

Fair Use and the Judicial Search for Meaning

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ABSTRACT

Are courts capable of deciphering the true meanings of artworks? Is it reasonable for them to try? Recent litigation between the Warhol Foundation and the photographer Lynn Goldsmith brought these questions into sharp focus. Fair use, the limited exception to the otherwise exclusive property rights granted to copyright owners, requires courts to assess the meaning of a secondary work so that they can determine whether the secondary use is sufficiently “transformative” to qualify for the fair use defense. Warhol used Goldsmith’s photo of Prince as the basis for his silkscreen, which he called the Orange Prince. Was it infringing, or was it fair use? What did Warhol’s work mean? Despite the centrality of this doctrinal question in all fair use disputes, neither courts nor scholars have ever devised a methodology for assessing new meaning. The theoretical vacuum has led to unpredictable and inconsistent case law. Warhol provided the Supreme Court with a rare opportunity to sharpen methodology, but the Court declined, leaving a pernicious theoretical gap at the heart of the fair use doctrine.

This Article provides a much-needed judicial basis for assessing new meaning. By weaving together doctrinal analysis—with insights drawn from existing case law—and art theory, the Article provides a framework that courts can utilize to determine whether new meaning exists.

First, the Article proposes a methodology that allows courts to determine whether there is new meaning without forcing judges to try to find—in vain—what a work of art “really” means, a doctrinal and theoretical dead end that, to date, has yielded painfully inconsistent case law. Second, the proposed methodology not only relieves judges from the impossible task of figuring out what a work of art means, but also provides a clearer standard for when new meaning is transformative. Third, the suggested standard for transformativeness provides a useful method for finding a healthy balance between free speech and economic rights, which are inevitably at odds with each other in fair use disputes. By recognizing that creative works have unique interpretive demands and that the judge’s role should be to inquire into meaning rather

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than to legislate it, the Article provides our courts—as well as fair use practitioners—with a clearer path forward than our current jurisprudence allows.

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INTRODUCTION

A few years ago, two teenagers placed a pair of glasses on the floor of the San Francisco Museum of Art, then watched as onlookers admired the spectacles as if they were looking at a work of art—which, of course, is what they thought they were doing.¹ The piece was in a museum, after all, which suggested that these frames were part of the exhibit and, ipso facto, art, rather than someone’s reading aid.

The prank deftly exposed our almost-gullible trust in institutional settings and cleverly cracked open the standard set of questions around art: Is something art merely by virtue of its inclusion in a museum setting? Could something be art without institutional imprimatur? Could it be art simply because it is intended to be art, or because the audience receives it as art? If it is art, what does it mean? How do you decide? On what basis? There is no single theory that provides definitive answers to all of these questions. It is easy enough to argue all sides—but virtually impossible to pick one position with principled certainty. In an era when art is no longer primarily mimetic or designed to convey a clear narrative, assessing whether something qualifies as art and what it means has become a daunting, if not impossible, challenge.

Some people relish the ambiguity, while others simmer with violent resentment. Agnes Martin, the minimalist artist, thought that the absence of clear meaning pushed some to vandalize her work: “[P]eople can’t stand that those are all empty squares, and the vandalism that happens, you wouldn’t believe how many of my paintings have been destroyed . . . They can’t take those empty squares . . . They don’t like emptiness.”² But no one *really* expects to get the last word in debates about art’s meaning.

At least superficially, though, there is one exception to our collective intellectual condition, and that is the judicial process. Judges *do* get the last word—indeed, they *have* to get the last word in order to resolve thorny legal disputes about meaning and classification. The judicial quest for meaning is particularly prominent in the context of fair use, which requires courts to determine whether the secondary work has a “new meaning,” or contributes “something new” to the existing work.

While the Supreme Court advanced the directive, however, it provided no methodology for applying it—nor has any court since. While some scholarship has explored ways in which courts look at art and images,³ in turn, no academic attempt has been made to provide courts with a comprehensive formula for assessing new meaning in the context of fair use. Judges are left to rely on their intuitions, an approach that, in the aggregate, has not generated stable jurisprudence. Unmoored from guiding principles, “courts are left with almost complete discretion in determining whether any

1. Christopher Mele, *Is It Art? Eyeglasses on Museum Floor Began as Teenagers’ Prank*, N.Y. TIMES (May 31, 2016), <https://www.nytimes.com/2016/05/31/arts/sfmoma-glasses-prank.html> [https://perma.cc/QF7C-H792] [https://web.archive.org/web/20231230083902/https://www.nytimes.com/2016/05/31/arts/sfmoma-glasses-prank.html].

2. BARBARA HASKELL ET AL., AGNES MARTIN 140 (1992).

3. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012); Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

given factor is present in any particular case,”⁴ which, so far, has yielded notoriously unpredictable and inconsistent case law.⁵

In the *Warhol* dispute, where one of the key questions was what Warhol’s *Orange Prince* means, the Court had a rare opportunity to show how the question of new meaning should be addressed. Without much explanation, though, the majority decided that the amount of meaning present in the *Orange Prince* was minimal, and the opinion altogether skipped over the question of approach. By passing up a rare opportunity to provide much-needed theoretical scaffolding to the analysis, the majority allowed a pernicious ambiguity to linger at the heart of fair use.

This Article proposes a much-needed judicial framework for determining whether new meaning exists for fair use purposes, particularly in the context of creative works. Part I argues that, by forcing judges to find true meanings of creative works, the current approach puts courts in an untenable position. Since a true meaning is impossible to determine, the single-meaning approach sets judges up for failure. In place of the single-meaning approach, Part I offers a framework that allows courts to admit a multitude of interpretations in order to assess whether new meaning is present. In other words, instead of deciphering what a work “really” means, courts only need to decide whether it has new meaning. Part II expands the concept of transformativeness to include a social benefit variable, which not only helps courts identify when new meaning is transformative, but also provides a basis for resolving the inevitable fair-use tension between free speech and property rights. Part III applies the proposed reasonable-meanings framework to Warhol’s *Orange Prince* as a way of highlighting the method’s efficacy and showing that the Supreme Court’s majority opinion is a misfire.

I. MEANING

A. FAIR USE’S FIRST FACTOR IN CONTEXT

Copyright ownership is not absolute. In limited circumstances, someone other than the author or a licensee can use copyrighted material without asking for permission. If, for instance, I am making a biographical film about a famous actor, I may be able take clips of movies in which the actor appeared so that I can illustrate aspects of that person’s career.⁶ Or, to use an example of fair use that we all rely on regularly, search engines can return thumbnails of copyrighted images to help us find the full-sized photos.⁷ In short, in specific situations, the doctrine allows all of us to take content, even if it is copyrighted, and use it for free. By making these uses possible without requiring payment to the copyright owner, fair use “offers a means of balancing the exclusive rights of a copyright holder with the public’s interest in dissemination of information affecting areas of universal concern, such as art, science and industry.”⁸

4. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A] (rev. ed. 2009).

5. David Nimmer, “*Fairest of Them All*” & *Other Fairy Tales of Fair Use*, 55 LAW & CONTEMP. PROBS. 263, 287 (2003).

6. *SOFA Ent., Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1276 (9th Cir. 2013).

7. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003).

8. *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977).

The central criteria for determining whether a particular use is fair were promulgated in an 1841 opinion and are still in use:

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.⁹

Because they are so loosely phrased, the four factors are open to judicial interpretation. “There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.”¹⁰ No factor is dispositive, and the entity raising the fair use defense does not need to show that every factor supports fair use. “Instead, all factors must be explored and the results weighed together in light of the purposes of copyright and the fair use defense.”¹¹

The first factor—the part of the doctrine that requires courts to assess new meaning—has been particularly mystifying. The Copyright Act’s “instruction to consider the ‘purpose and character’ of the secondary use . . . does not explain what types of ‘purpose and character’ . . . favor a finding of fair use and which do not.”¹² In a 1990 article, Judge Leval, in an attempt to stabilize the doctrine, emphasized the requirement that “the purpose and character of use” be transformative:

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story’s words, it would merely “supersede the objects” of the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.¹³

In 1994, the Supreme Court issued the following formulation: When evaluating the purpose and character of the use, one must consider “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.’”¹⁴ The Court added an important qualifier: “The more

9. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

10. *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1989).

11. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004).

12. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 213 (2d Cir. 2015).

13. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

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

transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹⁵

Not all courts are persuaded that this is the best approach, or that it should be the primary one, as it has effectively become:¹⁶

[A]sking exclusively whether something is “transformative” not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every “transformative use” can be “fair use” without extinguishing the author’s rights under § 106(2). We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).¹⁷

But the approach is deeply entrenched in case law. Courts routinely seek to determine whether the secondary use “merely supersedes 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.”¹⁸ In a 2001 Second Circuit opinion, Judge Leval emphasized that the “heart of the fair use inquiry is into the first specified statutory factor.”¹⁹ The Second Circuit reiterated the centrality of the first factor in 2006,²⁰ as did a recent Ninth Circuit case: “This factor has taken on a heightened significance because it influences the lens through which we consider two other fair use factors.”²¹

Precisely because the first factor “has a significant impact on the remainder of the fair use inquiry,”²² it has provided protection for creative speech that ranges from books²³ and photography²⁴ to music²⁵ and music videos.²⁶ But its contours remain elusive. The *Campbell* opinion provides a standard, but no clear guidelines for determining whether there is new meaning and a work is in fact transformative. Judges inevitably fall back on intuition and subjectivity, an approach that, in the aggregate, has yielded inconsistent outcomes. The first factor urgently needs a reasoned approach that brings methodological stability and transparency to the judicial assessment of new meaning.

15. *Id.* The commercialism comment was meant to undo the presumption that the Supreme Court created in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984) (“If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair.”).

