Fair Use for the Rich and Fabulous?

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In two recent decisions concerning copyright's fair use doctrine, the Second Circuit addressed the lawfulness of incorporating one creative work into a new one. In both *Cariou v Prince*[1] and *Salinger v Colting*,[2] US District Judge Deborah Batts enjoined similar activity using nearly identical reasoning.[3] But on appeal, the Second Circuit found fair use in the former[4] and likely infringement in the latter.[5] In this short essay, we welcome the *Cariou* decision's shift away from the singular, subjective intent of the putative fair user towards a more audience-focused inquiry. When *Cariou* is compared with *Salinger*, however, we are concerned that this shift introduces a new set of distributional problems into the fair use analysis.

In particular, why does a substantial reworking of *Catcher in the Rye* interfere with J.D. Salinger's "right *not* to authorize derivative works"[6] while Patrick Cariou's photographs are the "raw material"[7] for the "well-known appropriation artist" Richard Prince?[8] Is a use fair only if Anna Wintour, Brad Pitt, and Beyoncé are there to see it?[9] We recognize that courts must have a means of distinguishing "transformative" uses from "market substitutes,"[10] but in doing so we hope that courts do not convert

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1 784 F Supp 2d 337 (SDNY 2011).
2 641 F Supp 2d 250 (SDNY 2009).
3 Compare *Cariou*, 784 F Supp 2d at 353–54, with *Salinger*, 641 F Supp 2d at 268.
4 *Cariou v Prince*, 714 F3d 694, 712 (2d Cir 2013).
5 *Salinger v Colting*, 607 F3d 68, 83–84 (2d Cir 2010). While there is a relatively obvious argument that neither panel was particularly worried about interpanel consistency and each was simply trying to push the law in a slightly different direction, we note that Judge Peter Hall sat on both panels and voted with the majority in both decisions. Intentional contradiction therefore seems unlikely, though stranger things have happened.
6 Id at 74.
7 *Cariou*, 714 F3d at 706.
8 Id at 699.
9 Id at 709.
10 *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 587 (1994).

the right to rework, comment on, or otherwise engage with creative works into a privilege largely reserved for the rich and famous.

I. DISTRICT COURT OPINIONS: *SALINGER* AND *CARIOU* IN THE SOUTHERN DISTRICT

In both *Salinger* and *Cariou*, Judge Batts rejected a fair use defense for creative endeavors that she found insufficiently critiqued and commented on earlier copyrighted works. In *Salinger*, Fredrik Colting's novel, ***60** Years Later: Coming Through the Rye*, featured a number of storylines and characters from J.D. Salinger's *Catcher in the Rye*, including a seventy-six-year-old Holden Caulfield and a character modeled on Salinger himself.[11] In *Cariou*, Richard Prince incorporated photos taken by Patrick Cariou of Jamaican Rastafarians into a series of thirty paintings, titled *Canal Zone*, that was exhibited in 2008 at the Gagosian Gallery in Manhattan.[12] In both cases Judge Batts issued an injunction—preliminary in *Salinger*, permanent in *Cariou*—solely based on the merits, without considering the additional requirements for injunctive relief.[13]

In *Salinger*, Judge Batts rejected Colting's argument that his novel was a "parody" of *Catcher* and therefore a permissible "transformative use."[14] Considering the purpose and character of the use,[15] Judge Batts stated that parody includes "only those elements which criticize or comment upon the source author's work[ ]" and concluded that ***60** Years* "contains no reasonably

[11] *Salinger*, 641 F Supp 2d at 258.

[12] Some of the paintings took enlarged, cropped, and tinted versions of Cariou's photographs and collaged and painted elements on top of them. Other paintings used the photographs as collage elements alongside other appropriated photos. See *Cariou*, 714 F3d at 669 n 2.

[13] See *Winter v Natural Resources Defense Council*, 555 US 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."); *eBay Inc v MercExchange, LLC*, 547 US 388 (2006) (vacating a permanent injunction where the Federal Circuit failed to apply traditional four-part test for injunctive relief).

[14] *Salinger*, 641 F Supp 2d at 256–57. See also *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 579–80 (1994) ("[P]arody has an obvious claim to transformative value.").

[15] Section 107 of the Copyright Act instructs courts to consider four factors in determining whether a use of a copyrighted work is fair: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the potential market for the copyrighted work. See 17 USC § 107. Although Judge Batts considered all four fair use factors, her analyses in the two decisions largely focused on the first and fourth factors, and accordingly ours does as well.

discernable [sic] rejoinder or specific criticism of any character or theme of *Catcher*."[16] Even though the novel, according to literary expert Martha Woodmansee, "critically examin[ed] the character Holden, and his presentation in *Catcher* as an authentic and admirable (maybe even heroic) figure," Judge Batts observed that the themes in ***60 Years*** were "already thoroughly depicted and apparent in Salinger's own narrative about Caulfield."[17] Moreover, given earlier statements by reviewers and the defendant himself that ***60 Years*** was a "marvelous sequel" and "tribute" to *Catcher*,[18] "[i]t [was] simply not credible for Defendant Colting to assert now that his primary purpose was to critique Salinger and his persona."[19]

