, and that the book was actually criticizing Salinger rather than *Catcher in the Rye*.<sup>183</sup> Citing primarily to Justice Kennedy's concurrence in *Campbell*,<sup>184</sup> and also to the *Rogers v. Koons* case,<sup>185</sup> Judge Batts issued an injunction against further distribution of *60 Years Later*.<sup>186</sup>

On appeal, the Second Circuit agreed that Colting was unlikely to succeed in his fair use defense.<sup>187</sup> The Second Circuit did so despite expert testimony from:

Martha Woodmansee, a professor of English and law at Case Western University, who described *60 Years Later* as a 'work of meta-commentary' that 'pursue[d] critical reflection on J.D. Salinger and his masterpiece [*Catcher*] just as do the articles that literary scholars conventionally write and publish in scholarly journals, but it casts its commentary in an innovative 'post modern' form, specifically, that of a novel.'<sup>188</sup>

Thus, one could read the Second Circuit decision as a rejection of the legitimacy of postmodern readings of copyright law.

However, it is important to note that the Second Circuit was reviewing Judge Batts' decision at a preliminary stage in the proceedings, and thus on an incomplete record.<sup>189</sup> In addition, the Second Circuit expressly stated that "[i]t may be that a court can find that the [first] fair use factor favors a defendant even when the defendant and his work lack a transformative *purpose*."<sup>190</sup> In doing so, the Second Circuit called into question the primacy provided by the district court to whether or not Colting's explanation of his parodic purpose was credible. This qualification of the Second Circuit's decision regarding the likelihood of Salinger's success against the defendants' fair use argument unlocks the door to a rejection of Justice Kennedy's insistence<sup>191</sup> upon searching for the original intent of the author of

---

<sup>183</sup> *Id.* at 262.

<sup>184</sup> *Salinger v. Colting*, 641 F. Supp. 2d 250, 256-60 (S.D.N.Y. 2009) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 597, 599-600 (1994) (Kennedy, J. concurring)).

<sup>185</sup> 960 F.2d 301 (2d Cir. 1992).

<sup>186</sup> *Colting*, 641 F. Supp. 2d at 269.

<sup>187</sup> *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010).

<sup>188</sup> *Id.* at 72.

<sup>189</sup> *See id.* at 80-81 (emphasizing "that courts should be particularly cognizant of the difficulty of predicting the merits of a copyright claim at a preliminary injunction hearing").

<sup>190</sup> *Id.* at 83 (emphasis in original). The transformative standard as articulated by the *Campbell* Court indicates that a work may be transformative due to its "further purpose or different character." *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). So, perhaps, a transformative work could have a "different character" than an underlying work even if the creator of the transformative work did not have a "further purpose" in mind at the moment of creation.

<sup>191</sup> *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 596 (1994) (Kennedy, J. concurring).

a transformative work. Opening that door would further a postmodern copyright law that recognizes that judges should not assess the merit of transformative works any more than they should assess the merit of works when determining originality under *Bleistein*.<sup>192</sup>

Moreover, in *Colting*,<sup>193</sup> the Second Circuit reversed Judge Batts' decision regarding the issuance of a preliminary injunction because Judge Batts failed to consider the factors announced by the Supreme Court in *eBay v. MercExchange, LLC*.<sup>194</sup> In *eBay*, a patent case, the Court held that:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.<sup>195</sup>

In *Colting*, the Second Circuit held that this standard applies to copyright cases at the preliminary injunction phase as well.<sup>196</sup> The Second Circuit also emphasized that, post-*eBay*, courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction" because "[t]he public's interest in free expression . . . is significant and is distinct from the parties' speech interests."<sup>197</sup> Thus, the court brought the interests of the audience of a transformative work into the preliminary injunction analysis.<sup>198</sup>

If one reads the Second Circuit's *Colting* opinion in conjunction with its 2006 opinion in *Blanch v. Koons*,<sup>199</sup> it appears that *Colting* may present an unexpected move toward an even more postmodern view of copyright and fair use than *Blanch* did. With this move, the purpose of the creator of a transformative work, while still relevant, may not be the sole justification for

<sup>192</sup> 188 U.S. 239 (1903).

<sup>193</sup> *Colting*, 607 F.3d at 77-78.

<sup>194</sup> 547 U.S. 388 (2006).

<sup>195</sup> *Id.* at 391.

<sup>196</sup> *Colting*, 607 F.3d at 77-78.

<sup>197</sup> *Id.* at 79.

<sup>198</sup> See Lawrence B. Friedman & David H. Herrington, *After 'eBay' and 'Salinger,' Tougher Standard Applies in the Second Circuit*, 244 N.Y.L.J., Aug. 16, 2010 ("Salinger's mandate that courts must ensure that the 'public interest would not be disserved' by a preliminary injunction, which the Salinger court acknowledged has not previously been a formally stated factor in assessing preliminary injunction motions in the Second Circuit, will guarantee that courts consider and give weight to public interest concerns such as those raised by [news organizations] and other amici [concerned about prior restraints on speech].").