16. For a comprehensive analysis of each factor’s impact, see Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008).

17. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

18. *Campbell*, 510 U.S. at 579 (1994).

19. *Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

20. *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).

21. *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 451 (9th Cir. 2020).

22. *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 U.S. Dist. LEXIS 83267, at *23 (S.D.N.Y. May 11, 2023).

23. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

24. *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

25. *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310 (S.D.N.Y. 2008).

26. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013).

B. THE IMPORTANCE OF MEANING

There are two paths to finding a transformative use under the first factor: new purpose and new meaning. In practice, though, courts often look solely to purpose to determine whether a use is transformative. This approach makes sense with search engines, where the meaning of individual images is immaterial, but it is dangerous when applied to art works, where the question of whether a use is transformative requires a proper assessment of meaning. It is therefore critical that, when assessing creative works, courts look beyond purpose to meaning itself.

Both legislation and *Campbell* refer to “purpose” in a singular and monolithic way, but courts apply the word to a number of different practices. The first is what we might naturally think when we hear the word purpose, viz., something utilitarian. Search engines are paradigmatic examples—e.g., books in *Authors Guild v. Google, Inc.*²⁷ and thumbnails in *Kelly v. Arriba Soft Corp.*²⁸ Other well-known examples include APIs,²⁹ video recording devices,³⁰ or a virtual machine that allows “security researchers to gain deeper insights into” an operating system.³¹

The second type of purpose is expressive—i.e., instances in which the secondary use is meant to communicate a new meaning. Expressive purpose, in turn, breaks down into what we could call second-order purposes, or specific types of genres of expression that courts, following legislation, generally recognize as qualifying for fair use: criticism, for instance, and commentary. At this level, the meaning of the secondary work is generally assessed to confirm that it supports the purported genre—that, for example, it really is a parody,³² a historical reference,³³ or a commentary on a newsworthy debate.³⁴ “In the area of parody as copyright infringement, Second Circuit case law focuses first upon the general question—is the defendant’s work truly a parody?”³⁵ If the court confirms that the secondary use falls into the one of the categories delineated in legislation, the first factor tilts in favor of transformation.³⁶

In each instance, if the ostensible purpose is not confirmed (that is, whether the secondary use has a utilitarian purpose or expressive purpose), there is no transformation. There was a valid new purpose when *Gone with the Wind* was written in parodic form to expose aspects of the original,³⁷ and *Grease* was reworked as a play

27. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

28. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

29. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

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

31. *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 U.S. App. LEXIS 11225, at *3 (11th Cir. May 8, 2023).

32. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003) (“The issue of whether a work is a parody is a question of law, not a matter of public majority opinion.”).

33. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

34. *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

35. *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 829 (S.D.N.Y. 1990).

36. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (“[T]here is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in § 107.”).

37. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

to point out the film's retrograde values.³⁸ But the Sixth Circuit rejected as "wholly meritless"³⁹ the defendant's argument that its karaoke was for educational purposes, and another court was unpersuaded that the secondary use was really a form of criticism: "The effort to treat *Boldly* as lampooning *Go!* or mocking the purported self-importance of its characters falls flat."⁴⁰

It is a well-established judicial formula, and courts are confident in applying it: "The issue of whether a work is a parody is a question of law, not a matter of public majority opinion."⁴¹ Things get messy, however, when courts look at purpose without also considering meaning, particularly when the secondary work cannot be placed in a recognized fair-use category (e.g., parody). The Second Circuit's *Warhol* opinion, for example, relies heavily on the purpose-only approach. After declaring, in parallel with Holmes' century-old warning in *Bleistein*,⁴² that "judges are typically unsuited to make aesthetic judgments,"⁴³ the opinion concludes that "the overarching purpose and function of the two works at issue here is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person."⁴⁴ The court made no effort to decipher meaning.

The difference in emphasis—purpose versus meaning—can lead to very different outcomes. In *Seltzer v. Green Day*, for example, a Ninth Circuit case that had to determine whether Green Day (the band) could fairly use someone's photograph in a video projected during its concerts, the court applied the "new meaning" standard.⁴⁵ The Ninth Circuit found that, unlike the video projected during the band's concerts, which was replete with religious imagery, the original photograph "clearly says nothing about religion."⁴⁶ This discrepancy in meaning, the court reasoned, provided sufficient basis to find new and transformative meaning:

But regardless of the meaning of the original, it clearly says nothing about religion. With the spray-painted cross, in the context of a song about the hypocrisy of religion, surrounded by religious iconography, Staub's video backdrop using Scream Icon conveys "new information, new aesthetics, new insights and understandings" that are plainly distinct from those of the original piece.⁴⁷

If the Ninth Circuit had fixated on purpose instead of meaning—and concluded, for instance, that both photograph and video are visual works or are both expressive and

38. *Sketchworks Indus. Strength Comedy, Inc. v. Jacobs*, No. 19-CV-7470-LTS-VF, 2022 U.S. Dist. LEXIS 86331 (S.D.N.Y. May 12, 2022).

39. *Zomba Enters. v. Panorama Recs., Inc.*, 491 F.3d 574, 582 (6th Cir. 2007).

40. *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020).

41. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003).

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

43. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 114 (2d Cir. 2021).

44. *Id.* at 114.

45. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013).

46. *Id.* at 1176–77.

47. *Id.* at 1177.

therefore non-transformative—it might have found Green Day’s use to be unfair, and therefore infringing.

In *Arrow Prods. v. Weinstein Co. LLC*,⁴⁸ to use another example, the district court recognized that recreating scenes from an earlier movie provided new insights about the film and its actress, and was therefore fair use, despite the similarities between the original and the secondary work. The opinion could have said “they’re both movies and portraits of the same person and therefore they have the same purpose,” but that (painfully reductive) take would have missed the new and transformative meaning of the secondary use. In both *Seltzer* and *Arrow*, in other words, the respective superficial purpose, seen from a high level of abstraction, was the same: In the first instance, both the original and secondary pieces were visual works, and in the second instance, both the original and secondary works were movie scenes. In each, the court might have found the same purpose, but in each, the court reached a fair use outcome by identifying new and transformative meaning.

Faced with uncertainty about how to assess meaning in a work, courts may be tempted to fall back on the much-easier assessment of purpose instead, even if the actual meanings are, as Justice Kagan put it in her dissent in *Warhol*, “worlds away.”⁴⁹ Images in particular create considerable interpretive obstacles—not only for lawyers,⁵⁰ who arguably prefer working with text over images,⁵¹ but for virtually all theorists.⁵² But particularly in the context of art, it is critical that courts do not resort to purpose as a way of avoiding the often vexing question of meaning. The purpose-only approach ignores the fact that a secondary use can have a “legitimate purpose”⁵³ and be transformative, even if the ostensible purpose is the same. By staying away from meaning per se, courts might well appear content neutral, but paradoxically, might be suppressing more speech than they would have if they analyzed actual meaning. For the first factor to function in connection with creative works, where the purpose of both the original and secondary work will often be the same, courts need to look closely at the secondary work’s actual meaning.

C. SOURCES OF MEANING

Courts need to identify reliable sources that may be leveraged to determine whether a secondary use has new meaning. The Second Circuit’s *Warhol* opinion suggested that “whether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic—or for that matter, a judge—

48. *Arrow Prods. Ltd. v. Weinstein Co. LLC*, 44 F. Supp. 3d 359 (S.D.N.Y. 2014).

49. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 558 (2023) (Kagan, J., dissenting).

50. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012).

51. Jessica D. Litman, *Silent Similarity*, 14 CHI-KENT J. INTELL. PROP. L. 11 (2015).

52. James Elkins, *On the Impossibility of Stories: The Anti-Narrative and Non-Narrative Impulse in Modern Painting*, 7 WORD & IMAGE 348 (1991).

53. *Twin Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993) (“Where, as here, the abridgment serves no transformative function and elaborates in detail far beyond what is required to serve any legitimate purpose, the first factor cannot be weighted in favor of the fair use defense.”).

draws from the work.”⁵⁴ But if, as the opinion instructs, we silence authors, critics, and judges, who is left to determine meaning? The court’s argument seems to eliminate all interested parties from the conversation, which inescapably leads to a dead end. Each one of these sources brings something useful to the proverbial table, and each can help courts determine whether there is new meaning under the first factor.

1. Reasonable People and Experts

The assessment of meaning could start with “that most useful legal personage—the ordinary, reasonable observer,”⁵⁵ the mythological creature who gets invited to all the legal parties and figures prominently in case law. In defamation, for example, “courts must additionally consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person.”⁵⁶ When determining trademark confusion, the “standard to be employed is the ordinary purchaser, not the expert.”⁵⁷ Copyright’s *de minimis* analysis relies on the average lay observer: “Sandoval’s photographs as used in the movie are not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs, much less the style used in creating them.”⁵⁸ Copyright infringement, too, leverages the ordinary observer: The “standard test for substantial similarity . . . is whether an ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [their] aesthetic appeal as the same.”⁵⁹ Conversely, outliers need not contribute to an obscenity analysis, which excludes the “particularly susceptible persons.”⁶⁰

This step could be largely standard free (apart from being reasonable, that is), requiring only “good eyes and common sense,”⁶¹ in parallel to the total “look and feel” standard applied in the context of infringement claims, which considers all criteria that the non-lawyer might find relevant. The seminal “look and feel” case looked at mood, characters, arrangement of words, and the combination of artwork conveying a particular mood with the particular message.⁶² In *The Perfect Critic*, T.S. Eliot warned of readers who project their own subjective preferences onto works of art and “like one poet because he reminds him of himself, or another because he expresses emotions

54. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 41 (2d Cir. 2021).

55. Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 422 (2d Cir. 1985).

56. Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270, 1273–74 (N.Y. 1991).