Regarding the effect of the use upon the potential market for the copyrighted work, Judge Batts concluded, "the publishing of ***60 Years*** and similar widespread works could substantially harm the market for a *Catcher* sequel or other derivative works."[20] It didn't matter that Salinger "ha[d] not demonstrated any interest in publishing a sequel or other derivative work of *Catcher*," because he "ha[d] the right to change his mind" and was "entitled to protect his *opportunity* to sell his [derivative works]."[21] Moreover, "[j]ust as licensing of derivatives is an important economic incentive to the creation of originals, so too will the right *not* to license derivatives sometimes act as an incentive to the creation of originals."[22]

Judge Batts's decision two years later in *Cariou* employed a remarkably similar analysis.[23] Judge Batts reiterated, "all of the precedent this Court can identify imposes a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works."[24] Relying principally on Prince's testimony that he didn't "really have a message," Judge Batts concluded, "Prince did not intend to comment on any aspects of the original works or on the broader

16 *Salinger*, 641 F Supp 2d at 257–58.

17 Id at 258.

18 Id at 260 n 3.

19 Id at 262.

20 *Salinger*, 641 F Supp 2d at 267.

21 Id at 268 (alteration omitted), quoting *Salinger v Random House, Inc*, 811 F2d 90, 99 (2d Cir 1987) (barring inclusion of Salinger's unpublished letters in an unauthorized biography).

22 *Salinger*, 641 F Supp 2d at 268.

23 See *Cariou*, 784 F Supp 2d at 343–54.

24 Id at 348.

culture."[25] Additionally, as in *Salinger*, "Defendants' protestations that Cariou has not marketed his Photos more aggressively . . . [were] unavailing."[26] Judge Batts reiterated that it is the "potential market" for derivatives that matters for purposes of fair use, "even if the author has disavowed any intention to publish them during his lifetime."[27] Accordingly, Judge Batts (1) granted summary judgment to Cariou; (2) barred defendants from selling, displaying, and marketing the *Canal Zone* paintings; and (3) ordered them to "deliver up for impounding, destruction, or other disposition . . . all infringing copies of the Photographs."[28]

II. COURT OF APPEALS OPINIONS: *SALINGER* AND *CARIOU* AT THE SECOND CIRCUIT

Despite the similar analyses in each case—defendants had not intended to comment on plaintiffs' work, and it was legally irrelevant that plaintiffs had not actively pursued derivative markets—on appeal the two Second Circuit panels reached opposing results.

In *Salinger*, the court's decision focused primarily on the appropriate standard for issuing a preliminary injunction, and it remanded to the district court to apply the correct test. The court ordered the district court to consider the defendant's "First Amendment interest in the freedom to express him or herself" and the "public's interest in free expression," but also noted "a copyright holder might also have a First Amendment interest in *not* speaking."[29]

Although the court vacated the preliminary injunction, it nonetheless "in the interest of judicial economy" noted that "there is no reason to disturb" the district court's consideration of the merits.[30] The Second Circuit mentioned the district court's observations that "parody must critique or comment on the work itself," and the panel found no clear error in Judge Batts's determination that it was "simply not credible for Defendant Colting to assert [ ]. . . that his primary purpose was to critique Sal-

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25 Id at 349.
26 Id at 353.
27 *Cariou*, 784 F Supp 2d at 353 (quotation marks omitted).
28 Id at 355.
29 *Salinger*, 607 F3d at 81.
30 Id at 83.

inger and his persona."[31] The panel acknowledged that it "may be" that fair use could favor a defendant without a "transformative *purpose*," but it concluded that in light of "the District Court's credibility finding together with all the other facts in this case[,] . . . Defendants are not likely to prevail in their fair use defense."[32]

In *Cariou*, the Second Circuit took a different stance towards the accused infringer's stated intentions and the copyright owner's right not to authorize derivatives. Under the purpose and character of the use, the court declared, "The law imposes no requirement that a work comment on the original or its author in order to be considered transformative."[33] Instead, "[i]f the secondary use adds value to the original—if [the original work] 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."[34] Because at least twenty-five[35] of Prince's paintings "manifest[ed] an entirely different aesthetic from Cariou's photographs," they were "transformative as a matter of law."[36]

In contrast to the witness-credibility determination found dispositive in *Salinger*, the Court of Appeals found inconsequential Cariou's statement that he doesn't "really have a message."[37] The Second Circuit emphasized that "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."[38] Instead, "[w]hat is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work."[39]

This central concept of a "reasonable observer" also appears to have driven the court's analysis of the effect on the potential market. The court observed that Prince's work "appeals to an entirely different sort of collector than Cariou's" and that the

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31 Id at 73, 83.

32 Id at 83.

33 *Cariou*, 714 F3d at 706.