<sup>199</sup> 467 F.3d 244 (2d Cir. 2006).

finding a work to be either transformative or fair. Rather, where a transformative work enables the audience to perceive a new purpose or meaning for the preexisting work, this characteristic of the new work may be sufficient. In addition, even if a court concludes that it is *insufficient* in a particular case, issuing an injunction may be improper because it will harm the audience of the transformative work.<sup>200</sup>

This interpretation of *Colting* may be overly optimistic and generous, but it is a plausible interpretation that is consistent with the trajectory of equitable decisions, including decisions regarding fair use and injunctions, related to copyright. Therefore, it appears that the answer to Professor Jaszi's provocative question of "is there such a thing as postmodern copyright?"<sup>201</sup> may be "yes." If we assume that is correct, new questions emerge regarding where academic discourse regarding copyright should go from here.<sup>202</sup>

## II. REFOCUSING ON MEANINGFUL LEARNING: FOUCAULT AND BUDDHISM AS TOOLS OF SILENCE

As discussed above, postmodernism heavily influenced the academic discourse of the past two decades with respect to copyright laws. If we assume that this discourse succeeded in helping to frame a fair use doctrine that is capable of empowering authors and audiences to exist in a somewhat equitable power relationship with one another that lacks, to the extent feasible,

---

<sup>200</sup> Judge Alex Kozinski of the Ninth Circuit actually called for such an alteration of the standard for issuing injunctions in the wake of the *Dr. Seuss* opinion. See Judge Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y USA 513 (1999). The *Campbell* opinion indicated a similar position was held by the Supreme Court. See *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 578 n. 10 (1994) ("Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, 'to stimulate the creation and publication of edifying matter,' are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.") (internal citations omitted). Although some commentators and judicial opinions recognized the possibility of withholding injunctive relief in fair use cases before *Colting*, this possibility was largely theoretical. See Richard Dannay, *Copyright Injunctions and Fair Use: Enter eBay – Four Factor Fatigue or Four Factor Freedom*, 55 J. COPYRIGHT SOC'Y USA 449, 459 (2008) ("Denial of injunctive relief despite a liability finding has been more theory than practice in copyright cases.").

<sup>201</sup> Jaszi, *Postmodern*, *supra* note 9.

<sup>202</sup> Some scholars will undoubtedly be unwilling to assume this is correct. Even if the assumption is made, other important ongoing conversations remain. For example, one continuing project focuses on social justice issues related to copyright and Internet access. See, e.g., Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97 (2007); Ann Bartow, *Some Peer-to-Peer, Democratically, and Voluntarily-Produced Thoughts*, 5 J. ON TELECOMM. & HIGH TECH. 1. 449 (2007). Continuing debates surrounding the anti-circumvention provisions of the DMCA exist as well. However, rulemakings regarding the impact of these provisions on fair uses have unearthed few problems. See Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/1201/> (last revised Feb. 7, 2011).

domination and exploitation by one of the other,<sup>203</sup> then it is likely time to think carefully about how to talk about this emergent power relationship in a manner that results in as much learning as possible. In other words, now that copyright law is moving toward a scenario in which each individual will be allowed to autonomously and democratically participate in the creation of cultural meaning through networked creative practices, how should our academic discourse regarding copyright theory change?

My suggestion is that our discourse should move toward conversations regarding when silence is advisable. I do not suggest that there is necessarily too much speech in the current cultural marketplace or that we are even approaching that point.<sup>204</sup> I am not attempting to reframe the “babble objection” that Yochai Benkler and others have undermined.<sup>205</sup> Nor am I aiming to criticize networked amateurism or immaturity in a manner akin to Andrew Keen,<sup>206</sup> Mark Bauerlein,<sup>207</sup> or Mark Helprin.<sup>208</sup>

What I am suggesting is that more speech is not inherently good.<sup>209</sup> It is not inherently good for political progress and, perhaps more to the point, it is not inherently good for individual progress. There are limits to what individuals can learn through speech, and there are benefits at times to silence. If the goal of our copyright system is to promote progress through learning, we should discuss what people in our time need to be taught or what they need to teach themselves. We should ask, then, when does silence teach?

This question is not a novel one. In fact, in 1983, Michel Foucault spoke of silence as a beneficial experience.<sup>210</sup> After a career of chronicling discourses regarding the histories,

<sup>203</sup> See Foucault, *Subject*, *supra* note 33 (describing three types of subjugation studied by Michel Foucault).

<sup>204</sup> Sometimes it does feel that way, however. See Alessandro Pizzorno, *Foucault and the Liberal View of the Self*, in MICHEL FOUCAULT, *PHILOSOPHER* 209 (T. Armstrong trans. 1992) (“[C]onsider the current state of freedom of expression. The noise of everything that is freely expressed is such that the expression of any single voice is completely stifled.”); LEWIS HYDE, *COMMON AS AIR: REVOLUTION, ART AND OWNERSHIP* 70 (2010) (“The noise of our village now surrounds us so fully it often seems there is no way to escape it.”).

