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Laura A. Heymann

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Reasonable Appropriation and Reader Response

Laura A. Heymann*

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INTRODUCTION

Since the U.S. Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*,¹ many courts have considered, when evaluating a claim of fair use in copyright, whether the defendant’s use of the plaintiff’s work is “transformative,” which the *Campbell* Court described as “add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”² Transformativeness, the Court noted, although not required for a finding of fair use, furthers copyright law’s aims, lying “at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”³ Such works, in other words, contribute to the store of creative activity available for audiences while not encroaching on the (legally created) space that copyright law reserves to the original author.

In the years since *Campbell*, but before the Second Circuit’s decision in *Cariou v. Prince*,⁴ courts seem to have focused primarily on the method by which authors engaged in transformation rather than on exploring the values or concepts that might motivate a determination of transformativeness. These courts used the activities or thought process of the defendant: the changes he or she made to the

* Chancellor Professor of Law, William & Mary Law School. Many thanks to Annemarie Bridy, Dan Burk, Carys Craig, Andrew Gilden, Kavita Philip, Mark Rose, Betsy Rosenblatt, Zahr Said, Jessica Silbey, Simon Stern, and Brooks Thomas, as well as the hosts of and participants in the “Discursive Turn in Copyright” symposium at UC Irvine School of Law.

1. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
2. *Id.* at 579.
3. *Id.*
4. *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

copyrighted work or evidence of his or her artistic intent or purpose in using the copyrighted work in the second work. If the court detected significant aesthetic changes, or if the defendant could convincingly persuade the court that the defendant's intended message differed from that of the original author—perhaps easiest to do when the second work was engaging in a parody of the first work—a finding of transformativeness typically followed.

In *Cariou*, the Second Circuit shifted the focus of the analysis, both confirming that a work could be transformative even if it did not comment on the original work or its author and stating that the key to the transformativeness analysis is “how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work.”⁵ This invocation of the “reasonable observer” seems to have come from the Supreme Court's reference in *Campbell* to the “threshold question” in that case: “whether [the] parodic character [of the defendant's work] may reasonably be perceived,”⁶ extended by the *Cariou* court to the nonparodic appropriation art at issue in that case.

The *Cariou* court's focus on the reasonable observer might be said to align with a reader-response approach to the transformativeness analysis. The task is to determine whether the second work has “alter[ed] the first with new expression, meaning, or message,” but that determination, in the *Cariou* court's view, is dependent not on authorial intent but rather on audience perception. In earlier, pre-*Cariou* work urging such an approach, I wrote that evidence of how readers interpret a work, including critical reception, would be useful in determining whether a separate discursive community had developed around the defendant's work, which would suggest transformativeness.⁷ I further suggested that if such evidence was unavailable, “courts are well equipped to act as the ‘reasonable reader’” and answer the question for themselves.⁸ This is true as an institutional matter, since resolving issues of interpretation is something we expect courts to be able to do. But what *Cariou* did not answer, and what my earlier assertion neglected too easily, is the process by which courts should engage in this analysis. The *Cariou* court, for its part, took on this task without much in the way of explanation as to why its conclusions were those of a “reasonable observer,” simply concluding that twenty of the twenty-five works at issue were, on their face, transformative, and sending the remaining five works back for consideration by the district court.⁹

5. *Id.* at 707.

6. *Campbell*, 510 U.S. at 582.

7. Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 455 (2008).

8. *Id.* at 456–57; see also, e.g., Amy Adler, *Fair Use and the Future of Art*, 91 NYU. L. REV. 559, 609 (2016); H. Brian Holland, *Social Semiotics in the Fair Use Analysis*, 24 HARV. J.L. & TECH. 335, 360 (2011).

9. *Cariou*, 714 F.3d at 707–08 (“Here, looking at the artworks and the photographs side-by-side, we conclude that Prince's images, except for those [five] we discuss separately below, have a different character, give Cariou's photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou's.”); *id.* at 710–11 (noting that the remaining

Given the possibility that judges may act as “bad reviewers,”¹⁰ in that they may focus too narrowly on their own view and disregard the possibility of alternative interpretations, was the *Cariou* majority’s approach appropriate? Should courts attempt to learn as much as they can about the works at issue, the views of relevant audiences, and the schools within which each author or artist is operating?¹¹ To what extent should the court put a thumb on the scale—on either side—to recognize the cultural importance of one of the works or distributional inequities? Is it enough for the court to assume that its views are those of a “reasonable reader”¹² and so incorporate nothing more into its analysis than a side-by-side comparison of the works? Indeed, why should the analysis even require reasonableness?

A grounded sense of the reasonable reader should recognize the value of taking into account questions of context and meaning, including considerations of gender, race, socioeconomic status, sexuality, and privilege, among others.¹³ A requirement that the interpretation be “reasonable” can be read to mean that interpretations that the courts or dominant interpretive communities find too transgressive can be deemed outside artistic (and therefore legal) boundaries.¹⁴ Andrew Gilden and Timothy Greene have highlighted the socioeconomic distinctions that can infect a decision about which audiences to consider, where the Richard Princes of the world are assumed to be engaging in legitimate creative activity but lesser known artists are outlaws.¹⁵ Gilden, in a separate work, also

five works “do not sufficiently differ from the photographs of Cariou’s that they incorporate for us confidently to make a determination about their transformative nature as a matter of law”); *cf. id.* at 714 (Wallace, J., concurring in part and dissenting in part) (agreeing with the legal standard but disagreeing with the majority’s decision not to remand all thirty works for consideration by the district court on an open record).

10. Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LIT. 20, 21 (2013).

11. The Court famously stated in *Bleistein* that “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 248, 251 (1903). Amy Adler notes that the Andy Warhol Foundation and, later, the Robert Rauschenberg Foundation took the position in *Cariou* that expert opinion was necessary to the transformativeness determination. Adler, *supra* note 8, at 609 n.226.

12. *Cf.* Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 ST. LOUIS U. L.J. 781, 785 (2008) (“[I]t is worth reminding students how much one’s own viewpoint can be mistaken for a general worldview . . . and how courts’ tendencies to do the same can have the effect of creating a market that is more homogeneous than reality suggests.”).

13. *Cf.* MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* (2003); Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769 (2001).

14. Holland, *supra* note 8, at 366 (“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.”).

15. Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. ONLINE 88, 98 (2013) (contrasting Second Circuit’s apparent disregard of scholars who testified about the way in which Fredrik Colting’s *60 Years Later: Coming Through the Rye* was a critical commentary on *Catcher in the Rye* with its crediting the opinions of famous artists and celebrities on Richard Prince’s merit); *see also* Laura R. Bradford, *Parody and Perception: Using Cognitive Research to*

highlights the way in which the vocabulary of “raw materials”—used to describe the work of others deemed available for reappropriation—can perpetuate gender, racial, and other hierarchies and argues compellingly that such phrasing can suggest that these materials are not “deeply infused with meaning.”¹⁶ Similarly, Madhavi Sunder has noted that the increasing scholarly attention given to the public domain may have the effect of characterizing traditional knowledge “as the raw material of innovation—ancient, static, and *natural*—rather than as intellectual property—modern, dynamic, *scientific*, and *cultural invention*.”¹⁷ It is perhaps not surprising, then, that earlier transformativeness analyses focused on the robustness of the defendant’s artistic activity and vision rather than on the work and that length of time in the artistic world (and/or associated recognition and reputation) would serve as a proxy for legitimacy.¹⁸

I. TRANSFORMATIVENESS IN U.S. COPYRIGHT LAW

We should begin, then, with a review of the doctrine. Section 107 provides that the “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.”¹⁹ The statute then provides four (now well-known) factors that “shall” be included among those used to make this determination: “(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.”²⁰

The first factor has traditionally comprised two analyses. One is derived from the concluding clause and considers whether the use is commercial or noncommercial. Until the Court’s decision in *Campbell*, courts tended to assume that commercial uses were not fair uses, particularly given the Court’s discussion in *Sony Corporation of America v. Universal City Studios*, which included a statement that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”²¹ In *Campbell*, however, involving a parody by the rap group 2 Live Crew of Roy Orbison’s song “Oh, Pretty Woman,” the Court pivoted away from that

Expand Fair Use in Copyright, 46 B.C. L. REV. 705, 763–64 (2005) (describing study in which a group of respondents evaluated a poem’s merits differently depending on their understanding of its authorship).

16. Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 357 (2016).

17. Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 100 (2007).

18. *Compare* Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), *with* Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

19. 17 U.S.C. § 107 (2012).

20. *Id.*

21. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

language, noting that *Sony* “called for no hard evidentiary presumption” and that the commercial nature of a use instead “tends to weigh against a finding of fair use,” depending on the context.²²

The second, and more complex, analysis derives from the first part of the first factor: the purpose and character of the use. Pierre N. Leval (then a judge on the U.S. District Court for the Southern District of New York and now a senior judge on the U.S. Court of Appeals for the Second Circuit) contended in a 1990 article in the *Harvard Law Review*²³ that courts had not to that point accorded sufficient importance to the first factor. Noting that “all intellectual creative activity is in part derivative” and that “important areas of intellectual activity” (such as philosophy and criticism) “are explicitly referential,”²⁴ Judge Leval concluded that determining whether the defendant’s use was justified—the heart of the first factor—should turn “primarily on whether, and to what extent, the challenged use is transformative.”²⁵ Here, Judge Leval continued, he meant that the use should not merely “repackage[] or republish[] the original”; rather, such a use transforms the original “in the creation of new information, new aesthetics, new insights and understandings.”²⁶ The *Campbell* Court, after noting that all four statutory fair use factors “are to be explored, and the results weighed together, in light of the purposes of copyright,”²⁷ described the first factor, adopting Judge Leval’s “transformativeness” vocabulary but not all of his descriptive text, as asking a court to determine “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.’”²⁸ The suggestion that this consideration should weigh heavily in the overall analysis was suggested by the Court’s further statement 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.”²⁹

In the years following the Court’s opinion in *Campbell*, courts considered how best to determine whether a second work indeed changed the original work by contributing a “new expression, meaning, or message.”³⁰ Many courts focused on

22. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994).

23. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

24. *Id.* at 1109.

25. *Id.* at 1111.

26. *Id.*

27. *Campbell*, 510 U.S. at 578.

28. *Id.* at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass 1841)) (other citations omitted).

29. *Id.*

30. Many commentators have also provided insight on this question. See, e.g., Adler, *supra* note 8; Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 750 (2011) (“The test quite clearly requires the court to identify the expressive purpose for which the author of the copyrighted work created that work and the expressive purpose for which the defendant copied from the work, and then to compare the two to determine if the defendant’s expressive purpose materially

the defendant's activities or intent: What message did the defendant intend to communicate through his or her use of the plaintiff's work?³¹ How did he or she incorporate it? What changes did he or she make? In some cases, the presence or absence of this evidence was dispositive. For example, in two cases involving the appropriation artist Jeff Koons, Koons's inability in the first case, *Rogers v. Koons*,³² to provide persuasive testimony as to his intent led to a judgment in the plaintiff's favor; by the time of the second case, *Blanch v. Koons*,³³ Koons (or his lawyers) had figured out that the key to success was a cogent, artistically plausible story about what he intended to communicate through his work.³⁴ (The fact that Jeff Koons had, by the time of *Blanch*, become a more well-known appropriation artist was also likely a factor in the decision.³⁵)

This approach hit a snag, however, in *Cariou v. Prince*. Patrick Cariou, a professional photographer, published a book of photographs taken during the six years he spent in Jamaica. Many of the photographs were of Rastafarian individuals; the photographs' existence, Cariou testified, resulted from the relationships that he had been able to develop with the subjects.³⁶ The resulting book, titled *Yes, Rasta*, was published in 2000, to apparently little notice. Richard Prince, a well-known appropriation artist represented by the Gagosian Gallery, mounted a show at the Eden Rock hotel in St. Barths from December 2007 to February 2008. The show included a collage titled *Canal Zone (2007)*, which "consisted of 35 photographs torn from *Yes, Rasta* and attached to a wooden backer board."³⁷ Prince had painted over some parts of the photographs and/or used only part of some of the photographs. *Canal Zone (2007)* was the prelude to a *Canal Zone* series comprising 30 works, 28 of which incorporated 41 images from *Yes, Rasta*—some almost in their entirety and some only as parts of a collage. Twenty-two of Prince's works

differs from that of the author. But neither the test nor precedent provides dispositive rules for how broad the relevant categories of expressive purpose should be, and just how different the defendant's expressive purpose must be from that of the author to qualify as a transformative use.").

31. See, e.g., *Educ. Testing Serv. v. Stanley H. Kaplan, Ltd.*, 965 F. Supp. 731, 736 n.6 (D. Md. 1997) (suggesting that the "purpose and character of the use" derives from the defendant's "goals and intent").

32. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

33. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

34. *Id.* at 253 ("Koons is, by his own undisputed description, using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media.").

35. See Adler, *supra* note 8, at 581 & n.102 (identifying the change in Koons's reputation in between the two cases as a factor contributing to Koons's win in *Blanch* and wondering whether "courts get worried about being on the wrong side of cultural matters"); cf. MARK ROSE, *AUTHORS IN COURT* 177–79 (2016) (discussing differing outcomes in the two cases and noting that the most obvious explanation is the intervention of the *Campbell* opinion).

36. *Cariou v. Prince*, 714 F.3d 694, 699 (2d Cir. 2013).

37. *Cariou v. Prince*, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011), *rev'd*, 714 F.3d 694 (2d Cir. 2013).

were shown at the Gagosian Gallery, and many of those were featured in the gallery's exhibition catalog.³⁸

Having become aware of Prince's works when an interested gallery owner decided to forgo a show with Cariou because, she assumed, he was already working with Prince,³⁹ Cariou sued Prince, the Gagosian Gallery, Larry Gagosian, and Rizzoli International Publications, Inc., for copyright infringement. (Rizzoli was later voluntarily dismissed.) On cross-motions for summary judgment, Prince raised a defense of fair use, which the district court rejected, holding both Prince and the Gagosian defendants liable for direct infringement and the Gagosian defendants also secondarily liable.⁴⁰

Prince had not availed himself of the strategy employed by Jeff Koons in *Blanch*. During his deposition, he was asked repeatedly about his intent in incorporating Cariou's photographs into his own work, and each time he disclaimed any such intent.⁴¹ Before the district court, his attorneys argued that the court could still find Prince's work transformative of Cariou's work notwithstanding the lack of evidence as to Prince's intent to comment on Cariou's work. But the district court rejected this argument, finding that no previous case had so held, and thus concluded that Prince's paintings could be transformative "only to the extent that they comment on the Photos; to the extent they merely recast, transform, or adapt the Photos, Prince's Paintings are instead infringing derivative works."⁴² Because the court had no evidence before it indicating Prince's intent to comment on Cariou's photographs, the court found that Prince's works were overall minimally transformative, thus weighing against a finding of fair use.⁴³

On appeal, the Second Circuit held that the district court took too restrictive a view of transformativeness in requiring commentary on the plaintiff's work. "The law imposes no requirement that a work comment on the original or its author in order to be considered transformative," wrote the court, "and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute."⁴⁴ Moreover, the court held, the fact that Prince claimed in his deposition to have had no particular intent with respect to Cariou's work was not dispositive. Rather, wrote the court, "[w]hat is critical is how the work in

38. *Cariou*, 784 F. Supp. 2d at 344; *Cariou*, 714 F.3d at 699 n.2 (noting that there were 30, not 29, works at issue).

