

SOCIAL SEMIOTICS IN THE FAIR USE ANALYSIS

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* Associate Professor, Texas Wesleyan School of Law. I would like to express my appreciation to participants at the 2010 Intellectual Property Scholars Conference at Berkeley School of Law, the 2010 Intellectual Property Scholars Roundtable at Drake University School of Law, the 2010 Southwest Junior Scholars Conference at Arizona State University's Sandra Day O'Connor College of Law, and the Annual Conference of the Central States Law School Association at Capital Law School. I am particularly indebted to Professor Laura Heymann for her valuable comments. Thank you also to Rebecca Croes, Abby Kwellner, and Stevenson Moore, for providing excellent research assistance and support. Finally, thank you Sarah, Will, and Ella, for the most important things.

I. INTRODUCTION

In 2008, artist Shepard Fairey created the now-iconic “Hope” poster,¹ a closely cropped image of presidential candidate Barack Obama, composed in geometric forms of red, white, and blue. The Hope poster was wildly popular with Obama supporters, selling thousands of copies.² Proceeds from these sales were used to produce thousands more posters, which were given away for free.³ After Obama’s election, the original work was acquired by the Smithsonian Institution’s National Portrait Gallery for its permanent collection.⁴

The Hope poster was created using a reference photograph of Obama.⁵ In 2009, The Associated Press (“The AP”) claimed copyright ownership of that photograph and sought to obtain licensing fees and royalty revenues from Fairey for its use.⁶ Those initial efforts failed and ultimately led to litigation.⁷ The AP claimed copyright infringement, and Fairey raised a fair use defense.⁸ At the heart of that defense is the issue of transformativeness, a key factor in those infringement cases in which protected works are used as raw material for the creation of subsequent works. Copyright doctrine accommodates transformative new works because, rather than merely superseding the original work, the subsequent work alters the original with new “expression, meaning, or message.”⁹ Evaluation of a new work’s transformative value traditionally requires an examination of the new work and the transforming artist’s process of creation for evidence of authorial purpose, process, and activity.¹⁰ As with many postmodern pieces, however, the traditional transformativeness analysis does not favor Fairey’s Obama posters. Copyright law — stubbornly clinging to romantic ideals of authorship and originality as the exclusive grounds for protection — appears unable to acknowledge the social value of Fairey’s work.

In this case, evidence of the Obama posters’ social value is all around us. The Hope poster was not only popular with Obama sup-

1. The “Hope” poster was one of several similarly themed works created by Fairey in support of Obama’s candidacy for President of the United States. Complaint at 1, *Fairey v. Associated Press*, No. 09 Civ. 1123 (S.D.N.Y. Feb. 9, 2009) [hereinafter Complaint]. The Obama campaign “encouraged” but was not initially involved in the creation of these works, although it later embraced Fairey’s efforts. *Id.* at 3.

2. *Id.* at 6.

3. *Id.*

4. Dave Itzkoff, *National Portrait Gallery Gets Obama Poster*, N.Y. TIMES, Jan. 8, 2009, at C2, available at <http://artsbeat.blogs.nytimes.com/2009/01/07/national-portrait-gallery-gets-obama-poster>.

5. Complaint, *supra* note 1, at 1, 7.

6. *Id.* at 1, 9.

7. *Id.*

8. *Id.* at 1, 10–11.

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

10. *See infra* Part II.

porters, it was also a lightning rod for his detractors. As discussed in Part III.C.3, Fairey intended the image to convey a message of idealistic leadership potential, and for most supporters this was precisely the meaning derived. But for other, differently situated audiences, the meaning of the work was quite different. These various interpretive communities engaged the Hope poster as a symbol of socialism, communism, religious idolatry, anti-Americanism, and elitism. In essence, the effect of this single work was to cultivate multiple meanings, each of which can be seen as a new form of expression. The transformative nature of the poster is evidenced in mash-ups produced by Obama supporters, who took Fairey's intended message and made it their own, producing both pro-Obama and anti-McCain or anti-Palin derivatives. Obama detractors did the same, alternating both image and text to produce mash-ups that reflected their own interpretations of Fairey's work. This is precisely the transformative effect that should be accommodated through the fair use doctrine. Under conventional fair use analysis, however, these dramatic transformative effects are nearly irrelevant.

Fair use is perhaps the most contested doctrine in all of copyright law.¹¹ New technologies that not only enable increased audience engagement with cultural works, but also facilitate the use of these "raw materials" to produce new works have made fair use more controversial.¹² At another level, these technologies have made visible an audience, not of passive content consumers, but of active participants in discourse around and about those works.

This Article presents an argument for an expansion of fair use based on social semiotic theory, rather than on theories of authorship or rights of autonomy of subsequent authors. Instead, it employs a theory of the audience linked to social practice. The Article asks, in essence, whether audiences determine the meaning, purpose, function, or social benefit of an allegedly infringing work, often independent of the creator's intent. If so, does it matter for the purpose of a fair use analysis based on a claim of transformativeness?

Part II sets the doctrinal groundwork for an exploration of social semiotic theory in the fair use inquiry. It focuses on transformativeness, a concept at the heart of the fair use analysis of the purpose and character of a defendant's use of a copyrighted work. Transformative-

11. See, e.g., *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (containing the oft-cited statement that "the issue of fair use . . . is the most troublesome in the whole law of copyright," generally credited to Judge Learned Hand).

12. See, e.g., Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 930-55 (2009) (discussing the copyright problems associated with appropriation and remix); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1491 (2007) (noting the prevalence of user-produced content and the importance of remix as a mode of production as requiring reform of fair use).

ness recognizes the value of new works created using protected works as raw material, where those subsequent works constitute new expression, meaning, or message, and accommodates these works within the limitations of existing expressive monopolies.

Part III explores the prevailing conception of transformativeness and proposes an alternative conception. In practice, the transformativeness inquiry focuses on whether the defendant engaged in authorial purpose or activity. This focus on authorship, rather than the resulting work, emphasizes monopoly rights-based incentives to create new works at the expense of accommodating new works that use protected works as raw materials. This imbalance in the equilibrium between monopoly incentive and accommodation means that the full social benefit of additional expression is not realized. Social semiotics offers an alternate conception of transformativeness in which social value is manifest in the process of meaning-making that occurs as individuals and interpretive communities engage the work. Copyright's commitment to the enrichment of society can be best evaluated in the context of this process of semiosis as a distinct question apart from the creation of new authorial rights. Finally, the case of *Fairey v. Associated Press* is used to illustrate how social semiotic theories are applied.¹³

Part IV looks at how social semiotic theory might be relevant in an analysis of the remaining fair use factors: the nature of the copyrighted work, the amount and substantiality used, and the effect on actual and potential markets. This Article concludes that social semiotics is most helpful in terms of the nature of the copyrighted work, with only limited application to the remaining factors. Part V concludes.

II. SITUATING TRANSFORMATIVENESS IN THE FAIR USE ANALYSIS

The starting point for a fair use analysis is a defendant's alleged infringement of a copyright holder's exclusive rights attendant to an original work, usually through the reproduction of the original or the

13. In January 2011, *Fairey v. Associated Press* was settled prior to a decision on the merits. Press Release, The Associated Press, *AP and Shepard Fairey Announce Agreement in Obama Poster Case*, Jan. 12, 2011, available at http://www.ap.org/pages/about/pressreleases/pr_011211a.html. In March 2011, The AP settled its claims against Obey Clothing, the exclusive licensee of Shepard Fairey. Press Release, The Associated Press, *The Associated Press and Obey Clothing Settle Copyright Infringement Suit*, March 16, 2011, available at http://www.ap.org/pages/about/pressreleases/pr_031611b.html. Also in March 2011, the AP filed suit against clothing retailers Urban Outfitters and Nordstrom, among others, for selling apparel adorning with the Fairey image; these suits remain active as of publication. Press Release, The Associated Press, *AP Sues Clothing Retailers over 'HOPE' Image*, March 11, 2011, available at http://www.ap.org/pages/about/whatsnew/wn_031111a.html.

creation of a derivative work without the authorization of the copyright holder. Fair use is thus an affirmative defense to the infringement charge.¹⁴ This Part of the Article both sets out the substance of the fair use analysis and explores the emergence of transformativeness as a central question in that inquiry.

A. The Fair Use Defense

Most scholars agree that fair use first appeared in American law as a common law concept, grounded in two mid-nineteenth century opinions by Justice Story.¹⁵ The first, *Gray v. Russell*, discussed in dicta the difficulty of determining whether infringement of a protected work might be excused where the subsequent work is in the form of a criticism or abridgement of the original.¹⁶ This opinion was followed two years later by *Folsom v. Marsh*, in which Justice Story addressed and rejected defendants' affirmative assertion of fair use.¹⁷ "[T]he real hinge of the whole controversy" was, Story observed, whether "the defendants had a right to abridge and select, and use the materials which they have taken for their work, which, though it embraces [a significant amount of the original work], is an original and new work."¹⁸ The defendants sought to justify their significant use of the original works by arguing that "only such materials . . . as suited [the

14. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (stating that "fair use is an affirmative defense"). *But see* WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:1.50 (2011) ("Limitations and exceptions to copyright," a phrase much in current use, posits the issue backwards . . ."). According to Patry, before the statutory recognition of the doctrine, fair use was used by courts "to ensure that the objectives of copyright . . . were not stifled by copyright owners bent on shutting down all unauthorized uses or extracting license fees for conduct that should be uncompensated." *Id.* Further, Patry calls fair use "an important safety valve that acts as a bulwark against the monopoly power that inheres in an exclusive right and which leads owners of such rights to act in ways contrary to the public interest." *Id.*; *see also* Mary W. S. Wong, "Transformative" User-Generated Content in Copyright Law: *Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075, 1109–10 (2009).

15. Early in its discussion of fair use, the *Campbell* Court turned to Justice Story to describe the importance of fair use:

For as Justice Story explained, "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."

Campbell, 510 U.S. at 575 (alteration in original) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)). It is also broadly acknowledged, however, that American courts drew from English law in developing their common law doctrine. *See, e.g., id.* at 576 (referencing cases brought under England's Statute of Anne, particularly involving "fair abridgements" of existing works).

16. 10 F. Cas. 1035, 1038 (C.C.D. Mass. 1839). *See also* WILLIAM F. PATRY, PATRY ON FAIR USE § 1:20 n.9 (2009) [hereinafter PATRY ON FAIR USE] (discussing the *Gray v. Russell* decision).

17. 9 F. Cas. 342, 347–49 (C.C.D. Mass. 1841).

18. *Id.* at 347.

adapting author's] own limited purpose as a biographer" had been selected.¹⁹ Justice Story, although conceding this point and noting that defendants had "produced an exceedingly valuable book," rejected this assertion of contextual need as dispositive of the question:

It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. . . . [It does not] necessarily depend upon the quantity taken It is often affected by other considerations, [such as] the value of the materials taken, and the importance of it to the sale of the original work. . . . In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.²⁰

As conceived in *Folsom*, fair use turned both on quantitative and qualitative distinctions between the original work and the allegedly infringing work, and on associated market harms. Applying these principles to the case at bar, the defense was rejected.²¹

19. *Id.* at 348.

20. *Id.*

21. Patry describes the application of these principles as follows:

Why did Upham lose? He had appropriated a mere 4.5% of the plaintiff's work, and had in the process produced an admittedly excellent work the enjoining of which prevented its use by the intended audience of schoolchildren. Justice Story's decision was based on his conclusion that Upham's use of the plaintiff's work was not the result of a "fair exercise of a mental operation." That this failure is what doomed Upham is established by the court's comment that this was not a case where "abbreviated or select passages are taken from particular letters; but the entire letters are taken." Earlier, after remarking on the necessity of a "real [and] substantial condensation," Justice Story had condemned the "facile use of the scissors," which is apparently what he thought defendant had done by copying entire letters.

PATRY ON FAIR USE, *supra* note 16, § 1:20 (footnotes omitted) (quoting *Folsom*, 9 F. Cas. at 345, 349).

Fair use remained a common law doctrine until its codification in Section 107 of the Copyright Act of 1976:²²

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.²³

In substance, statutory fair use leans heavily on considerations identified in *Folsom*.²⁴ The defense is framed by examples contained in the preamble, focusing on socially beneficial works promoting critical discourse, news, and education.²⁵ These examples are followed by a list of four non-exclusive factors²⁶ to guide the resolution of a particu-

22. Copyright Act of 1976, 17 U.S.C. §§ 101–805 (2006). It is generally agreed that “Section 107 is intended to restate the [common law] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” H.R. REP. NO. 94-1476, at 66 (1976).

23. 17 U.S.C. § 107 (2006).

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

25. H.R. REP. NO. 94-1476, at 65 (1976).

26. *Id.* But see Beebe, *supra* note 24, at 563 (finding that in fact “judges rarely explicitly considered factors beyond the four listed in section 107”).

lar case.²⁷ There are no per se cases of fair use; rather, each factor should be considered against the specific facts of an individual case.²⁸

B. The Emergence of Transformativeness

Early Supreme Court cases applying Section 107 contained no reference to the transformative nature of a work as a factor in the fair use analysis. Instead, the Court tended to focus on the interplay between the commerciality aspect of factor one and the question of market harm set forth in factor four. In *Sony Corp. v. Universal City Studios, Inc.*,²⁹ the Court created what came to be known as “the *Sony* presumption,”³⁰ positing that “under factor one, a commercial ‘purpose’ is presumptively unfair and a noncommercial purpose presumptively fair.”³¹ Commercial use is treated as a “presumptively . . . unfair exploitation of the monopoly privilege” because it tends to inhibit the copyright holder’s ability to capitalize on potential markets and thus also inhibit the incentive to create.³² Noncommercial use is comparatively less likely to have this effect, and thus carries no presumption of market harm, requiring instead a showing of either actual harm or the likelihood of future harm caused by the challenged use.

27. See, e.g., H.R. REP. NO. 94–1476, at 66 (“[T]here is no disposition to freeze the doctrine in the statute . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”).

28. See, e.g., *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009) (“Section 107 contemplates that the question of whether a given use of copyrighted material is ‘fair’ requires a case-by-case analysis in which the statutory factors are not ‘treated in isolation’ but are ‘weighed together, in light of the purposes of copyright.’” (quoting *Campbell*, 510 U.S. at 578)); Jeannine M. Marques, Note, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 BERKELEY TECH. L.J. 331, 335 (2007) (“Fair use is a mixed question of law and fact that can be determined at summary judgment if no genuine issue of material fact exists.”); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“Fair use is a mixed question of law and fact.”).

29. 464 U.S. 417 (1984) (relying primarily on the fourth fair use factor to hold that the time-shifting of free broadcast television shows constituted fair use).

30. See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1386 (6th Cir. 1996) (discussing the continuing viability and substance of the “*Sony* presumption” after *Campbell v. Acuff-Rose*); Stacey L. Dogan, *Comment: Sony, Fair Use, and File Sharing*, 55 CASE W. RES. L. REV. 971, 973–74 (2005) (discussing the applicability of “the *Sony* presumption” to cases involving peer-to-peer file-sharing networks); Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1870–71 (2006) (discussing application of “*Sony*’s presumption” in *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992)).

31. Beebe, *supra* note 24, at 599; see also *Sony*, 464 U.S. at 449 (observing that “[i]f the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair,” but “[t]he contrary presumption” was to be applied to the “noncommercial, nonprofit activity” at issue in the case at bar). Some commentators have criticized the Supreme Court for relying solely on the work of commentator Melville Nimmer for this proposition, without adequate explanation or citation to case law. See PATRY ON FAIR USE, *supra* note 16, § 6:5 (arguing that the “handful of cases cited by Professor Nimmer do not bear out his assertion”).

32. *Sony*, 464 U.S. at 450–51; see also Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 943–44 (2005) (discussing the Court’s rationale for the *Sony* provision).

Although the Court cast some doubt on the *Sony* presumption in *Harper & Row*,³³ the presumption was apparently reaffirmed in *Stewart v. Abend*.³⁴ During the period between *Harper & Row* and *Stewart v. Abend*, despite the ambiguity created by *Harper & Row*, the *Sony* presumption was readily applied by most lower courts.³⁵ The effect on potential markets, buttressed by commerciality, thus remained the dominant factor in the fair use analysis.

However, just four years later, the Court appeared to reverse course in *Campbell v. Acuff-Rose*.³⁶ “Apparently abandoning the idea that any factor enjoys primacy, *Campbell* instructs that “[a]ll [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.”³⁷ Indeed, the Court seemed to chide the Court of Appeals for “applying a presumption ostensibly culled from *Sony*” that commercial use is always unfair,³⁸ calling commerciality just one element of the first factor analysis to be weighed in a “sensitive balancing of interests.”³⁹ Liberally invoking *Harper & Row*, while all but ignoring *Stewart v. Abend*, the Court treated this as a settled question and criticized the Court of Appeals for not recognizing it as such:

Sony itself called for no hard evidentiary presumption. . . . The Court of Appeals’s elevation of one sentence from *Sony* to a *per se* rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication. Rather, as we explained in *Harper & Row*, *Sony* stands for the

33. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985). The *Harper & Row* Court initially stated that “[t]he fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use,” suggesting a certain equality among factors. *Id.* The Court immediately hedged this observation, however, by quoting the presumptive language from *Sony* and weighing the “profit from exploitation” heavily against the defendant. *Id.*

34. 495 U.S. 207, 237 (1990) (invoking the *Sony* presumption without reference to *Harper & Row*, and apparently rejecting any suggestion that *Harper & Row* had altered the landscape).