<sup>205</sup> See BENKLER, *WEALTH*, *supra* note 3, at 466 (“Given freedom to participate in making our own information environment, we neither descend into Babel, nor do we replicate the hierarchies of the mass-mediated public sphere to avoid it.”); see generally CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006) (analyzing how people and technologies sort information and make decisions online).

<sup>206</sup> *THE CULT OF THE AMATEUR: HOW TODAY’S INTERNET IS KILLING OUR CULTURE* (2007).

<sup>207</sup> *THE DUMBEST GENERATION: HOW THE DIGITAL AGE STUPEFIES YOUNG AMERICANS AND JEOPARDIZES OUR FUTURE* (2008).

<sup>208</sup> *DIGITAL BARBARISM: A WRITER’S MANIFESTO* (2009).

<sup>209</sup> If postmodernism has taught us anything, it should be that nothing is inherently good.

<sup>210</sup> See FOUCAULT, *POLITICS*, *supra* note 30, at 3-4. Foucault did not always speak of silence as a beneficial activity, however. See JEREMY R. CARRETTE, *FOUCAULT AND RELIGION: SPIRITUAL CORPORALITY AND POLITICAL SPIRITUALITY* 30 (2000) (explaining that Foucault’s work often focused on silence as a result of oppression).

genealogies, and archaeologies of the power structures that created the modern subject,<sup>211</sup> Foucault stated that he was in favor of “cultivating silence as a cultural ethos.”<sup>212</sup> He explained that he “often wondered why people had to speak. Silence may be a much more interesting way of having a relationship with people.”<sup>213</sup>

Consideration of these statements within the context of Foucault’s self-described intellectual objective – asceticism – suggests that identifying when silence is more interesting than speaking may have transformational potential.<sup>214</sup> Our semiotic democracy may be richer if individuals remain silent at times. Meaning can emerge from receiving communications from others. An audience member can learn by choosing not to respond. An audience or author can learn from witnessing a lack of response.

Lawrence Lessig alludes to this kind of learning in a particularly perceptive passage from his book *Remix: Making Art and Commerce Thrive in the Hybrid Economy*.

The law is just one part of the problem. A bigger part is us. Our norms and expectations around the control of culture have been set by a century that was radically different from the century we’re in. We need to reset these norms to this new century. We need to develop a set of norms to guide us as we experience the [read/write] culture and build hybrid economies. *We need to develop a set of judgments about how to react appropriately to speech that we happen not to like.* We, as a society, need to develop and deploy these norms.<sup>215</sup>

However, Lessig’s book is clearly about “build[ing] a culture around the idea of talking back.”<sup>216</sup> Although he admits that “[t]he first step of learning is listening,” he believes that “the capacity to understand . . . comes not just from passively listening, but also from writing [and speaking].”<sup>217</sup> He also argues that the kind of learning that writing and speaking foster facilitates the development of “integrity” through recognition by the writer/speaker that he is “responsible” for the work product.<sup>218</sup>

The stated objective of *Remix* is to promote more of the kinds of learning that remix culture makes possible and that Lessig

---

<sup>211</sup> See Foucault, *Subject*, *supra* note 33, at 208-09.

<sup>212</sup> FOUCAULT, POLITICS, *supra* note 30, at 4.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 14.

<sup>215</sup> LESSIG, REMIX, *supra* note 8, at 274 (emphasis added).

<sup>216</sup> *Id.* at 103.

<sup>217</sup> *Id.* at 106.

<sup>218</sup> *Id.* at 87. This notion is similar to the romantic idea that an author should possess rights in his works if he is to be held legally responsible for their content. See Mark Rose, *The Author in Court*, in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 215-16 (Martha Woodmansee & Peter Jaszi, eds., 1994) (discussing arguments of Daniel Defoe).

believes are hindered by current copyright laws.<sup>219</sup> Thus, Lessig does not spend much time discussing the attributes of “integrity” and “responsibility” that he celebrates. His focus is on creating change that he sees as necessary before those attributes can be facilitated.<sup>220</sup> Nevertheless, room remains to improve the current academic discussion regarding what we are learning from remix culture.

Many scholars posit that the sole purpose of copyright law is to ensure that incentives exist to encourage the maximum amount of creativity: creativity by authors, and creativity by users. If creative output is maximized, learning should result through the creative process itself as well as through the consumption and repurposing of creative works. Once the proper legal balance is achieved, this theory claims, there is nothing left for copyright to do. But what if we discover, once we have properly calibrated that balance, that the extremely meaningful culture we seek remains absent?

An admittedly nonscientific survey of our current culture<sup>221</sup> reveals that some of us feel that life is becoming more and more *meaningless*. In a recent column in the *New York Times*, David Brooks described “two provocative arguments about American life” made by Jonathan Franzen in the novel *Freedom*.<sup>222</sup> Brooks said that Franzen first “argues that American culture is over obsessed with personal freedom” and then “portrays an America where people are unhappy and spiritually stunted.”<sup>223</sup> Although Brooks took objection to Franzen’s depiction as “tell[ing] us more about America’s literary culture than about America itself,”<sup>224</sup> one can find complaints similar to Franzen’s coming from diverse voices.