39. *Cariou*, 714 F.3d at 704.

40. *Cariou*, 784 F. Supp. 2d at 354.

41. Prince Deposition Transcript at 338:9–12, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *rev'd*, 714 F.3d 694 (2d Cir. 2013) ("Q: And just again, what is your intent, what are you changing [the original work] into? A: To make great artworks that make people feel good."); *id.* at 339:11–12 ("[I]n any artwork I don't think there's any one message."); *id.* at 354:17–18 ("I don't really make comments with any of my work.").

42. *Cariou*, 784 F. Supp. 2d at 349.

43. *Id.* at 350.

44. *Cariou*, 714 F.3d at 706.

question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so."⁴⁵ The key task, the court held, was not to confine its consideration to the defendant's explanation but instead to "examine how the artworks may 'reasonably be perceived' in order to assess their transformative nature."⁴⁶

With this, the court took on for itself the role of comparing the two sets of works, concluding that twenty-five of the thirty works from Prince "manifest[ed] an entirely different aesthetic from Cariou's photographs" and so were transformative as a matter of law.⁴⁷ (The decision regarding the remaining five works was remanded to the district court.⁴⁸) The court's focus on aesthetics was not deeply tied to a consideration of message or meaning. Rather, as the court concluded:

Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative. Cariou's black-and-white photographs were printed in a 9 1/2" x 12" book. Prince has created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.⁴⁹

Judge Wallace, while agreeing with the majority as to the correct legal standard, parted ways with the majority on two issues: (1) the majority's decision to judge for itself whether the works were transformative (Judge Wallace would have sent all thirty back to the district court) and the apparent devaluing of Prince's deposition testimony. While acknowledging that such statements may be self-serving, Judge Wallace found them to be "relevant to the transformativeness analysis."⁵⁰

The Seventh Circuit has been critical of the decision, stating pointedly in a 2014 opinion that transformativeness is "not one of the statutory factors, though the Supreme Court mentioned it in [*Campbell*]," and characterizing the *Cariou* court as having "run with the [*Campbell* Court's] suggestion,"⁵¹ to the detriment of the

45. *Id.* at 707.

46. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994)).

47. *Id.* at 706.

48. The case settled in March 2014. Brian Boucher, *Landmark Copyright Lawsuit Cariou v. Prince Is Settled*, ART IN AMERICA (Mar. 18, 2014), <http://www.artinamericamagazine.com/news-features/news/landmark-copyright-lawsuit-cariou-v-prince-is-settled/> [https://perma.cc/SU4C-6XMC].

49. *Cariou*, 714 F.3d at 706.

50. *Id.* at 713 (Wallace, J., concurring in part and dissenting in part).

51. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014). As Rebecca Tushnet has astutely observed, saying that the Supreme Court "mentioned" transformativeness in *Campbell* is like

derivative works right in 17 U.S.C. § 106(2).⁵² But many other courts that have engaged with the *Cariou* decision since its publication have followed the Second Circuit's lead by assuming that the court itself is the "reasonable reader" of the Second Circuit's holding and thus resolving the issue without resort to any evidence beyond the works themselves. For these courts, the perceived need for only a side-by-side comparison means that the transformativeness question can be resolved at an early stage of the case—even on the pleadings, assuming both works are incorporated by reference.⁵³

saying that "Article III courts [are] merely 'mentioned' in the Constitution." Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 886 (2015).

52. *Kienitz*, 766 F.3d at 758. *But see* Pierre N. Leval, *Campbell as Fair Use Blueprint?*, 90 WASH. L. REV. 597, 610 (2015) ("The transformation involved in making a derivative is usually one of form or medium, offering the same work in a new version, form, medium, or shape, rather than offering information or commentary *about* the original. . . . The classic understanding of derivatives is that they are works that represent the original author's creative expression in a different medium or form to an audience that either is, or would be, motivated by appreciation of the original author's creative expression—a novel converted into a film, a poem translated into another language, an oil painting photographically reproduced on paper."); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008) (concluding, after reviewing cases, that "[i]n assessing transformativeness, the courts generally emphasize the transformativeness of the defendant's *purpose* in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the *content* of the underlying work"). Concluding, in the case at hand, that the plaintiff had failed to argue that there had been any reduction in demand for his work or harm to his licensing market (factor four) and that the defendant had altered the photo to such an extent that little of the original remained (factor three), the *Kienitz* court affirmed summary judgment for the defendants. *Kienitz*, 766 F.3d at 759.

53. *TCA Television Corp. v. McCollum*, 839 F.3d 168, 181 (2d Cir. 2016) (noting some of the criticism of *Cariou* but concluding that, in the case at hand, "even scrupulous adherence to that decision does not permit defendants' use of *Who's on First?* in *Hand to God* to be held transformative") (reversing 12(b)(6) dismissal of complaint on fair use grounds but affirming dismissal on copyright ownership grounds); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013) ("[A]n allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent. This is so even where—as here—the allegedly infringing work makes few physical changes to the original or fails to comment on the original."); *Lombardo v. Dr. Seuss Enters., L.P.*, 279 F. Supp. 3d 497, 505 (S.D.N.Y. 2017) ("[A]lthough discovery might yield additional information about plaintiffs' intent, such information is unnecessary to resolve the fair use issue; all that is needed is the parties' pleadings, copies of [the two works], and the relevant case law.") (finding the second work to be a parody and thus transformative); *Adjmi v. DLT Entertainment Ltd.*, 97 F. Supp. 3d 512, 516 (S.D.N.Y. 2015) (in suit alleging that play infringed television show "Three's Company," on motion for judgment on the pleadings, court relied on nine seasons of the show, the script, and some reviews of the play, "each incorporated by reference in the pleadings"); *id.* at 532 n.13 ("In making this determination, the Court notes that it does not rely on reviews, user comments related to online reviews, images of the play, or certain of Mr. Adjmi's statements regarding the *3C*. Along the same lines, the Court does not require 'intent' evidence, purporting to explain the aims and goals animating *Three's Company* and *3C*, of the type cited by the Court of Appeals in [*Blanch*]."); *Arrow Prods., LTD v. Weinstein Co.*, 44 F. Supp. 3d 359, 368 (S.D.N.Y. 2014) (rejecting plaintiff's argument that court should not decide fair use on a motion for judgment on the pleadings); *id.* ("[T]here is a complete factual record before the court and discovery would not provide any additional relevant information in this inquiry. All that is necessary for the court to make a determination as to fair use are the two films at issue. . . .").

This has not been true of all courts, however,⁵⁴ and in a recent case also involving Richard Prince, the court expanded the scope of the reasonable reader to include the reader of the opinion, noting that Prince's work in that case "[did] *not* belong to a class of secondary works that are so aesthetically different from the originals that they can pass the Second Circuit's 'reasonable viewer' test as a matter of law."⁵⁵ The court continued, "The reader of this Opinion—perhaps a reasonable observer—is invited to perform his or her own side-by-side comparison [of the two works]. That observer must conclude that [Prince's work] does not so 'heavily obscure[] and alter[]' [the plaintiff's work] that it renders the original photograph 'barely recognizable.'"⁵⁶ The court concluded that because Prince had essentially incorporated the plaintiff's entire photograph, "substantial evidentiary support" as to transformativeness—via art critics, the artist's intent, and other sources—was required.⁵⁷

In general, however, the courts have tended to treat themselves as the reasonable observer, perhaps not surprising in a legal system that asks a court to reach *some* answer at the end of the day. But the opinions do not fully reveal an awareness that this task involves interpretation of some sort and so should be approached with consideration of the best tools for the job.⁵⁸ Here, I mean something more than what Rebecca Tushnet calls "epistemological humility,"⁵⁹—an awareness that other viewpoints may exist—although that, too, is called for. Brian Richardson reminds us, along the same lines, that conceiving of "the reader" as a unitary being, with no gender, race, sexuality, or socioeconomic class, serves to minimize the very real experiences that individual readers bring to a reading,⁶⁰ and in previous work, I have made the same observation regarding judges in trademark law cases, who may see the reasonable consumer as having the same

54. *See, e.g.,* Hirsch v. CBS Broadcasting, Inc., No. 17 Civ. 1860 (PAE), 2017 WL 3393845, at *7 (S.D.N.Y. Aug. 4, 2017).