35. *See, e.g., Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 844 (11th Cir. 1990) (applying the presumption in a factor one analysis and finding that defendant’s “flagrant commercial purpose . . . cannot be disguised as fair use”); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (applying the presumption and extending it to factor four). *But see, e.g., Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1261–62 (2d Cir. 1986) (rejecting plaintiff’s assertion that the commercial nature of defendant’s use mandated judgment against him, and further rejecting the suggestion that the *Sony* “Court intended to attach heightened significance to the element of commerciality”).

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

37. *Am. Geophysical Union v. Texaco Inc.*, 37 F.3d 881, 894 (2d Cir. 1994) (alteration in original) (quoting *Campbell*, 510 U.S. at 578).

38. *Campbell*, 510 U.S. at 583–84.

39. *Id.* at 584–85 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984)).

proposition that the “fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.” But that is all, and . . . even the force of that tendency will vary with the context⁴⁰

In a sharp departure, the *Campbell* Court expressly limited application of the commercial-use market-harm presumption to that narrow band of cases in which the defendant engaged in “mere duplication for commercial purposes.”⁴¹ Reaching back to Justice Story’s *Folsom* decision, the Court found that such duplication “clearly ‘supersede[s] the objects . . .’ of the original and [thus] serves as a market replacement for it.”⁴² Market harm to the original is therefore likely.⁴³ Absent

40. *Campbell*, 510 U.S. at 584–85 (citations omitted) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)); see also *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998) (recognizing that the *Campbell* Court “rejected” the *Sony* presumption). *Campbell* appeared to debunk the *Sony* presumption once and for all. See Pierre J. Leval, *Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 22 (1994) [hereinafter Leval, *Justice Souter’s Rescue of Fair Use*] (describing *Campbell* as having “fixed the rudder and restored the compass bearing” in fair use analysis by, *inter alia*, clearly eliminating the “pernicious ‘commercial use’ presumption”). But see Beebe, *supra* note 24, at 601–02 (invoking empirical data to “suggest that Judge Leval may have been overly pessimistic with respect to how judges used the *Sony* presumption before *Campbell*, but overly optimistic with respect to how they would use it after *Campbell*”). The *Sony* presumption remains a stubborn fixture in fair use case law, applied in some of even the most recent cases. See, e.g., *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 530 (9th Cir. 2008) (applying a rule gleaned from *Sony* that “commercial use of copyrighted material is ‘presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright’” (quoting *Sony*, 464 U.S. at 451)). Indeed, Barton Beebe’s empirical study of copyright fair use cases found a “renewal of interest in the presumption among some lower courts” applying the first factor, calling the *Sony* presumption an “exceptionally tenacious meme[] in the fair use case law.” See Beebe, *supra* note 24, at 601–02.

Part of this tenaciousness can perhaps be explained by the relationship between the first factor’s “commercial use” inquiry and the fourth factor’s “market effect” analysis. In evaluating the fourth factor, the *Sony* court recognized oppositional evidentiary presumptions arising from the commercial/noncommercial distinction. 464 U.S. at 451. Commercial use should be treated as a “presumptively . . . unfair exploitation of the monopoly privilege” that inhibits the copyright holder’s ability to capitalize on potential markets and thus the incentive to create. *Id.* Noncommercial use is comparatively less likely to have this effect. *Id.* Thus, noncommercial use would carry no presumption of market harm and instead require a showing of either actual harm or the likelihood of future harm caused by the challenged use. *Id.*

41. *Campbell*, 510 U.S. at 591 (emphasis added) (noting, *inter alia*, that *Sony* involved the “verbatim copying” of television shows); see also Christina Mitakis, *The E-Rated Industry: Fair Use Sheep or Infringing Goat?*, 6 VAND. J. ENT. L. & PRAC. 291, 300 (2004) (describing *Campbell*’s reworking of the market-harm presumption). The *Campbell* decision arguably called into question the very existence of a market-harm presumption, even under these limited circumstances, by saying only that it “might find support in *Sony*.” *Campbell*, 510 U.S. at 591 (emphasis added).

42. *Campbell*, 510 U.S. at 591 (alteration in original) (citation omitted) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

43. *Id.* (stating that this conclusion “simply makes common sense”).

“mere duplication for commercial purposes,” however, no such presumption of market replacement and market harm is supported.⁴⁴

In narrowing the effect of the commercial/noncommercial distinction — premised on the distinction between mere duplication and alteration — *Campbell* circled back to the first factor and the newly recognized doctrine of transformative use,⁴⁵ noting that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁴⁶ Although drawn from prior sources, the concept of transformative use was most famously articulated in Judge Leval’s 1990 law review article, *Toward a Fair Use Standard*.⁴⁷ Linking transforma-

44. *Id.* As discussed *supra* note 40, however, the *Sony* presumption is an “exceptionally tenacious meme[] in the fair use case law.” Beebe, *supra* note 24, at 601–02. See, e.g., *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (citing *Sony* for the proposition that market harm can be assumed with commercial uses of a copyrighted work); PATRY ON FAIR USE, *supra* note 16, § 3:4 (observing that “so effective has *Campbell* been in purging fair use of the nest of presumptions and anticommercial prejudices that had grown up, that it is quite common for courts of appeals to describe a user’s commercial purpose as virtually irrelevant” but that “[o]ther panels, however, continue to characterize commercial uses negatively”).

45. *Campbell*, 510 U.S. at 591 (setting mere duplication and transformative use in opposition, and concluding that “when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred”).

46. *Id.* at 579. Transformateness exists on a sliding scale. The more transformative the subsequent work, the less significant the other factors — including commercialism. This is because a commercial work that is highly transformative is likely to add new and original work to the marketplace, serving the goals of copyright, without regard to its commercial nature. See, e.g., Pamela Samuelson & Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 I/S: J.L. & POL’Y FOR INFO. SOC’Y 67, 83–85 (2010) (discussing the link between transformateness and the goals of copyright). This oppositional relationship between transformateness and the other fair use factors helps to explain the *Campbell* Court’s rather drastic contraction of *Sony*’s broad presumption of market harm. The *Campbell* Court limited the market harm presumption to commercial works of “mere duplication” not because of their commercial purpose, but because identical or verbatim copies are significantly more likely to serve as a substitute in the market for the original goods. *Campbell*, 510 U.S. at 591. Outside of this singular circumstance, however, the Court declined to recognize any operative market harm presumption or factor grounded in transformateness, but instead maintained the analytical distinction between these parallel but discrete inquiries. See *id.* at 577–94.

47. Judge Leval argued prior to the *Campbell* decision that:

Factor One’s direction that we “consider[] . . . the purpose and character of the use” raises the question of justification. Does the use fulfill the objective of copyright law to stimulate creativity for public illumination? This question is vitally important to the fair use inquiry, and lies at the heart of the fair user’s case. Recent judicial opinions have not sufficiently recognized its importance.

In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user’s justification against factors favoring the copyright owner.

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*.

tiveness to the purposes of copyright and the justification of fair use accommodation, Leval offered:

The use must be *productive* and must employ the quoted matter in a *different manner* or for a *different purpose* from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test If, on the other hand, the secondary use adds *value* to the original — if the quoted matter is used as raw material, transformed in the creation of *new* information, *new* aesthetics, *new* insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.⁴⁸

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

This factor draws on Justice Story's formulation, "the nature and objects of the selections made." The enquiry here may be guided by the examples given in the preamble to § 107 The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."⁴⁹

In application, the Court noted, works of transformative value "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."⁵⁰

Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) [hereinafter Leval, *Toward a Fair Use Standard*] (alteration and omission in original) (footnotes omitted).

48. *Id.* (emphases added) (footnote omitted).

49. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994) (alteration in original) (citations omitted) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841); Leval, *Toward a Fair Use Standard*, *supra* note 47, at 1111).

50. *Id.* at 579. The Court then evaluated the parodic nature of the infringing work, *id.* at 580–83, but offered little more on the concept of transformativeness itself.

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

Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.⁵¹

As this passage from *Campbell* suggests, a primary goal of copyright is to provide a public benefit by expanding the available body of “new” expression. Two statutory mechanisms are employed to promote the creation of these new works. The first mechanism (some would say the primary mechanism) provides authors of new works with an artificially limited monopoly in those works, thereby facilitating a market in which to exploit their value.⁵² These are the Section 106 rights.⁵³ The second mechanism secures space for others to use protected works as raw materials in the production of new works.⁵⁴ This is the Section 107 fair use defense.⁵⁵ Fair use not only serves the goals of copyright by permitting the creation of new works, but also attends to First Amendment concerns regarding restrictions on free expression.⁵⁶ The fair use analysis thus seeks a socially optimal point of equilibrium between the grant of substantive rights of exploitation

51. *Id.* at 579 (footnote omitted) (citations omitted); see also *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) (embracing the district court's determination “that the commercial aspect [of the subsequent work] was not significant in light of [its] transformative nature”). *Campbell* notes, however, an “obvious statutory exception to this focus on transformative uses [in] the straight reproduction of multiple copies for classroom distribution.” 510 U.S. at 579 n.11. This is precisely the point on which the dissent in *Princeton University Press v. Michigan Document Services, Inc.* thought the majority erred, when the majority held that a copy house could not serve as a money-making middleman between professors and students in printing and selling coursepacks, despite their obvious educational nature. 99 F.3d 1381, 1400 (6th Cir. 1996) (Ryan, J., dissenting).

52. See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

53. 17 U.S.C. § 106 (2006).

54. This mechanism raises the question of whether the subsequent creator should himself be incentivized through the provision of substantive rights in the new work. This question implicates the difficult intersection between transformativeness and the derivative work right.

55. 17 U.S.C. § 107 (2006).

56. See *Eldred*, 537 U.S. at 219–20.

in the original work and the accommodation of subsequent works that draw from that protected expression.⁵⁷

Because transformativeness is weighed on both sides of this equilibrium, transformativeness can sometimes appear to dominate the fair use analysis. First, transformative works are more likely to further the purposes of copyright by adding something new — “a further purpose or different character, . . . new expression, meaning, or message.”⁵⁸ Second, although the market harm analysis is distinct from that of purpose and character, as a descriptive matter transformative works are generally less likely to serve as market substitutes for the original work upon which they draw, thereby disincentivizing the copyright holder by usurping the market for the original work.⁵⁹

III. SOCIAL SEMIOTICS AND TRANSFORMATIVE USE

Transformativeness is a core concept in the fair use analysis, often framed as crucial to the outcome of a particular case. The prevailing conception of transformativeness is one of romantic authorship, evidenced by a defendant’s authorial purpose or activity. However, this prevailing conception of transformativeness creates a doctrinal conflict between mechanisms of monopoly incentive and boundaries of accommodation, imposing a rivalry of incentivized authors that is at odds with the purposes of fair use. This Article proposes an alternate conception of transformativeness to supplement, rather than replace, the authorship model. This approach, grounded in social semiotic theory, attempts to account for the multiple and divergent meanings created as various interpretive communities engage a particular work, clearing “breathing space”⁶⁰ in which this process of meaning-making may occur.

57. *E.g.*, *Marques*, *supra* note 28, at 335 (“[A] use is usually fair if it can serve the dual purposes of stimulating the public’s wealth of knowledge without diminishing incentives for creativity.”).

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

59. *See Wong*, *supra* note 14, at 1129 (observing that there is an “uncertain relationship between transformativeness (and more generally, the first fair use factor) and the fourth factor of market harm”). However, it should be noted that any relationship between transformativeness and substitutive market harm is non-operative — merely an observed inverse correlation. Moreover, focusing the market substitution analysis on transformativeness dilutes both the market comparison at the heart of market harm and the transformativeness inquiry. Transformativeness is in essence subsumed into the question of market substitution and, in most cases, the determination of market harm. Maintaining the distinction between market harm analysis and transformativeness allows the fair use analysis to seek that point of equilibrium previously discussed: between the incentives provided by the copyright holder’s substantive right to exploit the original work and the public benefit derived from accommodating the creation of new works that draw from that protected expression. *See supra* notes 52–58 and accompanying text.

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

A. Prevailing Conceptions of Transformativeness and Authorial Presence

Laura Heymann observes a crucial shift between Judge Leval's articulation of transformative use and that of the Supreme Court in *Campbell*.⁶¹ Omitted from *Campbell* is Leval's reference to "productive" use, as well as to "secondary use [that] adds value to the original."⁶² Likewise, *Campbell* does not specify the use of the original work as "raw materials" to create "new information, new aesthetics, new insights and understandings."⁶³ Instead, *Campbell* looks at the extent to which a subsequent work alters the original work by "add[ing] something new," in the form of a new expression, new meaning, or new message.⁶⁴

Heymann interprets this shift as encouraging courts to focus the transformativeness inquiry on "authorial presence" and the degree to which the defendant has engaged in "authorial activity."⁶⁵

This language represents a subtle shift, to be sure, but one that — at least on its face — seems to encourage courts to focus on whether the second artist has added material to the first work to the exclusion of consideration of whether the artist has recontextualized the copyrighted work. In other words, *Campbell* suggests that the focus should be not on whether the defendant has transformed the meaning of the work but on what the defendant has done to the work — a shift in focus from reader interpretation to authorial activity.⁶⁶

61. See Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 452 (2008).

62. *Id.* ("[W]hen the Court incorporated this language into its opinion in *Campbell*, it engaged in a bit of subtle, but important, transformation itself. No longer was the focus on whether the use of the copyrighted work was 'productive' or 'add[ed] value to the original'" (alteration in original) (quoting Leval, *Toward a Fair Use Standard*, *supra* note 47, at 1111)).

63. Heymann, *supra* note 61, at 452 (noting that in *Campbell*, the focus was no longer on what Leval called "new information, new aesthetics, new insights and understandings" (quoting Leval, *Toward a Fair Use Standard*, *supra* note 47, at 1111)); see *Campbell*, 510 U.S. at 579.

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

65. Heymann, *supra* note 61, at 452.

66. *Id.* (noting that *Campbell* "suggests that 'transformativeness' depends to a significant extent on evaluating the second artist's creative activity: when and how strongly he asserts his own authorial presence"); see, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) ("We decline to consider Mattel's survey in assessing whether Forsythe's work can be reasonably perceived as a parody. Parody is an objectively defined rhetorical device."); *Yankee Publ'g Inc. v. News Am. Publ'g Inc.*, 809 F. Supp. 267, 280

Beyond an isolated comparison of the two standards, her claim is difficult to assess because the analysis in *Campbell* itself is so myopically focused on parody as a singular category of use. There is, indeed, no mention of productive use,⁶⁷ new information, aesthetics, insights or understandings — all concepts invoked by Leval to describe transformative use.⁶⁸ *Campbell* does use the word “value” — both in terms of “transformative value”⁶⁹ and “social value”⁷⁰ — but without clear reference to a “secondary use [that] adds value to the original,” as Leval contextualizes the term.⁷¹ Indeed, in the case of parody, its social value generally lies in criticism of and commentary on the original work,⁷² often lessening the economic value of its target

(S.D.N.Y. 1992) (noting that disagreement regarding the “success” of a parody is not relevant to fair use protection where the author has employed parodic elements).

67. Some commentators have argued that, by citing to Justice Blackmun’s dissent in *Sony*, the *Campbell* Court implicitly incorporated “productive use” as part of the transformativeness standard. For instance, Stephen Wilson has argued:

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

Stephen R. Wilson, *Rewarding Creativity: Transformative Use in the Jazz Idiom*, U. PITT. J. TECH. L. & POL’Y, 10 (2003), <http://tlp.law.pitt.edu/wp-content/uploads/2011/02/Vol-IV-Wilson.pdf> (footnotes omitted) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478 (1984)). This conclusion requires a rather broad leap, particularly in its reliance on the Court’s citation to Blackmun’s *Sony* dissent. Nevertheless, there is some evidence that Leval considered *Campbell* to have reaffirmed a place for productive use in the fair use inquiry: “[*Sony*] was generally taken to mean that productivity was no longer a useful or important standard. . . . Having been deprived of its most important compass bearing, the doctrine then drifted aimlessly without a governing standard for ten years” until the *Campbell* decision. Leval, *Justice Souter’s Rescue of Fair Use*, *supra* note 40, at 20. Perhaps the more difficult question is the relationship between transformative use and productive use, which Leval himself has struggled to articulate. See, e.g., Leval, *Toward a Fair Use Standard*, *supra* note 47, at 1121 (referring to transformative and productive justifications as distinct); *id.* at 1111, 1127 (using productive to describe or define transformative).

68. See Leval, *Toward a Fair Use Standard*, *supra* note 47, at 1111.

69. *Campbell*, 510 U.S. at 579 (“Suffice it to say now that parody has an obvious claim to transformative value . . .”).