Peggy Orenstein has described how creating a Twitter account caused her to feel oddly disconnected from herself while she was constantly engaging in self expression.<sup>225</sup> Sherry Turkle has expressed related concerns regarding our willingness to withdraw from productive relationships by expressing ourselves through technology.<sup>226</sup> And Jaron Lanier has gone so far as to

<sup>219</sup> See generally LESSIG, REMIX, *supra* note 8.

<sup>220</sup> I often disagree with Lessig’s prescriptions for that facilitation.

<sup>221</sup> See Cohen, *Network*, *supra* note 113, at 92 (“What makes the network good can only be defined by generating richly detailed ethnographies of the experiences the network enables and the activities it supports . . .”).

<sup>222</sup> David Brooks, Op-Ed., *The ‘Freedom’ Agenda*, N.Y. TIMES, Sept. 20, 2010, at A31 (citing JONATHAN FRANZEN, FREEDOM (2010)).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Peggy Orenstein, *I Tweet, Therefore I Am: Are Twitter Posts an Expression of Who We Are – or Are They Changing Who We Are?*, N.Y. TIMES MAG., Aug. 1, 2010, at 11.

<sup>226</sup> See Interview, Sherry Turkle, Psychologist and Director of MIT Initiative on Technology and Self, PBS (Sep. 22, 2009),

assert that “[t]he defining idea of the coming era is . . . the decay of belief in the specialness of being human.”<sup>227</sup>

A study conducted by Professor Turkle showed that 400 children and parents surveyed about their use of social media and cell phones indicated that they felt uncontrollably shaped by external forces.<sup>228</sup> The survey participants felt that they constantly were auditioning in front of various audiences, and that the audiences were dictating the participants’ life choices.<sup>229</sup> As Orenstein puts it, on the Internet, “those moments in which you’re supposed to be showing your true self become a performance.”<sup>230</sup> In other words, we are all Kim Kardashian.<sup>231</sup>

Of course, helping people realize that no one has a “true self;” that we *are* in fact repeatedly performing for audiences; and that meaning in our lives and works is shaped, at least in large part, by those around us, is precisely the postmodern project.<sup>232</sup> But we will miss an opportunity if we fail to make the most of the disorientation that our current culture is producing.<sup>233</sup> We risk sliding into nihilism<sup>234</sup> if we do not ask people for more than just

---

<http://www.pbs.org/wgbh/pages/frontline/digitalnation/interviews/turkle.html> (“There’s this sense that you can have the illusion of companionship without the demands of friendship. The real demands of friendship, of intimacy, are complicated. They’re hard. They involve a lot of negotiation. They’re all the things that are difficult about adolescence. And adolescence is the time when people are using technology to skip and to cut corners and to not have to do some of these very hard things.”); *see generally* SHERRY TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER* (2011).

<sup>227</sup> Jaron Lanier, *The End of Human Specialness*, CHRON. HIGHER. EDUC., Aug. 29, 2010. *See generally* JARON LANIER, *YOU ARE NOT A GADGET: A MANIFESTO* (2010).

<sup>228</sup> *See* Orenstein, *supra* note 225.

<sup>229</sup> *See id.*

<sup>230</sup> *Id.*

<sup>231</sup> *See* Lynn Hirschberg, *The Art of Reality*, W, Nov. 2010, at 108 (“Kim Kardashian can’t sing, act, or dance, but she’s found the role of a lifetime in the fine art of playing herself.”); *see also* Andrew Romano, *Lennox’s Other Legacy*, NEWSWEEK, Dec. 13, 2010, at 59 (“Today, the line between life and art is so blurry, and the eyes and ears of the world are so accessible, that everyone suddenly seems to be lusting after his or her own share of the spotlight.”); Patricia Cohen, *In 500 Billion Words, New Window on Culture*, N.Y. TIMES, Dec. 15, 2010, at A3 (a dataset derived from 5.2 million books by Google shows that fame is becoming more fleeting, causing researchers to speculate that “[i]n the future everyone will be famous for 7.5 minutes.”) (internal citations omitted).

<sup>232</sup> *See* James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 495 (1999) (“[T]o the extent that postmodernism has any philosophical content at all, it is its hospitality to a series of arguments – some of them very old indeed – that point out the insoluble difficulties in postulating a coherent, unitary self, text, or set of moral principles.”); Katyal, *Performance*, *supra* note 5, at 478 (describing a “performance theme” within copyright triggered by “postmodern accounts”); PARK, *supra* note 32, at 148 (discussing Jean-Francois Lyotard’s belief that “[a]s opposed to modern belief in the certainty of knowledge and its function as a creator of ethics and justice, postmodernism begins with the question: “Who decides what knowledge is, and who knows what needs to be decided?”) (quoting JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 9 (Geoff Bennington & Brian Massumi trans. Manchester University Press 1984) (1979)).

<sup>233</sup> A recent *New York Times* article argued that we are actually are living through a cultural recession rather than experiencing a newly meaningful world. *See* Michael Kimmelman, *Culture of Recession? Or Vice Versa?*, N.Y. Times, Dec. 16, 2010, at AR26.