55. *Graham v. Prince*, 265 F. Supp. 3d 366, 380 (S.D.N.Y. 2017).

56. *Id.* at 381 (quoting *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013)).

57. *Id.* at 382 (quoting *Cariou*, 714 F.3d at 707).

58. Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 251 (1998) ("A truly open-minded copyright jurisprudence therefore requires explicit consciousness of aesthetics.").

59. Tushnet, *supra* note 10, at 22; *see also* Gilden, *supra* note 16, at 382 ("By making a straightforward, side-by-side comparison of the original work and likeness and the visible aesthetic qualities shared between them, courts exhibit confidence in their abilities to discern sufficient transformation without having to look deeper into the motivations of the defendant or the broader social value and meaning of the parties' respective endeavors.").

60. Brian Richardson, *The Other Reader's Response: On Multiple, Divided, and Oppositional Audiences*, 39 CRITICISM 31, 47–48 (1997) ("[I]n a number of particularly rich, challenging, or provocative texts, vastly different readers are addressed, rewarded, and, at times, confounded. Individual readers are frequently divided, and often maintain and negotiate multiple, contradictory experiences at the same time. Minority challenges to exclusionary paradigms should benefit from at least partial consolidation into a more expansive, non-dualistic framework, and reception theory will continue to suffer as long as it fails to fully incorporate these and many other reader-oriented critical studies.").

visual abilities, dialect, and literacy levels as themselves.⁶¹ Rather, I mean a more deliberate, overt recognition by the court of its function as a reader in the first place, in conversation with other readers of the same material.⁶² A threshold inquiry for any such court should start with this question: Why should it matter how the work in dispute appears to the “reasonable observer” or whether any new meaning or message “may reasonably be perceived”? What is gained by such a limitation—and, more pointedly, which views are left out?

When we talk of a reasonable person in tort law more generally, we are referring to a legal construct that sets a standard of care. From a law-and-economics perspective, by saying one must act reasonably, we are saying that one must take those precautions that are cost-justified. To hire round-the-clock security personnel to guard against a microscopic chance of minor injury incurs too much cost and so is not required by a standard of reasonable care. From a rights-based perspective, taking reasonable care might inhere in what we, as members of a community, expect from one another in light of generally accepted individual limitations.⁶³ We expect those who create a risk of harm to others—say, by driving a vehicle—to take care to avoid injury to others; we expect a child to take only those precautions expected for her age.⁶⁴ In trademark law, we use the “reasonable consumer” as a lens through which to determine what is lawful or unlawful behavior for a putative infringer. As in tort law, we don’t expect defendants to incur the cost of minimizing confusion for consumers who act unreasonably—who see similarities that most would not or who refuse to notice what is directly presented to them. It is not that the experiences of unreasonable consumers are invalid or untruthful; it is that the law will not require a putative defendant to take their confusion into account.

But what work is reasonableness doing in a transformativeness inquiry? The limitation of viewpoints on transformativeness to those of a “reasonable observer” may contribute to establishing the line between lawful and unlawful use, but the *Carion* court did not seem to be establishing the reasonable observer as a metric by which future defendants should tailor their actions. In other words, unlike in the scenarios just described, the reasonable observer is not establishing a standard of conduct to follow or locus for potential harm. When a court finds fair use based on transformativeness, it is not saying that the defendant acted reasonably in her artistic choices or that she took cost-effective precautions to avoid encroaching on the plaintiff’s rights. (If anything, these considerations attach to the third fair use factor,

61. Heymann, *supra* note 12.

62. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 708–09 (2012) (“Right when interpretation is most needed, courts abandon interpretation, or at least think they have no need to engage in it.”); Zahr Kassim Said, *Only Part of the Picture: A Response to Professor Tushnet’s Worth a Thousand Words*, 16 STAN. TECH. L. REV. 349 (2013) [hereinafter Said, *Only Part of the Picture*] (expanding Tushnet’s analysis from visual images to include text). See generally Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469 (2015).

63. Kenneth S. Abraham, *Strict Liability in Negligence*, 61 DEPAUL L. REV. 271, 274 (2012) (contrasting rights-based theories of negligence with instrumentalist theories of negligence).

64. RESTATEMENT (SECOND) OF TORTS § 283A (AM. LAW. INST. 1965).

which asks whether the defendant took too much of the plaintiff's work for her purposes.) Nor does the limitation seem related to the mode of the defendant's argument, as it would if the transformativeness inquiry focused on the defendant's purpose; in such a case, a court might ask whether the use the defendant made was reasonable in light of her intended purpose or justification. But from a reader-response perspective, what would an "unreasonable observer," by contrast, conclude after viewing two works? If the works of Richard Prince or Sherrie Levine, which often appropriate wholesale the work of others, are considered to be transformative by those knowledgeable about contemporary art, what conclusion as to transformativeness would be unreasonable, given the breadth of discursive or interpretive communities?

Indeed, it would be curious were a court to deem a reading of a work unreasonable if an interpretive community had formed around that view, precisely because the reasonable observer in this context is not meant to set a standard of care. In other words, the goal of the inquiry is not to identify the "correct" or "best" interpretation—it is simply to ensure enough interpretive distance between the two works such that the second is not merely a substitute for the first.⁶⁵ Thus, unlike with other (normative) assessments of the reasonable person, where a court could deem an activity unreasonable despite the fact that it had found favor among many,⁶⁶ the existence of an interpretive community around an interpretation tilts the analysis in favor of transformativeness. *Bleistein* cautioned courts against substituting their preferred aesthetic assessment over others based on individual preferences,⁶⁷ but it did not—I don't think—anticipate that courts should decline to engage in any interpretive assessment whatsoever. Indeed, the transformativeness analysis, in requiring *some* conclusion by a court, requires an interpretive and/or aesthetic assessment that becomes, at least in part, a normative one.

The use of reasonableness as a limitation thus seems to be best designed to encourage courts not simply to offer conclusions but to offer *reasons*: to discuss, as part of a discursive or interpretive community, the aspects of the two works that lead the court to conclude that the second alters the first with new meaning or

65. In this regard, the analysis under the first fair use factor and the fourth fair use factor are interrelated. *See* Leval, *supra* note 52, at 602 (noting that the first and fourth factors are "two facets of one complex question" in that "[t]he greater the divergence of the objectives of the copying from those of the original, the less likely that the secondary work will compete in the original's exclusive markets"); *id.* at 605 (noting that "*Campbell* characterizes the first factor inquiry as subservient to the fourth"); Jonathan Francis, Note, *On Appropriation: Cariou v. Prince and Measuring Contextual Transformation in Fair Use*, 29 BERKELEY TECH. L.J. 681, 712 (2014) (contending that courts should use market value as evidence of transformativeness). Audiences who interpret a work as transformative rather than as derivative might also represent a different market for the second work, and courts that place extra emphasis on the fourth factor might view the reasonable observer through a "harm to the market" lens.