34 Id (alteration omitted).

35 The court remanded as to the remaining five works, which the court found "do not sufficiently differ" from the originals "for us to confidently make a determination about their transformative nature as a matter of law." Id at 710–11.

36 Id at 706, 711.

37 *Cariou*, 714 F3d at 707.

38 Id.

39 Id at 709.

opening dinner for the Gagosian show "included a number of the wealthy and famous."[40] The invitation list included:

> Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, *Vanity Fair* editor Graydon Carter, *Vogue* editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt.[41]

Moreover, Prince sold eight artworks for $10,480,000, and exchanged seven others for works by Larry Rivers and Richard Serra. By contrast, "Cariou ha[d] not aggressively marketed his work, and ha[d] earned just over $8,000 in royalties."[42] The court clarified that an accused infringer only usurps the market for derivatives "where the infringer's target audience and the nature of the infringing content is the same as the original,"[43] and there was nothing to suggest that anyone wouldn't purchase Cariou's work as a result of the "market space that Prince's work has taken up."[44] The court accordingly vacated the injunction, reversed as to twenty-five of Prince's paintings, and remanded as to the remaining five.[45]

III. FAIR USE FOR THE RICH AND FABULOUS?

The Second Circuit's opinion in *Cariou* significantly improves the state of copyright fair use precedent (at least in the Second Circuit), but is by no means perfect. The opinion takes great strides in jettisoning the much-criticized "commentary" requirement in favor of a broader understanding of transformative use, but it loses its footing in emphasizing the differences in cultural and economic status among the art, artists, and audiences in question.[46]

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40 Id.

41 *Cariou*, 714 F3d at 709.

42 Id.

43 Id.

44 Id.

45 *Cariou*, 714 F3d at 712 & n 5 (observing that "destruction of Prince's artwork would be improper and against the public interest").

46 In addition to the two concerns described in depth in this Part, we also note briefly the *Cariou* court's unfortunate decision to analyze Prince's works individually instead of relative to each other. Especially with respect to appropriation art, the transformative effect of a work that may seem minimally transformative in isolation will often become apparent only when the work is considered in thematic context.

A. *Cariou*'s Virtues

First, the Second Circuit's opinion in *Cariou* shifted the doctrine away from a rather long line of cases requiring the putative fair user to "at least in part" comment on the borrowed work itself.[47] Although "comment" is mentioned in § 107's nonexhaustive list of activities protected as fair use,[48] the statute in no way limits the object of this commentary to the copyrighted work itself. Nonetheless, when confronted with expressive works, many courts have drawn from Justice Kennedy's concurrence in *Campbell v Acuff-Rose Music, Inc*[49] and turned the first-factor analysis into a categorical binary. These courts distinguished parody, which comments directly on the work from which it draws, from satire, which comments more broadly on society. This distinction ultimately reduced to the question: What is the second user commenting on? "Parodies" were generally held protected while "satires" were not.[50]

Cariou, more than any other case to this point,[51] clarifies how unhelpful the parody/satire distinction is in analyzing fair

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[47] *Campbell v Acuff-Rose Music, Inc*, 510 US 569, 580 (1994). See also Part I. Other nonexpressive uses are often found transformative on grounds of transformative *purpose*. See, for example, *Bill Graham Archives v Dorling Kindersley Ltd*, 448 F3d 605, 612–13 (2d Cir 2006) (holding the use of copyrighted posters as part of historical account of the Grateful Dead to be fair use); *Hofheinz v A & E Television Networks*, 146 F Supp 2d 442, 446 (SDNY 2001) ("[O]ur cases establish that biographies in general and critical biographies in particular, fit 'comfortably within' these statutory categories 'of uses illustrative of uses that can be fair.'"); *Perfect 10, Inc v Amazon.com, Inc*, 508 F3d 1146, 1165 (9th Cir 2007) (holding that Google's use of thumbnail images for its search engine was "highly transformative").

[48] 17 USC § 107 ("[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.").

[49] 510 US 569 (1994).

[50] See, for example, *Suntrust Bank v Houghton Mifflin Co*, 268 F3d 1257, 1269 (11th Cir 2001) (finding a novel that utilized characters and scenes from *Gone with the Wind* a "specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites" in *Gone with the Wind*"); *Leibovitz v Paramount Pictures Corp*, 137 F3d 109, 114 (2d Cir 1998) ("Applying *Campbell* . . . we inquire whether Paramount's advertisement 'may reasonably be perceived,' as a new work that 'at least in part, comments on' Leibovitz's photograph."), quoting *Campbell*, 510 US at 580–82; *Dr. Seuss Enterprises, LP v Penguin Books USA, Inc*, 109 F3d 1394, 1401 (9th Cir 1997) ("Although *The Cat NOT in the Hat!* does broadly mimic Dr. Seuss' characteristic style, it does not hold *his style* up to ridicule."). See also Bruce P. Keller and Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 Trademark Rep 979, 984–99 (2004) (collecting and describing cases).