70. *Id.* at 599.

71. Leval, *Toward a Fair Use Standard*, *supra* note 47, at 1111.

72. See *Campbell*, 510 U.S. at 579 (“Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”); *id.* at 599 (“Factor four thus underscores the importance of ensuring that the parody is in fact an independent creative work, which is why the parody must ‘make some critical comment or statement about the original work which reflects the original perspective of the parodist — thereby giving the parody social value beyond its entertainment function.’” (quoting *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979))).

by suppressing demand.⁷³ Whether criticism and commentary on the original work can add social value to that underlying work seems a highly subjective question. In this context, the social value of the parodic work is consistent with Heymann's characterization of *Campbell* as viewing transformative use through the lens of authorial activity.⁷⁴

Given *Campbell's* rather truncated treatment of transformative use, perhaps the more useful sources for evaluating Heymann's interpretation are subsequent fair use decisions applying *Campbell's* transformativeness standard. A number of commentators have attempted to bring structure to these cases by organizing transformative use into categories, types, clusters, and so on. William Patry, for instance, defines transformative uses as those "that employ the original for a different objective from the original."⁷⁵ He then breaks transformative use into three descriptive categories: "(1) an alteration of the authorial content[;] (2) no change in the form of the original, but a use that performs a valuable purpose; or (3) no change or alteration, but rather the presentation of the original intact in a new context or with new insights."⁷⁶

Anthony Reese begins by distinguishing between two types of transformativeness: (1) transforming a work's content, and (2) using a work for a transformative purpose⁷⁷ — "serv[ing] a different function than the original work."⁷⁸ Evaluating appellate court decisions involving fair use, he divides the courts' opinions into four categories:

73. See *Campbell*, 510 U.S. at 590–94 (discussing effects on potential markets); see also *infra* notes 286–289 and accompanying text.

74. See Heymann, *supra* note 61, at 452.

75. See PATRY ON FAIR USE, *supra* note 16, § 3:9.

76. *Id.*

77. See R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 484–85 (2008).

78. *Id.* at 485 (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007)). In further describing transformative purpose, Reese discusses four cases in which "the court's conclusion as to transformativeness rested on its view of the defendant's transformative purpose, even in the absence of any transformation of the content of the plaintiff's work." *Id.* at 488–89; see *Perfect 10*, 508 F.3d at 1165 ("Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, [defendants' use] transforms the image into a pointer directing a user to a source of information."); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) (the use "serves a different function than [the copyright owner's] use — improving access to information on the internet versus artistic expression"); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) ("[P]laintiffs' photographs were originally intended to appear in modeling portfolios, not in the newspaper; the former use, not the latter, motivated the creation of the work."). Additionally, *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) held:

DK's purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. Originally, each of BGA's images fulfilled the dual purposes of artistic expression and promotion [of live concerts]. . . . In contrast, DK used each of BGA's images as histori-

1. The defendant has transformed the content of the plaintiff's copyrighted work and is using it for a transformative purpose.
2. The defendant has transformed the content of the plaintiff's copyrighted work but is not using it for a transformative purpose.
3. The defendant has not transformed the content of the plaintiff's copyrighted work but is using the copyrighted work for a transformative purpose.
4. The defendant has not transformed the content of the plaintiff's copyrighted work and is not using the copyrighted work for a transformative purpose.⁷⁹

Categories one and four — what Reese termed “double or nothing” transformativeness — produced “relatively straightforward” results, with transformativeness weighing in favor of fair use in the category one and against fair use in category four.⁸⁰ In the “either-or” cases captured in categories two and three, a defendant's transformative purpose was far more likely to produce a finding of transformativeness than alterations to the work's content.⁸¹

Pamela Samuelson attempts to build on the empirical work of Barton Beebe by organizing fair use cases into “clusters.”⁸² Under Samuelson's approach, transformative use is classified as a subset of fair use cases implicating First Amendment interests. Transformative uses include (1) parodies, (2) other transformative criticism of the original work, and (3) transformative adaptations of the original work as an expression of artistic imagination.⁸³ Two additional clusters among those implicating First Amendment interests are classified as nontransformative, although they may fit within those transformative uses identified by Patry and Reese.⁸⁴ The first, “productive uses in critical commentary,” includes “iterative[] copie[s] . . . of another's copyrighted work [used] in preparing a new work critical of the first

cal artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip*'s timeline.

Id. at 609.

79. *See* Reese, *supra* note 77, at 486.

80. *Id.* at 486–88.

81. *Id.* at 488–94.

82. *See* Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2541–43 (2009).

83. *Id.* at 2546–55. Although Samuelson presents a narrow conception of transformative use, her overall treatment of fair use is rather broad.

84. *See* PATRY ON FAIR USE, *supra* note 16, § 3:9; Reese, *supra* note 77, at 486.

author's work."⁸⁵ The second, "iterative copying for orthogonal purposes," is defined by the "necess[ity], in order to make an effective critical commentary, to make or publish iterative copies of the whole or significant parts of a copyrighted work for a different (i.e., orthogonal) speech-related purpose than the original."⁸⁶ Other uses that may be thought of as transformative are categorized as clusters implicating the productive use of other authors' works, rather than First Amendment interests. These include use in social or cultural commentary, use to set historical context, and use in a reference work.⁸⁷

The various categories of use identified by Patry, Reese, and Samuelson are largely consistent with Heymann's interpretation of transformative use post-*Campbell*. Expressive authorial activity is most clearly evidenced where the transformative purpose⁸⁸ of the subsequent use is to provide criticism of the original work, including parody.⁸⁹ Likewise, expressive authorial activity can be found where the original work is used for the transformative purpose of commenting on some general characteristic or aspect of that work, or the class of works to which it belongs.⁹⁰ Finally, expressive authorial activity has been found in some cases where the transformative purpose is to comment both on the original and on some aspect of society at large.⁹¹

85. Samuelson, *supra* note 82, at 2555.

86. *Id.* at 2557.

87. *See id.* at 2570–75. Samuelson does not classify these as transformative uses, but, as discussed *infra*, courts have treated them as such.

88. As Reese observes, using a work for a transformative purpose that "serves a different function than the original work" is more likely to produce a finding of transformativeness than alterations to the content of the underlying work. Reese, *supra* note 77, at 484–87.

89. *See, e.g.*, *Savage v. Council on American-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *6 (N.D. Cal. July 25, 2008) (finding the transformative purpose of defendants' use was "to criticize and comment on plaintiff's statements and views"); *see also* Samuelson, *supra* note 82, at 2557 (citing *Savage* as an example of "iterative copying for orthogonal purposes"). All three purpose-oriented categories fall into either category (1) or (3) of Reese's categorization. *See* Reese, *supra* note 77, at 486.

90. *See, e.g.*, *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00 CIV. 3802(HB), 2001 WL 1111970, at *6 (S.D.N.Y. Sept. 20, 2001); *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442, 447 (S.D.N.Y. 2001) (involving the use of original video footage); *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 137 (E.D.N.Y. 2001) (same).

91. *See, e.g.*, *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (finding the defendant's use to be "commentary on the social and aesthetic consequences of mass media"); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 322–24 (S.D.N.Y. 2008) (finding the defendants' use to be criticism of the original song, of John Lennon's naïve views, and of anti-religious views in society). *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986), decided pre-*Campbell*, implicates similar transformative purposes, although accomplished primarily through a change in context and audience. *Hustler* had produced a parody critical of the Moral Majority and its leader, Jerry Falwell. *Id.* at 1149. Defendants responded with a mailer to their constituents that included copies of the parody in its entirety, but sought "to rebut the personal attack upon Falwell and make a political comment about pornography." *Id.* at 1153. Thus, the new purpose was primarily expressive of the defendant's views. *See* Samuelson, *supra* note 82, at 2557–58 (citing *Hustler* as an example of "iterative copying for orthogonal purposes"). It should be noted that defendants' mailer also included a plea for donations, however, this fundraising purpose was offset by the critical nature of the subsequent use. *Hustler*, 796 F.2d at 1152–53.

Another group of transformative purpose cases requires more exploration. In these cases, the defendant's transformative purpose is not to criticize the original work, the class of works to which it belongs, or even society at large. Rather, defendant uses these works as referential objects within a new authorial work. For instance, in *Bill Graham Archives v. Dorling Kindersley Ltd.*, the author of a book on the Grateful Dead used unadulterated concert posters to set the historical context for his commentary.⁹² In this new context, the original works were no longer used primarily for artistic expression and promotion purposes, but had been transformed into historical artifacts.⁹³ Likewise, in *Warner Bros. Entertainment Inc. v. RDR Books*, where portions of a series of original works of fiction were used in creating a guide to the series,⁹⁴ their purpose was transformed from entertainment to reference.⁹⁵ Finally, in *Núñez v. Caribbean International News Corp.*, the defendant used an unaltered photograph intended to appear in a modeling portfolio in a newspaper story concerning the model and her appearance in that photo.⁹⁶ The use of these works as referential objects, although not within the universe of archetypal transformativeness cases, nevertheless evidences authorial activity through the expressive nature of their use.

B. Imbalances Between Monopoly Incentive and Accommodation

By focusing the transformative use analysis so narrowly on the degree to which a defendant has engaged in authorial activity, courts reflect and reinforce an imbalance in the equilibrium between monopoly incentive and accommodation, thereby failing to maximize the public benefit at the heart of copyright.⁹⁷ The analysis of authorial activity is centered primarily on a defendant's process, intent, and purpose;⁹⁸ whether in terms of bad faith, willingness to engage in creative work, how readers are to use the work, the impact or effect of

92. 448 F.3d 605, 609–10 (2d Cir. 2006).

93. *Id.*; see also Samuelson, *supra* note 82, at 2573–74 (citing *Graham* as an example of use to set historical context); Reese, *supra* note 77, at 489–90 (citing *Graham* as an example of use for a transformative purpose).

94. 575 F. Supp. 2d 513, 520–21 (S.D.N.Y. 2008).

95. See *id.* at 541–44 (comparing the original entertainment and aesthetic purposes with the referential purposes of the subsequent work); see also Samuelson, *supra* note 82, at 2574–75 (citing *RDR Books* as an example of use in a reference work).

96. 235 F.3d 18, 23 (1st Cir. 2000); see also Reese, *supra* note 77, at 489 (citing *Núñez* as an example of use for a transformative purpose).

97. See *supra* notes 52–58 and accompanying text.

98. See Heymann, *supra* note 61, at 448–49 (“[C]ourts often, as the word ‘purpose’ suggests, focus their analysis on the creator of the second work. The question then becomes not how the work is perceived or interpreted but what the author intended or hoped to achieve.”); see also Wong, *supra* note 14, at 1109–10 (noting that after *Campbell*, “courts . . . have tended to focus largely on the purpose of the defendant’s use, rather than the result thereof”).

the work, or the markets to be served.⁹⁹ This emphasis on the relationship between the defendant and the work she has produced reflects the dominant roles of authorship and originality in copyright law,¹⁰⁰ as well as the system of incentives and protections that rewards authorial activities.¹⁰¹ As a result, fair use analysis — although premised on finding “breathing space”¹⁰² within the tangle of existing protections — tends toward these dominant attributes of protection, rather than space and accommodation.¹⁰³ This accounts, in significant part, for the ongoing conflict between transformative fair use and derivative work rights, whether accruing to the original author or to the subsequent user.¹⁰⁴

Mary Wong, addressing the law’s treatment of user-generated content,¹⁰⁵ argues that copyright law should focus less on the defendant’s purpose and more on the resulting work as it exists in society.¹⁰⁶ With the rise of participatory culture, she argues, the audience has evolved from a passive consumer of content into an empowered active participant, even to the point of co-creation or collaboration.¹⁰⁷ Copyright law should adapt to this development, she argues, by reconceptualizing the fair use analysis:

It may be more useful . . . and better serve the understanding of the integral role of users in copyright law to approach the transformativeness question by instead asking what the plaintiff’s work has *become as a result of the defendant’s additions and changes*. . . . Requiring the court to also look at *the result of the defendant’s actions*, and not just the

99. See *supra* notes 75–88 and accompanying text (discussing categories or clusters of fair use decisions, focusing on authorial process, intent, and purpose).

100. See Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 348 (2005) (“[C]opyright is first and foremost a law of authors’ rights . . .”).

101. See Wong, *supra* note 14, at 1097 (“[C]opyright law in policy and practice . . . has emphasized . . . the importance of incentives and protection for the author/publisher.”).

102. *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994).

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

104. See Wong, *supra* note 14, at 1105 (“It seems patently unnecessary to contradict the statement that ‘only authors, but not copycats, should be entitled to fair use privilege,’ but the evolution . . . of a fair use test that relies heavily on the transformative nature of the use raises the further question of whether transformativeness equals authorship in the derivative work context.” (footnote omitted) (quoting Gideon Parchomovsky, *Fair Use, Efficiency, and Corrective Justice*, 3 *LEGAL THEORY* 347, 371 (1997)).

105. See Wong, *supra* note 14; see also Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 *VAND. J. ENT. & TECH. L.* 921 (2009); Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 *COLUM. J.L. & ARTS* 497 (2008).

106. See Wong, *supra* note 14, at 1109–10.

107. *Id.* at 1097.

substance and purpose of those actions, would . . . underscore the objective of the transformativeness inquiry . . . namely, to evaluate whether in fact the defendant did ultimately transform the plaintiff's work by *giving* it a new meaning, information, or expression and thereby adding to progress and the advancement of learning.¹⁰⁸

This approach stands in contrast to the general tendency of copyright law to undervalue the audience¹⁰⁹ by “highlight[ing] the vital part played by the user — in many respects as much an ‘author’ as the initial creator — in copyright and in contributing to a vibrant culture of knowledge creation.”¹¹⁰ In the context of user-generated content this approach makes a great deal of sense.

Despite turning the focus away from what the defendant did and why, and toward the resulting work, Wong maintains the emphasis on authorship, incentive, and protection.¹¹¹ She focuses on the defendant's authorial activity, whether by addition or alteration — as someone who “gives” the work “new meaning, information, or expression.”¹¹² By focusing on the degree to which the defendant has engaged in authorial activity, Wong's approach to the transformativeness inquiry raises two related substantive challenges. The first challenge is to determine whether “the emphasis that *Campbell* placed on transformativeness in fair use analysis will affect the scope of the copyright owner's derivative work right to control forms in which her work is transformed.”¹¹³ The second challenge is to determine whether a work constituting transformative fair use, and therefore not infringing, will qualify for copyright protection in its own right.¹¹⁴ Wong therefore undertakes to define a standard that not only “secur[es] justifiable secondary markets for the initial author, but also . . .

108. *Id.* at 1109 (emphases added) (arguing that this would come closer to the objective standard from *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

109. *See id.* at 1097; *see also* Cohen, *supra* note 100, at 347 (“Copyright doctrine . . . is characterized by the absence of the user.”).

110. Wong, *supra* note 14, at 1112; *see also* Halbert, *supra* note 105, at 924 (“User-generated content is in reality authorship and creative work . . .”).

111. *See* Wong, *supra* note 14, at 1090–91, 1115. Wong does argue that the originality requirement should be modified in these situations. *Id.*

112. *Id.* at 1109.

113. Reese, *supra* note 77, at 468; *see also* Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701, 703 (2010) (“[C]ourts have struggled . . . to distinguish the sort of transformation that counts for fair use analysis from the sort of transformation that violates the exclusive right to prepare derivative works.”); Wilson, *supra* note 67, at 8 (stating a “fundamental question” as “whether creating a new work based on an existing work falls within the definition of a derivative work or under the transformative use component of the fair use doctrine”).

114. *See* Wong, *supra* note 14, at 1118–19.

encourag[es] creativity — and thereby progress — through protection of derivative creations that represent a substantive change from the initial work.”¹¹⁵ By conceptualizing the issue as one of authorship, however, the fair use inquiry becomes hopelessly mired in the reconciliation of competing claims of protection.

This approach asks too much, and indeed more than necessary, of fair use. The fair use doctrine is not, after all, concerned with incentivizing the creation of new works through the grant of monopoly. Rather, the heart of the fair use doctrine is its “guarantee of *breathing space* within the confines of copyright.”¹¹⁶ Indeed, the value of the transformativeness inquiry hinges on the interplay between monopoly incentive and accommodation, seeking a point of equilibrium between these two mechanisms rather than assuming that the transformative work should receive protection for the same reasons as the original work. Wong’s work is important because it properly shifts the focus of the transformativeness inquiry away from what the defendant did or intended to do, and toward the resulting work in its relationship with the audience or user. But in making this shift, it is unnecessary to take that next step — seeking to tie the concept of transformative fair use to the authorial requirement for copyright protection in the subsequent work.

This tendency to infuse the transformativeness analysis with monopoly incentive theories reflects one iteration of “the author effect.”¹¹⁷ From this perspective, two ideologies have come to dominate all aspects of copyright law and policy, obscuring nearly any claim to the public interest in new works that is not grounded in a model of property-like rights and economic reward. The first is a romantic ideal of author-as-genius, a wellspring of art and originality, to be compensated for sharing her gifts with the public.¹¹⁸ The second is a Lockean theory, closely allied with natural law, in which authorship-as-labor is justly rewarded with a property-like right of exclusive exploitation.¹¹⁹

115. *Id.* at 1116.

116. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (emphasis added).

117. See generally 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); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* 15, *supra*, at 15, 17.

118. See, e.g., Halbert, *supra* note 105, at 928 (discussing “the myth of the romantic and original artist”); Fiona Macmillan, *Artistic Practice and the Integrity of Copyright Law*, in *ART AND LAW: THE COPYRIGHT DEBATE* 49, 71–72 (Morten Rosenmeier & Stina Teilmann, eds., 2005) (describing personality right justifications for copyright protection as “based on the argument that a work is the embodiment of the personality of the creator and, therefore, should be subject to the creator’s ownership and/or control”).

119. See Macmillan, *supra* note 118, at 71 (describing a natural rights justification of copyright protection “said to spring from Lockean theories of property and involve the proposition that the author is entitled to a reward for the creation of the work in question” and noting that “copyright provides an economic incentive to creators and exploiters of

Certain critical theorists, particularly those aligned with the law and literature movement, challenge the dominance of the romantic ideal and the Lockean theory in copyright doctrine.¹²⁰ They recognize authorship as a social construction rather than a truth, while they conceive of the creative process as collaborative rather than insular.¹²¹ Indeed, many post-structuralists argue that originality is not a condition of authorship,¹²² thereby contesting one of the foundational justifications for copyright. Post-structuralists replace the concept of the romantic author with a focus on the text itself, the meaning of which is no longer controlled by author subjectivity. Meaning is not transmitted from author to audience, but is instead intertextual. New texts borrow from prior texts and are interpreted through their relationship to the larger body of existing works.¹²³ The meaning of a text is thus shaped by its social context among other texts.

One can persuasively argue that these critical theories are simply too radical to be useful in the formulation of copyright law and policy. Practically speaking, the challenge to romantic authorship and dominant ideologies of originality would implicate a drastic reduction, or even elimination, of authors' rights. These theories would therefore be difficult to apply to existing copyright doctrine without unacceptably undermining the existing institutionalized allocation of rights and in-

copyright work, thus encouraging the creation and dissemination of cultural works with consequent cultural development" (footnotes omitted)).

120. See, e.g., Paul Edward Geller, *Must Copyright Be for Ever Caught Between Marketplace and Authorship Norms?*, in *OF AUTHORS AND ORIGINS* 159 (Brad Sherman & Alain Strowel eds., 1994); Jaszi, *supra* note 117, at 29; Woodmansee, *supra* note 117, at 28 ("In short, the law has yet to be affected by the 'critique of authorship' initiated by Foucault and carried forward in the rich variety of post-structuralist research that has characterized literary studies in the last two decades."); Elton Fukumoto, Note, *The Author Effect After the "Death of the Author": Copyright in a Postmodern Age*, 72 WASH. L. REV. 903 (1997); see also Roger Chartier, *Figures of the Author*, in *OF AUTHORS AND ORIGINS*, *supra*, at 7.

121. See, e.g., RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 239 (1996) ("[W]hat humans are able to think and create at the current stage of history is due to the contributions of all humanity."); Jaszi, *supra* note 117, at 40 ("Copyright law, with its emphasis on rewarding and safeguarding 'originality,' has lost sight of the cultural value of what might be called 'serial collaborations' — works resulting from successive elaborations of an idea or text by a series of creative workers, occurring perhaps over years or decades.").

122. See, e.g., BETTIG, *supra* note 121, at 239 ("[Intellectual property law] is built upon a notion of individual artists creating in a pure state of nature. Clearly, this is not how intellectual and artistic works are created."); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 74 (2009) ("[A]lthough many authors fervently believe in their own absolute originality or novelty, in the colloquial and legal meanings of those terms, the truth is far different."); Peter Jaszi & Martha Woodmansee, *Introduction*, in *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 117, at 1, 8 ("Today . . . law has missed out on the contemporary 'critique of authorship' — the impulse, especially in literary studies, to put in question the naturalness and inevitability of Romantic ideas about creativity.").

123. See, e.g., Fukumoto, *supra* note 120, at 910 ("Opposition to the New Critics' emphasis on the individual work arose in the criticism of influential literary theorists . . . who[] viewed literature as intertextual. . . . [O]ne could best understand a given work of literature by understanding literature as a whole.").

terests. Moreover, this approach raises questions about our current conception of fair use. Challenging the ideologies of authorship and originality implicates a dramatic cut in the substantive rights of the first claimant, rather than an accommodation of subsequent transformative works within a framework of copyright protection.

Still, certain aspects of the critical theories aligned with the law and literature movement are useful to a more expansive model of transformative fair use that addresses both monopoly incentive and accommodation concerns. First, these critical theories shift the focus away from works of authorship and toward audience engagement with the text. This mitigates the tendency to overvalue, through a monopoly interest, those who most closely fit the image of the romantic author and to undervalue both prior works and the audience. Second, these critical theories acknowledge that an author does not control the meaning of a work. Instead, meaning is determined, at least in part, through intertextual processes. This opens the door to a reconsideration of meaning-making and the role of audiences in that process, with significant implications for copyright doctrine.

C. An Alternate Conception of Transformativeness

Given the parallel foci on authorial purpose or activity and the creation of new works, it is not surprising that Wong and others are forced to wrestle with competing authorial claims to monopoly incentives and exclusive rights. They measure social value not by whether the allegedly infringing work has expanded the available body of new expression, but rather by whether the defendant satisfies our conceptions of a worthy author. From this traditional narrow perspective on social value, the creator of the subsequent work is thus judged by the same standard of romantic authorship, regardless of whether the defendant's claim is for monopoly incentives and exclusive rights or a more circumscribed claim for accommodation under the fair use defense. It is a mistake, however, to define the social value at the heart of copyright solely in terms of authorial activity.

1. Meaning as Social Value

As Heymann observes, “[c]opyright is not a reward for creative production as such; it is an incentive to ensure that the public has access to works that would not otherwise exist.”¹²⁴ Certainly, incentivizing authors to create new and derivative works can produce social value. But social value can also be found more generally in the ac-

124. Heymann, *supra* note 61, at 453.

commodification of new expression, even when the form of the work is not new, regardless of authorial pedigree.

Wong was entirely correct to suggest that the transformativeness inquiry should focus not on the defendant's actions or intent, but rather on the resulting work.¹²⁵ The question is not, however, whether that resulting work evidences the type of authorial social value to be rewarded with copyright protection. Instead, the proper inquiry is whether the resulting work ultimately produces additional value by “yield[ing] ‘new information, new aesthetics, [or] new insights and understandings.’”¹²⁶ Ultimately, the question is whether the resulting work “is transformative in its meaning — that is, whether the reader perceives the second copy as signifying something different from the first.”¹²⁷ Heymann summarizes the point this way:

What the fair use doctrine should be concerned with, then, is not what an author does when she creates — whether the second author changes the first author's expression in some ascertainable or substantial way — but rather whether the reader perceives an interpretive distance between one copy and another (in other words, a lack of similitude). If distinct discursive communities can be identified surrounding each copy, that fact should lead us to think that the meaning of the expression has been transformed, even if the expression itself has not.¹²⁸

This suggests at least two strands to Heymann's analysis. One includes cases in which the defendant has taken affirmative steps to recontextualize the original work and courts assess audience engagement and interpretation with the work as part of its transformativeness analysis.¹²⁹ *Blanch v. Koons* is one such example, with the court citing Koons' recontextualization as indicative of his “sharply different” purposes in using the original,¹³⁰ and “highlighting Koons's efforts to engage viewers in a different interpretive discourse from that of Blanch.”¹³¹ These cases generally fit comfortably within the

125. See *supra* notes 111–116 and accompanying text.

126. Heymann, *supra* note 61, at 452 (second alteration in original).

127. *Id.* at 455.

128. *Id.*

129. See *id.* at 453.

130. 467 F.3d 244, 252 (2d Cir. 2006) (“Koons asserts — and Blanch does not deny — that his purposes in using Blanch's image are sharply different from Blanch's goals in creating it.”).

131. Heymann, *supra* note 61, at 461 (describing the court's approach, “which, although still adhering to notions of authorial intent, adopted language indicating a focus on interpretation”).

universe of expressive authorial activity,¹³² although Heymann's work provides an important and more constructive frame for the analysis.

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

If fair use is taken seriously as a doctrine of accommodation, distinct from monopoly incentives, then the answer is yes. From this perspective, the courts' narrow focus on authorial purpose and activity is misplaced. Courts should focus instead on the resulting work, not solely as evidence of authorship, but as a potential source of social value. That value, viewed through the goals of copyright, is realized in the production of new expression. From the very inception of the transformativeness inquiry, the Supreme Court has recognized the transformative value of expression to include not just new forms, but also new messages and meanings; as the recontextualization cases suggest, "facilitating dissemination of multiple meanings of the same work can achieve [the goal of copyright law] as well as the dissemination of multiple works."¹³³

Courts have come to assume, however, that those messages and meanings reside in the mind and intentions of the "author," that those messages and meanings are transmitted from the author to the audience, and that certain segments of the audience either "get it" or do not. But this paradigm misconceives the process by which "meaning" is realized. Meaning is not controlled, transmitted, or even consistent. It is, instead, negotiated and actualized in engagement with the audience, or, more appropriately, audiences.¹³⁴

132. It is worth noting a distinct group of cases in which, as in *Blanch*, the original work is used for an entirely different purpose, but with no significant authorial activity. In *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003), for instance, the original purpose of the work was entertainment or information. The subsequent purpose was the use of that same work, entirely without change, as evidence. Of course, these are entirely different functions, with the subsequent use being non-expressive with no authorial activity. Likewise, in *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, the court found defendant's use to be transformative because "iParadigms . . . uses the [students' term] papers for an entirely different purpose, namely, to prevent plagiarism and protect the students' written works from plagiarism . . . by archiving the students' works as digital code." 562 F.3d 630, 638 (4th Cir. 2009) (omission in original) (quoting *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 482 (E.D. Va. 2008)).

133. Heymann, *supra* note 61, at 466.

134. See ROBERT HODGE & GUNTHER KRESS, SOCIAL SEMIOTICS 12 (1988) ("Meaning is always negotiated in the semiotic process, never simply imposed inexorably from above by an omnipotent author through an absolute code.").

Media studies provide a useful starting point for exploring this idea.¹³⁵ The literature offers three general conceptions of the audience: audience-as-mass, audience-as-outcome, and audience-as-agent.¹³⁶ As a mass, “the audience is seen as a large collection of people scattered across time and space who act autonomously.”¹³⁷ The audience-as-outcome paradigm invokes “a ‘transmission’ model of communication,”¹³⁸ that conceives of people as “passive receiver[s] of the information contained in [a] message.”¹³⁹ The third conception, audience-as-agent, characterizes audience members as “free agents choosing what media they will consume, bringing their own interpretive skills to the texts they encounter, [and] making their own meanings”¹⁴⁰ This does not mean, however, that an audience can be scrutinized in isolation, without reference to outside influences. Rather, audience members are both “individual agents [and] participants in the larger dynamics of social and institutional structure.”¹⁴¹

This audience-as-agent conception has largely come to dominate our understanding of the engagement between reader and text.¹⁴² This model allows us to move toward the idea that audience engagement can itself create social value¹⁴³ — whether cultural, creative, political,

135. See, e.g., Victor Costello & Barbara Moore, *Cultural Outlaws: An Examination of Audience Activity and Online Television Fandom*, 8 TELEVISION & NEW MEDIA 124, 124 (2007) (“One of the more persistent debates in mass communication research centers on the question, Is the audience active or passive? In other words, are viewers or listeners capable of making their own meaning out of message content or are they merely helpless victims of media producers?” (citations omitted)).

136. See James G. Webster, *The Audience*, 42 J. BROADCASTING & ELECTRONIC MEDIA 190, 191 (1998).

137. *Id.* at 192 (describing the audience-as-mass as “defined as an entity by their common exposure to media”).

138. *Id.* at 194.

139. *Id.* at 193 (quoting William J. McGuire, *The Yale Communication and Attitude-Change Program in the 1950s*, in AMERICAN COMMUNICATION RESEARCH: THE REMEMBERED HISTORY 39, 55 (Everette E. Dennis & Ellen Wartella eds., 1996)) (describing this perspective as focused on the often detrimental power of the media, and the audience as unaware of how the media is acting upon them).

140. *Id.* at 194.

141. *Id.* at 203.

142. See, e.g., Leah A. Lievrouw & Sonia Livingstone, *Introduction to the Updated Student Edition*, in HANDBOOK OF NEW MEDIA: SOCIAL SHAPING AND SOCIAL CONSEQUENCES OF ICTS 5, 7 (Leah A. Lievrouw & Sonia Livingstone eds., updated student ed. 2006) (“As the dominance of mass communications began to unravel at the end of the twentieth century, audience researchers were already seeking different terms for understanding the power of the media — moving away from the language of effects or impacts, towards a conception of the active audience, the diffused, embedded audience, or more broadly, towards ‘new audience studies.’” (citations omitted)). It is worth noting that this conception is in accord with Wong’s view of an audience that is “no longer just a passive consumer of content but is empowered to be an active participant and even a co-creator or collaborator.” Wong, *supra* note 14, at 1097.

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

or otherwise. Indeed, all expressive works have the potential for meaning, but that meaning cannot be directly transmitted from author to audience. It can only be mediated through the audience's social context, which lies outside the author's control. This context is where true social value is realized.

2. Transformativeness as a Social Semiotic Process

The model of the active but socially situated audience finds significant parallels in the field of social semiotics. Like more formalistic structural semiotics, social semiotics is a theory of the production and interpretation of meaning. Rather than emphasizing the structure of rigid, unchanging codes and relationships among signs, however, social semiotics is primarily about process¹⁴⁴ — “the social aspect of signification . . . where meaning is construed as semantic value produced though culturally shared codes”¹⁴⁵ that are themselves formed through social processes. Social semiotics emphasizes that signs are resources that have the potential to be used in a social process of meaning-making. “Meaning is not ‘transmitted’ to us — we actively create it”¹⁴⁶ through engagement with the work.

The foundations of the meaning-making process are semiotic resources, defined as “the actions, materials and artifacts we use for communicative purposes.”¹⁴⁷ These “[s]emiotic resources have a meaning potential, based on their past uses, and a set of affordances based on their possible uses.”¹⁴⁸ The sign-maker is purposeful in her use and transformation of those semiotic resources, but their potential for meaning is not realized in that use. It is instead “actualized in concrete social contexts where their use is subject to some form of semi-

subsequent use served an entirely different function than the original work, using the images as part of an electronic search engine that facilitated users' access to the underlying work. See *Perfect 10*, 508 F.3d at 1165; *Kelly*, 336 F.3d at 819. Indeed, the *Perfect 10* court found that “a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.” *Perfect 10*, 508 F.3d at 1165. Here, the distinction in function was itself enough to find transformative use, even without authorial purpose or activity, but the social value of that function hinged on audience engagement with the copies.

144. See HODGE & KRESS, *supra* note 134, at 1 (“‘Mainstream semiotics’ emphasizes structures and codes, at the expense of functions and social uses of semiotic systems, the complex interrelations of semiotic systems in social practice . . .”).

145. Pamela Nilan, *Applying Semiotic Analysis to Social Data in Media Studies*, 1 JURNAL KOMUNIKASI MASSA 60, 67 (2007).

146. *Id.* at 67.

147. THEO VAN LEEUWEN, INTRODUCING SOCIAL SEMIOTICS 285 (2005).

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

otic regime.”¹⁴⁹ From this critical perspective, social semiotics posits a relationship between the potential of semiotic resources and relations of power, acknowledging that dominant social conventions shape semiotic processes. Meaning is not merely intertextual. Instead, meaning is negotiated in the discourse of interpretive communities. The process of meaning-making at the heart of social semiotics links that theory to a conception of transformative fair use that conceives of the resulting work as a text with *potential* meanings, rather than merely as evidence of authorial purpose or activity.

This complexity is evident in the way that social semiotic theory represents the relationship between text, discourse, audience, authors, and meaning:

The notion of text needs to be retained and contrasted to the notion of discourse as process, precisely because a text is so limited and partial an object of analysis. . . .

. . . [Social semiotics] acknowledge[s] the importance of the flow of discourse in constructing meanings around texts Meaning is always negotiated in the semiotic process, never simply imposed inexorably from above by an omnipotent author through an absolute code. . . . [We] cannot assume that texts produce exactly the meanings and effects that their authors hope for: it is precisely the struggles and their uncertain outcomes that must be studied at the level of social action, and their effects in the production of meaning.¹⁵⁰

Viewed through this social semiotic frame, the transformativeness inquiry occurs in the context of audience interaction with and about the work, rather than in “the meanings and effects that [its] authors hope for.”¹⁵¹ Social value is manifested in interpretive communities, and through the cultivation of new and expansive cultural meanings, messages, and insights. It is in this process of semiosis that copyright’s commitment to the enrichment of society can be best evaluated, as a distinct question apart from the creation of new authorial rights.