57. Omega Importing Corp. v. Petri-Kine Camera Co., 451 F.2d 1190, 1195 (2d Cir. 1971).

58. Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (2d Cir. 1998).

59. Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 61 (2d Cir. 2010).

60. Roth v. United States, 354 U.S. 476, 488–89 (1957).

61. Couleur Int’l Ltd. v. Opulent Fabrics Inc., 330 F. Supp. 152, 153 (S.D.N.Y. 1971).

62. Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (“It appears to us that in total concept and feel the cards of United are the same as the copyrighted cards of Roth. With the possible exception of one United card . . . the characters depicted in the art work, the mood they portrayed, the combination of art work conveying a particular mood with a particular message, and the arrangement of the words on the greeting card are substantially the same as in Roth’s cards.”).

which he admires.”⁶³ In the reasonable person category, though, just as with the “look and feel” analysis, we do not need principled analysis.

Here are some short examples of reasonable readers analyzing Martin Parr’s oeuvre, taken from a Reddit thread:

His work says something very potent about the British, and about leisure globally.

His work is compelling storytelling and strong social commentary . . . expertly executed with a great eye for colour, composition and timing. He captures human expression and interaction with uncanny precision. He extracts perfect tableaux from everyday life.

He creates bodies of work that convey a single narrative. The images within that narrative are like paragraphs or chapters in a book.⁶⁴

While none look at a specific work, these comments show the ease with which the proverbial ordinary person can engage with images.

The reasonable person step could mimic trademark law, too, and include surveys,⁶⁵ magazine articles, and any other relevant communication that speaks to the meaning attributed to a work. By opening the reasonable person as a source of meaning, courts would ensure that current cultural readings of creative works are taken into account.

If the reasonable reader finds sufficient meaning or the author offers a persuasive reading, there might be no need to keep going; in some instances, it might not “take an art expert to see a transformation.”⁶⁶ But courts ought to exhaust all sources before deciding there is no meaning, and if doubt persists, the search for meaning should move to experts—i.e., critics, academics, curators, or other artists—who can supplement the reasonable person interpretation by supplying additional readings.

Notably, some works will not yield clearly articulated explanations from either experts or reasonable readers, but it is key that these be considered. “It would be disastrous to attempt a detailed logical exegesis of this, line by line and image by image, for in Donald Hall’s phrase, this kind of imagination is irrational. Yet it would be a poor reader who felt any large margin of unintelligibility here.”⁶⁷ Consider this review from *The Nation*: “I was aware not merely of the impoverished materials but of their diffident, and elegant, seizure of my attention. It is an indication of how ramified is this art that its sensuality exists more richly and vividly as a psychological state than as a physical act.”⁶⁸

63. T.S. Eliot, *The Perfect Critic*, in *SELECTED PROSE OF T.S. ELIOT* 50, 55 (Frank Kermode ed., 1975).

64. blore40, *Why Is Martin Parr Regarded as a Great Photographer?*, REDDIT (May 6, 2014), https://www.reddit.com/r/photography/comments/24w17b/why_is_martin_parr_regarded_as_a_great [https://perma.cc/PCX7-PTFP].

65. Notably, surveys ensure the presence of community standards and address some of the risks associated with taking fair use analysis out of the hands of juries. See, e.g., Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275 (2019).

66. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 565 (2023).

67. Marius Bewley, *Modes of Poetry*, 21 HUDSON REV. 713, 719 (1969).

68. Max Kozloff, *Art*, THE NATION, Nov. 14, 1966, at 524, 525.

“I frequently hear the question, ‘What do these images mean?’” wrote Adolph Gottlieb. “This is simply the wrong question. Visual images do not have to conform to either verbal thinking or optical facts. A better question would be ‘Do these images convey any emotional truth?’”⁶⁹ From both reasonable readers and experts alike, works not open to an obvious explanation might nevertheless yield an aesthetic response. “The characteristic of a work of art is its power of provoking aesthetic emotion”⁷⁰ It is imperative for courts to recognize the importance of “aesthetic emotion,”⁷¹ and create space for viewers to have their own experience of the work. However, because a reasonable reader’s inability to provide a clear explanation might be seen as a failure of meaning in the work itself, experts can reassure courts that this is not in fact the case—that, in other words, there is a there there, even if we cannot point to its exact location on the map.

2. Authors

In and out of courtrooms, intent as the sole or even primary source of meaning has been criticized as an insufficient method of interpretation. Critics of intentionalism believe that authors are not in a privileged position to make sense of their own works. “An ambiguous text does not become any less ambiguous because its author wills one of the possible meanings.”⁷² Fry, for his part, thought artists are “the least fitted to report upon the aesthetic value of the objects they pressed upon us.”⁷³ It is a platitude, for instance, that creators do not always know what they are creating, or why they are creating it. Andres Serrano’s interpretation of *Piss Christ*, the highly controversial photograph that led Jesse Helms to call the photographer a jerk, was open to many interpretations—some positive and some very negative.⁷⁴ But it seems Serrano himself was not sure what the meaning of his photograph was when he set out to work on it: “At the time I made *Piss Christ*, I wasn’t trying to get anything across,” Serrano told *The Guardian*. “In hindsight, I’d say *Piss Christ* is a reflection of my work, not only as an artist, but as a Christian.”⁷⁵ Consider these two examples, the first from a novelist and the second from a film director and screenplay writer:

69. WHITNEY MUSEUM OF AM. ART, *THE NEW DECADE: 35 AMERICAN PAINTERS AND SCULPTORS* 36 (John I. H. Bauer ed., 1955).

70. CLIVE BELL, *ART* 62 (1920).

71. *Id.* at 62.

72. MONROE C. BEARDSLEY, *THE POSSIBILITY OF CRITICISM* 29 (1970) (emphasis omitted).

73. ROGER FRY, *VISION AND DESIGN* 47 (1925).

74. David Ng, *A Survey of Heated Rhetoric on Andres Serrano’s ‘Piss Christ,’* L.A. TIMES (Apr. 19, 2011, 11:47 PM), <https://www.latimes.com/archives/blogs/culture-monster-blog/story/2011-04-19/a-survey-of-heated-rhetoric-on-andres-serranos-piss-christ> [https://perma.cc/H839-79Q7] [http://web.archive.org/web/20230918211955/https://www.latimes.com/archives/blogs/culture-monster-blog/story/2011-04-19/a-survey-of-heated-rhetoric-on-andres-serranos-piss-christ].

75. Amanda Holpuch, *Andres Serrano’s Controversial Piss Christ Goes on View in New York*, THE GUARDIAN (Sept. 28, 2012), <https://www.theguardian.com/artanddesign/2012/sep/28/andres-serrano-piss-christ-new-york> [https://perma.cc/G5MM-ZY2L] [http://web.archive.org/web/20230918213011/https://www.theguardian.com/artanddesign/2012/sep/28/andres-serrano-piss-christ-new-york].

I was just writing . . . I didn't know that I was writing until it was happening. I didn't go with the intention of writing a book. I wrote three hundred pages in ten weeks. I *really* wrote. I'd never done it like that.⁷⁶

It was like 350 pages of *stuff*, that then I kind of looked at and figured out what felt essential and what felt like the core of the story to me . . . I don't really decide what the core of a story is before I write, I write to figure out what the story is.⁷⁷

There are parallel instances in case law. In *Cain v. Universal Pictures Co.*, for example, “[t]he author did not seem to be conscious of the effect of the final scene. And when the meaning just expressed was called to his attention, he stated that he had not had it in mind when writing.”⁷⁸ And another, from a photographer:

[The] photo just happened, in a brief moment. I recognized it, shot it the best I could, and moved on, continuing to shoot the devastation. I did note the similarity to Joe Rosenthal's World War II photograph of the Iwo Jima flag-raising and was certainly aware of the symbolism of what these firefighters were doing, but in no way did I have time to analyze it. The events of the day were far more important, and in my mind, always will be.⁷⁹

It may well be the case that sometimes, if not most of the time, authors simply do not know what their work means. Maybe this is an inescapable condition: “In real art theory does not precede practice, but follows her. Everything is, at first, a matter of feeling. Any theoretical theme will be lacking in the essential of creation—the inner desire for expression—which cannot be determined.”⁸⁰ Or as Matisse put it: “The things that are acquired consciously permit us to express ourselves unconsciously with a certain richness.”⁸¹ All of this supports the view that the author “may of course have some critical ability of his own, and so be able to talk about his own work. But the Dante who writes a commentary on the first canto of the *Paradiso* is merely one more of Dante's critics. What he says has a peculiar interest, but not a peculiar authority.”⁸²

Moreover, some authors might prefer to stay silent—temporarily (“I'll play it and tell you what it is later”)⁸³ or permanently (“The responsibility of the response to art is

76. Malcolm Gladwell, *Late Bloomers*, THE NEW YORKER (Oct. 13, 2008), <https://www.newyorker.com/magazine/2008/10/20/late-bloomers-malcolm-gladwell> [https://perma.cc/9GM7-KEMM] [http://web.archive.org/web/20230928142315/https://www.newyorker.com/magazine/2008/10/20/late-bloomers-malcolm-gladwell].

77. Kate Erbland, *Greta Gerwig Explains How Much of Her Charming Coming-of-Age Film 'Lady Bird' Was Inspired by Her Own Youth*, INDIEWIRE (Oct. 6, 2017, 3:04 PM), <https://www.indiewire.com/2017/10/greta-gerwig-lady-bird-inspired-by-youth-1201884532> [https://perma.cc/S6Y5-XSZ9] [http://web.archive.org/web/20230929163302/https://www.indiewire.com/2017/10/greta-gerwig-lady-bird-inspired-by-youth-1201884532].

78. *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1018 (S.D. Cal. 1942).

79. *N.J. Media Grp., Inc. v. Pirro*, 74 F. Supp. 3d 605, 610 (S.D.N.Y. 2015).