<sup>234</sup> *See* Robert C. Solomon, *Nihilism in THE OXFORD COMPANION TO PHILOSOPHY*, *supra*

speech. As Sean Kelly recently wrote,

Nihilism is one state a culture may reach when it no longer has a unique and agreed upon social ground. . . . On the positive end, when it is no longer clear in a culture what its most basic commitments are, when the structure of a worthwhile and well-lived life is no longer agreed upon and taken for granted, then a new sense of freedom may open up. Ways of living life that had earlier been marginalized or demonized may now achieve recognition or even be held up and celebrated. . . . But there is a downside to the freedom of nihilism as well, and the people living in the culture may experience this in a variety of ways. . . . The threat of nihilism is the threat that freedom from the constraint of agreed upon norms opens up new possibilities in the culture only through its fundamentally destabilizing force.<sup>235</sup>

So, how do we conscientiously embrace the freedom that our postmodern moves have provided us in a manner that transforms each of us for the better if unlimited self-expression, facilitated by technological networks, in itself, will not necessarily achieve that goal? How do we build upon realizing that we are not what we once thought we were and that we will become, at least temporarily, whatever we choose? According to Foucault, “[f]rom the idea that the self is not given to us . . . there is only one practical consequence: we have to create ourselves as works of art.”<sup>236</sup>

Creating ourselves as works of art requires patience, care, and technique.<sup>237</sup> As Professor Lessig suggests, it requires reading/listening *and* writing/speaking.<sup>238</sup> It also requires silence at times because recognizing our inability to articulate truth or accurately describe or express our authentic selves through language (or audio or visual media) is part of undoing the romantic notion that meaning is only found in quests for truth and accuracy.<sup>239</sup> As Roland Barthes wrote in his book on Japan,

note 2, at 623 (“By definition, the nihilist believes in nothing and disdains all values.”).

<sup>235</sup> Sean D. Kelly, *Navigating Past Nihilism*, N.Y. TIMES OPINIONATOR, (Dec. 5, 2010) <http://opinionator.blogs.nytimes.com/2010/12/05/navigating-past-nihilism/>. For more on Professor Kelly’s take on how to avoid nihilism see HUBERT DREYFUS & SEAN D. KELLY, *ALL THINGS SHINING* (2010).

<sup>236</sup> DREYFUS & RABINOW, *supra* note 30, at 237. See also ROBERT THURMAN, *INNER REVOLUTION: LIFE LIBERTY AND THE PURSUIT OF REAL HAPPINESS* 270 (1998) (“After throwing off the yoke of dominance, people have the task of finding methods of self-restraint.”).

<sup>237</sup> It may also require the ability to “imagine Sisyphus happy.” See ALBERT CAMUS, *THE MYTH OF SISYPHUS* 123 (Justin O’Brien trans., Vintage Books 1st ed. 1991) (1955).

<sup>238</sup> LESSIG, *REMIX*, *supra* note 8, at 106. See also MILLER, *supra* note 30, at 33 (quoting Michel Foucault: “One writes to become someone other than who one is.”).

<sup>239</sup> DREYFUS & RABINOW, *supra* note 30, at 237 (containing critique by Foucault of Jean Paul Sartre for “turn[ing] back to the idea that we have to be ourselves – to be truly ourselves”).



there is value in reaching a space where language “halts.”<sup>240</sup>

Buddhist thinkers<sup>241</sup> have long recognized such a space, and Foucault, somewhat like Barthes, may have conceived of silence through a Buddhist lens.<sup>242</sup> The Buddha himself reportedly responded to some questions with silence in order to avoid stepping into linguistic traps that assumed the existence of a stagnant truth.<sup>243</sup> One such assumption relates to the existence of the individual self. “Buddhist tradition claims that entities, by nature, lack the self-nature that sustains an entity in separation from other existence. . . . Existence, in this sense, is understood as inter-relationship, and subjectivity, as intersubjectivity. No entity contains its self-nature or independent essence of its own, but exists in conjunction with other beings.”<sup>244</sup>

Buddhists contend that the “illusion”<sup>245</sup> of the self causes us anxiety because we perceive ourselves as competing for power against others who seek to dominate us.<sup>246</sup> Building on the work of Martin Heidegger,<sup>247</sup> postmodernists also tend to recognize that modern beliefs in meta-narratives regarding truth and individuals lead to anxiety and unhappiness.<sup>248</sup> Both Buddhists and postmodernists recommend letting go of your attachment to yourself in order to experience a transformation.<sup>249</sup>

In order to “create a history of the different modes by which,

<sup>240</sup> ROLAND BARTHES, *EMPIRE OF SIGNS* 74 (Richard Howard trans. 1982) (1970); *see also* PARK, *supra* note 32, at 70 (discussing the limitations of Barthes’ position if taken to the extreme).

<sup>241</sup> There is diversity within the views of “Buddhist thinkers” and I do not intend to imply otherwise. *See* PARK, *supra* note 32, at 4 (“no . . . system is homogeneous”). For a survey of various Buddhist schools and traditions *see* RICHARD H. ROBINSON & WILLARD L. JOHNSON, *THE BUDDHIST RELIGION: A HISTORICAL INTRODUCTION* (4th ed. 1997).