Before engaging this claim through example, however, it is important to acknowledge two key limitations. First, the analysis is not intended to address the scope of substantive rights allotted to the first

149. *Id.* at 285.

150. HODGE & KRESS, *supra* note 134, at 12.

151. *Id.*

creator, but is limited to an analysis of transformative fair use of that work by another. Second, the goal is not to supplant current conceptions of transformative fair use grounded in authorial purpose, process, and activity. The social semiotic approach opens additional lines of inquiry for determining the transformativeness of the subsequent work, thereby supplementing, not displacing, conventional ideals of authorship. In other words, authorial efforts and intent matter, but even where these fall short, valuable new expression may still be present.

Doctrinally, a social semiotic theory of transformativeness focuses on the text, not as evidence of authorship but as a potential source of social value. A primary goal of copyright is to expand the available body of new expression through incentive and accommodation.¹⁵² New expression encompasses not just new and different forms, but the cultivation of new and multiple meanings around the same text. These new and multiple meanings are realized in audience engagement with and about the text. An optimal theory of fair use accommodates this process of meaning-making without cannibalizing incentives to create the raw materials upon which fair uses draws.

As audiences engage and interact with the work, divergent and unexpected social responses may produce a multitude of different meanings. In these circumstances, the promotion of science and the arts is best served by maintaining what *Campbell* called “the fair use doctrine’s guarantee of breathing space within the confines of copyright.”¹⁵³ It is in this space that interpretive engagement and the process of meaning-making truly occur.

This approach is also consistent with First Amendment principles, with which modern copyright seems so often at odds.¹⁵⁴ Although a full exploration of the conflict is well beyond the scope of this Article, it is sufficient to note that a significant number of fair use cases have recognized the difficult relationship between copyright, fair use, and the values of free expression, particularly in terms of censorship and “the public interest in airing divergent points of view.”¹⁵⁵ As the court in *Suntrust Bank* recognized, “[f]reedom of speech . . . requires the

152. See *supra* notes 52–58 and accompanying text.

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

154. See, e.g., Matthew D. Bunker, *Adventures in the Copyright Zone: The Puzzling Absence of Independent First Amendment Defenses in Contemporary Copyright Disputes*, 14 COMM. L. & POL’Y 273 (2009); David S. Olson, *First Amendment Interests and Copyright Accommodations*, 50 B.C. L. REV. 1393 (2009); cf. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (holding that, although “copyright’s built-in free speech safeguards are generally adequate to address” First Amendment concerns, “copyrights [are not] ‘categorically immune’ from First Amendment limitations (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001))).

155. Samuelson, *supra* note 82, at 2565–66; see *supra* notes 86–88 and accompanying text. Samuelson categorizes transformative uses as “free speech and free expression” fair uses. Samuelson, *supra*, at 2548–55.

preservation of a meaningful public or democratic dialogue.”¹⁵⁶ “This is true whether one understands the First Amendment as protecting political speech, promoting democracy or self-government, furthering the search for truth, or enhancing autonomy and enabling self-expression.”¹⁵⁷ As a primary mechanism of accommodating First Amendment principles in copyright law,¹⁵⁸ fair use must be interpreted and applied through the lens of these principles. The central thesis of First Amendment protection is the free flow of information, particularly the expression of individuals and groups at the margins of social power, against whom the threat of censorship is most acute.

Social semiotic theory recognizes that the process of meaning-making is in many respects an exercise in power, as we struggle to define social reality.¹⁵⁹ It offers a glimpse into a moment of unsettled authority, dominance, and control, as individuals and interpretive communities engage the work. The larger point of the theory is thus the question of whose realities are privileged and whose are suppressed. Audience engagement with a work is not entirely unconstrained; rather, “while texts may have certain encoded meanings, individuals are nonetheless capable of ‘negotiating’ those meanings.”¹⁶⁰ In this process of negotiation, both the sign-maker and the audience are pressured by the constant limitations of dominant social conventions regarding the meaning attendant to semiotic resources.¹⁶¹ These dominant conventions of meaning do not, however, “negate new [sign-]making,” but rather “attempt[] to limit and constrain the

156. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001) (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.10[B] (2001)); see also *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (“[B]ecause parody is ‘a form of social and literary criticism,’ it has ‘socially significant value as free speech under the First Amendment.’” (quoting *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997))); *Yankee Publ’g Inc. v. News Am. Publ’g Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”).

157. Tushnet, *supra* note 103, at 538; see also *id.* at 538–47 (discussing the conflict between copyright and the First Amendment).

158. See *Eldred*, 537 U.S. at 219–20.

159. See Nilan, *supra* note 145, at 67 (asserting that social semiotics “can assist us to become more aware of social reality as a construction and of the roles played by ourselves and others in constructing it”).

160. Webster, *supra* note 136, at 197 (citing Stuart Hall, *Encoding/Decoding*, in *CULTURE, MEDIA, LANGUAGE* 107 (Stuart Hall et al. eds., 1980)).

161. See GUNTHER KRESS & THEO VAN LEEUWEN, *READING IMAGES: THE GRAMMAR OF VISUAL DESIGN* 12 (2d ed. 2006) (“The effect of convention is to place the pressure of constant limitations of conformity on sign-making; that is, the way signifiers have been combined with signifieds in the history of the culture, acts as a constantly present constraint on how far one might move in combining signifiers with signifieds.”). Of course, it takes work to create meaning outside of dominant conventions — work by the sign-maker and by the audience, laboring in opposition to and rejection of social convention. This suggests a certain connection between the process of meaning-making and dominant natural law and Lockean theories of authorship-as-labor.

semiotic scope of [new] combinations.”¹⁶² It is implicit in the social semiotic model that social conventions made by people can be changed by people; however, these processes are governed by social relations of power,¹⁶³ and “[t]o be able to change rules you need power.”¹⁶⁴

Tying fair use to First Amendment jurisprudence undoubtedly carries its own pitfalls.¹⁶⁵ At the very least, however, values of free expression embrace the freedom to participate in shaping culture. This participation is not limited to dissent, commentary, and criticism, although these are certainly valued. It is, as *Suntrust Bank* suggests, the value of the dialogue itself.¹⁶⁶ Social semiotics further recognizes that constraints on the process of making meaning are manifestations of the power relations embedded in expressive communication. By providing “breathing space” for that process, fair use facilitates the value of expressive dialogue by recognizing the social value of marginalized expression.

3. Example: *Fairey v. Associated Press*

In 2008, Shepard Fairey created two posters for the Obama campaign, *Obama Progress* and *Obama Hope* (together, the “posters”), each a variation on a single image.¹⁶⁷ Fairey used a reference photo in creating the image, a photo later determined to have been taken by Mannie Garcia at a 2006 National Press Club event.¹⁶⁸ Garcia was hired by The Associated Press (“The AP”) to photograph the event, and The AP claimed copyright in the photo.¹⁶⁹ When The AP con-

162. *Id.*

163. *See id.*

164. VAN LEEUWEN, *supra* note 147, at 48.

165. *See, e.g.*, Tushnet, *supra* note 103, at 560 (“[T]he risk is that courts and others may conclude that fair use doesn’t protect anything more than the First Amendment requires.”).

166. *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263–65 (11th Cir. 2001); *see also Nat’l Rifle Ass’n of Am. v. Handgun Control Fed’n of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994) (holding that added weight should be given to the defendant’s claim of fair use because it was directly related to defendant organization’s “First Amendment speech rights to comment on public issues and to petition the government regarding legislation”). In *National Rifle Ass’n*, the court went on to explain that “[defendant]’s use of the list, if it did anything, helped *create* a market for [plaintiff], as citizens on one side of a controversial issue presumably feel more need to engage in political activity if citizens on the other side of the issue are active.” *Id.*

167. Complaint, *supra* note 1, at 1, 4.

168. *Id.* at 1, 7; *see also* Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 452–56 (2009) (discussing the lawsuit); Jo-Na Williams, *The New Symbol of “Hope” for Fair Use: Shepard Fairey v. The Associated Press*, LANDSLIDE, September/October 2009, at 55, 55–56 (2009). The reference photograph was one of Obama and actor George Clooney. Complaint, *supra* note 1, at 8.

169. Complaint, *supra* note 1, at 1, 9. It should be noted that Garcia initially disputed the ownership of rights in the photograph, arguing that he was not an AP employee and that the photograph was not a work for hire. *See* Memorandum of Law in Support of Intervenor Mannie Garcia’s Motion to Intervene at 1–2, *Fairey v. Associated Press*, No. 09 Civ. 1123

tacted Fairey claiming both ownership and infringement, he refused The AP's demand to pay both a licensing fee and a royalty on revenues associated with the posters.¹⁷⁰ Instead, Fairey filed a declaratory judgment action against The AP, seeking a finding of fair use and injunctive relief.¹⁷¹ The heart of Fairey's fair use claim was his assertion of transformative use of the Garcia photo¹⁷² which "altered the original with new meaning, new expression, and new messages."¹⁷³ Fairey also claimed to have altered the purpose of the work, moving from a work intended to document events to a work intended "to inspire, convince and convey the power of Obama's ideals, as well as his potential as a leader, through graphic metaphor."¹⁷⁴

The AP filed counterclaims against Fairey alleging, *inter alia*, copyright infringement.¹⁷⁵ The AP alleged that Fairey copied the "distinctive characteristics [of Garcia's photo] in their entirety . . . without any credit to The AP."¹⁷⁶ Refusing to acknowledge that Fairey made any artistic contribution to Garcia's photo, The AP characterized Fairey's work as "a form of computerized 'paint by numbers.'"¹⁷⁷ The AP also alleged that the Garcia photo and the Fairey image "serve exactly the same character and purpose . . . in communicating . . . evocative themes."¹⁷⁸ Finally, The AP condemned Fairey's unap-

(S.D.N.Y. July 8, 2009). Garcia later abandoned that claim. See Randy Kennedy, *Photographer Withdraws Lawsuit in Shepard Fairey Case*, N.Y. TIMES ARTS BEAT: THE CULTURE AT LARGE, August 23, 2010, available at <http://artsbeat.blogs.nytimes.com/2010/08/23/photographer-withdraws-lawsuit-in-shepard-fairey-case>. Others have noted that the romantic conception of authorship appears incongruent with the work-for-hire doctrine, under which "the firm or individual who paid to have a work created, rather than the person who created it, is regarded as the 'author' for purposes of copyright ownership." Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 Duke L.J. 455, 485 (1991) (noting that "it is somewhat surprising to encounter the individualistic Romantic conception of 'authorship' deployed to support a regime [the work-for-hire doctrine] that disassociates creative workers from a legal interest in their creations"). In this way, the transformativeness inquiry regards authorship as a romantic concept distinct from that of ownership.

170. See Complaint, *supra* note 1, at 9.

171. *Id.* at 10–11.

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

173. *Id.* at 11.

174. *Id.* at 5.

175. See Answer, Affirmative Defenses and Counterclaims of Defendant, The Associated Press at 10, 37, *Fairey v. Associated Press*, No. 09 Civ. 1123 (S.D.N.Y. Mar. 11, 2009) [hereinafter Answer].

176. *Id.* at 37; see also *id.* at 10. Interestingly, "Garcia admitted that he did not recognize his photograph of Obama as the photograph Fairey referenced to create his works." Answer, Affirmative Defenses and Counterclaims of Plaintiffs and Counterclaim Defendants at 20, *Fairey v. Associated Press*, No. 09 Civ. 1123 (S.D.N.Y. Aug. 14, 2009).

177. Answer, *supra* note 175, at 38.

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

proved use of the Garcia photo as “utter disregard of The AP’s long-established licensing program.”¹⁷⁹

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

A. The Work

According to Fairey, the posters were created using Garcia’s photograph as a “visual reference.”¹⁸⁰ Unlike the Garcia photograph, Fairey’s posters depict a tightly cropped Obama as the sole represented participant.¹⁸¹ Obama is seen from a low angle, with the degree of elevation somewhat exaggerated by close proximity.¹⁸² He is looking to his left, slightly up and off into the distance at someone or something out of the frame.¹⁸³ This has the effect of elevating Obama’s chin. Obama appears serious, perhaps as though he is listening. His eyes are slightly narrowed, as though focusing.¹⁸⁴

Fairey’s posters are composed using bright, primary colors.¹⁸⁵ Red, white, and blue (in two shades) are used to create both vertical and horizontal divisions.¹⁸⁶ The image incorporates geometric shapes in the design, some more explicit and others more abstract.¹⁸⁷ A one-word slogan — either “HOPE” or “PROGRESS” — appears at the bottom of each poster.¹⁸⁸

179. *Id.* at 12–14.

180. Complaint, *supra* note 1, at 4.

181. *See id.* at Ex. A (the Garcia photograph); *id.* at Ex. B–C (the posters).

182. *See id.* at Ex. B–C.

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.*

B. Semiotic Resources Represented in the Work

Fairey's catalog is intended to be subversive, not only in imagery, but also in medium (e.g., graffiti, posters, stickers, etc.) and the environment in which his art is encountered.¹⁸⁹ Fairey's use of bold colors and striking geometric shapes is likely to draw attention in the crowded streets where his work has appeared.¹⁹⁰ He re-appropriates and manipulates iconic images.¹⁹¹ His work is also intended to be mass-produced.¹⁹²

The Fairey posters draw aesthetically from the Constructivist movement in Russia between 1919 and the mid to late 1930s.¹⁹³ Constructivism was overtly political, rejecting the concept of art for art's sake in favor of a functional, utilitarian conception of art for social purposes.¹⁹⁴ Constructivism tends toward angular, geometric design elements, bold and bright colors, and thick lettering. The second readily identifiable influence is the Bauhaus school, which was itself influenced both by Constructivism and the Dutch artistic movement known as De Stijl.¹⁹⁵ De Stijl emphasized the use of straight lines, horizontal/vertical orientations, the use of geometric shapes and primary colors, and the combination of oppositional elements. Americans were exposed to Bauhaus-influenced designs in the 1930s and

189. *Id.* at 2 (describing Fairey's work); *id.* at 3 ("A large body of Fairey's work questions and criticizes Presidents, politicians and world leaders, past and present."); *id.* (describing his "Obey" campaign as work that "urges the observer to question obedience to social commands and the political status quo"); *id.* ("The content of Fairey's work is a call to action about hierarchies and abuses of power, politics and the commodification of culture."); see also Robert L. Pincus, *Social Ferment Not Always Reflected in Fermentation of Artworks*, SIGN ON SAN DIEGO, Dec. 30, 2007, <http://legacy.signonsandiego.com/news/features/20071230-9999-mz1a30art.html> (describing a Fairey work in which "traffic signs, buildings and the like were plastered with his image of Andre the Giant").

190. See Complaint, *supra* note 1, at 2 (describing Fairey's "street art"); Steven Heller, *Beyond Red, White and Blue*, CAMPAIGN STOPS BLOG (Feb. 15, 2008, 6:58 PM), <http://campaignstops.blogs.nytimes.com/2008/02/15/beyond-red-white-and-blue> ("[A]lternative graphic approaches are decidedly more eye-catching and that can't help but have a positive public impact."); Pincus, *supra* note 189.

191. Complaint, *supra* note 1, at 3 ("Fairey is committed to creating work that has meaning for his audience — by using familiar cultural iconography that people can relate to and by constantly bringing his work into the public sphere.")

192. See Colin Gleadell, *Shepard Fairey's Obama Comes to London*, THE TELEGRAPH, Jan. 19, 2009, <http://www.telegraph.co.uk/culture/art/4291504/Shepard-Faireys-Obama-comes-to-London.html> (describing the mass production of Fairey's work).

193. Ken Johnson, *Can a Rebel Stay a Rebel Without the Claws?*, N.Y. TIMES, March 18, 2008, at C1. See generally STEVEN A. SEIDMAN, POSTERS, PROPAGANDA, AND PERSUASION IN ELECTION CAMPAIGNS AROUND THE WORLD AND THROUGH HISTORY 20 (2008) (discussing the influence of the Bauhaus school and Constructivism on graphic design generally and political posters more specifically).

194. LIZ DAWTREY ET AL., INVESTIGATING MODERN ART 175 (1996).

195. See generally PAM MEECHAM & JULIE SHELDON, MODERN ART: A CRITICAL INTRODUCTION 120–122 (2000) (discussing Constructivism, Bauhaus and De Stijl, as well as the relationship between them).

early 1940s through the Federal Art Project of the Works Progress/Work Projects Administration.¹⁹⁶

In addition to the aesthetic design elements just described, the image of Obama in Fairey's posters invokes the depiction of Soviet, Chinese, and German leaders from early to mid-twentieth century propaganda posters.¹⁹⁷ There are, however, clear distinctions. For instance, posters of Stalin often depict him in a specific posture and were not cropped as closely as Fairey's posters.¹⁹⁸ Unlike Fairey's posters, in which Obama appears alone, posters of Stalin often include "the masses."¹⁹⁹ Mao has been depicted as proximate to the viewer, and occasionally made to appear as though hovering over earthen landscapes or crowds of small people.²⁰⁰ Many Mao posters are horizontally oriented to capture this landscape effect.²⁰¹ While Mao, like Fairey's depiction of Obama, is often pictured from a low, oblique-angle perspective, he is often looking directly at the viewer and smiling.²⁰² Finally, Mao has been depicted as framed by the sun, with beams of light radiating from his countenance.²⁰³ Hitler was often portrayed from a greater distance, but with head and body positions similar to the Obama posters.²⁰⁴

The Fairey posters also draw on elements found in many domestic campaign posters. As in the Fairey posters, U.S. presidential candidates have often been presented as the sole participant with his face in close proximity to the viewer.²⁰⁵ Moreover, in many posters,

196. See generally COLIN MOORE, PROPAGANDA PRINTS: A HISTORY OF ART IN THE SERVICE OF SOCIAL AND POLITICAL CHANGE 131–136 (2010) (describing evolving aesthetics from Bauhaus to the Works Progress/Work Projects Administration and highlighting the prominent role of certain Bauhaus-trained artists).