80. WASSILY KANDINSKY, *CONCERNING THE SPIRITUAL IN ART 35* (M.T.H. Sadler trans., Dover Publ'ns 1977).

81. Henri Matisse, *Statement to Tériade: On Creativity, 1933*, in *MATISSE ON ART 107* (Jack Flam ed., 1995).

82. NORTHROP FRYE, *ANATOMY OF CRITICISM: FOUR ESSAYS 5* (2000).

83. MILES DAVIS QUINTET, *If I Were a Bell, on RELAXIN WITH THE MILES DAVIS QUINTET* (Prestige Records 1958).

not with the artist”).⁸⁴ Intent as the single method of interpretation is thus an unstable tool: Sometimes authors cannot divine final meaning of their works, and at other times they simply do not want to. And, in context of fair use, the suggested intent could very well be a convenient post-hoc defensive twist: “[I]t appears that the fair-use defense was merely a post-hoc rationalization concocted to skirt liability.”⁸⁵

Finally, authors may not make the most reliable witnesses. Even if Warhol himself were available to testify as to the meaning of the *Orange Prince*, for instance, we might have never known for sure what his intent was, not least because he was a master of prevarication: “Warhol lied constantly, almost recreationally. He lied about his age even to his doctor.”⁸⁶ Or, according to Donald Kuspit, who describes Warhol’s life as if it were at all times a type of performance art, he was engaged in “the pseudo-revelatory serving up of oneself to the ideal spectator, that is, one who only wants to look, not understand.”⁸⁷

When the author wants to speak, though, there is no reason to suppress the author’s interpretation; it would be odd if the author were prohibited from engaging in the very activity that is available to the rest of us, after all. The audience-only approach makes sense in other legal contexts. In defamation, for instance, harm depends on reasonable people adversely interpreting a statement or implication, since someone’s reputation depends on other people’s impressions, not the author’s opinion. But if we can philosophically get past the post-structuralist death of the author,⁸⁸ it seems unnecessary to silence authors altogether or to trivialize their input in favor of audience interpretations. Indeed, readers might well miss reasonable interpretations available to the author. *The Fountain* was initially rejected by the art establishment yet went on to revolutionize the very concept of art, which makes it a historic example of the clash between authorial intent and reader interpretation.⁸⁹

On the other hand, courts should not be prejudiced against works or authors that refuse to reveal themselves clearly. In *Graham v. Prince*, the court noted that “the murkiness of Prince’s purpose stands in stark contrast to Google’s clearly discernible, well-recorded purpose.”⁹⁰ But artists are not corporations, and art pieces are not utilitarian objects, and it is unreasonable for courts to expect artists to articulate a purpose in the same way that a company creating an API might. The artist’s failure to

84. AGNES MARTIN, *Reflections*, 22 ARTFORUM 38, 38 (1973).

85. *Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 584 n.9 (6th Cir. 2007).

86. Joan Acocella, *Untangling Andy Warhol*, THE NEW YORKER (June 1, 2020), <https://www.newyorker.com/magazine/2020/06/08/untangling-andy-warhol> [https://perma.cc/WF2J-5UCF] [http://web.archive.org/web/20230929193515/https://www.newyorker.com/magazine/2020/06/08/untangling-andy-warhol].

87. DAVID KUSPIT, *THE NEW SUBJECTIVISM: ART IN THE 1980S*, at 397 (1988).

88. See Roland Barthes, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142 (Stephen Heath trans., 1977).

89. See, e.g., ARTHUR C. DANTO, BEYOND THE BRILLO BOX: THE VISUAL ARTS IN POST-HISTORICAL PERSPECTIVE 93 (Farrar, Straus, Giroux 1992) (“These changes have seemed at times so cataclysmic as to make Picasso look almost traditional in retrospect. The boundary lines between the arts have been redrawn, as have been the boundary lines between art, taken in the most global sense, and the rest of life.”).

90. *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 U.S. Dist. LEXIS 83267, at *41 (S.D.N.Y. May 11, 2023).

“provide those sorts of explanations in his deposition—which might have lent strong support to his defense—is not dispositive,”⁹¹ and absence of explanation is not tantamount to lack of meaning.

In sum, authors can interpret their own work as freely as everyone else can. While the author’s interpretation need not be required or final, and arguably *should not* be final, it ought to be acknowledged when the author offers it, not least because it can be critically helpful to the assessment of meaning. Shutting it out altogether would be unnecessarily inimical to determining whether there is new meaning. The first factor should create space for willing authors to throw their own interpretations into the hat.

Of course, many artists would prefer to hold on to their vision and interpretation. “It always irritated me when someone, looking at my work, immediately conceived the idea of applying it to his particular interests.”⁹² Zadie Smith mused that Nabokov would never relinquish to the reader the important task of controlling meaning: “So proud of his own genius, so particular about his interpretations, Nabokov refused to lie down and die”⁹³ after Roland Barthes famously proclaimed that it is language that speaks not authors, thereby ushering in the infamous death of the author.⁹⁴ She adds later: “Barthes, though, had no interest in what the author felt or wished you to feel, which is where my trouble starts.”⁹⁵ Some authors want their interpretation to control and will resist anyone else’s. If the court is persuaded by the author’s reading, there is arguably no reason to keep going. If meaning remains unclear, though, or if the court is not persuaded by the author’s reading, then the authorial interpretation should be supplemented by other sources.

D. AMBIGUITY AND POLYSEMY

While all the sources listed above provide useful bases for assessing new meaning, they do not provide a basis for deciding which interpretation should govern. On what grounds can courts choose one meaning over another, and do so without perpetuating rampant judicial subjectivity? The solution is to shift away from attempting to decipher a work’s “best” or “most persuasive” meaning, and instead to find a way of determining whether a new meaning, whatever it may be, exists. In other words, courts ought to apply a mechanism that allows them to detect the presence of new meaning—which they can do—without attempting to decipher what a work “really” means—which, often, no one can do. This section outlines the importance of moving away from the single-meaning approach and provides an alternative method that allows courts to consider multiple, reasonable meanings.

91. *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013).

92. *MAN RAY, SELF-PORTRAIT* 166 (1963).

93. ZADIE SMITH, *CHANGING MY MIND: OCCASIONAL ESSAYS* 46 (2009).

94. *See Barthes, supra* note 88.

95. SMITH, *supra* note 93, at 44.

1. Most Persuasive Meaning

In determining whether a producer had the right to make a film based on the book *Ben Hur*, the Southern District of New York had to look at the parties' contract, "the true meaning of which is the ultimate problem presented by this case."⁹⁶ The starting point, in other words, was a search for a single, "true meaning" to be discovered from the terms of the agreement. The search for "true meaning" is evident in statutory interpretation, too. In Hawaii, to take a semi-random example, there are rules of engagement:

Where the words of a law are ambiguous:

- (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
- (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
- (3) Every construction which leads to an absurdity shall be rejected.⁹⁷

The twofold presumption in contract and statutory interpretation, in other words, is that legal terminology communicates a true and fixed meaning⁹⁸ and that courts, using proper methodology, mine the text to discover it. They reach for dictionaries to "determine the meaning of undefined statutory words."⁹⁹ They apply common sense: "The presumption in commercial contracts is that the parties were trying to accomplish something rational . . . Common sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons."¹⁰⁰ They look to intent, which sometimes overrides actual language: The "true meaning of a contract is to be ascertained from a consideration of all its provisions in order to carry out the true intention of the parties gathered from the whole instrument,"¹⁰¹ and, in statutory interpretation, "it is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning."¹⁰² They look to history: When the meaning of a statute is doubtful, "the history of the legislation may be considered in connection with the object, purpose and language of the statute in order to arrive at its true meaning."¹⁰³

96. *Harper Bros. v. Klaw*, 232 F. 609, 610 (S.D.N.Y. 1916).

97. HAW. REV. STAT. § 1-15.

98. If the legal language does not reveal the true meaning with sufficient clarity, legislators can amend it without altering the substance of the law itself. *See, e.g., W. Sec. Bank v. Super. Ct.*, 933 P.2d 507, 514 (Cal. 1997) ("Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning . . . Such a legislative act has no retrospective effect because the true meaning of the statute remains the same.").

99. *Hiwan Homeowners Ass'n v. Knotts*, 215 P.3d 1271, 1273 (Colo. App. 2009) ("[A]ppellate courts may determine the meaning of undefined statutory words by referring to the dictionary.").

100. *Fishman v. LaSalle Nat'l Bank*, 247 F.3d 300, 302 (1st Cir. 2001).

101. *Sindlinger v. Dep't of Fin. Insts.*, 199 N.E. 715, 724 (Ind. 1936).

102. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

103. *Applewood Props., LLC v. New S. Props., LLC*, 742 S.E.2d 776, 779 (N.C. 2013).

When addressing the right to bear arms, the court pointed to “the reliance of millions of Americans (as our historical analysis has shown) upon the true meaning of the right to keep and bear arms.”¹⁰⁴ There are lots of other principles, starting with the axiom that courts start by looking for ordinary meaning¹⁰⁵—“we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used”¹⁰⁶—to looking at every comma.¹⁰⁷

What unites all these efforts, over inevitable disagreements over methodology,¹⁰⁸ is the search for a single and most persuasive meaning that is free of ambiguity. Everyone is looking for the eureka moment: “When so read, the contract’s true meaning becomes clear.”¹⁰⁹ The presence of more than one possible meaning renders the text ambiguous, and therefore in need of interpretive triage. “The question is which interpretation comports with the true meaning of the statute.”¹¹⁰

In the context of infringement, too, courts typically believe there is a single idea underlying the expression: “[E]ach of Roth’s cards, considered as a whole, represents a tangible expression of an idea.”¹¹¹ The district court found “a different character” and “a new expression” that created new aesthetics in its *Warhol* opinion. The Second Circuit, in turn, looked for “a fundamentally different and new artistic purpose and character,” and the Supreme Court subsequently referred to “a different meaning or message.”¹¹² These are all singular standards. In line with this approach, Justice Kagan, in her impassioned dissent, synthesized various interpretations of the *Orange Prince* into a single one about “the dehumanizing culture of celebrity in America.”¹¹³

But the single, most-persuasive meaning approach is often at odds with creative works, which are open-ended and subject to multiple interpretations. Legal tools used to clarify contracts and statutes are useless in the context of art, first and foremost because they take a different target: “Any ambiguity must be resolved in a manner consistent with the objectively reasonable expectations of the insured in light of the

104. *District of Columbia v. Heller*, 554 U.S. 570, 624 n.24 (2008).