[51] Other cases, like *Blanch v Koons*, 467 F3d 244 (2d Cir 2006), signaled a shift away from the commentary requirement, but none did so as firmly and explicitly as *Cariou*. See *Blanch*, 467 F3d at 253 (finding fair use where appropriation artist Jeff Koons'

use and ultimately how pernicious the distinction can be in practice.[52] Scholars have noted many problems with the parody/satire distinction, including the lack of a "true division" between the labels[53] and the distinction's "[p]ractical [s]lipperiness."[54] Most importantly, though, the "parody" and "satire" labels turn out to be poor proxies for determining whether a given use should be held fair when the other fair use factors are considered. As Bruce Keller and Professor Rebecca Tushnet note, neither label offers any real guidance for distinguishing "markets that copyright owners are unlikely to develop" from those they might develop.[55] Further, the distinction doesn't account for the significant social value created by a well-done satire—dissent can be a value in itself,[56] allowing for societal discussion about normative values through a common means of expression and understanding.[57] Moving beyond the parody/satire distinction, an appropriation artist should not be categorically barred from her chosen genre due to concerns about copyright infringement any more than a biographer should need to be a literary analyst in order for her work to qualify for fair use's protection.[58] The "commentary on the original" require-

used a copyrighted photograph "as fodder for his commentary on the social and aesthetic consequences of mass media").

52 See *Cariou*, 714 F3d at 707–08.

53 Keller and Tushnet, 94 Trademark Rep at 985 (cited in note 50), citing Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J Copyright Socy USA 546, 557 (1998). This view, however, is not universal. See, for example, Richard A. Posner, *When Is Parody Fair Use?*, 21 J Legal Stud 67, 71 (1992) ("[T]he [parody] doctrine should provide a defense to infringement only if the parody uses the parodied work as a target rather than as a weapon or . . . simply as a resource to create a comic effect.").

54 Keller and Tushnet, 94 Trademark Rep at 992 ("When a 'fertile imagination or a literature degree' can define a work as parody instead of satire, we should be unsurprised that lawyers possessed of one (or both) can manipulate the distinction.") (citation omitted), quoting Melville B. Nimmer and David Nimmer, 4 *Nimmer on Copyright* § 13.02[C][2] at 13-217 (Bender 2002).

55 Id at 995–99 (noting many instances of publishers licensing or creating parodies of their own works).

56 See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L J 535, 549–52 (2004).

57 See Michael A. Einhorn, *Miss Scarlett's License Done Gone!: Parody, Satire, and Markets*, 20 Cardozo Arts & Ent L J 589, 603–04 (2002) ("The gains to the general public from satire, if anything, seem greater than in parody. There are profound benefits to be had when artists and writers can make use of recognized artifacts and icons to ridicule or criticize political institutions, cultural values, or media presentations."); Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* 264–72 (Duke 1998).

58 See generally Michael C. Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-fiction Works*, 59 J Copyright Socy USA 477 (2012).

ment and related parody/satire distinction unduly impinges on artists' right to speak freely using their chosen media.

Second, the Court of Appeals in *Cariou* rightfully moved away from past cases' reliance on the artist's authorial intent in determining whether a use might be fair.[59] For years, courts have struggled with how to differentiate the "real artists" from those who use copyrighted works "to avoid the drudgery in working up something fresh."[60] *Cariou* recognizes the futility in trying to distinguish "real" from "post-hoc" artistic purposes. Purposes are *always* varied and sometimes conflicting, making it impossible, or at least unnecessarily reductive, to try to identify an artist's sole motivation in using a work.[61] *Cariou* wisely takes the highly manipulable question of artistic intent[62] out of the

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59 *Cariou*, 714 F3d at 707 ("What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative . . . even without Prince's stated intention to [comment on Cariou's work or on culture]."). For cases attempting to identify individual purposes behind a work, see *Castle Rock Entertainment v Carol Publishing Group, Inc*, 150 F3d 132, 143 (2d Cir 1998) ("*The SAT*'s plain purpose, therefore, is not to expose *Seinfeld*'s 'nothingness,' but to satiate *Seinfeld* fans' passion for the 'nothingness' that *Seinfeld* has elevated into the realm of protectable creative expression."); *Ringgold v Black Entertainment Television, Inc*, 126 F3d 70, 78 n 8 (2d Cir 1997) ("Ringgold's work was used by defendants for precisely the decorative purpose that was a principal reason why she created it.").

60 *Campbell*, 510 US at 580. See also, for example, *Elvis Presley Enterprises, Inc v Passport Video*, 349 F3d 622, 628 (9th Cir 2003) (characterizing the defendant's use as "seek[ing] to profit at least in part from the inherent entertainment value of Elvis' appearances"); *Warner Brothers Entertainment Inc v RDR Books*, 575 F Supp 2d 513, 547 (SDNY 2008) ("[A] copier is not entitled to copy the vividness of an author's description for the sake of accurately reporting expressive content.").