197. See Miranda Siegel, *A Look at Art for Obama with Shepard Fairey*, NEW YORK MAG. (Oct. 1, 2009, 4:26 PM), http://nymag.com/daily/intel/2009/10/obama_art.html.

198. See, e.g., *Stalin Posters*, FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625192566084> (last visited May 6, 2011).

199. See VICTORIA E. BONNELL, ICONOGRAPHY OF POWER: SOVIET POLITICAL POSTERS UNDER LENIN AND STALIN 163 (1997) (noting that "[c]ritics . . . devoted a good deal of attention to" the issue of "Stalin's relationship to the masses" in these posters). In one review, a critic took the artists to task for showing Stalin "full-face . . . held aloft by five arms" with "[f]lags and industrial scenes fill[ing] the background." *Id.* at 164. The critic stated: "In order to show Comrade Stalin as the *vozhd*' of the masses, as the genius leader, as the active participant in socialist construction . . ., the artists raise him above the masses and juxtapose them. The masses are deprived of class character, depersonalized in the direct sense of the word . . ." *Id.*

200. See, e.g., *Mao Posters*, FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625067659005> (last visited May 6, 2011).

201. See, e.g., *id.*

202. See, e.g., *id.*

203. See, e.g., *id.*

204. See, e.g., *Hitler Posters*, FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625192567940> (last visited May 6, 2011).

205. SEIDMAN, *supra* note 193, at 242 ("Most modern election posters . . . have followed this simple format: a photograph of a smiling candidate, a slogan, and a party's logo."); See, e.g., *id.* at 9 (McClellan); 40 (Lincoln); 58 (Hoover); 74 (Nixon, Lodge); 85 (Carter); see

American presidential candidates are seen from a low, oblique angle, often with the chin slightly elevated.²⁰⁶ The subject is often portrayed in three-quarters profile, looking slightly up and off into the distance at someone or something out of the frame.²⁰⁷ Although the aesthetic composition of U.S. campaign posters is generally more varied, depictions of presidential candidates have utilized elements similar to those found in propaganda pieces featuring Stalin, Mao, and Hitler. These include the use of bright, primary colors to resemble a colorized photograph, and the use of color and geometric shapes to create vertical and horizontal divisions.²⁰⁸ Depictions of other candidates have incorporated elements that, although not incorporated in the Obama poster, have clear reference in the Soviet, Chinese, and German propaganda posters.²⁰⁹

The commonalities of these compositions are unsurprising in the context of a presidential campaign. Low angles are said to make the subject “look imposing and awesome” by “giv[ing] an impression of superiority, exaltation and triumph.”²¹⁰ Oblique angles create a sense of other-worldliness.²¹¹ Proximity has religious overtones, serving “a dramatic function, allowing the subtlest of emotional relationships with a minimum of dramatic scenery.”²¹² This relationship between subject and viewer is reinforced by the unsmiling expression indicative of a “demand” image “that realize[s] a particular social relation.”²¹³ These characteristics establish a certain type of charismatic authority.

also *Presidential Campaign Posters (Historical)*, FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625184240834> (last visited May 6, 2011).

206. See, e.g., *id.*; see also SEIDMAN, *supra* note 193, at 8 (describing “a 1976 U.S. election poster for the reelection campaign of President Gerald Ford, which used a photograph of Ford, shot from below, so that viewers would perceive him as more imposing”).

207. See SEIDMAN, *supra* note 193, at 83 (describing poster images of Kennedy and McGovern in profile, but recognizing this as somewhat atypical);

208. See, e.g., *Presidential Campaign Posters (Historical)*, FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625184240834> (last visited May 6, 2011).

209. See, e.g., John McCain Campaign Poster, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090106525/in/set-72157625184240834> (last visited May 6, 2011) (depicting an oversized image of McCain’s head, floating in the sky, with his face illuminated and illuminating the clouds around him); Richard Nixon Campaign Poster, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090702860/in/set-72157625184240834> (last visited May 6, 2011) (utilizing bold colors in an image of Nixon surrounded by, but separate from, a large crowd of advisers, celebrities, and citizens); Ronald Reagan Campaign Poster, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090702918/in/set-72157625184240834> (last visited May 6, 2011) (imposing the candidate’s larger-than-life image over a landscape of American icons, linking him to the national mythology); Wendell Willkie Campaign Souvenir, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090106391/in/set-72157625184240834> (last visited May 6, 2011) (using a design strikingly reminiscent of the beams of radiating light used in images of Mao).

210. KRESS & VAN LEEUWEN, *supra* note 161, at 140.

211. See *id.* at 136.

212. *Id.* at 125 (internal quotation marks omitted).

213. *Id.* at 123.

C. Motivations of the Sign-Maker

Fairey's interest in the object (then-candidate Obama) guided his selection of criterial aspects — young, smart, hip, progressive. According to Fairey, the posters were “designed to capture the optimism and inspiration created by Obama's candidacy.”²¹⁴ Presumably, the aesthetic forms Fairey chose to signify these aspects are those that he considered apt for the intended meaning. Here, Fairey chose the aesthetic of communist chic, although he might not term it as such.

Like Andy Warhol and many of the other pop artists preceding him, Fairey takes existing and often iconic semiotic resources and places them in a different context to create new meanings.²¹⁵ His work includes elements of “Soviet-era propaganda, paintings from Works Progress Administration campaigns, and ‘60s-era psychedelic rock poster art.”²¹⁶ His use of these symbols is intended to be ironic, rather than traditionally political.²¹⁷

In Fairey's social context — that of a pop artist, inspired by others who have used such symbols, moving in a network of others who comprehend those symbols in a similar way — these symbols, elements, and aesthetics are available to create meaning. Fairey does not revere traditional cultural symbols as static or unassailable, but rather treats them as elements with which to play. Fairey does not reject capitalism, but rather refines and reconfigures it in the context of other interests and values.²¹⁸ Similarly, in Fairey's Obama posters, “[b]y evoking stylized propaganda posters more often associated with autocrats and dictators, Fairey at once portrays the inevitability of

214. Complaint, *supra* note 1, at 3.

215. See, e.g., John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 108–111 (1988) (discussing pop artists' appropriation and recontextualization of ordinary and iconic objects as semiotic resources).

216. Geoff Edgers, *Shepard the Giant*, THE BOSTON GLOBE, Jan. 25, 2009, at N1; see also Melena Ryzik, *Closer to Mainstream, Still a Bit Rebellious*, N.Y. TIMES, Oct. 2, 2008, at E1, available at <http://www.nytimes.com/2008/10/02/arts/design/02fair.html> (noting that Fairey, who admits to the label “pop artist,” “has always toyed with ideas of commercialism, advertising and appropriation”).

217. Fairey claims to reject the underlying subversive politics of the symbols he uses as reference material:

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

John Del Signore, *Shepard Fairey, Street Artist*, GOTHAMIST (June 21, 2007, 8:40 AM), http://gothamist.com/2007/06/21/interview_shepa.php.

218. See *id.*

Obama's triumph, while suggesting qualities of wisdom and vision that pull viewers willingly into Obama's message of hope, progress and change."²¹⁹ Fairey intended the work in question to represent the "visual embodiment of the unprecedented grassroots support Obama had harnessed."²²⁰

D. Discourse, Negotiation, and Interpretive Communities

As various interpretive communities encountered the posters as contextual texts, they drew on semiotic resources, and the divergent flows of discourse around those texts produced multiple distinct and often contradictory meanings and effects. For Fairey and others — those interpretive communities sharing similar semiotic regimes — the aesthetic of the poster was interpreted through social conventions of the young, smart, and hip. In this context, the semiotic resources available to interpret the text were drawn from pop artists such as Warhol, whose work has been described as commenting on the "relentless victory of Capitalism" over communism.²²¹ In this social context, the allusion to socialist, communist, and fascist dictators was not serious; it was radical, ironic, and idealistic, and distinctly not anti-capitalist.²²²

Reaction within other interpretive communities was quite different, and two distinct themes were dominant. The first accused Fairey's posters of invoking the imagery of socialism, communism, and/or fascism.²²³ This theme encompassed at least three underlying

219. Complaint, *supra* note 1, at 5.

220. *Id.* at 6; *see also id.* at 1 (describing the works as "powerful symbols of Obama's grassroots support").

221. Auction listing for Andy Warhol's *Hammer and Sickle*, CHRISTIE'S, http://www.christies.com/LotFinder/lot_details.aspx?intObjectID=4978852 (click on "Lot Notes") (last visited May 6, 2011). In Warhol's appropriation of communist symbols, "the world of commerce has taken the apparatus of its adversary, absorbed it and turned it against itself." *Id.* Fairey acknowledges similar influences. *See* SEIDMAN, *supra*, note 193.

222. *See id.* *see also* Del Signore, *supra* note 217.

223. *See, e.g.*, Press Release, Lawrence Graham Williams III, Independent Art Historian, *Obama's Public Image Speaks Volumes* (Sept. 4, 2008), available at http://www.lgwilliams.com/art/Obama_Public_Image_Speaks_Volumes.pdf ("Obama's 2008 Presidential poster actually conveys, to the learned viewer, an arbitrary red, white and blue façade placed over an old Communist authority. . . . [U]nderlying this familiar face one can also recognize the template of political ruthlessness, suppressed freedoms, and an uncompromising authoritarian."); Shawn D. Akers, *Obama's Henchmen and the Rise of Commufascism*, BROOKESNEWS (Oct. 13, 2008), <http://www.brookesnews.com/081310obamacensorship.html> ("[S]cattered around the nation are tri-color campaign posters of Mr. Obama, bearing a striking resemblance to the larger than life representations of Lenin, Marx, and Engels used by soviet propagandists in the glory days of Mother Russia."); Peggy Shapiro, *Obama's Posters: Message in the Image*, AM. THINKER (Apr. 15, 2008), http://www.americanthinker.com/blog/2008/04/obamas_posters_message_in_the.html ("[The poster] image appropriates the graphic style of totalitarian Soviet propaganda. It recalls the idealized portraits and personality cult of the 'Beloved Leader' such as Stalin and Lenin.").

concerns: the imposition of an alternate, non-capitalist economic system; the rise of a dominant, totalitarian government that would threaten basic liberties; and the elevation of Obama as a leader of cult-like status.²²⁴ The second theme, in some ways related to the first, accused Obama and his supporters of equating him to the messiah or a messiah-like figure.²²⁵

The variation in these reactions can be explained in part by differences in semiotic conventions. Each of these interpretive communities, negotiating against the needs and interests of that community, developed social conventions regarding the meaning of semiotic resources employed in the Fairey posters. As the various communities encountered the posters as a collection of semiotic resources with potential meanings, and engaged in discourse with and about those works, the process of meaning-making occurred in the context of that community's dominant semiotic regime. The results were quite distinct.

In order to conceptualize these varied and distinct semiotic regimes, and the role of these dominant conventions on the interpretation of the Fairey posters, it may be helpful to take a broader look at how some other communities — communities quite different from that inhabited by Shepard Fairey — had come to regard the use of Eastern Bloc aesthetics in art and fashion. Take, for instance, the revitalization of “Soviet chic,” “communist chic,” and the resurgent “cult of Che”²²⁶ that occurred after the fall of the Berlin Wall. Many conservatives, particularly those tending toward libertarianism, were intensely critical, terming it a foolish trend among Hollywood elites,

224. See, e.g., Williams, *supra* note 223; Akers, *supra* note 223; Shapiro, *supra* note 223 (“What is then unsettling about the Obama poster campaign is that it may be perfectly suited for a man whose candidacy is based on a personality cult . . .”).

225. See, e.g., Warner Todd Huston, *Obama's Propagandistic Iconography: The Making of a Messiah*, NEWSBUSTERS (June 22, 2008, 2:45 PM), <http://newsbusters.org/blogs/warner-todd-huston/2008/06/22/obamas-propagandistic-iconography-making-messiah> (referring to Fairey's work as “[t]he overblown, obscenely reverential posters featuring Obama's upturned face in Jesus-like poses” and noting that “[o]ne has but to view a few communist posters meant to keep the people reminded of the god-like status of their communist dictators and oppressors to see the stunning similarity that the Obama posters reveal with their communist progenitors”); Gary C. Lawrence, *Messiah Chic in the White House*, MERIDIAN (Apr. 27, 2009) (on file with author) (discussing “[t]he halos and streaming rays of sunlight emanating from Obama's chin-forward visage, first in pop art, then campaign posters, and then on the covers of magazines” and “[t]he ubiquitous pictures from low camera angles looking upward into his face”); Shapiro, *supra* note 223 (describing the posters as depicting “[t]he leader, face illuminated by a ‘holy’ light, [who] looks off to the horizon and sees the truth that is not available to his mere mortal followers, who must look up to his image”).

226. The so-called “cult of Che” is not a new phenomenon. In 1968, shortly after Che Guevara's execution by Bolivian soldiers, *Time* published an article with that title, deriding students wearing Che-style berets and “[h]andkerchiefs, sweatshirts and blouses decorated with his shaggy countenance” as “a new source of profits for composers, poster makers and book publishers.” *The Cult of Che*, TIME, May 17, 1968, at 46, 46, available at <http://www.time.com/time/magazine/article/0,9171,838357-1,00.html>.

urban hipsters, and privileged college students.²²⁷ The growing popularity of the KGB Bar in New York was a particular point of conflict, as the conservative press ridiculed not only the bar, but the complicity of elite intellectuals and of *The New York Times* in promoting the venue's popularity.²²⁸

Although it is unclear whether the elites and hipsters were aware of the change, the skirmish took on a more serious tone around the turn of the century, during the first term of George W. Bush after 9/11 and the invocation of the axis of evil,²²⁹ during the revitalization of Russia under Putin,²³⁰ and around the time of Reagan's death.²³¹ David Horowitz conducted a campus campaign against dangerous liberal professors.²³² *The Weekly Standard* warned that "what starts as Commie chic easily grows into full-fledged intellectual Stalinism."²³³ Nevertheless, by 2004, the elements of communist chic were a force in fashion, art, music, and intellectual discourse, both in the United States and Europe. In Europe, the 2003 release of the film *Goodbye, Lenin!* became "a cult sensation, rejuvenating the retro, Communist-chic style among East and West Germans."²³⁴ The largest exhibit of

227. See, e.g., Stephen Marche, *Some Straight Talk on China*, THESTAR.COM, Apr. 12, 2008, <http://www.thestar.com/News/Ideas/article/413767> (identifying the primary adherents of communist chic as privileged college students and lefty professors, "teenagers who have read too much and not enough," and Hollywood elites like Cameron Diaz, who was vilified for wearing a handbag with Maoist slogans while touring Macchu Picchu).

228. John Wilson, *Communist Chic: Hoisting a Few to the Ghost of Stalin*, WEEKLY STANDARD, February 15, 1999, at 38 (discussing a review of the KGB Bar that appeared in the *New York Times*, and noting that "the Ku Klux Klan, like Nazism, is still beyond the pale, but the Soviets (the *Times* explains with a wink and a nudge) are just dangerous enough to be fun").

229. See David E. Sanger, *Bush, Focusing on Terrorism, Says Secure U.S. Is Top Priority*, N.Y. TIMES, Jan. 30, 2002, at A1, available at <http://www.nytimes.com/2002/01/30/us/state-union-overview-bush-focusing-terrorism-says-secure-us-top-priority.html> (discussing President Bush's first invocation of the "axis of evil" concept).

230. See generally Marshall I. Goldman & Joanne J. Myers, *Petrostate: Putin, Power, and the New Russia*, CARNEGIE COUNCIL, June 4, 2008, <http://www.carnegiecouncil.org/resources/transcripts/0047.html> (interview discussing the rise of Putin from 1999 to 2008).

231. See generally Marilyn Berger, *Ronald Reagan Dies at 93; Fostered Cold-War Might and Curbs on Government*, N.Y. TIMES, June 6, 2004, at 1, available at <http://query.nytimes.com/gst/fullpage.html?res=9A04E0DA1131F935A35755C0A9629C8B63>.

232. See generally DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* (2006).

233. Wilson, *supra* note 228, at 38–39. Wilson also observes:

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

Id. at 38.