<sup>242</sup> *See* Schaub, *supra* note 32, at 314 (linking Foucault’s view of silence with Zen practices); FOUCAULT, *POLITICS*, *supra* note 30, at 4 (referencing Japan as a culture where silence was an “ethos”); *see also* JEREMY R. CARRETTE, *RELIGION AND CULTURE BY MICHEL FOUCAULT* 110 (1999) (stating that Foucault lived in Japan in 1978 and was “very interested in Buddhist philosophy”).

<sup>243</sup> PARK, *supra* note 32, at 151; *see also id.* at 124 (comparing the linguistic analyses of Jacques Derrida with “the Buddha’s silence”).

<sup>244</sup> *Id.* at 164.

<sup>245</sup> *See* Richard Sennett & Michel Foucault, *Sexuality and Solitude*, LONDON REV. OF BOOKS, May, 1981 (with Foucault stating: “The Buddhist . . . has to go to the light and discover the truth about himself. . . . In Buddhism . . . you discover that your self was only an illusion”).

<sup>246</sup> *See* Thurman, *supra* note 234, at 57-58 (“As long as we remain convinced that we are separate from a world we conceive as set against us, we are bound to be frustrated in our desires, bound to lose our battles against such overwhelming odds.”); HIS HOLINESS THE DALAI LAMA, *BECOMING ENLIGHTENED* 3 (Jeffrey Hopkins trans. 2009) (“Seeing that defective states of mind such as lust and hatred are rooted in egotism, Buddha taught something that had not been explained before him, the view of selflessness.”).

<sup>247</sup> *See* PARK, *supra* note 32, at 108 (discussing how Heidegger exposed that the foundation of truth was questionable).

<sup>248</sup> *See id.*, at 148-49 (focusing on Lyotard).

<sup>249</sup> *See, e.g.*, MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 17 (A. M. Sheridan. Smith trans., 1982) (“Do not ask me who I am and do not ask me to remain the same . . .”); *see also* THURMAN, *supra* note 236, at 98 (“selflessness is freedom from alienated ego addiction”).

in our culture, human beings are made subjects,”<sup>250</sup> Foucault conducted empirical studies of power in action over time. By “subject,” Foucault meant two distinct things: “subject to someone else by control and dependence, and tied to [your] own identity by a conscience or self-knowledge.”<sup>251</sup> For his purposes, Foucault identified three types of “struggles” relevant to how subjects are made:

[struggles] either against forms of domination (ethnic, social, and religious); [struggles] against forms of exploitation which separate individuals from what they produce; or [struggles] against that which ties the individual to himself and submits him to others in this way (struggles against subjection, against forms of subjectivity and submission).<sup>252</sup>

Foucault suggested that these three kinds of struggle sometimes mix together, but he argued that “even when they are mixed, one of them, most of the time, prevails. . . . [N]owadays, the struggle against the forms of subjection – against the submission of subjectivity – is becoming more and more important, even though the struggles against forms of domination and exploitation have not disappeared.”<sup>253</sup> In other words,

maybe the target nowadays is not to discover what we are, but to refuse what we are. We have to imagine and build up what we could be . . . . We have to promote new forms of subjectivity through the refusal of this kind of individuality which has been imposed on us for several centuries.<sup>254</sup>

These statements suggest that Foucault saw the postmodern conversation moving toward a rather Buddhist reimagining of the self.<sup>255</sup> Foucault realized that “a certain kind of freedom may have, not exactly the same effects, but as many restrictive effects as a directly restrictive society.”<sup>256</sup> Overcoming domination and exploitation is not enough. Implicit in Foucault’s assertion that asking “who is the author?” of a work limits the potential meanings of the work<sup>257</sup> is the assertion that asking “who are we?” is similarly limiting.<sup>258</sup> According to Foucault, the only kind of curiosity “worth being practiced with a little obstinacy [is] . . . the kind that

<sup>250</sup> Foucault, *Subject*, *supra* note 33, at 208.

<sup>251</sup> *Id.* at 212.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 216.

<sup>255</sup> See generally Schaub, *supra* note 32.

<sup>256</sup> FOUCAULT, *POLITICS*, *supra* note 30, at 5. See also PARK, *supra* note 32, at 150 (discussing the work of Max Horkheimer and Theodor Adorno and stating: “Modernity has become its own victim in terms of creating and believing the myth of a universal emancipation of human ‘selfhood.’”).

<sup>257</sup> See Foucault, *Author*, *supra* note 23, at 238 (stating that “[t]he meaning and value attributed to [a] text depend[s] on the author’s name”).