61 See Julie Cohen, *Creativity and Culture in Copyright Theory*, 40 UC Davis L Rev 1151, 1178 (2007) ("There is broad agreement among creative individuals of all types that creativity is characterized pervasively by a *not knowing* in advance that encompasses both inspiration and production."); Ochoa, 45 J Copyright Socy USA at 557 ("[The parody/satire distinction] assumes that courts can definitively determine an author's intent in writing a particular work, a task that many literary scholars argue is both foolish to attempt and impossible to achieve.") (footnote omitted). For commentary on the descriptive failures of an atomistic model of creativity, see Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 Wm & Mary L Rev 513, 522–37 (2010) (describing how "[m]any standard experiences of creativity simply do not fit into the [pecuniary] incentive model[ ]").

62 The two Second Circuit decisions addressing work by artist Jeff Koons highlight the manipulability of artist statements as evidence of fair use. Compare *Rogers v Koons*, 960 F2d 301, 309 (2d Cir 1992) (noting Koons's statement that the meaning of the particular underlying works he utilized was immaterial to his artistic purposes), with *Blanch*, 396 F Supp 2d at 480–81, affd 467 F3d 244 (2d Cir 2006):

> To me, the legs depicted in the Allure photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular. By using a fragment of the Allure photograph in my painting, I thus

picture by instead examining "how the artworks may 'reasonably be perceived' in order to assess their transformative nature."[63] Hopefully, judges in other circuits will take *Cariou*'s cue and recognize the drawbacks of relying primarily on witness statements instead of reasonable readers' responses.[64]

B. *Cariou*'s Follies

1. Raw vs. Cooked?

Scholars have long acknowledged that copyright law values certain creative activities over others.[65] Copyright typically rewards those endeavors that map most easily onto a romanticized "pure" artist who produces a new work of authorship from a blank slate.[66] Because copyright privileges "originality," copy-

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> comment upon the culture and attitudes promoted and embodied in Allure Magazine.

It's entirely possible Koons intended to comment on Blanch's photograph in a way he didn't with respect to the images used in his earlier work. But it's equally possible, and quite likely, the second time around he knew which buzzwords to reference: "transform," "message," "meaning," and the implication that he was commenting on the photo (as an instantiation of Allure's values).

63 *Cariou*, 714 F3d at 707, quoting *Campbell*, 510 US at 582. See also David A. Simon, *Reasonable Perception and Parody in Copyright Law*, 2010 Utah L Rev 779, 788 ("The need for examining whether the author sought to avoid work (i.e., cognitive laziness) is irrelevant here in the same way that it is irrelevant to determining whether an author's work is significantly 'original' to gain copyright protection.").

64 See, for example, Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 L & Lit 20, 28 (2013) ("[W]hen reasonable audience members could discern commentary on the original work, a court should find favored 'parody,' even when other reasonable audience members could disagree."); Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 Colum J L & Arts 445, 448 (2007) ("[T]he better test of whether a second work has contributed a 'new expression, meaning, or message' to the first is to turn to the reader, the one who 'holds together in a single field all the traces by which the written text is constituted.'").

65 See, for example, James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* 51–60 (Harvard 1996); Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 L & Contemp Probs 97, 100 (Spring 2007); Sonia K. Katyal, *Semiotic Disobedience*, 84 Wash U L Rev 489, 497 (2006) ("[Intellectual property law] enables certain types of legal and illegal dissent, conferring legitimacy on some types of speech through the prism of fair use, but often excluding other types of expression from protection."); Keith Aoki, *Authors, Inventors, and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 Colum J L & Arts 1, 35–45 (1993).

66 See Jessica Litman, *The Public Domain*, 39 Emory L J 965, 965 (1990) ("Our copyright law is based on the charming notion that authors create something from nothing, that works owe their origin to the authors who produce them."). See also Boyle, *Shamans, Software and Spleens* at x–xiii (cited in note 65); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, in Martha Woodmansee and Peter Jaszi, eds, *The Construction of Authorship: Textual Appropriation in Law and Literature* 29, 29 (Duke 1994).

right commentators often associate the resulting devaluation of downstream, "second-generation" authorship with limited fair use protections.[67] But as Professor Mark Lemley has observed, "[o]ne could invoke the language of romantic authorship either to demand strong copyright protection for a first-generation author or to demand an expansive interpretation of fair use for a second-generation author who has 'transformed' a first-generation work."[68]

Cariou and *Salinger* highlight the malleability of originality and authorship rhetoric within copyright law. Plaintiff J.D. Salinger had a "First Amendment interest in *not* speaking" and the "right *not* to authorize derivative works";[69] Plaintiff Patrick Cariou had no "inevitable, divine, or natural right" to absolute ownership of his creations, which are used as "raw material [ ]. . . in the creation of new information, new aesthetics, new insights and understandings."[70] Defendant Fredrik Colting's critique was "not credible"; Defendant Richard Prince's "message" didn't matter.[71]

It's unclear *why* the Second Circuit employed such different rhetoric to the parties in the two cases. The court in *Cariou* emphasized that a work's transformative nature is determined from the perspective of the "reasonable observer,"[72] but who are these observers? Apparently they're not the scholars who testified to ***60 Years***'s critical character,[73] but they may very well be the parade of celebrities, socialites, and famous artists the court identified at the opening of *Canal Zone*. The court emphasized that an infringer's "target audience" must be "the same as the original," and that "Prince's work appeals to an entirely differ-

67 See, for example, Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 Chi Kent L Rev 725, 794 (1993) ("The plaintiff's status as 'author' immediately elevates his or her position vis-à-vis the defendant, who is a mere 'user,' no matter how creative the second work may be.").