234. Nora Fitzgerald, *Berlin's Wall Is Down, but Try To Keep Mom from Finding Out*, N.Y. TIMES, Apr. 2, 2003, at E1, available at <http://www.nytimes.com/2003/04/02/movies/berlin-s-wall-is-down-but-try-to-keep-mom-from-finding-out.html>.

East German art to date followed shortly thereafter in Berlin.²³⁵ In 2005, a *Newsweek* article observed: “Eastern Europe is the new cool in the same downbeat intellectual subculture way that Paris in the 1950s gave us existentialism and the black turtleneck, that kind of coffeehouse undercurrent that is the antithesis of the establishment.”²³⁶

All the while, discourse in the conservative and libertarian community grew more critical, even angry.²³⁷ Communist chic aesthetics were linked to intellectualism, academia, elitism, arrogance, and certain conceptions of class distinction, primarily based on education.²³⁸ *National Review* criticized liberals for romanticizing Guevara.²³⁹ Libertarian commentator Radley Balko admitted, “I just wanna’ smack ‘em a few times.”²⁴⁰

A second strand of conservatism, what Bill O’Reilly calls the “Culture Warriors,” sounded a similar theme.²⁴¹ As further explained on O’Reilly’s website, “America is in the midst of a fierce culture war between those who embrace traditional values and those who want to change America into a ‘secular-progressive’ country.”²⁴² Populists like Lou Dobbs echoed much of this sentiment, setting “government,

235. See *East German Art Retrospective Sparks Debate*, DEUTSCHE WELLE (July 27, 2003), <http://www.dw-world.de/dw/article/0,,934779,00.html>; see also Nora Fitzgerald, *Artifacts of Überkitsch Evoke Old East Germany; High and Low Culture Offer Powerful Reminders*, N.Y. TIMES, Oct. 1, 2003, at E1, available at <http://www.nytimes.com/2003/10/01/arts/artifacts-uberkitsch-evoke-old-east-germany-high-low-culture-offer-powerful.html>.

236. Ginanne Brownell, *Coming Fashion*, NEWSWEEK (ATLANTIC EDITION), Sept. 12, 2005, at 60 (quoting David Wolfe, creative director of trend-forecasting company The Donegar Group). Much of the press found this trend “ironic,” “retro-groovy,” and “amusing.” See, e.g., Geoff Collett, *Posters Recall Cult of Mao*, THE PRESS (CHRISTCHURCH), Apr. 23, 2007, at 7.

237. See, e.g., Jeff Jacoby, Op-Ed., *Communist Chic*, BOSTON GLOBE, Apr. 30, 2006, at E9, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/04/30/communist_chic. (attacking “totalitarian fashion”)

238. A 2009 article by Stephen Marche remarked:

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

Stephen Marche, *What’s So Bad About Socialism, Anyway?*, ESQUIRE, Feb. 2009, at 50, available at <http://www.esquire.com/features/thousand-words-on-culture/obama-socialist-connections-0209>.

239. See Jay Nordlinger, *Che Chic*, NAT’L REV., December 31, 2004, at 28.

240. Radley Balko, *Soviet Chic*, THE AGITATOR (Aug. 30, 2004, 11:12 AM), <http://www.theagitator.com/2004/08/30/soviet-chic> (“[T]here’s something really aggravating about these middle class kids born into the most privileged conditions in all of human history suddenly finding it trendy to carry water for a belief system that murdered hundreds of millions of people, and enslaved billions more.”).

241. See *Culture Warrior*, BILL O’ REILLY, <http://www.billoreilly.com/culturewarrior> (last visited May 6, 2011).

242. *Id.*

big business, and special interests” against the American Dream.²⁴³ The imagery is fierce and warlike.

Many with libertarian leanings interpreted the aesthetic through conventions of counter-revolution: naïveté, intellectualism, elitism, arrogance, and certain conceptions of class distinction.²⁴⁴ The semiotic resources employed were interpreted as metaphors for alternative forms of governance and economic organization.²⁴⁵ The dominant convention was to see communist chic as truly dangerous, a real call to political conversion.²⁴⁶ The dominant meaning was not that Obama was cool, or hip, but rather that the Obama movement was actually dangerous as a threat to capitalist culture.

Culture warriors seemed to pick up the communist/socialist convention proffered by the Libertarians and then mold or extrapolate its meaning according to the conventions of their social context: traditional but fading power and homogeneous values and beliefs. According to this group, the central threat of communism/socialism was godlessness. The Fairey posters were said to portray Obama as a messiah-like false god.²⁴⁷ This interpretation both emerged from and fed into several dominant, politically charged narratives about Obama’s identity: Obama the Muslim;²⁴⁸ Obama the black liberation theologian;²⁴⁹ Obama the foreign-born candidate;²⁵⁰ Obama the mixed-race child;²⁵¹ and Obama the terrorist sympathizer.²⁵²

243. See, e.g., LOU DOBBS, *WAR ON THE MIDDLE CLASS: HOW THE GOVERNMENT, BIG BUSINESS, AND SPECIAL INTEREST GROUPS ARE WAGING WAR ON THE AMERICAN DREAM AND HOW TO FIGHT BACK* 12 (2006).

244. See *supra* notes 238–243, and accompanying text.

245. See *supra* notes 226–228.

246. See *supra* notes 227–228.

247. See, e.g., Huston, *supra* note 225 (drawing a link between Fairey’s invocation of “the graphic tradition of communist propaganda,” various leaders’ desire for “god-like status,” and an attempt by the Obama campaign to “turn[] Barack Obama from mere politician to religious icon”).

248. See, e.g., Lauren Green, *Nearly 1 in 5 Americans Thinks Obama Is Muslim, Survey Shows*, FOX NEWS.COM (Aug. 19, 2010), <http://www.foxnews.com/politics/2010/08/19/nearly-americans-thinks-obama-muslim-survey-shows>.

249. See, e.g., Ed Sherwood, *Obama and Black Liberation Theology*, WASH. TIMES, May 2, 2008, at A23, available at <http://www.washingtontimes.com/news/2008/may/2/obama-and-black-liberation-theology>; cf. Jeremiah Wright Graphic with “DAMN” Caption, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090697046/in/set-72157625059444405> (last visited May 6, 2011); Obama Graphic with “RACIST” Caption, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090101901/in/set-72157625059444405> (last visited May 6, 2011).

250. See, e.g., Michael Mello, *Buena Park Pastor Files Suit to Keep Obama from Taking Office*, ORANGE COUNTY REG., Nov. 18, 2008, <http://www.ocregister.com/news/obama-103280-drake-evidence.html>.

251. See, e.g., Shelby Steele, *The Identity Card*, TIME (Nov. 30, 2007), <http://www.time.com/time/magazine/article/0,9171,1689619,00.html>; see also Obama Graphic with “TAUPE” Caption, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090101957/in/set-72157625059444405> (last visited May 6, 2011).

252. See, e.g., Pamela Geller, *Obama’s Ties to Funding Terrorists*, RIGHT WING NEWS (Mar. 24, 2008, 10:39 AM), http://rightwingnews.com/mt331/2008/03/obamas_ties_to_

This discourse highlights the struggle and uncertainty surrounding the employment of these particular semiotic resources. As discussed previously, the Fairey posters draw upon certain elements that consistently appear in portrayals of U.S. presidential candidates.²⁵³ Comparing these portrayals side-by-side with the Obama image, the similarities are striking. Indeed, Fairey indicated that part of his purpose in creating the image was to convey Obama's potential as a leader.²⁵⁴ In many interpretive communities, however, the discourse either ignored or rejected past uses of these elements in favor of a different semiotic regime. The semiotic text, once released into a multitude of social contexts, was out of the author's control. In many of these contexts, the author's desired meanings were not missed by the audience but simply rejected.

E. Social Convention and Power

There is remarkable evidence here of the struggle for power through control of social convention. The Fairey posters themselves served as raw material for countless mash-ups by supporters and detractors.²⁵⁵ Obama is variously portrayed as a Communist or Socialist,²⁵⁶ as Hitler²⁵⁷ or Che,²⁵⁸ as a false messiah,²⁵⁹ as a fraud,²⁶⁰ or as a snob.²⁶¹ Other propaganda posters superimposed Obama's face on iconic posters from the Soviet Union, Maoist China, and Nazi Ger-

funding_terrori_1.php; see also Obama Graphic with "ARAB" Caption, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090101873/in/set-72157625059444405> (last visited May 6, 2011); Obama Graphic with "SHARIA" Caption, FLICKR, <http://www.flickr.com/photos/51369494@N02/5090699856/in/set-72157625059444405> (last visited May 6, 2011).

253. See *supra* notes 205–209 and accompanying text.

254. See *supra* notes 174, 214, and accompanying text.

255. See, e.g., Bianca Bartz, *Political Parodies: Bush Vs. Obama: DOPE Parodies HOPE*, TRENDHUNTER (May 7, 2008), <http://www.trendhunter.com/trends/bush-obama-dope-hope> (collecting derivatives of the original Hope poster); *Spoofing Shepard Fairey's Obama "Hope" Posters*, VILLAGE VOICE, <http://www.villagevoice.com/slideshow/spoofing-shepard-faireys-obama-hope-posters-165211> (last visited May 6, 2011) (same); Rene Wanner, *Web Poster Exhibition — Shepard Fairey Posters for Barack Obama*, RENE WANNER'S POSTER PAGE, <http://www.posterpage.ch/exhib/ex216oba/ex216oba.htm> (last updated Nov. 5, 2008) (same).

256. See, e.g., HOPE Mash-Ups (Communism & Socialism), FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625184310806> (last visited May 6, 2011).

257. See, e.g., HOPE Mash-Ups (Hitler), FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625059471043> (last visited May 6, 2011).

258. See, e.g., HOPE Mash-Ups (Che), FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625184317022> (last visited May 6, 2011).

259. See, e.g., HOPE Mash-Ups (Messiah), FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625184277958> (last visited May 6, 2011).

260. See, e.g., HOPE Mash-Ups (Fraud), FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625059475737> (last visited May 6, 2011).

261. See, e.g., HOPE Mash-Ups (Snob), FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625059455385> (last visited May 6, 2011).

many.²⁶² These mash-ups evidence both individuals' attempts to negotiate the meaning of the Fairey posters, and the struggle against the author's attempt to control, transmit, and maintain meaning. Moreover, these images are themselves evidence of certain dominant social conventions within the various interpretive communities from which they emerged — only to be engaged, negotiated, and challenged once again.

F. The Transformativeness Inquiry

The traditional transformativeness inquiry requires a comparison of the protected work and the allegedly infringing work in a search for evidence of authorship. In contrast, social semiotic theory focuses on audience engagement with and about the work, as a social process in which interpretive communities cultivate new cultural meanings, messages, and insights. Garcia's photograph — although protectable under copyright — employs rather conventional, even common imagery. This point is reinforced when one deconstructs the semiotic resources represented in the photograph in the context of a U.S. presidential campaign. Garcia's apparent intent (conscious or not) was to record the event itself and to depict Obama as a traditional politician participating in a public event, drawing on elements familiar to that narrative. Fairey's work retains the essence of these elements, but draws on additional multitextual references, with the apparent intent of presenting Obama not only as a legitimate politician and presidential candidate, but as a certain type of candidate. In the situated social context of Fairey's interpretive communities, particularly those allied with post-modernist art, the aesthetic design elements of constructivism and the Bauhaus school implicate positive interpretations. If Fairey's use and transformation of those resources was motivated by his desire to portray Obama as a young, hip, smart, and idealistic leader, this is arguably the type of authorial activity intended to be protected under a conventional fair use analysis.

Fairey's work does not, however, fit the dominant conception of the romantic author and the ideology of originality.²⁶³ Fairey's debt to prior works is not obscured. He does not claim originality of form as much as a repurposing and recontextualization of content.²⁶⁴ Fairey does not claim to critique the original work, *per se*, but rather to

262. Hundreds of these appropriated and repurposed images can be found online. *See, e.g.*, Mash-Ups (Soviet, Maoist, Fascist), FLICKR, <http://www.flickr.com/photos/51369494@N02/sets/72157625059436075> (last visited May 6, 2011).

263. *See supra* note 118.

264. *See* Shepard Fairey, *The AP, Obama, & Referencing*, THE HUFFINGTON POST (March 26, 2009, 12:18 PM), http://www.huffingtonpost.com/shepard-fairey/the-ap-obama-referencing_b_179562.html (describing Fairey's technique as reference, appropriation, and recontextualization).

comment at a broad societal level.²⁶⁵ Finally, he does not claim control over the meaning of his work at a mass level, but instead aims his work at a particular audience — what he describes as a “grassroots” audience²⁶⁶ — with shared semiotic codes. These “failings” of authorship might have jeopardized his transformativeness claim under a conventional analysis.

In contrast, social semiotic theory looks to more than evidence of authorial purpose, process, or activity. It supplements the question of authorship, reframing the transformativeness analysis to focus on the resulting work as a potential source of social value. Valuable new expression — new meanings and new messages — created by social interaction with the work can occur entirely apart from the author. This social semiotic approach recognizes that the meaning of a text is not controlled, transmitted, or even consistent across audiences. Instead, the sign-maker employs semiotic resources to create a text with meaning potential based on past and possible uses of those resources. The meaning potential of semiotic resources is only realized, however, when active, socially-situated audiences engage the work in a discourse involving culturally-shared codes. Meaning-making is thus a process of social interaction and response. When audience engagement with a work (here, Fairey’s posters) promotes divergent and unexpected social responses in the form of discourse around that work there is the potential for significant social value in the promotion of new meanings or messages. Where that discourse is distinct from the discourse surrounding the prior work (here, Garcia’s photo), the new work is transformative.

Under this framework, Fairey’s work is highly transformative. The semiotic resources employed by Fairey in his creation of the Obama image proved to be more powerful and more ambiguous than he likely imagined, engaging multiple and distinct semiotic regimes, and producing multiple meanings from the same text. There is no evidence that Garcia’s photo produced discourse or meaning beyond that intended by The AP — that is, recording and conveying a junior senator’s appearance at a public event. The evidence of meaning-making around the Fairey image is vast by comparison. Indeed, the various mash-ups of the Fairey posters, produced by interpretive communities with distinct systems of semiotic codes, are a testament to the contested nature of the semiotic resources employed. In essence, Fairey’s inability to control the meaning of his work, and his inability to have audiences choose the potential meaning he intended, ultimately support a finding of fair use.

265. *See id.* (describing the use of a “reference as a part of social commentary”).

266. *See id.*; Complaint, *supra* note 1, at 5–6 (describing the perceived connection with inspired “grassroots” voters).

Unlike conventional transformativeness analysis, the goal of the approach described here is not to reward or economically incentivize the creation of distinctive works; rather, the semiotic fair use analysis prioritizes the accommodation of expression around the protected work. In this view, the fair use inquiry should not be a rivalry of incentivized authors. The social semiotic analysis allows us to move away from competing authorial claims and conceptions of purpose, and to focus instead on audience engagement with the work in a process of meaning-making that may, in some cases, produce the very type of new expression sought to be accommodated under fair use.

Under this approach, moreover, Fairey's own purpose in creating the work and his success in doing so are relatively immaterial considerations. What matters is how various interpretive communities engage the work to produce new expression. As applied to works of appropriation art, such as Fairey's, this shift from intent to result may help to defuse the moral and ethical suspicion that seems to follow the act of borrowing or recycling existing texts to create new works.

If copyright law fails to accommodate this semiotic struggle to make meaning around the Fairey posters — to provide breathing space for this process among restrictive intellectual property rights — then the First Amendment values that ground the fair use defense are diminished. Fairey's work cultivated dialogue, encouraging the flow of information. It stimulated discourse among diverse communities, both at the center and at the margins of social power. It served “the public interest in airing divergent points of view.”²⁶⁷ Fairey's work, in other words, had a transformative effect in the form of new expression through multiple meanings and messages.

IV. SOCIAL SEMIOTICS AND THE REMAINING FAIR USE FACTORS

Section 107 of the Copyright Statute identifies four primary factors to be considered in the fair use analysis, the first of which is the nature and character of defendant's use, including whether that use was transformative.²⁶⁸ The remaining factors include the nature of the copyrighted work (the second factor), the amount and substantiality of the portion used (the third factor), and the effect of that use on the potential market for, or value of, the original work (the fourth factor).²⁶⁹ This Part explores these remaining factors from a social semiotic perspective to determine if this theory provides any insight into how they might be applied.

267. Samuelson, *supra* note 82, at 2565–66.

268. *See supra* Part II.B.

269. *See supra* note 23 and accompanying text.