<sup>258</sup> See Foucault, *Subject*, *supra* note 33, at 216 (discussing Descartes and Kant).

permits one to get free of oneself.”<sup>259</sup>

Our freedom to “author our own lives” is expanding.<sup>260</sup> At this point in time, however, we may be able to begin moving beyond the notion of authorship that clings to control over a conversation and power over our rivals. We may be able to shift toward a vision of a culture unattached to the notion that speech comes from within discrete individuals capable of such control and power.<sup>261</sup> Remaining silent when one is free to speak can sometimes serve as an attempt at such a move.<sup>262</sup> It can “open the way for a transformation, a metamorphosis, that is not simply individual but has a character accessible to others.”<sup>263</sup> By choosing not to “talk back,”<sup>264</sup> a person can alter a relationship and thereby alter herself. “Silence may be a much more interesting way of having a relationship with people.”<sup>265</sup> In these interesting relationships, we may find meaning.<sup>266</sup>

### III. CONCLUSION

This essay does not set out to prove anything. It is rather an attempt to insert the concept of beneficial silence into academic discourse in the U.S. regarding copyright theory.<sup>267</sup> The concept of silence complicates conversations regarding copyright theory because the concept questions a nagging assumption that is infrequently highlighted: the assumption that generating more

---

<sup>259</sup> MILLER, *supra* note 30, at 35.

<sup>260</sup> BENKLER, WEALTH, *supra* note 3, at 175.

<sup>261</sup> Just as creation and copyright ownership can create an “attachment effect,” use of the creations of others in order to “talk back” can have psychological effects. See PATRY, *supra* note 26, at 131-32 (“In short, we become very attached to things we have created, even ideas, as anyone who has been in a meeting with someone who simply will not give up a bad idea can attest to. . . . We may not be able to extinguish such instincts, but policy makers and judges should be aware of their presence and reject them when asserted.”).

<sup>262</sup> See HYDE, *supra* note 204, at 71-75 (explaining that the composer John Cage believed that when we speak we sometimes “screen out the trivia of life so as to focus on what we take to be the important parts, but by doing so we reduce our own awareness and confine ourselves to the story our intended noise is telling”).

<sup>263</sup> MILLER, *supra* note 30, at 32 (quoting Foucault).

<sup>264</sup> LESSIG, REMIX, *supra* note 8, at 103.

<sup>265</sup> FOUCAULT, POLITICS, *supra* note 30, at 4.

<sup>266</sup> For better or worse, people tend to become attached to creative products. See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEORG. L.J. 287, 349 (1988) (describing Hegelian theory used to justify, among other things, moral rights). Recognition that a work has something to say constitutes recognition of the person who created it. *Id.* One justification for property rights is as an effort to reduce “strife.” Carol Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 152 (1998). Remaining silent may sometimes serve that purpose, thereby benefitting both the silent party and the speaking party. Speaking may sometimes bind a person into a level of struggle that is unhealthy. See generally PARK, *supra* note 32 (discussing the anxious futility involved in gaining control over others).

<sup>267</sup> See Paul Edward Geller, *Copyright History and the Future: What’s Culture Got To Do With it?*, 47 J. COPYRIGHT SOC. USA 209, 256 (2000) (suggesting that issues “arising in the shift from patchwork to network” are so novel that they “make[] it hard to draw responses out of traditional doctrines”).

speech is an inherent good that is the purpose of copyright laws.<sup>268</sup> Scholars have used postmodern ideas to interrogate other central aspects of our copyright system, such as the concepts of “authorship,” “originality,” the “work,” and the “user.”<sup>269</sup> But interrogating the notion that copyright should be an ‘engine of free expression’<sup>270</sup> in this manner seems for some reason more troubling.

Perhaps it is more troubling because we may not be able to do anything politically to implement the results of considering silence. In other words, there may not be any legislation that Congress could pass in order to encourage silence. Although courts previously have recognized that copyright laws do not conflict with the First Amendment when those laws merely prevent us from making “other people’s speeches,”<sup>271</sup> I agree with Lawrence Lessig that “none of the . . . justifications for [copyright] regulation could ever support the idea that we intervene to suppress a form of ‘culture’ that some elite believe is not good enough. Subsidies are one thing. Prohibition is something radically different.”<sup>272</sup> Thus, I hope that this essay is not viewed as an attempt to convince academics to serve as technocrats in charge of picking the winners and losers of remix culture.<sup>273</sup>

On the other hand, I do believe that it would be valuable to

---

<sup>268</sup> Another way of stating the assumption, which is perhaps a more fitting description for some scholars’ claims, is that generating more *diverse* speech is an inherent good that is the purpose of copyright laws. See, e.g., Friedman, *supra* note 94, at 158 (“Since a thriving culture is one with as many original works available to the public as possible, some degree of copyright protection is necessary.”); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806-07 (1995) (“My thesis is that . . . new information technologies . . . will dramatically reduce the costs of distributing speech; and, therefore, . . . the new media order that these technologies will bring will be much more democratic and diverse than the environment we see now. Cheap speech will mean that far more speakers - rich and poor, popular and not, banal and avant garde - will be able to make their work available to all.”); Neil Weinstock Netanel, *New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952 (2008) (discussing Jerome Barron’s conception of the First Amendment); FISHER, PROMISES, *supra* note 3, at 28 (“Cultural diversity, Mill observed, has [positive] cumulative cultural effects. . . . The radical expansion of the range of readily available entertainment options that the new technology makes possible could move us closer to Mill’s utopia.”); see also Brett M. Frischmann, *Cultural Environment and the Wealth of Networks*, 74 U. CHI. L. REV. 1083, 1096 (2007) (“We place too much emphasis on easily observable and measurable outputs - works and inventions - and figure the more the merrier.”); Leslie A Kurtz, *Commentary: Copyright and the Human Condition*, 40 U.C. DAVIS L. REV. 1233, 1234-25 (2007) (“The quantity of copyrightable works that are created is often used as a marker for creativity, but there is no reason to believe that maximizing the number of copyrightable works is equivalent to maximizing creativity.”).