105. See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 797 (2018) (“Judges routinely advert to the idea of crediting the ‘ordinary meaning’ of statutory text.”).

106. *Richards v. United States*, 369 U.S. 1, 9 (1962).

107. *Gollberg v. Bramson Pub. Co.*, 685 F.2d 224, 228 (7th Cir. 1982) (citing *Lessee of Ewing v. Burnet*, 36 U.S. 41, 54 (1837)) (“Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail, but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.”).

108. *United States v. Rybicki*, 354 F.3d 124, 158 (2d Cir. 2003) (“The majority opinion is a prolonged and sustained search for some prior settled meaning for an opaque statutory phrase—‘the intangible right of honest services’—so that it can be construed as a term of art. That effort to infuse the putative term of art with meaning is conducted in a painstaking way, and considers an abundant variety of alternative meanings. However, a term of art has one single and apparent meaning, in the same way that a pun has two; it is as odd to conduct a scholarly search for the meaning of a term of art as it would be to hear a pun, conduct research in semantics, etymology and philology for a month, and then laugh.”).

109. *Gollberg*, 685 F.2d at 229.

110. *State v. Tischio*, 527 A.2d 388, 391 (N.J. 1987).

111. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (emphasis added).

112. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 522, 523, 525 (2023) (citing the District Court and Second Circuit Court of Appeals opinions) (emphasis added).

113. *Id.* at 566 (2023).

nature and kind of risks covered by the policy.”¹¹⁴ There are no “reasonable expectations” with art, and courts cannot check the Oxford English Dictionary to determine the customary meaning of Agnes Martin’s empty squares, or legislative history to determine who “she” was in Wordsworth’s poem.

More importantly, art often simply cannot be assessed with a sigma five level of accuracy. Martin Heidegger’s assessment of Van Gogh’s *A Pair of Old Shoes* is a clear example of the mismatch between truth-seeking and meaning-seeking. Heidegger was confident that the painting was of a peasant woman’s shoes and that “[t]he artwork let[] us know what [the] shoes, in truth, are,”¹¹⁵ but it turned out there was no peasant woman, and the shoes most likely belonged to Van Gogh himself.¹¹⁶ Heidegger’s truth turned out to be nothing more than another interpretation, in other words, and it was invalid solely because he was reaching after the painting’s “true” meaning rather than looking for a reasonable reading of it.

Does lack of transparency in a creative work make it any less potent? Not at all. Consider Donald Hall’s review of a Marianne Moore poem:

The method of “Nine Nectarines” might be criticized as deliberately obscuring meaning, but only if one believes that a poem has to “mean” something. The poem is hard to paraphrase. It will not be tucked neatly into a box, for some image or phrase is always hanging out. But who cares? If one wants philosophy there are plenty of essays for us to read. What we have in “Nine Nectarines” is poetry; a joy in words and rhythm, a pleasure in description. What we have, finally, is imagination itself, not talk about imagination.¹¹⁷

The fact that a work cannot be read with certainty does not diminish its potency or standing in the art world. Most people would not look away from a Magritte painting and complain that its meaning is unclear. On the contrary, ambiguity is often expected, and can enhance a work’s impact: “I don’t entirely understand it,” wrote Randall Jarrell about a Marianne Moore poem, “but what I understand I love, and what I don’t understand I love almost better.”¹¹⁸ Some of us, along with the late Louise Gluck, might actually prefer ambiguity: “I am, myself, drawn to the unfinished, to sentences that falter. I dislike poems that feel too complete, the seal too tight; I dislike being herded into certainty.” Adopting Randall Jarrell’s comment, David Lehman wrote that a poem by John Ashbery “has an extraordinary immediacy, but you can’t ‘entirely understand it.’ Its pleasures are accessible, but its meanings are so elusive that the poetry itself sometimes seems to be its first and last subject. It accommodates any number of

114. *Legacy Vulcan Corp. v. Super. Ct.*, 185 Cal. App. 4th 677, 688 (2010) (citing *State Farm Gen. Ins. Co. v. Mintarsih*, 175 Cal. App. 4th 274, 283 (2009)).

115. Martin Heidegger, *The Origin of the Work of Art*, in *THE BLOOMSBURY ANTHOLOGY OF AESTHETICS* 376, 383 (Joseph Tanke & Colin McQuillan eds., 2012).

116. Meyer Schapiro, *The Still Life as a Personal Object—a Note on Heidegger and Van Gogh*, in *THE BLOOMSBURY ANTHOLOGY OF AESTHETICS* 403, 404 (Joseph Tanke & Colin McQuillan eds., 2012).

117. Donald Hall, *Selected Poems 1935*, in *MARIANNE MOORE: THE CAGE AND THE ANIMAL* 74, 92 (1970).

118. Randall Jarrell, *Two Essays on Marianne Moore*, in *POETRY AND THE AGE* 179, 205 (expanded ed. 2001).

interpretations, but at the same time it resists conventional critical analysis, and it nearly always defeats any attempt to paraphrase it.”¹¹⁹

From Infinite Jest (“Get it? I’m not sure ‘get it’ is the point here, really”)¹²⁰ to Mulholland Drive (“the predominant attitude seems to be that whatever Lynch is up to, you are free to love it or hate it but there is no use trying to understand it”),¹²¹ there are countless examples of works that are inescapably open to various interpretations and, in some cases, frustrate readers with their “lack of clearly discernible meanings.”¹²² But while ambiguity may be a defect in legislation or contract, it is a positive feature of creative works. “[A] painting should contain a mystery, but not for mystery’s sake, a mystery that is essential to reality.”¹²³ We do not for sure know who “she” is in Wordsworth’s “A Slumber did my Spirit Seal.” Was “she” even a person? Or was “she” a metaphor, or a comment on the nature of poetry, making “quiet mockery of ideas of poetic representation which involve an imitation of reality?”¹²⁴ We do not know, and we do not *need* to know. “Poetry is not like reasoning,”¹²⁵ and it is precisely because there is more than one possible answer that some works have the potency they have. In these works, ambiguity is not mold concealing the actual object; ambiguity is a key part of the actual object.

The refusal to yield a clear, “true” meaning rubs salt into the basic human wish for what psychologists call “cognitive closure,” the “desire for definite knowledge on some issue and the eschewal of confusion and ambiguity.”¹²⁶ But ambiguity is not something that courts should strive to remove the way they remove ambiguity from an insurance

119. David Lehman, *The Pleasures of Poetry*, N.Y. TIMES (Dec. 16, 1984), <https://www.nytimes.com/1984/12/16/magazine/the-pleasures-of-poetry.html> [<https://perma.cc/L9QW-KSB4>] [<https://web.archive.org/web/20230917203557/https://www.nytimes.com/1984/12/16/magazine/the-pleasures-of-poetry.html>].

120. Sven Birkerts, *The Alchemist’s Retort*, THE ATLANTIC (Feb. 1996), <https://www.theatlantic.com/magazine/archive/1996/02/the-alchemists-retort/376533> [<https://perma.cc/4QC2-K9XX>] [<https://web.archive.org/web/20230917204157/https://www.theatlantic.com/magazine/archive/1996/02/the-alchemists-retort/376533/>].

121. Michael Vass, *Cinematic Meaning in the Work of David Lynch; Revisiting Twin Peaks: Fire Walk with Me, Lost Highway, and Mulholland Drive*, CINEACTION, Summer 2005, at 12, 13.

122. Nicholas Wroe, *Parallel Lines*, THE GUARDIAN (Apr. 22, 2005), <https://www.theguardian.com/books/2005/apr/23/featuresreviews.guardianreview13> [<https://perma.cc/XXP6-MYTJ>] [<https://web.archive.org/web/20230917204833/https://www.theguardian.com/books/2005/apr/23/featuresreviews.guardianreview13>].

123. Fairfield Porter, *Letter to Joe Brainard*, in MATERIAL WITNESS: THE SELECTED LETTERS OF FAIRFIELD PORTER 255 (Ted Leigh, ed. 2005).

124. Frances C. Ferguson, *The Lucy Poems: Wordsworth’s Quest for a Poetic*, 40 ELH 532, 533 (1973).

125. Percy Bysshe Shelley, *A Defence of Poetry*, in ESSAYS, LETTERS FROM ABROAD, TRANSLATIONS AND FRAGMENTS 1, 47 (1840).