68 Mark A. Lemley, Book Review, *Romantic Authorship and the Rhetoric of Property*, 75 Tex L Rev 873, 885 (1997). See also Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 Cardozo Arts & Enter L J 293, 314 n 71 (1992) ("The dependence on Romantic ideas of 'authorship' by copyright law limits the availability of the 'fair use' defense . . . . The same conception of "authorship," however, has been invoked to justify 'fair use.'").

69 *Salinger*, 607 F3d at 74, 81.

70 *Cariou*, 714 F3d at 705, 706.

71 *Cariou*, 714 F3d at 707.

72 Id.

73 See *Salinger*, 607 F3d at 72 (summarizing declarations of Professors Martha Woodmansee and Robert Spoo).

ent sort of collector than Cariou's."[74] But this did not appear to be due to a different *intended* audience—both Cariou and Prince were in discussions with New York City art gallery owners.[75] Instead, the difference seems to revolve around Prince's celebrity, the exclusive price tag on his work, and the Gagosian Gallery's portfolio of wealthy contacts. It might be appropriate for fair use to inquire into whether the two works appeal to "distinct and separate discursive communit[ies],"[76] but what demarcates the lines between such communities?[77]

Professor Lawrence Lessig observed, "fair use in America simply means the right to hire a lawyer."[78] *Cariou* and *Salinger* suggest that wealth and fame may entitle an author not just to a robust legal defense, but also to a privileged position in harnessing copyright's rhetoric. The famous artist understandably has greater ability to influence her potential audience than the un-

[74] *Cariou*, 714 F3d at 709.

[75] See id at 703–04. One could, of course, define the artists' intended audiences more broadly (any art gallery or the entire consumer market) or more narrowly (Lower East Side art galleries dealing in high-concept appropriation art). As Professors Mark Lemley and Mark McKenna have written, fair use determinations are made using implicit market definitions—a court that interprets copyrights broadly will also tend to conceive of available markets broadly, and vice versa. See Mark A. Lemley and Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 Geo L J 2055, 2074–76, 2107 (2012) (arguing that fair use should be found unless a "market-substituting effect can be traced to the protectable elements of the copyrighted work"). Parsing the market by class and income seems theoretically sensible but for the problematic distributional consequences.

[76] Heymann, 31 Colum J L & Arts at 449 (cited in note 64).

[77] Professor Rebecca Tushnet notes that an audience-focused approach to fair use might transfer existing problems with judges making aesthetic judgments into problems "defining who counts as a 'reasonable' audience member." Tushnet, 25 L & Lit at 29 (cited in note 64). She suggests looking to the existence of "communities of practice," including "appropriation artists, vidders, or others" to help determine "that such audiences are both reasonable and real." Id. In our view, this practice-oriented analysis might avoid some of the problematic socioeconomic implications and effects of *Cariou*'s market-oriented approach and also recognize Colting's "critical intervention" into ongoing debates about Holden Caulfield and J.D. Salinger. Id at 26. In other words, although *the artist whose work is at issue* should not be the definitive guide to how others perceive—or should perceive—her work, the knowledge and experience of other artists can provide valuable context for the fair use inquiry. See Simon, 2010 Utah L Rev at 805 (cited in note 63):

> The ["reasonably perceived" test] should assume that this reasonable perceiver makes an interpretation of a work in context and has a familiarity with the underlying work. Allowing a contextual analysis by someone familiar with the underlying work prevents the law from privileging nonminority parodies and also avoids looking to author intent.

[78] Lawrence Lessig, *Free Culture: How Big Media Used Technology and the Law to Lock Down Culture and Control Creativity* 187 (Penguin 2005).

known artist,[79] but the "reasonably perceived" transformative use that results does not happen in isolation. Originality in copyright depends on a plentiful supply of source material,[80] and regardless of whether the sources are facts, ideas, the "public domain," or copyrighted works, the "raw material" designation has the potential to fall disproportionately on less-affluent creators and laborers.[81] The divide between the protected and appropriable domains of copyright is porous and manipulable,[82] and these qualities generally inure to the benefit of those with the resources to mine, appropriate, and exploit the raw materials of creation.[83] *Cariou* and *Salinger* remind us that this dynamic can occur on either side of the "v."