<sup>269</sup> See *supra* notes 4-8 and accompanying text.

<sup>270</sup> *Harper & Rowe Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985).

<sup>271</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

<sup>272</sup> LESSIG, REMIX, *supra* note 8, at 97.

<sup>273</sup> Cf. Anne Bartow, *A Portrait of the Internet as a Young Man*, 108 MICH. L. REV. 1079, 1106 (2008) (reviewing Jonathan Zittrain’s *The Future of the Internet and How to Stop It* and implying that Professor Zittrain envisions an Internet run by academics as philosopher kings of sorts).

consider and discuss how, if at all, we can take the concept of beneficial silence into account either within the Copyright Act itself via a reconfigured adaptation right,<sup>274</sup> or within a limiting doctrine, such as fair use.<sup>275</sup> As suggested in Neal Weinstock Netanel's book, *Copyright's Paradox*, copyright laws have an "expressive function."<sup>276</sup> "[L]aw plays a role in symbolically reinforcing certain values, independent of its ability to regulate behavior linked to those values."<sup>277</sup> According to Professor Netanel, "copyright plays a compositional role in our understanding of authorship and of the place of individual expression within our cultural and political matrix."<sup>278</sup> Thus, whether we like it or not, the Copyright Act and the parameters or the fair use doctrine communicate with us.<sup>279</sup> If we accept that silence may have meaningful benefits in some circumstances, do we work at cross purposes if we do not incorporate this understanding into our laws and court decisions?<sup>280</sup> Is ignoring the import of silence any better than ignoring the romantic assumptions that were/are playing roles in other aspects of copyright?

Academics should discuss the various responses to these questions because, as Professor Netanel says, copyright laws say something about what we see as progress.<sup>281</sup> Although I disagree with Professor Netanel's contention that we should work to restore to copyright a positive message regarding the "Enlightenment ideal of progress,"<sup>282</sup> I agree that we should be concerned with the view of progress that copyright laws espouse. Given the postmodern moves achieved over the past twenty years, I prefer

---

<sup>274</sup> 17 U.S.C. § 106(2). Many scholars have proposed ways to amend the adaptation right. See NETANEL, PARADOX, *supra* note 3, at 215-16 (discussing some proposals); Cohen, *Creativity*, *supra* note 3, at 1198-1205 (same).

<sup>275</sup> In fact, it can be argued that the Copyright Act already protects silence in that it protects the right not to speak. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 345 (1841) (infringer "made" George Washington "tell the story of his own life" by publishing Washington's unpublished letters).

<sup>276</sup> NETANEL, PARADOX, *supra* note 3, at 81.

<sup>277</sup> Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1148 (2009). See generally Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) (exploring "how legal 'statements' might be designed to change social norms").

<sup>278</sup> NETANEL, PARADOX, *supra* note 3, at 105.

<sup>279</sup> See Katyal, *Performance*, *supra* note 5, at 479 ("Through the law's protection of parody, property becomes a dialogue, instead of a one-way transmission of meaning."); see also HYDE, *supra* note 204, at 213 ("[P]ractices around cultural property allow us to be certain kinds of selves; with them we enable or disable ways of being human.").

<sup>280</sup> See Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1574 (2009) ("Copyright law, much like the common law, is concerned with inducing behavior of a certain kind by incentivizing it.").

<sup>281</sup> NETANEL, PARADOX, *supra* note 3, at 106.

<sup>282</sup> See *id.* (stating that this view of progress "embodies the belief that the accumulation of knowledge and deployment of reason will advance human welfare"); see also THURMAN, *supra* note 236, at 214-15 (describing problems generated by Enlightenment thinking).

the view of progress that Julie Cohen has articulated: “Stripped of its association with modernist teleologies, progress consists, simply, in that which causes knowledge systems to come under challenge and sometimes to shift.”<sup>283</sup> At the present time, in our networked and participatory world, silence is at times progressive. But can our copyright laws say that?

---

<sup>283</sup> See Cohen, *Creativity*, *supra* note 3, at 1168 (arguing that fear of relativism has led some scholars, such as Jurgen Habermas, to try to preserve Enlightenment notions and liberal political theory); see also PARK, *supra* note 32, at 154-55 (discussing Habermas’ efforts to find “a way back to the Enlightenment project”); see generally Brent Flyvbjerg, *Habermas and Foucault: Thinkers for Civil Society*, 49 BRIT. J. SOCIOLOGY 211 (1998) (summarizing differences between Foucault and Habermas). I often disagree with the policies Professor Cohen advocates, however.