66. *See, e.g.,* The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) ("Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

67. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

message, and ideally to engage with views that conclude otherwise.⁶⁸ By *reasons*, I do not mean *justifications*; the court is not being asked to square its interpretation with an existing rule or principle.⁶⁹ (A court adhering to the common law tradition must, of course, be cognizant of the fact that it is expected to follow, and to create, precedent, but the nature of the transformativeness inquiry makes it difficult to derive any larger principles from an individual case beyond the definition of the term itself.⁷⁰) A reader-focused view of interpretation entails reasoning because it involves a discursive process by which readings are contested within and among interpretive communities. Providing the reasons for a particular interpretation is what makes possible the discourse that, I contend, the transformativeness inquiry necessarily contemplates.

II. READER RESPONSE AND INTERPRETIVE COMMUNITIES

In previous work, I suggested that transformativeness “should not be a binary concept”; rather, “the relevant question should be the *degree* of transformativeness—the amount of interpretive distance that the defendant’s use of the plaintiff’s work creates.”⁷¹ If that distance is great enough such that a separate discursive or interpretive community exists around the second work, that distance suggests that transformation has occurred.⁷² This aligns with what is typically described as reader-response theory, which “shift[s] the emphasis from the productive to the receptive process, stressing the creative and transformative activities of the reader, who does not recreate the subjectivity materialized into a written text, but produces a new subjectivity, a product of the interaction between text and reader,”⁷³ and in particular Stanley Fish’s much analyzed (and often critiqued⁷⁴) theory of interpretive

68. See LOUISE M. ROSENBLATT, *THE READER, THE TEXT, THE POEM: THE TRANSACTIONAL THEORY OF THE LITERARY WORK* 146 (1978) (offering the view that rather than “thinking of the text as the medium of communication between author and reader,” we should instead “consider the text as an even more general medium of communication *among readers*”).

69. Cf. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995).

70. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 69 (2000) (“[I]t is difficult to understand how a finding in one [copyright] case will aid others in any but the vaguest of ways.”). I do not mean by this to discount the very real impact that a judicial decision on fair use can have both on the parties before the court and on others attempting to use the decision as a guide to future behavior.

71. Heymann, *supra* note 7, at 449.

72. *Id.*

73. Gabriele Schwab, *Reader-Response and the Aesthetic Experience of Otherness*, 3 STAN. LIT. REV. 107, 114 (1986).

74. See, e.g., Terry Eagleton, *The Estate Agent: Stanley Fish and His Trouble with Principles*, in *POSTMODERN SOPHISTRY: STANLEY FISH AND THE CRITICAL ENTERPRISE* 181 (Gary A. Olson & Lynn Worsham eds., 2004).

communities,⁷⁵ of which Janice Radway's pioneering work on romance novels is but one example.⁷⁶

Fish's theory, in the extreme way in which he has historically presented it, runs the risk of seeming hopelessly relativistic. Fish takes the position that all interpretive activity results from the strategies employed by the interpretive community of which the reader is a part. In this sense, one might conclude that no reader interprets with complete agency and that interpretive activity is simply the engagement of contested readings of a work, none having any primacy over any other except to the extent its proponents can persuade others of its superiority.⁷⁷ (Judicial opinion writing at the appellate level is but one example, whereby the interpretation deemed correct is the one that is able to garner the votes of a majority of the panel, the correctness of which (so defined) can never be certain until the day the opinion is released.) This result, coupled with the acknowledged difficulty of defining an interpretive community in anything but a self-referential way (the community is defined by the interpretation in which it engages) has led critics to characterize the theory as unhelpful.⁷⁸

But recall the limits of our consideration here. The transformativeness inquiry, as it is currently envisioned by courts, is not seeking to determine the meaning of a particular work, in the same way that a court is asked to give the meaning of a statute, which meaning then necessarily controls future interpretations until the statute is amended or the opinion is overturned.⁷⁹ Rather, the inquiry is seeking a degree of difference in interpretations, a question that is necessarily relativistic. Thus, we need not take Fish's theory in its strongest form to find applicability here. Indeed, it may be that such indeterminacy is inherent in determining whether a particular use is "fair."⁸⁰

75. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

76. JANICE A. RADWAY, *READING THE ROMANCE: WOMEN, PATRIARCHY, AND POPULAR LITERATURE* (1st ed. 1984).

77. FISH, *supra* note 75, at 368 ("According to the position presented here, no one can claim privilege for the point of view he holds and therefore everyone is obliged to practice the art of persuasion.").

78. See, e.g., Robert Scholes, *Who Cares About the Text?*, 17 *NOVEL* 171, 178 (1984) ("From my point of view the notion of interpretive community suggests a process that is too monolithic to represent adequately the agonies of choice that confront actual interpreters, who often have at their disposal more codes than they can use."); see also, e.g., Dennis Patterson, *You Made Me Do It: My Reply to Stanley Fish*, 72 *TEX. L. REV.* 67, 69-71, 74 (1993); Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 *GEO. L.J.* 37, 45 (1987). But see, e.g., *Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.").

79. Cf., e.g., William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 *NW. U. L. REV.* 629 (2001).

80. Cf. Tushnet, *supra* note 70, at 68; Rob Kasunic, *The Problem of Meaning in Non-Discursive Expression*, 57 *J. COPYRIGHT SOC'Y U.S.A.* 399 (2010).

Is there, then, an unreasonable reading of a work? Louise Rosenblatt's scholarship tells us that to be viewed as reasonable, readings must be cued by the text. It would be unreasonable, for example, for a reader to interpret a Shakespearean sonnet as a murder mystery or to interpret the Mona Lisa as conveying the story of the invention of the driverless car.⁸¹ Relatedly, as philosopher Sherri Irvin writes, the artist can be seen to have "sanctioned" particular features of the work—creating, in other words, the boundaries of the work to be interpreted by, for example, "presenting a painted canvas with a particular set of visible features," painting only one side of the canvas (which implicitly suggests that only one side is to be displayed), or by titling the work.⁸² But these features do not dictate a particular interpretation of the work, except insofar as the features constrain the bounds of interpretation; "we are not free to ignore the work's features as we interpret."⁸³ So, in her example, "[t]he artist's sanction can determine that the paint flaking from a painting is properly regarded as a feature of the work that must be considered when we interpret, rather than a problem with the object that must be fixed so it does not interfere with our understanding of the work. The artist's sanction does not, however, determine *how* that feature is to be interpreted."⁸⁴

But Fish would note that the boundary between reasonable and unreasonable does not exist of its own accord; rather, it exists because the activity of interpretation "is determined by the literary institution which at any one time will authorize only a finite number of interpretative strategies."⁸⁵ How are these acceptable strategies determined? The process is dynamic:

The point is that while there is always a category of things that are not done (it is simply the reverse or flip side of the category of things that *are* done), the membership in that category is continually changing. It changes laterally as one moves from subcommunity to subcommunity, and it changes through time when once interdicted interpretive strategies are admitted into the ranks of the acceptable.⁸⁶

81. ROSENBLATT, *supra* note 68; see also Zahr K. Said, *A Transactional Theory of the Reader in Copyright Law*, 102 IOWA L. REV. 605, 635 (2017) ("The reader comes along and makes the text mean something, but she cannot do so with total freedom, or disregard for the textual cues.").

82. Sherri Irvin, *The Artist's Sanction in Contemporary Art*, 63 J. AESTHETICS & ART CRITICISM 315, 319 (2005).

83. *Id.* at 319–20, 323. Irvin distinguishes "sanction" from "intention":

[I]f an artist intended that the artwork have a particular feature but failed to act effectively on that intention either through the presentation of the object or through other actions or communications, then a sanction has not been established, and the artist's intention is irrelevant to the nature of the work.