126. Arie W. Kruglanski & Donna M. Webster, *Motivated Closing of the Mind: “Seizing” and “Freezing,”* 103 PSYCH. REV. 263, 278 (1996).

policy. On the contrary, ambiguity is something that ought to be protected as an essential part of creative works, an inescapable and meaningful feature, not a failure of communication. In *Hurley*, the Court acknowledged that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message’ . . . would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”¹²⁷ Like the First Amendment, art “recognizes no such thing as a ‘false’ idea.”¹²⁸ If the first factor of the fair use doctrine is to recognize creative works on their own terms, rather than foisting incongruous legal values and demands upon them, and if it is to help sustain fair use as the First Amendment safety valve, it too needs to embrace ambiguous aspects of artworks. The fact that a work is not created “with such clarity as to remove all ambiguity”¹²⁹ may be a valid criticism of a treaty, but it would be an invalid criticism of art. While the legal system dislikes ambiguity and aims to eradicate it, creative endeavors often embrace it. An advertising campaign could be deliberately ambiguous,¹³⁰ for example, and a song could contain deliberately non-sensical lyrics: In 1972, for instance, Adriano Celentano released *Prisencolinensinainciusol*, a catchy pop tune with gibberish lyrics designed to highlight Italian obsession with American music.¹³¹ Fair use ought to protect ambiguity in works of art. “A court should not . . . stretch its imagination in order to read ambiguity into a [contract] where none is present.”¹³² Similarly, a court should not have to stretch its imagination to articulate a “true” meaning of an ambiguous work or, to adapt a phrase from a 1954 opinion by the Virginia Supreme Court, “make that certain which is in fact uncertain.”¹³³

But where does that leave judges? In effect, we have a doctrine full of ambiguity analyzing creative content full of ambiguity. Artists, critics, and theoreticians can disregard interpretive methodologies without compromising their works. Judges, on the other hand, need to make sense of art in a way that aligns with doctrine. How can courts reconcile doctrinal imperative—i.e., to determine whether there is a new meaning—with artistic freedom to say anything in any way so that it means any number of things? If art resists final interpretation, will courts not be destined to fail if they look for a single and final meaning in something that by design is not meant to provide one?

127. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

128. *Hustler Mag. v. Falwell*, 485 U.S. 46, 51 (1988).

129. *Distribuidora Dimsa v. Linea Aerea Del Cobre S.A.*, 976 F.2d 90, 95 (2d Cir. 1992).

130. *See, e.g., Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 257 (Sup. Ct. 1984) (“Evidently, to stir comment, the relationship portrayed in the ad campaign was meant to be ambiguous, to specify nothing but suggest everything.”) (internal quotation marks omitted), *aff’d*, 110 A.D.2d 1095 (1985).

131. ROLLING STONE IT, *Twitter si è innamorato di Prisencolinensinainciusol’ di Celentano*, ROLLING STONE ITALIA (Nov. 30, 2020), <https://www.rollingstone.it/musica/news-musica/twitter-si-e-innamorato-di-prisencolinensinainciusol-di-celentano/541828/> [<https://perma.cc/YM7S-E8BG>] [<https://web.archive.org/web/20231121161813/https://www.rollingstone.it/musica/news-musica/twitter-si-e-innamorato-di-prisencolinensinainciusol-di-celentano/541828/>].

132. *Mullins v. Fed. Dairy Co.*, 568 A.2d 759, 762 (R.I. 1990).

133. *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 592 (Va. 1954).

A good amount of interpretive tension and aimlessness is removed if, rather than looking for the most persuasive meaning when analyzing creative works, courts treat the first factor as a mechanism for aggregating reasonable interpretations. If courts let go of the first factor as a tool for finding true and persuasive meaning, and instead assess all reasonable interpretations to determine whether there is new meaning in the aggregate, first-factor analysis will morph from a subjective standard to an objective mechanism for detecting the presence of new meaning. The question would not be what a work means, but what reasonable interpretations it can sustain.

2. Reasonable Meanings

In many instances, the single-meaning approach will work just fine for first-factor analysis. If the work is factual rather than creative (e.g., news rather than a comic book), a distinction that is deeply entrenched in copyright law,¹³⁴ a single-meaning interpretation is probably sufficient—judges can determine new meaning without recourse to expert testimony. In biographies, for example, a quotation or clip typically conveys a clear, single meaning, and its interaction with the surrounding context is easy enough to discern. In *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*, for instance, the meaning of a clip was self-evident: “By using the clip for its biographical significance, Dodger has imbued it with new meaning and did so without usurping whatever demand there is for the original clip.”¹³⁵

Creative works, however, demand a broader framework that is sensitive to art’s sui generis interpretive demands. Since creative works are open, any interpretive “account will be viewed as plausible more than as true, once what is indisputably descriptive has been provided—and always with a caution that the work may be construed in alternative ways.”¹³⁶ The single, “most persuasive” meaning approach simply does not work.

As a thought experiment, consider this clause: “[I]t is impossible to interpret language that is unintelligible. Thus, when faced with such language, the court has only two options. It may legislate by saying, ‘this unintelligible language means X,’ or, it may declare the law invalid and give the General Assembly an opportunity to write an intelligible statute.”¹³⁷ In the context of fair use, a court has the same two options when faced with a work whose meaning is unclear: It can impose its own meaning, or it can refuse—or fail—to find a meaning. If a court chooses option B, it likely will not find fair use. If a court chooses option A, and if we agree that in modern art there is no such thing as a single, valid, and “true” meaning of a work, then, under the guise of finding the true interpretation, the court imposes its own reading and in effect legislates the meaning of art.

134. *Stewart v. Abend*, 495 U.S. 207, 237 (1990) (“In general, fair use is more likely to be found in factual works than in fictional works.”).

135. *SOFA Ent., Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1276 (9th Cir. 2013).

136. JOSEPH MARGOLIS, *THE LANGUAGE OF ART & ART CRITICISM: ANALYTIC QUESTION IN AESTHETICS* 82 (1965) (“It is difficult to decide what is admissible in interpretations of works of art.”).

137. *Bd. of Trs. of the Jud. Form Ret. Sys. v. Att’y Gen.*, 132 S.W.3d 770, 781 (Ky. 2003).

As a matter of theory, it is a specious outcome. The court's interpretation is no more valid than any other reasonable interpretation, which means that option A forces judges into a disingenuous assessment, legal fiction at best and epistemological error at worst. As a matter of doctrine, in turn, it creates unpredictable and subjective results. A search for "truth" in the context of art forces judges to engage in what one psychologist called "satisficing,"¹³⁸ an approximation of meaning, and an exercise that is no different—and no less subjective—from what a critic, unbounded by precedent and legal principle, would do: "I merely look closely at and into all sort of photographic images and attempt to pinpoint in words what they provoke me to feel and think and understand."¹³⁹ This is not a formula for predictable jurisprudence.

In addition, the single-meaning approach clashes with a handful of free speech values:

Content Neutrality. Since an artwork is open to a range of interpretations, courts looking for a single meaning are forced to fall back on intuition and subjective assessments, and, in effect, pluck one interpretation out of many, whether their own or somebody else's, and thus favor one idea over the rest, which goes against "a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."¹⁴⁰

Official Culture. In the aggregate, judicial interpretation also generates a slice of official culture: Forced to decide meaning, courts may well favor works that are easily interpreted, and find meaning only if the works appeal to their own set of values. Indeed, government cherry picking is one argument against any government-based funding of art: "But if we think about the arts as a whole, it's easy to see that the endowments have moved us dramatically toward a fully institutionalized, bureaucratized and univocal art, an art that is infinitely more hostile to subversive voices of the right or the left or nowhere at all."¹⁴¹ The possibility, if not inevitability, of judges bending interpretation to suit their own preferences is as great in art as it is in statutory interpretation: "Without definite standards an ordinance becomes an open door to favoritism and discrimination."¹⁴²

Prevented Speech. If, moreover, courts decide meaning for us, which includes finding no meaning at all, the broader community might well be locked out of the conversation before it even starts, an outcome that preemptively silences not only the work itself but the discourse that would have followed, not just in the immediate future, but next year, and decades later. If Ulysses had remained banned, how many dissertations would not have been written?

138. Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 *Psych. Rev.* 129, 136 (1956).

139. A.D. COLEMAN, *LIGHT READINGS: A PHOTOGRAPHY CRITIC'S WRITINGS 1968-1978*, at 204 (1998).

140. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

141. Crispin Sartwell, *Jesse Helms Was Right: Kill the NEA*, *L.A. TIMES* (Aug. 30, 2001), <https://www.latimes.com/archives/la-xpm-2001-aug-30-me-40195-story.html> [https://perma.cc/R2BH-7XCV] [https://web.archive.org/web/2020111222737/https://www.latimes.com/archives/la-xpm-2001-aug-30-me-40195-story.html].

142. *Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A.2d 50, 53 (Me. 1968).

Compelled Speech. The single-meaning assessment also sometimes looks like compelled speech. In *Hurley*, the Supreme Court lamented the presence of “a message the organizers do not wish to convey.”¹⁴³ But judicial interpretation that discovers a single and “true” meaning of an artwork—whether it be the original or the secondary use—publicly attaches that meaning to the work even if the author does not agree, a meaning that is publicized through court papers rather than, say, a license plate.¹⁴⁴ *Shostakovich v. Twentieth Century-Fox Film Corp.* is a glaring example of a copyright opinion, entirely oblivious to Soviet sensibility, condoning a misattributed meaning.¹⁴⁵

In short, the single-meaning approach to creative work is full of tensions, inside and outside the legal system. A lot of the strain is removed, however, if courts stop looking for the most persuasive meaning and, instead, look for all reasonable meanings. By aggregating reasonable interpretations rather than looking for the best one, judges can replace the precarious and arguably futile process of finding a “true” meaning with a more manageable standard that scours all reasonable interpretations rather than searching for the one that is “best” or “true.”

The reasonable-meanings approach addresses the free speech risks delineated above: Content Neutrality. Since a court will draw on a range of sources and detect the presence of new meaning rather than select its favorite interpretation, it remains content-neutral vis-a-vis all possible readings.

Official Culture. A key benefit of canvassing a range of sources for meaning is that no single person or theory will dictate meaning, and, just as George Lucas could not control the meaning of the phrase “star wars,”¹⁴⁶ no one—including courts—can control the meaning of a creative work. And because a wide swath of the community is involved, the range of interpretations will reflect community values—a sort of Urban Dictionary built into the doctrine itself.