To the extent *Cariou* implicitly acknowledges the intertextual nature of all creative works, it is a welcome shift in the purely author-focused jurisprudence that precedes it. But the vast majority of creators who wish to engage with and reuse copyrighted works may not share the circumstances that gave rise to this doctrinal shift. If fair use is to be a "speech-protective" safeguard,[84] it certainly must develop a richer understanding and vocabulary for creative inspiration. But maintain-

79 See Heymann, 31 Colum J L & Arts at 450 (cited in note 64) ("An implicit statement by Andy Warhol that 'this soup can is art' is likely to be reflected among readers to a greater extent than a similar statement by an unknown artist.").

80 See, for example, Litman, 39 Emory L J at 968 (cited in note 66) ("The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.").

81 See Sunder, 70 L & Contemp Probs at 107 (cited in note 65) (arguing that fortifying the boundary between "authors and raw materials . . . has the perverse effect of congealing poor people's knowledge as the *object* of property, the raw material from which real intellectual property is derived").

82 See Julie Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in L. Guibault and P.B. Hugenholtz, eds, *The Future of the Public Domain* 121, 157 (2006) ("[P]artially or differently public without the correlative partially or differently private is a *non sequitur*."); Anupam Chander and Madhavi Sunder, *The Romance of the Public Domain*, 92 Cal L Rev 1331, 1339 (2004) ("Private property and the public domain are paired together in a perpetual dance.").

83 See Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 Am U J Gender Soc Pol & L 183, 202 (2006) ("It may be those entities already endowed with the greatest resources that are best positioned to take advantage of such freely available resources."). See also Chander and Sunder, 92 Cal L Rev at 1343 (cited in note 82) ("[T]he public domain is essential to our private property system because it offers a sphere of free works upon which capitalists can draw without either seeking consent or drawing liability."); Aoki, 18 Colum J L & Arts at 39–40 (cited in note 65) (observing that treating "alternate types of cultural production" as "sources" for original authorship sets up these cultural productions "for over-exploitation and eventual depletion or destruction").

84 See *Eldred v Ashcroft*, 537 US 186, 219–20 (2003).

ing a conceptual wedge between "raw" and "cooked" culture is a highly problematic way of doing so.[85] *Cariou* makes fair use fairer for some, but there's a real risk its virtues won't be available to all.[86]

2. High vs. Low?

These distributional concerns are not unique to *Cariou* and *Salinger*. Although the trend isn't universal,[87] conventionally popular litigants do tend to win in fair use case law.[88] *Catcher in the Rye* and Salinger are beloved hallmarks of American litera-

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85 See Sunder, 70 L & Contemp Probs at 107 (cited in note 65). For commentary on the hierarchies perpetuated by distinctions between raw/cooked and nature/culture, see Sherry B. Ortner, *Is Female to Male as Nature Is to Culture*, in Michelle Zimbalist Rosaldo and Louise Lamphere, eds, *Women, Culture, and Society* 67, 80 (Stanford 1974) (observing that the transformation from raw to cooked is associated with transition from nature to culture and that women typically appear "to have stronger and more direct connections with nature"); Carol MacCormack and Marilyn Strathern, eds, *Nature, Culture and Gender* (Cambridge 1980).

86 This problem isn't limited solely to copyright, but extends to other analogous rights as well. For example, the California Supreme Court, in a major case involving that state's right-of-publicity statute, held that lithographs and charcoal drawings featuring the Three Stooges violated rights in the Stooges' personae. It noted, however:

> [W]e do not hold that all reproductions of celebrity portraits are unprotected by the First Amendment. The silkscreens of Andy Warhol, for example, have as their subjects the images of such celebrities as Marilyn Monroe, Elizabeth Taylor, and Elvis Presley. Through distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself. Such expression may well be entitled to First Amendment protection.

Comedy III Productions, Inc, v Gary Saderup, Inc, 21 P3d 797, 811 (Cal 2001) (citation and footnote omitted).

87 See, for example, Rogers, 960 F2d at 301.

88 See Matthew Sag, *Predicting Fair Use*, 73 Ohio St L J 47, 78 (2011) (summarizing empirical data and noting a persistent "overdog effect in relation to fair use litigation"). See also, for example, *Brownmark Films, LLC v Comedy Partners*, 682 F3d 687, 692 (7th Cir 2012) (holding recreation of the viral video "What What (In the Butt)" in an episode of South Park to be "an obvious case of fair use"); *Bourne Co v Twentieth Century Fox Film Corp*, 602 F Supp 2d 499, 511 (SDNY 2009) (holding that use of the song "When You Wish Upon a Star" by the television show *Family Guy* qualified as fair use); *Warner Brothers Entertainment*, 575 F Supp 2d at 513 (rejecting a fair use defense for use of J.K. Rowling's copyrighted works in a Harry Potter encyclopedia). By contrast, artists operating in comparatively marginalized art forms often lose. For example, in *Morris v Guetta* a district court found street artist Mr. Brainwash's creative labor to pale in comparison to the value provided by the photograph of Sid Vicious he used as source material. *Morris*, 2013 WL 440127, *8 (CD Cal) ("The Photograph is a picture of Sid Vicious making a distinct facial expression. Defendants' works are of Sid Vicious making that same expression. . . . Defendants' works remain at their core pictures of Sid Vicious.").

ture, and Colting's novel is seen as a simple retread;[89] Cariou's pictures, which nobody seems to like all that much,[90] are grist for Prince's high-concept art mill.[91] Jeff Koons's work was unfair when he was exhibiting at relatively small galleries, but he wins fair use arguments once he makes it to the Museum of Modern Art (MoMA)[92] and the Met,[93] at last firmly legitimated by contemporary society.