Id. at 321. *But see* K.E. GOVER, ART AND AUTHORITY: MORAL RIGHTS AND MEANING IN CONTEMPORARY VISUAL ART 123 (2018) ("[T]he line of influence between artist's sanctions and interpretations is more of a hermeneutic circle than a unidirectional vector. The features of the work that are deemed essential to it and which are fungible will depend in part on what the work is seen in advance to be 'about.'").

84. Irvin, *supra* note 82, at 322.

85. FISH, *supra* note 75, at 342.

86. *Id.* at 343–44.

Fish clarified later:

[A]n interpretive community is not an entity at all—it's not something awaiting your description—rather it is what emerges in the effort to answer a certain kind of question The interpretive community is a device of interrogation, and what it promises and delivers is a method. Once a question has been framed, the interpretive community thesis tells you that in order to answer it you should attend to the relevant background conditions—assumed definition, notions of evidence, locations of reputable archives, storehouses of legitimate arguments . . . senses of what we do around here and what it is not our business to do—within which the relevant actors perform.⁸⁷

Put differently, as Brian Holland has written, differences in reaction to an aesthetic work can sometimes be explained by “differences in semiotic conventions”—that is, different interpretive communities “negotiating against the needs and interests of that community, develop[ing] social conventions regarding the meaning of semiotic resources” in a work.⁸⁸

This does not mean that everything is indeterminate. Michael Bérubé writes, commenting on Fish, that “as any practicing member of any interpretive community knows, some interpretations are so widely agreed upon as to be indistinguishable from brute facts: ‘facts,’ on this reading, are simply interpretations that have won nearly unanimous consensus,”⁸⁹ such as the interpretation that the phrase set apart at the top of the first page of an article is its title. There are, therefore, in the transformativeness inquiry, certain examples where, if only asymptotically, the interpretation approaches this level of consensus. Perhaps quoting two or three sentences of a book in a book review would fall into this category—a community practice that is so engrained that few at this point would even think to challenge the act (even if they might challenge the conclusions that the review draws based on the text). Put differently, as Gerald Graff writes, “[a]ppealing to ‘the evidence’ to settle disputes about ‘what is in the text’ works only if there is a consensus about what that evidence is.”⁹⁰ It’s interpretation all the way down.

What this means for a transformativeness analysis, then, is that for a reading to be “reasonable,” a court must set out the priors that help us to understand the interpretive community of which the court is a part. This, then, raises the question of what role the court should play in this effort. Is the court a census taker,

87. Stanley Fish, *One More Time*, in POSTMODERN SOPHISTRY: STANLEY FISH AND THE CRITICAL ENTERPRISE, *supra* note 74, at 265, 276.

88. Holland, *supra* note 8, at 375 (discussing the different reactions to Shepard Fairey’s “Hope” poster of Barack Obama).

89. Michael Bérubé, *There Is Nothing Inside the Text, or, Why No One’s Heard of Wolfgang Iser*, in POSTMODERN SOPHISTRY: STANLEY FISH AND THE CRITICAL ENTERPRISE, *supra* note 74, at 11, 18.

90. Gerald Graff, *How I Learned to Stop Worrying and Love Stanley*, in POSTMODERN SOPHISTRY: STANLEY FISH AND THE CRITICAL ENTERPRISE, *supra* note 74, at 27, 32.

attempting only to determine the existence of contested interpretations, or should the court engage with those contestations in a particular way?

III. CONTESTED INTERPRETATIONS

Copying, as many commentators have noted, can be fundamental to identity creation. When we share a creative work with others, we are saying something about our likes and dislikes, our preferred styles, or the cultural moments that we find important.⁹¹ But a court's declaration that such a use is appropriate or inappropriate is not merely a legal judgment; it must inevitably also be an aesthetic and intellectual judgment on whether a "reasonable" reading would gain anything additional of value from the second work.

To be clear, by "value," I do not mean that the court finds the use to be worthy of praise. Many fair uses have involved messages and meanings that some would find distasteful. Rather, I mean that there exists something to grapple with, to engage in discourse around, that is different from what the first author's work has contributed. It should not go unobserved that the mere ability to declare this status, and to have that declaration treated as authoritative, is an exercise of power, and different interpreters may be accorded different levels of authority in this regard. Darren Hudson Hick notes of John Cage's work *4'33"*, which consists of a score directing four minutes and thirty-three seconds of silence by the orchestra (such that the audience hears only the ambient noise of the venue), that it was years after its first performance before the piece was recognized as falling into the category of "musical works."⁹² Indeed, Hick continues, "Cage had proposed an ontology for the work"—that it was a musical work—"but its realization was contingent upon buy-in from the artworld, and matters could easily have turned out otherwise."⁹³

Likewise, the hierarchical position of the artist who uses another's work (often deemed "appropriation"⁹⁴) may succeed in narrowing or even eliminating the conversation that would otherwise take place. An artist who parodies or who otherwise uses a well-known work may be more easily seen as engendering a conversation around meaning, whereas an artist who uses a lesser-known work may be seen to transform only in the physical sense; the second artist's work is the one

91. Mark Alfino, *Deep Copy Culture*, in *THE AESTHETICS AND ETHICS OF COPYING* 19, 29 (Darren Hudson Hick & Reinold Schmücker eds., 2016) ("Without exaggeration, one could say that we are not only the products of our interactions with our environments and artifacts, but we spend a great deal of energy producing and reproducing social meanings through citation, expression, and consumption. We are copy creatures.")

92. Darren Hudson Hick, *The Nature of Copying and the Singular Literary Work*, in *THE AESTHETICS AND ETHICS OF COPYING*, *supra* note 91, at 119, 126.

93. *Id.*

94. The fact that the verb form of "appropriate" and the adjectival form of "appropriate" share a lexical unit but not necessarily a meaning should not go unnoticed, nor should the difference conveyed by the use of "appropriation" rather than "borrowing."

that is seen as creating meaning.⁹⁵ Moreover, the “meaning” of a work long embedded in critical consciousness may be assumed rather than interrogated, such that a use of the work that appears obviously oppositional also seems obviously reasonable. (Zahr Said makes a related point with respect to *Gone with the Wind*, the “long and storied reception history” of which enabled the U.S. Court of Appeals for the Eleventh Circuit to take a nonformalist approach to determining whether *The Wind Done Gone*, which retells the story from the perspective of a slave, was a fair use.⁹⁶)

There is a risk, then, that an interpretive community keenly aware of these dynamics may attempt to characterize another community’s view as “unreasonable”—as, indeed, an early proponent of the status of 4’33” as a musical work would have been deemed until time caught up with that view.⁹⁷ An interpretive community unaware of the complexities of commentary may see an unauthorized derivative work where others see transformativeness. Likewise, reliance by courts on expert testimony risks privileging dominant or entrenched views over others if the expert testimony is used not as a means of educating the court about the existence of particular interpretive communities but rather as an imprimatur.⁹⁸ The exercise is inherently complicated, and rightly so.⁹⁹

The importance of a broad view of transformativeness is particularly important, as Rebecca Tushnet writes, “to preserve equal freedom of interpretation

95. Olufunmilayo Arewa, Curation, Music, and Law 19 (Mar. 15, 2017) (manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932520 [<https://perma.cc/TFN3-6VUX>] (“Lack of familiarity with African American music and culture in the broader American society has given collectors of such culture and other intermediaries tremendous power and latitude to curate cultural material to bolster their ideologies and conceptions about black culture.”); *see also* Gilden, *supra* note 16, at 355.

96. Said, *Only Part of the Picture*, *supra* note 62, at 362 & n.54 (citing *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001)).