A. Nature of the Copyrighted Work

The second fair use factor “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”²⁷⁰ In practice, this is often presented as a dichotomy between works that are primarily creative, and thus closer to the core of protection, and works that are primarily factual, and thus further from the core.²⁷¹ Works may contain both creative and factual elements, with the proportion affecting the weight given this factor.²⁷² Courts seldom engage in an intensive analysis on this point,²⁷³ although it may in some cases carry particular significance.²⁷⁴ Commentators have noted that, while the distinction between factual and creative elements may be more apparent in certain classes of works, others are more difficult to classify. Robert Kasunic has made this point in regard to literary and visual works:

[A] photograph or pictorial work may be assumed to be purely creative. But some pictorial works are primarily factual. Consider a photograph of the Mai Lai massacre or the Sandinista 1979 uprising. While there may certainly have been selection, coordination, and arrangement involved, the subject matter of these works is unquestionably factual. . . . An impressionistic photograph of a factual event would be more creative, whereas a photographic manipulation of light and color might be viewed as purely creative. The analysis must be based on the facts; but it is important to understand that there is a spectrum between fact and creative expression for many types of works other than literary works, and potentially relevant distinctions should be made when analyzing the nature of the work.²⁷⁵

As this suggests, the distinction between factual and creative works is closely tied to the concept of original authorship and eligibility for

270. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

271. See Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529, 544 (2008).

272. See PATRY ON FAIR USE, *supra* note 16, § 4:1.

273. See Kasunic, *supra* note 271, at 544.

274. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563–65 (1985) (focusing on *The Nation's* use not only of the factual aspects of the work, but chiefly the “expressive elements of the work”).

275. Kasunic, *supra* note 271, at 554 (footnote omitted).

copyright protection.²⁷⁶ Thus, there is a tendency to view the question as binary (either protectable or unprotectable). In the context of fair use, however, the distinction allows for a more nuanced characterization.

Social semiotics is potentially useful in this regard. Semiotic resources are at the heart of the meaning-making process. Those “[s]emiotic resources have a meaning potential, based on their past uses, and a set of affordances based on their possible uses.”²⁷⁷ The sign-maker is motivated to draw upon this potential by transforming existing semiotic resources in an attempt to produce a particular meaning and effect.²⁷⁸ From this perspective, creativity is found not in the constituent elements of the text but in their context, combination, and similar factors — almost as one would view a compilation work under copyright law.²⁷⁹ Attempts to dissect the various elements of a work as proof of creativity are therefore suspect as divorced from the text.

The Fairey case presents an interesting example of this idea. Garcia’s photograph employs semiotic resources with powerful encoded meanings, tightly constrained by social convention: close proximity, upward angle, elevated chin, sideways gaze into the distance, and patriotic symbolism.²⁸⁰ These encoded meanings are reinforced by Garcia’s use and transformation of these semiotic resources. It is a classic portrait pose used in depicting politicians. Garcia has done nothing to recontextualize the semiotic resources, nor has he altered the social context in which the audience encounters and engages the text: the image is suitable for use in newspapers, accompanying a report about a junior senator at an event.

Fairey argued that, looking at the work in its entirety, “[t]he Garcia Photograph . . . is a factual, not fictional or highly creative, work,” relying primarily on The AP’s purpose in creating the work to document an event.²⁸¹ The AP responded by invoking Garcia’s “distinctive . . . creative and artistic input,” as embodied in various aspects of the photo-making process — “including (1) his deliberate selection of a specific moment in time to capture President Obama’s expression; (2) his choice in using a particular type of lens and light for optimal impact; and (3) his careful and unique composition of the photo-

276. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” (citations omitted)).

277. VAN LEEUWEN, *supra* note 147, at 285.

278. See KRESS & VAN LEEUWEN, *supra* note 161, at 7.

279. See 17 U.S.C.A. § 101 (West 2011).

280. See *supra* notes 181–184 and accompanying text.

281. Complaint, *supra* note 1, at 11.

graph.”²⁸² The social semiotic analysis sharply recasts this evidence of “creative and artistic input”²⁸³: Garcia’s efforts are more accurately described as an attempt to capture unremarkable semiotic resources with powerful encoded meanings, to combine those resources and present the text in an unremarkable way, and to do so for purposes of conveying conventional meanings. From this perspective, there is little creativity in either the Garcia photo or its constituent elements. There is labor, but with minimal originality.

B. The Amount and Substantiality of the Portion Used

The third fair use factor addresses the proportion of the plaintiff’s work used by the defendant, both quantitatively and qualitatively.²⁸⁴ This “factor favors copyright holders where the portion used by the alleged infringer is a significant percentage of the copyrighted work, or where the portion used is essentially the heart of the copyrighted work.”²⁸⁵ Applying this standard in *Harper & Row*, for example, the Court found that the defendant had taken the heart of the plaintiff’s work by copying “dramatic focal points” of great “expressive value,” which played a “key role in the infringing work.”²⁸⁶ This application suggests a certain connection between the second factor and the third factor, with more creative aspects of the text tending toward the heart of the work.²⁸⁷

282. Answer, *supra* note 175, at 12–13 (“These facts, combined with Mr. Garcia’s experience, skill and judgment, resulted in the creation of a distinctive image of a unique moment and expression of President Obama.”); *see also id.* at 25 (describing the unique characteristics of the Garcia photo and the associated artistic choices); *id.* at 26 (quoting interview with Garcia describing the process of taking the photo); *id.* at 20 (describing the various artistic decisions associated with photography).

283. *Id.* at 12.

284. *See* 17 U.S.C. § 107 (2006); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587–88 (1994) (“[T]his factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too.”).

285. *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 325 (S.D.N.Y. 2008) (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 480 (2d Cir. 2004)).

286. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). *But see* PATRY ON FAIR USE, *supra* note 16, § 5:1 (collecting cases in which courts have “rejected fair use claims when defendant copied a small but qualitatively important part, including the ‘heart of the work.’” (quoting *Harper & Row*, 471 U.S. at 564–65)).

287. Although *Campbell* draws a potential correlative connection between factor three and factors one and four, no such connection is expressly drawn with the second factor:

[W]hether “a substantial portion of the infringing work was copied verbatim” from the copyrighted work is a relevant question, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

Campbell, 510 U.S. at 587–88 (citation omitted) (quoting *Harper & Row*, 471 U.S. at 565).

From a social semiotic perspective, this analysis implicates similar concerns about Garcia's choice and use of semiotic resources. The AP argued that Fairey selected Garcia's "distinctive image" as a reference because of its "unique qualities,"²⁸⁸ but it is equally likely that Fairey chose Garcia's image because of its almost generic nature and powerful encoded messages. The photo is essentially a compilation of semiotic resources with strictly limited meaning potential, the power of which is reinforced by standard transformation and contextualization.²⁸⁹ It is difficult, then, to characterize the text itself as having significant expressive value beyond that of the dominant social conventions constraining the semiotic resources employed. The work has little "heart" for Fairey to take.

C. Effect on Actual and Potential Markets

The fourth factor of the fair use inquiry is "the effect of the use upon the potential market for or value of the copyrighted work."²⁹⁰ This factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."²⁹¹ This includes both harm to the original and harm to the market for derivative works.²⁹²

The market harm analysis recognizes that true market substitutes "cause[] the greatest harm to copyright owners,"²⁹³ whether the copy

288. See Answer, *supra* note 175, at 12–13.

289. See *supra* Part III.C.3.f.

290. 17 U.S.C. § 107 (2006).

291. *Campbell*, 510 U.S. at 590 (1994) (omission in original) (quoting MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05 (1993)); see also Brandon Grzandziel, *A New Argument for Fair Use Under the Digital Millennium Copyright Act*, 16 U. MIAMI BUS. L. REV. 171, 195 (2008) ("Campbell's formulation imposes a higher burden of proof on the party alleging infringement. Because of this 'substantially' higher burden, *Campbell* effectively enlarges the scope of fair use by giving to those claiming it more room to act before they 'substantially' affect the market.").

292. See *Campbell*, 510 U.S. at 590.

293. Sara K. Stadler, *Relevant Markets for Copyrighted Works*, 34 J. CORP. L. 1059, 1059–60 (2009). *Sundeman v. Seajay Society, Inc.*, 142 F.3d 194 (4th Cir. 1998), structures the market harm analysis into three categories: (1) impairment of marketability; (2) market substitution; and (3) derivative or potential markets. *Id.* at 206–07. In *Sundeman*, impairment of marketability focuses on the effect of defendant's limited use on the value of or potential markets for an unpublished work. See *id.* Market substitution considers the question of transformativeness and implicates the distinction between adverse market effects arising from various forms of republication (substitution) and those resulting from criticism (suppression). See *id.* at 207. The derivative or potential market analysis again focuses on substitution, but is limited to market harms in "uses that the copyright holder of the original work would [potentially] develop or license others to develop." *Id.* at 207; see also *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 805–06 (9th Cir. 2003) (considering plaintiff's argument that defendant's work could lead to market harm by impairing the value of the original work, derivatives of that work, and/or licensing of the work or its derivatives).

serves as a substitute for the original work or a derivative work.²⁹⁴ However, just as transformativeness exists on a spectrum, so too does market substitution and the resulting market harm.²⁹⁵ Determining the degree of substitutive effect requires a comparative examination of the copyright holder's actual or potential markets and markets for a defendant's work. At one extreme are works that are mere duplicates of the copyrighted work and are created for commercial purposes. In such cases, substitutive effect and the resulting market harm are presumed.²⁹⁶ At the other extreme are parodies and other critical works that comment on the copyrighted work, for which "the law recognizes no derivative market"²⁹⁷ and thus no cognizable harm in substitution.

This final point turns on the distinction between usurpation of market demand and suppression of market demand. Generally speaking, usurpation resulting from the availability of market substitutes is a cognizable harm under copyright law,²⁹⁸ whereas suppression resulting from criticism or comparison is not.²⁹⁹ Outside of this precise distinction between market usurpation and market suppression, however, the question of market substitution becomes more nuanced, unstructured, and unpredictable. This middle ground tends to be described in terms of the allegedly infringing work rather than the markets for the original, inviting an analysis of transformativeness as a matter of degree. For instance, Sara Stadler describes cases "involving accused works that exist in significant part to enable new uses. . . . [where] the defendant has taken something from the plaintiff, added something, and given the copyrighted expression (which emerges largely intact) a different purpose than the one served by the original."³⁰⁰ Likewise, Christina Bohannon describes cases in which "the defendant might

But see PATRY ON FAIR USE, *supra* note 16, § 3:10 (noting that "[r]egrettably," the proper purposes and goals of fair use analysis are "occasionally lost in favor of economic tests centering around the presence of an ill-defined concept of 'market failure'").

294. *See* Stadler, *supra* note 293, at 1066 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985), and *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d. 512 (7th Cir. 2002)).

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

296. It should be noted that mere duplication is not per se harmful. "[N]ot all harm to the market caused by unauthorized uses may be weighed under the fourth factor (or, indeed, considered at all)." PATRY ON FAIR USE, *supra* note 16, § 6:6. For instance, some material from the original may be unprotectable, or the use of protected material *de minimis*. *Id.*; *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363–64 (1991) (holding that the "names, towns, and telephone numbers" in the white pages were "not original to [plaintiff] and therefore were not protected by [its] copyright," and thus defendant's "use of the listings [did not] constitute infringement").

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

298. *See* PATRY ON FAIR USE, *supra* note 16, § 6:6 ("It is only harm arising from the ability of defendant's use to act as a substitute for plaintiff's work in the marketplace that may disqualify one from successfully asserting fair use.").

299. *See id.* ("Indirect harm caused to the value of the work by criticism or comment may . . . be eliminated from consideration.").

300. Stadler, *supra* note 293, at 1073.

copy less from the copyrighted work, add to or transform the work, or exploit the work in markets that are more remote from the copyright owner's foreseeable markets."³⁰¹

Social semiotics may provide some insight into this question of market differentiation by distinguishing markets based on audience engagement. The Fairey case presents an interesting illustration of both the promise and the limitations of this approach. Direct markets for the Garcia photo include The AP itself, newspapers, and other media outlets. The direct market for Fairey's work would likely include art collectors and Obama supporters. The AP might argue that Obama supporters are a potential market for the Garcia photo, but there appears to be limited evidence to support that assertion. The more difficult issue is what might be called indirect markets, where The AP licenses an image to third-party producers of "advertising, artistic works and merchandise, including . . . tote bags, T-shirts, posters, prints, banners and the like."³⁰² The AP vehemently argues that its "long-established licensing program . . . is fundamental to The AP's existence."³⁰³ According to The AP, "[Fairey's] unauthorized use of the Obama Photo has caused substantial impairment to the potential market for the original photo, namely, The AP's ability to license its use."³⁰⁴

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

301. Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 1019 (2007).

302. Answer, *supra* note 175, at 24.

303. *Id.* at 14. The AP argued that

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

Id. at 24.

304. *Id.* at 39. Fairey asserted that his use of the photo "imposed no significant or cognizable harm to the value of the Garcia Photograph or any market for it or any derivatives." Complaint, *supra* note 1, at 11.

constraints, these markets are less foreseeable. In the latter instance, substitutive market harm carries less weight.

The Fairey case raises two questions in this regard. The first is whether Fairey's deliberate transformation of an almost generic or iconic image into a stylized expression of inspirational "difference," and distribution of the new work thus created, represented a foreseeable market for the Garcia photo. The second is whether the unexpected cultural flows that developed around the Fairey posters — in terms of mash-ups of the posters themselves, mash-ups of other propaganda posters, and the fervent political and cultural dialog surrounding these images — constitute foreseeable (or even possible) markets for Garcia's photo. Remembering that substitutive market harm exists on a scale, rather than as an either/or, the question is not whether Fairey *could have* licensed the photo but rather the *likelihood* of a substantial effect on these potential markets. Part of that question is the likelihood that these licensing markets, as well as the markets that emerged because of Fairey's use, would have ever existed. Given the power relations embedded in expressive communications, that is highly unlikely in this case. As this example suggests, social semiotic theory can in some cases be useful in distinguishing those markets that were foreseeable at the time of creation and/or distribution from those entirely speculative markets that nevertheless later develop.

It should be cautioned, however, that an analysis of substitutive market harm can rather easily become focused on the transformative nature of defendant's work, rather than the markets themselves. This tendency can be traced back to *Campbell*. There the Court drew a distinction between mere duplication and transformative works, noting that while a presumption of market harm may be proper as regards the former, no such presumption was proper for transformative works.³⁰⁵ This distinction was based on the inherently substitutive nature of verbatim copies, which the Court found strong enough to justify a limited evidentiary presumption.³⁰⁶ The Court also recognized that transformative works are less likely to serve as market substitutes.³⁰⁷

305. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

306. See *id.*

307. See *id.*; see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274 n.28 (11th Cir. 2001). It should be noted, however, that a significant number of courts have distorted this correlative observation, asserting instead that transformativeness is a primary factor in the market effect analysis. See, e.g., *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 643 (4th Cir. 2009) (stating that "regardless of whether the defendant used the original work to critique or parody it, the transformative nature of the use is relevant to the market effect factor"); *Suntrust Bank*, 268 F.3d at 1274 n.28 ("Whereas a work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original, a transformative work is less likely to do so." (quoting *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 607 (9th Cir. 2000)); *On Davis v. Gap, Inc.*, 246 F.3d 152, 176 (2d Cir. 2001) (asserting that "market effect must be evaluated in light of whether the secondary use is transformative").

In this context, applying social semiotic theory both to the transformativeness inquiry and the question of market harm potentially increases the risk of either subsuming the transformativeness inquiry or, on the other end of the spectrum, double-counting the transformative nature of the subsequent work. Both results should be avoided. Certainly, transformative works are less likely to serve as a market substitute for the original, but this merely restates the observed inverse correlation between transformativeness and market harm, and should thus not constitute an operative factor in the market harm analysis. It is important, therefore, to maintain the distinction between social semiotics as an analytical tool in the transformativeness inquiry and social semiotics as a means of market definition in an analysis of market harm.

V. CONCLUSION

Supplementing traditional fair use analysis with a social semiotic approach to fair use serves copyright's goal of expanding the body of new expression by accommodating meaning-making processes that occur as various interpretive communities engage a particular text. By focusing on the text, rather than focusing exclusively on authorial purpose and activity, the social semiotic approach avoids the rivalry of authors that plagues the fair use analysis. It is also consistent with modern understandings of authorship and originality, but without displacing the accommodation of more traditionally evidenced authorship.

The social semiotic approach acknowledges that new and different meanings — often multiple meanings — may be realized in the social life of a text, rather than solely in the mind of an author. Social semiotic theory offers an analytical methodology by which to identify those works that, when encountered by an audience, move significantly beyond author intention by engaging distinct social conventions and semiotic regimes. Where this discourse and the multiple meanings produced through that process of meaning-making coalesce around a subsequent work rather than the original work, transformativeness is shown.

Social semiotic analysis is particularly well adapted to the challenges of certain postmodern artistic practices, such as appropriation and the user-generated content that is the hallmark of our remix culture, both of which utilize and retain the core of cultural elements protected under copyright law. The transformative nature of the subsequent work is evidenced, not by dissecting elements of inspired authorship, but by the artifacts of audience engagement and meaning-making that add to the body of new expression. An infringement defendant claiming this form of transformativeness would therefore

need to produce evidence of audience engagement and the negotiation of new and distinct meanings around the text. In *Fairey v. Associated Press*, for example, this evidence would include both vibrant discussion of the work and the many mash-ups produced by Obama supporters and detractors alike. The social semiotic analysis benefits from a networked environment in which active discourse around a work is both facilitated and preserved, and the social value of that expressive process is more readily apparent. The evidence of transformativeness is all around us.