The problem largely appears to be one of framing.[94] We unconsciously categorize the things to which we relate and accord respect to those things that fit within the categories we deem respectable.[95] Colting's book isn't the real thing—it "comes across as fan fiction" with "none of the edginess that still oozes from *The Catcher in the Rye*."[96] It's not "art" so it's not fair. Although appropriation art by Koons and Prince took a long time to gain

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89 See *Salinger*, 641 F Supp 2d at 258 (noting that Colting's criticisms were "thoroughly depicted and apparent in Salinger's own narrative about Caulfield").

90 *Cariou*, 714 F3d at 699 (noting Cariou had earned only $8,000 from *Yes, Rasta* and sold only four prints to personal acquaintances).

91 We are careful, however, to note the five works the Second Circuit remanded to the district court for further review. Regardless, we agree with Judge Wallace, who argued in a partial concurrence that he couldn't understand how the majority could "confidently" distinguish between the five remanded works and the rest. See id at 713 (Wallace concurring in part and dissenting in part).

92 See Jeff Koons, *The Collection*, Museum of Modern Art (2013), online at http://www.moma.org/collection/artist.php?artist_id=6622 (visited June 25, 2013) (listing Koons's works in MoMA's permanent collection).

93 See Ken Johnson, *A Panoramic Backdrop for Meaning and Mischief*, NY Times E5 (Apr 22, 2008) (describing a Koons exhibit on the roof of the Metropolitan Museum of Art).

94 See Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* 21–26 (Northeastern 1974); E.H. Gombrich, *The Sense of Order: A Study in the Psychology of Decorative Art* 17–18 (Cornell 1980). See also Daniel Miller, *Stuff* 49–50 (Polity 2010) (tying together Professors Goffman's and Gombrich's analyses in describing material culture).

95 See Miller, *Stuff* at 49 (cited in note 94) ("A more radical version of Gombrich's thesis could argue that art itself exists only in as much as frames, such as art galleries or the category of *art* itself, ensure that we pay particular respect, or pay particular money, for that which is contained within [particular] frames."). See also *Grand Upright Music Limited v Warner Brothers Records Inc*, 780 F Supp 182, 183 (SDNY 1991) (observing that in the context of digital sampling, "[t]hou shalt not steal").

96 Richard Davies, *Review of* 60 Years Later: Coming Through the Rye (AbeBooks), online at http://www.abebooks.com/books/coming-through-catcher-rye/60-years-later.shtml (visited June 25, 2013). By contrast, in *Morris*, street art like Mr. Brainwash's doesn't yet neatly fit society's preconception of "art," so judges characterize it as unfair; it's not creative, it's not provocative—it's theft. See *Morris*, 2013 WL 440127 at *8. See also *Friedman v Guetta*, 2011 WL 3510890 (CD Cal). But see Brian Chidester, *The Unstoppable Ascendency of Street Art*, The American Prospect (May 30, 2013), online at http://prospect.org/article/love-letters-wall (visited June 25, 2013) (describing the increasing acceptance of street art by "the establishment").

wide cultural acceptance, it now fits quite firmly within general understandings of contemporary art. And therefore it's held to be fair.

While this type of framing is to some extent inevitable, we at least hope future judges will step back and recognize the subjectivity inherent in distinguishing different genres of creative activity. As Justice Oliver Wendell Holmes famously wrote in *Bleistein v Donaldson Lithographing Co*:[97]

> It 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. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.[98]

Although Justice Holmes was referring to threshold determinations of copyrightability, *Cariou* and *Salinger* show that judging aesthetic value on the back end through fair use carries many of the same risks as doing so on the front end.[99] Given that aesthetic value judgments in copyright cases are to some extent inevitable,[100] copyright law must better account for the cultural divisions created, or at least reified, by such judgments.

CONCLUSION

The Second Circuit observed in 1992 that "there would be no practicable boundary to the fair use defense" if the copied work was not "at least, in part, an object of the parody" or if infringement "could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use."[101] In its recent decision in *Cariou*, the Second Circuit appears to have

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97 188 US 239 (1903).

98 Id at 251–52 (1903). See also id at 251.

99 Consider Keller and Tushnet, 94 Trademark Rep at 987–88 (cited in note 50).

100 See generally, for example, Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 Ind L J 175 (1990).

101 *Rogers v Koons*, 960 F2d 301, 310 (2d Cir 1992).

recognized the unfairness, unworkability, and empirical deficiencies in these practicable boundaries. In shifting towards an audience-focused inquiry, however, it is important that the new boundaries of fair use are not set by socioeconomic status or judicial distinctions between high and low art.