97. Lisa Jones, *Appropriation and Derogation: When Is It Wrong to Appropriately?*, in *THE AESTHETICS AND ETHICS OF COPYING*, *supra* note 91, at 187, 204 (noting that once the viewer has engaged with Prince’s Canal Zone series, it will be difficult to see Patrick Cariou’s photographs “without imagining, involuntarily, the collaged additions and scribbles that Prince added to those images in his work”); *cf.* Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 *TEX. L. REV.* 923, 926 (1999) (arguing that treating users of cultural material as speakers engaged in their own acts of communication “passes over the interest of a vast number of non-owners in having cultural objects with stable meanings”).

98. Tushnet, *supra* note 51, at 890 (“[I]t is vital to recognize that different audiences may take different meanings from the same work, so that what seems like a critical transformation to one group may seem trivial to another.”); Erlend Lavik & Stef van Gompel, *On the Prospects of Raising the Originality Requirement in Copyright Law: Perspectives from the Humanities*, 60 *J. COPYRIGHT SOC’Y U.S.A.* 387, 428 (2013) (“[I]t is also misguided to think that greater aesthetic expertise automatically generates more sure-footed, coherent, and predictable verdicts. Indeed, the most sophisticated historical and philosophical studies of aesthetic judgment often complicate matters more than clarify them; they regularly seek to challenge, rather than obtain, certainty; and their conclusions tend to be tentative and provisional, highlighting the contingencies upon which apparent certitudes rest.”).

99. D.N. Rodowick, *The Value of Being Disagreeable*, 39 *CRITICAL INQUIRY* 592, 601 (2013) (“Reason-giving is messy, conflictual, contentious, and contingent—in short, disagreeable.”).

for all [interpretive] communities, whether federal judges are part of them or not.”¹⁰⁰ Put otherwise, engaging with interpretive communities on the various readings that might be made of a work can highlight how what might otherwise be seen as a derivative is actually responding to the work in some fashion. This is particularly important when the second work represents an attempt to respond to a dominant theme or paradigm (a paradigm that copyright discourse might reinforce when it refers to the plaintiff’s work as the “original” work).

For example: In 1937, the African-American jazz vocalist Maxine Sullivan “started a vogue,” as *Life* magazine reported it, by singing the familiar Scottish song “Loch Lomond” as a swing number.¹⁰¹ *Life* noted that her recording “became a favorite of the college boys” and “set jazz bands to swinging every folk tune from *Annie Laurie* to *Funiculi Funicula*.”¹⁰² The nightclub reporter for the *New York Times* wrote in 1937 that “[w]ithout offending any . . . sensibilities, [Sullivan] sings and plays the old . . . songs in a slightly swingy tempo and the resultant product has been approved by such kindred souls as Benny Goodman and Robert Benchley.”¹⁰³ But on March 8, 1938, when Sullivan sang the song as part of the CBS radio show “Saturday Night Swing,” the station manager of WJR radio in Detroit took her off the air in the middle of “Loch Lomond” because “it was sacrilegious to swing a traditional song.”¹⁰⁴ Perhaps the manager’s objection was a publicity stunt, designed to boost ratings—it led two weeks later to a “sing-off” that pitted the CBS studio in New York, playing swing versions of songs, against the Detroit station’s “traditional” versions¹⁰⁵—but the implications of the station manager’s position did not go unnoticed. The *Afro-American* newspaper in Baltimore wrote at the time:

Four years ago this column called attention to the fact that so-called Negro spirituals were being used as a basis of dance tunes. . . . But while most of us were visibly shocked by the outrageous use of sacred hymns for dance music, everybody else enjoyed the popular craze. Now that the swing fever has reached such ancient folk ballads as ‘Annie Laurie’ and ‘Loch Lomond,’

100. Tushnet, *supra* note 51, at 890.

101. *A Negro Girl Swings a Scottish Tune and Blows Up a Radio Storm*, LIFE, Mar. 21, 1938, at 19.

102. *Id.*

103. Jack Gould, *News of the Night Clubs*, N.Y. TIMES, Dec. 19, 1937, § 11, at 4.

104. PATRICK BURKE, COME IN AND HEAR THE TRUTH: JAZZ AND RACE ON 52ND STREET 99 (2008); *see also* WJR Cuts Off “Swinger,” RADIO DAILY, Mar. 10, 1938, at 2 (explaining that Tommy Dorsey was also taken off the air the next day as his band swung “Comin’ Thru the Rye.”).

105. Benny Goodman was to have led the CBS band but had to drop out due to scheduling difficulties. Before then, he said, “Swing bands are re-popularizing the old ballads. We are merely bringing these old tunes into the tempo of today.” *To Make It Real Hot, I’ll Get Maxine to Sing*, AFRO-AMERICAN, Mar. 19, 1938, at 10; *see also* *Melody Versus Swing Is Tuneful Battle*, AFRO-AMERICAN, Mar. 26, 1938, at 10; *It’s Fitzpatrick’s Story*, RADIO DAILY, Mar. 23, 1938, at 5 (relaying that the station manager later reported to *Radio Daily* that 85 percent of the mail and telegrams he had received after the program aired “objected to swing music and were in favor of the ‘songs our mothers used to sing.’”). One commentator suggested that the station manager ginned up the controversy to garner publicity for his station and listenership for the “Swing vs. Sentiment” program. Robert I. Fitzhenry, *The Emancipation of Swing*, MICH. DAILY, Mar. 20, 1938, at 4.

Scottish and Irish elements in our population are squawking loud and long.¹⁰⁶

Sullivan's appropriation of traditionally White music was interpreted by modern commentators as finding a voice, not erasing one. Writer Patrick Burke, for example, characterized her performance as conveying "that black musicians deserved to be seen as *conscious* artists with the ability to adapt any material to their own purpose, rather than as *natural* artists who were supposedly limited by their own racial proclivities."¹⁰⁷ Indeed, the act of appropriation could itself have been seen as a communicative act, responding, as the *Afro-American* newspaper suggested, to the earlier use of spirituals as dance music.

Failure to fully appreciate the kind of perspective that Burke provides is, perhaps, evident in *Campbell* itself, in which the Court, having found 2 Live Crew's "Pretty Woman" to be a parody of Roy Orbison's "Oh, Pretty Woman," remanded for further consideration of whether the former was, nevertheless, a market substitute for the rap version of the latter and thus an unlawful derivative work. In so doing, the Court suggested the possibility that 2 Live Crew was engaging in critical commentary of the Orbison work but using an impermissible genre. Justice Kennedy, concurring, expressed particular concern that 2 Live Crew was doing nothing more than recording an old song in a new key, all but erasing the group's own voice.¹⁰⁸ As Richard Schur suggests, this result shows little consideration of the function of the genre itself as a means of commentary, such that the two cannot be considered separately.¹⁰⁹

More attentive in this regard is the decision of the court in *Abilene Music, Inc. v. Sony Music Entertainment, Inc.*¹¹⁰ At issue was whether hip-hop artist Ghostface Killah's song *The Forest* engaged in a transformative use of the first three lines of *What a Wonderful World*, recorded most famously by Louis Armstrong. The court's analysis takes account of the way in which *The Forest* responds to *What a Wonderful World*, noting that despite the latter's popularity, "not everybody subscribes to its message of a pastoral world of 'skies of blue and clouds of white,'

106. *The Man Who Is Full Disdains a Honeycomb—Proverbs 28:7*, *AFRO-AMERICAN*, Mar. 26, 1938, at 4.

107. BURKE, *supra* note 104, at 100.

108. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592–93 (1994) ("2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry." (citations omitted)); *see also id.* at 599 (Kennedy, J., concurring) ("We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a 'comment on the naiveté of the original,' because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre. Just the thought of a rap version of Beethoven's Fifth Symphony or 'Achy Breaky Heart' is bound to make people smile." (citation omitted)).

109. RICHARD L. SCHUR, *PARODIES OF OWNERSHIP: HIP-HOP AESTHETICS AND INTELLECTUAL PROPERTY LAW* 137–38 (2009) (suggesting that the Court in *Campbell* "continue[d] the fiction of an unracialized intellectual property law").

110. *Abilene Music, Inc. v. Sony Music Entm't, Inc.*, 320 F. Supp. 2d 84 (S.D.N.Y. 2003).

where all men are brothers and the sound of ‘babies cryin’ is music to one’s ears.”¹¹¹ Highlighting the language from *Campbell* that the touchstone is “whether a parodic character may reasonably be perceived,”¹¹² the *Abilene Music* court emphasized that the relevant question “is not whether Ghostface Killah intended *The Forest* purely as a parody of *Wonderful World*, but whether, considered as a whole, *The Forest* ‘differs [from the original] in a way that may reasonably be perceived as commenting, through ridicule, on what a viewer might reasonably think’ is the unrealistically uplifting message of *Wonderful World*.”¹¹³ In a lengthy analysis, involving interpretation of the themes, lyrics, music, and intonations of each song,¹¹⁴ evidence from the parties, reviews referencing the alterations of the originals, and consideration of the audiences for each song, the court determined that *The Forest* was a transformative parody and, ultimately, constituted fair use of *What a Wonderful World*.¹¹⁵

A similar analysis took place in *Mattel, Inc. v. Walking Mountain Productions*,¹¹⁶ involving a series of photographs by Thomas Forsythe, many of them depicting an unclothed Barbie doll in various scenes with vintage kitchen items. Mattel, which had conducted a mall-intercept survey in which respondents were shown copies of the photographs, argued that because only some of the respondents perceived the photographs as a parody, the works were not transformative.¹¹⁷ The court rejected this argument, stating that “[t]he issue of whether a work is a parody is a question of law, not a matter of public majority opinion.”¹¹⁸ The use of surveys in this context, the court continued “would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity.”¹¹⁹ The court then set forth in considerable detail the difference in meanings it saw between that conveyed by a Barbie doll and those conveyed by Forsythe, ultimately concluding that the artist engaged in fair use.

My point here is not to persuade the reader that these results were correct, although I think they were, or to suggest that the courts did enough to ensure that they were familiar with a range of responses to each work. It is to suggest, however, that this level of engagement with the works at issue succeeds in positioning the court in dialogue with other readers. This, I think, is the most we can ask of an analysis that aims to describe what a “reasonable observer” perceives.

111. *Id.* at 87.

112. *Campbell*, 510 U.S. at 582.

113. *Abilene Music*, 320 F. Supp. 2d at 90 (quoting *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998)).

114. See Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343, 369 n.181 (2015) (characterizing *Abilene Music* as an example of formalistic analysis).

115. *Abilene Music*, 320 F. Supp. 2d at 89–92.

116. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

117. *Id.* at 801.

118. *Id.*

119. *Id.*

CONCLUSION

Transformativeness, to the extent it remains part of the fair use analysis in copyright, is first and foremost an interpretive exercise. Although one could evaluate whether a work has been transformed, in the lay sense, through a mere comparison of features—much as one might use the word “transformed” to describe a major house renovation—that use of transformed in the fair use context would make the first factor look too much like the third factor (the amount of the copyrighted work used). Rather, the first factor, by focusing on the purpose and character of the use, is asking something different—it is asking how the defendant’s work contributes in a different way from the plaintiff’s work to “promote the Progress of Science.” And that, as the Court indicated in *Campbell*, requires consideration of how the works are received, which requires, in turn, consideration of interpretive communities.¹²⁰

These issues are not, of course, unique to copyright law. Any time a court or other adjudicatory body is asked to rule something within or outside the boundaries of expressive activity, it is being asked to engage in interpretation, a task that will asymptotically approach the best answer the more it reflects a familiarity with multiple interpretive communities. The decision that Boston’s St. Patrick’s Day parade constitutes expressive activity¹²¹ implies, as Mark Tushnet writes, “that the First Amendment’s coverage depends on whether observers impute ‘meaning’ to what they see. . . . The reasonable observer must understand that the object on view *is* expressive, though not all observers will agree on what it expresses.”¹²² Determining Constantin Brancusi’s *Bird in Space* to be a work of art rather than a “manufactured object of metal” required the tribunal to take account of new schools of art and their influence “[w]hether or not [it was] in sympathy with these newer ideas.”¹²³ The Court’s conclusion in *Pope v. Illinois* that the third question in the tripartite test for whether material is obscene (“whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value”) should be judged by “whether a reasonable person would find such value in the material, taken as a whole”¹²⁴ inspired a forceful dissent from three of the Justices, who recognized that, in such inquires, to talk of “a reasonable person” was impracticable. Rather, the

120. Cf. Adler, *supra* note 8, at 563 (contending that “the move to the transformative analysis, thought by many to be the solution to fair use woes, has actually made things worse for the visual arts” because the analysis “requires courts to search for ‘meaning’ and ‘message’ when one goal of so much current art is to throw the idea of stable meaning into play”).

121. Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 577 (1995) (“[I]n the context of an expressive parade, as with a protest march, the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.”).

122. Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 201 (2012).

123. Brancusi v. United States, 54 Treas. Dec. 428, 431 (Cust. Ct. 1928); see also Stéphanie Giry, *An Odd Bird*, LEGAL AFFAIRS, Sept.–Oct. 2002, http://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp [<https://perma.cc/3ZBZ-F4CZ>].

124. Pope v. Illinois, 481 U.S. 498, 501 (1987). The tripartite test was developed in Miller v. California, 413 U.S. 15 (1973).

dissent urged, the standard should be whether “*some reasonable persons* could consider [the material] as having serious literary, artistic, political, or scientific value”; otherwise, a juror “might well believe that the majority of the population who find no value in [controversial works] are more reasonable than the minority who do find value.”¹²⁵

The *Carion* court referenced the views of “the reasonable observer.” Taking a cue from the *Pope* dissenters, we should instead think of this lens as the views of “some reasonable observers.” Courts that do not situate themselves as part of an interpretive community, engaging with other observers, risk having their transformativeness decisions seen as a *fait accompli*, rather than as a reasonable conclusion based on available evidence. This is, I think, the way to give meaning to the concept of a “reasonable observer” or meaning that may “reasonably be perceived” in a world where every interpretative community has the ability to contest meaning but where existing structures may privilege the views of those already seen as more “reasonable.” Putting this engagement on the record recognizes that transformativeness is cause, not effect; that a work is ultimately not what it is but “what it does.”¹²⁶ The result may well be that fair use disputes will be less frequently resolved at earlier stages of litigation if it turns out that courts feel more confident undertaking this task with the benefit of evidence, expert or otherwise, as to the existence of interpretive communities.¹²⁷ Fully recognizing that the resulting cost is not mine to bear, I do think it is the better outcome for the development of fair use doctrine.

125. *Pope*, 481 U.S. at 512 (Stevens, J., dissenting).

126. Jane P. Tompkins, *The Reader in History: The Changing Shape of Literary Response*, in *READER-RESPONSE CRITICISM: FROM FORMALISM TO POSTSTRUCTURALISM* 201, 224 (Jane P. Tompkins ed., 1980) (emphasis omitted); see also William Safire, *On Language*, N.Y. TIMES, Mar. 2, 2008 (Magazine), at 20 (defining “transformative” as “having the power to transform” (emphasis omitted)).

127. Cf. Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 101, 160 (2017) (calling on courts using reasonableness standards in constitutional analysis to inform review with “objective and empirical sources, and not just whatever the reviewing judge calls reasonable”). Taking such an approach in fair use considerations may ultimately result in limiting the scope of appellate review to assessing the process employed by the district court rather than the result reached, which itself raises the question of whether transformativeness is a factual question or a legal one. I leave further exploration to others.