Prevented Speech. Since the court will not silence valid interpretations simply because it itself cannot find one, the first factor will not silence reasonable readings, or the work itself.

Compelled Speech. Since the court will not favor a particular reading of a work, it will not misattribute a judicial meaning to a work that may very well mean something else to the author and audiences.

The reasonable-meanings approach not only prevents the First Amendment risks listed above, but also provides a copyright benefit—viz., a stronger idea-expression dichotomy. One of the key concepts in copyright, the idea-expression dichotomy is the principle that copyright protects only expression, not the idea behind it, so that the former does not hold the latter captive by a private owner. In line with Rilke’s

143. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995).

144. *Mitchell v. Md. Motor Vehicle Admin.*, 450 Md. 282 (2016).

145. *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575, 578 (S. Ct. 1948) (“The gravamen of plaintiffs’ charge is that by the portrayal of the espionage activities of the representatives of the Union of Soviet Socialist Republics in Canada and by the depicted disowning of these activities by one of these representatives a picture with an anti-Soviet theme has been published. The use of plaintiffs’ music in such a picture, it is argued, indicates their ‘approval’, [sic] ‘endorsement’ and ‘participation’ therein thereby casting upon them ‘the false imputation of being disloyal to their country’. [sic]”).

146. *See Lucasfilm, Ltd. v. High Frontier*, 622 F. Supp. 931 (1985).

devastatingly insightful phrase that there are more faces than people,¹⁴⁷ the idea-expression dichotomy recognizes that there are more expressions than ideas. Think of car chases in films, photos of handbags, or flying superheroes. In modern art, though, the opposite of the single-idea/multiple-expressions paradigm is true, too. A single expression can yield a multitude of ideas. An artwork, in other words, is the cultural locus of multiple meanings: “The formed matter of esthetic experience directly expresses . . . the meanings that are imaginatively evoked.”¹⁴⁸ Notably, it is not just modern art that is capable of potent polysemy: “[W]e all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings.”¹⁴⁹ To take an expression that is right on brand, under the first factor each idea can be given its fifteen minutes, and each will get a chance to stimulate “productive thought.”¹⁵⁰ A meaning-agnostic first factor augments the idea-expression dichotomy: By recognizing all ideas embedded in a single expression, rather than just one, it protects not only multiple expressions of a single idea but multiple ideas embedded in a single expression. That expansion, in turn, brings a First Amendment benefit, since it increases the free flow of ideas¹⁵¹ and “the widest possible dissemination of information from diverse and antagonistic sources.”¹⁵²

And here is a comforting thought to those among us who do believe artworks can have a true interpretation that would be diluted by the reasonable-meanings approach: If there is such a thing as a “true” meaning of a given work, it will survive along with the other interpretations, since a reasonable-meanings approach will capture the “true” meaning along with the other readings. At least in principle, subsequent commentaries can identify the most persuasive meaning in the First Amendment’s idealized marketplace of ideas,¹⁵³ and, through robust debate, we can figure out for ourselves which interpretations are the most compelling. In this way, a reasonable-meanings approach aligns fair use with the First Amendment’s lodestar,¹⁵⁴ “an uninhibited marketplace of ideas in which truth will ultimately prevail.”¹⁵⁵ Truth, on this view, might be an epistemological triumph, or it might be cultural meaning, but, in either case, it will be something that the interested community rather than a court will determine.

147. RAINER MARIA RILKE, *THE NOTEBOOKS OF MALTE LAURIDS BRIGGE* 4 (Robert Vilain, trans., Oxford U. Press 2016) (“Suprising, for example, that I’ve never been properly aware of how many faces there are. There are many people, but even more faces, since everyone has several.”).

148. JOHN DEWEY, *ART AS EXPERIENCE* 285 (2005).

149. *Spence v. Washington*, 418 U.S. 405, 413 (1974).

150. Leval, *supra* note 13, at 1110.

151. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“[T]he government itself shall not impede the free flow of ideas . . .”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”).

152. *Associated Press*, 326 U.S. at 20.

153. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

154. *Wash. Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019) (“The lodestar for the First Amendment is the preservation of the marketplace of ideas.”).

155. *Red Lion Broad. Co.*, 395 U.S. at 390.

Albrecht Dürer, the medieval artist, thought the community approach to aesthetics—*consensus omnium* (which translates to consent of all), or what today we might call the lowest common denominator—is naïve.¹⁵⁶ Notably, though, the reasonable-meanings approach is not actually a *consensus omnium*. The interpretations do not have to agree with each other. The threshold is the presence of reasonable meanings rather than agreement among them. If copyright is to remain content-neutral, and if it is true that “theory—in the requisite classical sense—is *never* forthcoming in aesthetics”¹⁵⁷ anyway, the presence of reasonable interpretations, rather than a single, most persuasive meaning or absolute agreement among them, is all the first factor can really detect and apply. Dürer’s complaint against the tyranny of popular taste—“[w]hat all the world holds to be beautiful . . . we shall think beautiful, too”¹⁵⁸—can be adapted to create a first factor axiom: What the community holds to be meaningful, courts will think meaningful, too. New meaning will then be “anything you can get away”¹⁵⁹ with as long as the community’s reading of the works allows it. Courts themselves will not need to solve an epistemological mystery—instead of searching for the interpretation that reveals the elusive “true” meaning, courts can look for the existence of all reasonable interpretations to determine if, in the aggregate, the secondary work has generated new meaning. “There is always a tendency to legislate rather than to inquire,”¹⁶⁰ wrote T.S. Eliot about criticism. This shift in doctrinal approach would reverse the pattern and allow judges to inquire into rather than legislate meaning.

3. Something New

The first factor can easily accommodate an approach that looks for reasonable meanings rather than the single best meaning. In fact, the case-law building blocks are already in existence.

1. Meaning Agnosticism. In *Seltzer*, the Ninth Circuit was entirely unclear about the meaning of both the original and the secondary work, but thought it enough that the secondary use clearly did not mean the same thing as the original:

The message and meaning of the original *Scream Icon* is debatable . . . But regardless of the meaning of the original, it clearly says nothing about religion . . . Staub’s video backdrop using *Scream Icon* conveys ‘new information, new aesthetics, new insights and understandings’ that are plainly distinct from those of the original piece.¹⁶¹

It is possible, in other words, for courts to find new meaning without actually identifying what that new—or even old—meaning is, which underscores the fact that finding the presence of new meaning is more important than deciphering it.

156. ERWIN PANOFSKY, *THE LIFE AND ART OF ALBERT DÜRER* 276 (1955).

157. Morris Weitz, *The Role of Theory in Aesthetics*, 15 J. AESTHETICS & ART 27, 27 (1956).

158. PANOFSKY, *supra* note 156, at 276.

159. The phrase is sometimes misattributed to Warhol; it is actually from MARSHALL MCLUHAN & QUENTIN FIORE, *THE MEDIUM IS THE MESSAGE* 132–36 (1967).

160. T.S. Eliot, *The Perfect Critic*, in *SELECTED PROSE OF T.S. ELIOT* 50, 56 (Frank Kermode ed., 1975).

161. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013).

2. Reasonableness. In *Campbell*, the Supreme Court asked whether the parodic element can be reasonably perceived: “The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.”¹⁶² The Ninth Circuit in 2004, for example, thought “the parodic character of Defendant’s work is reasonably perceived.”¹⁶³ And other opinions have applied this standard,¹⁶⁴ including the Second Circuit’s *Warhol* opinion.¹⁶⁵

3. Polysemy. The “something new” required by fair use jurisprudence does not need to be just one thing. Instead of deconstructing the work to find “a” new meaning, courts would simply ask if, given all available interpretations and relevant criteria, new meaning exists. The Eleventh Circuit recently adopted this approach with regard to purpose: “[T]ransformativeness does not require unanimity of purpose—or that the new work be entirely distinct—because works rarely have one purpose.”¹⁶⁶ The same multivalence principle can naturally apply to meaning.

If we combine these three pieces—meaning agnosticism, reasonableness, and polysemy—we have a formula that allows courts to abandon the divining-rod approach, which looks for the best and “true” and most persuasive interpretation, and open up the first factor to all reasonable interpretations that can then be analyzed in the aggregate for the presence of meaning. A creative work analyzed under the first factor could be a cornucopia of valid interpretations, each of which can be “something new,” and all of which, collectively, establishes the presence of new meaning. The first factor, on this view, would not be a requirement for discovering a single, “true” meaning, but an open space to discover multiple reasonable meanings. “The fact that the picture can be reasonably interpreted in multiple ways does not mean the picture lacks relevance, and is therefore, inadmissible.”¹⁶⁷ In the context of the first factor, the fact that a work can have multiple interpretations does not mean it lacks meaning and should be suppressed. The reasonable-meanings approach turns the first factor into a happy parade replete with meanings,¹⁶⁸ or, to use another First Amendment case metaphor, measures the volume of the rock concert, not its content, and asks if there is music, not what it means.¹⁶⁹

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

163. *Mattel, Inc. v. Walking Mountain Prods.*, No. CV 99-8543 RSWL (RZx), 2004 U.S. Dist. LEXIS 12469, at *5 (C.D. Cal. June 21, 2004).

164. *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (“Applying *Campbell* to the first-factor analysis, we inquire whether Paramount’s advertisement ‘may reasonably be perceived’ . . . as a new work that ‘at least in part, comments on’ [the original].”); *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (“[W]e . . . examine how the artworks may ‘reasonably be perceived’ in order to assess their transformative nature.”). See also *Apple Inc. v. Corellium, Inc.*, No. 21-12835, 2023 U.S. App. LEXIS 11225 (11th Cir. May 8, 2023); *Abilene Music, Inc. v. Sony Music Ent., Inc.*, 320 F. Supp. 2d 84 (S.D.N.Y. 2003).

165. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 37 (“We evaluate whether a work is transformative by examining how it may ‘reasonably be perceived.’”).

166. *Apple Inc.*, 2023 U.S. App. LEXIS 11225, at *27 (11th Cir. May 8, 2023).

167. *State v. J.L.S.*, 2012-Ohio-181, at ¶ 35 (Ct. App.).

168. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 569 (1995) (“Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages.”).

169. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (addressing the volume of concerts in Central Park).

II. APPLICATION

A. JUDICIAL ROLE

Recognition of polysemy does not mean that all readings should be deemed valid; anything cannot be “something new” for first factor purposes. Without judicial oversight, moreover, new meaning would become pure majority vote based solely on the number of interpretations that the defense can muster. Some judicial intervention or procedural framework is essential to ensure interpretive and doctrinal integrity. The judicial role should be (a) to aggregate readings from available sources, (b) to filter out interpretations that are based on defective sources, and (c) to determine whether the ones that remain signal new meaning.

1. Filtration

Here are some dimensions for courts to consider when assessing whether interpretations are based on defective sources.

Work Specificity. An interpretation may be based on a source that does not speak specifically to the particular work. For example, an expert might rely too heavily on an isolated statement in an artist’s autobiography. Consider what Warhol wrote (via his ghostwriters) in *The Philosophy of Andy Warhol*: “You’re recycling work and you’re recycling people, and you’re running your business as a by-product of other businesses.”¹⁷⁰ The sentence seems to promote predatory business practices, but that is not at all true. Warhol was a cultural environmentalist of sorts, making sure that cultural content did not go to waste. “Things that were discarded, that everybody knew were no good, I always thought had great potential to be funny. It was like recycling work.”¹⁷¹ As an interpretive tool, the first statement is of questionable utility, since it is a broad pronouncement that did not necessarily influence a particular work or its meaning.

Historical Context. Like textualists in the context of statutory interpretation, some theorists think interpretation should be limited to and based solely on the work itself. Beardsley, a well-known proponent of the text-only approach, said: “There is a gross body of life, of sensory and mental experience, which lies behind and in some sense causes every poem, but can never be and need not be known in the verbal and hence intellectual composition which is the poem.”¹⁷² Moreover, context can be manipulated, and force feed the meaning of a work: “The measure of control exercised by the artist and his sponsor . . . over the viewer’s approach to the work . . . his access to information and documentation about it, forecloses an independent appraisal of the work. It thereby renders problematic any discussion of the work as such, for it inhibits an effective dissociation between what one sees and what one is expected to see,

170. ANDY WARHOL, *THE PHILOSOPHY OF ANDY WARHOL: FROM A TO B AND BACK AGAIN* 93 (1977).

171. *Id.* at 93.

172. W.K. Wimsatt and Monroe Beardsley, *The Intentional Fallacy*, 54 *SEWANEE REVIEW* 468, 479–80 (1946).

between what one believes and what one is led to believe.¹⁷³ According to this school of thought, we should stick to the text or the frame: “Historians of images have learned well enough how the law of the frame touches them: image or context, that is the choice. It is better to stay with the particular or get quickly lost in the cover of the background.”¹⁷⁴

If the point is to allow the maximum number of interpretations, however, a work-only analysis would be an unnecessary limitation. An artwork makes most sense when viewed in its cultural and historical context, an assessment of its zeitgeist that inevitably requires consideration of external elements. The *Orange Prince*, to take the most immediate example, is part of Pop art, which has very clear criteria for inclusion: “Popular, transient, expendable, low-cost, mass-produced, young, witty, sexy, gimmicky, glamorous, and Big Business,” according to Richard Hamilton’s well-known formula.¹⁷⁵ The artist’s immediate social context might provide insights, too. In connection with *Silver Elvises*, for example, one theorist argued “that both time and place—the late spring and summer of 1963 and Los Angeles, respectively—played pivotal roles in the conception, installation, and intended meaning of the series.”¹⁷⁶

But some readings might go too far. Does the fact that Picasso was Spanish and exposed to bullfighting give his *Bull’s Head* an autobiographical meaning? Zadie Smith thought Nabokov’s experience in the Soviet Union predisposed him against “ideologies that made light of Western freedoms and individual privilege, up to and including the individuality of the author.”¹⁷⁷ They are reasonable suspicions and questions, but do they provide reasonable interpretations? Are these accurate analyses, *ex post hoc, ergo propter hoc* misreadings, or merely possible but not probable—and therefore, for first factor purposes, not reasonable—explanations?

Motivation. Do autobiographical details matter, or would we be delving into motivation rather than intent? Van Morrison notoriously recorded what has colloquially become known as the Contractual Obligation Session,¹⁷⁸ a series of songs meant to fulfill his contractual requirements, including gems like “Blow in your Nose,” “Nose in your Blow,” and “Want a Danish.” Is every lyric just obvious frustration with the music label, or should we interpret the words on their own terms? Does his motivation change the work’s meaning? Even if it is an accurate reading of the artist’s psychic impetus, does it matter if “the smile of Mona Lisa del Gioconda awakened in

173. John Beardsley, *Art and Authoritarianism: Walter De Maria’s “Lightning Field,”* ART WORLD FOLLIES, Spring 1981, at 35, 35.

174. JOHN TAGG, THE DISCIPLINARY FRAME: PHOTOGRAPHIC TRUTHS AND THE CAPTURE OF MEANING 5 (2009).

175. Letter from Richard Hamilton to Peter and Alison Smithson (Jan. 16, 1957) (on file with author). For more context, see John-Paul Stonard, *Pop in the Age of Boom: Richard Hamilton’s ‘Just What Is It That Makes Today’s Homes So Different, So Appealing?’* 149 BURLINGTON MAG. 607 (2007).

176. David McCarthy, *Andy Warhol’s Silver Elvises: Meaning Through Context at the Ferus Gallery in 1963,* ART BULL., June 2006, at 354, 354.

177. SMITH, *supra* note 93, at 47.

178. Daniel Kreps, *Van Morrison Details ‘Authorized Bang Collection,’* ROLLING STONE (Mar. 30, 2017), <https://www.rollingstone.com/music/music-news/van-morrison-details-authorized-bang-collection-117565> [https://perma.cc/V8AC-W2SC] [https://web.archive.org/web/20230922184414/https://www.rollingstone.com/music/music-news/van-morrison-details-authorized-bang-collection-117565/].

the man the memory of the mother of his first years of childhood?”¹⁷⁹ Or is this just motivation? More generally, is this too much reliance on psychology rather than objectively verifiable data?

Literal Meaning. Some readings are impossible to confirm or dispel: Wordsworth’s biographer thought “slumber” referred to the “creative sleep of the senses when the ‘soul’ and imagination are most alive.”¹⁸⁰ Is that an interpretive overreach? Is there a way to make that determination? Probably not. But the validity of some interpretations can be challenged on purely factual or logical grounds. Upon encountering the phrase “base football player,” for example, someone based in the United States might draw immediate associations, but Shakespeare clearly was not thinking about American sports. The phrase might be about Oswald’s social standing and his views on authority,¹⁸¹ but “base football player” in Shakespeare cannot possibly be a reference to Michael Vick. Similarly, though a woman appears to be holding a smartphone in an 1860 painting by Ferdinand Georg Waldmüller,¹⁸² for obvious reasons that interpretation is literally impossible, and a court would reject it.

In sum, judicial filtration would ensure that interpretations that use unreliable sources are removed from consideration. The ones that remain, in turn, would ipso facto be reasonable and provide material for courts to determine whether new meaning exists.

2. Assessment

Once defective readings are eliminated, the remaining interpretations can be used to determine whether a secondary use yields new meaning. Here are some possible approaches to this step.

Multiplicity of Reasonable Interpretations. The fact that a work of art can accommodate multiple interpretations that survive judicial review is itself evidence of new meaning; for first factor purposes, a work’s ability to sustain a range of interpretations and aesthetic reactions signals potency rather than weakness.

Convergence. Sometimes explanations coming from various sources will agree with each other, creating, in effect, a single, most persuasive meaning. Convergence indicates there is not only meaningful cultural discourse, but also a primary meaning (at least for the moment—future generations might collectively find a new shared interpretation). Lack of convergence, on the other hand, or the presence of various interpretations that do not overlap, should not be an argument against new meaning. No two people read the same book, goes the old adage, and Edmund Wilson took the argument even a step further by making continuity impossible even in a single reader: “In a sense, one can never read the book that the author originally wrote, and one can

179. SIGMUND FREUD, LEONARDO DA VINCI: A PSYCHOSEXUAL STUDY OF AN INFANTILE REMINISCENCE 91 (1916).

180. MARY MOORMAN, WILLIAM WORDSWORTH, A BIOGRAPHY: THE EARLY YEARS 1770–1803, at 426 (1957).

181. See Matthew Davis, *My Master Calls Me: Authority and Loyalty in King Lear*, 70 RENASCENCE: ESSAYS ON VALUES IN LITERATURE 59, 68 (2018).

182. Ferdinand Georg Waldmüller, *Die Erwartete* (1860), Neue Pinakothek (Munich, Ger.).

never read the same book twice.”¹⁸³ Courts should not expect readers to buttress the same interpretation—the whole point is to allow multiple interpretations. Absence of overlap, in other words, is not absence of meaning. Interpretations do not have to agree with each other. Absence of convergence should therefore be treated as neutral rather than a negative.

Mutual Exclusivity. Despite both being portraits of the same person, the actual meanings of Goldsmith’s *Prince* and the *Orange Prince* are mutually exclusive—the vulnerability in Goldsmith’s *Prince* is entirely missing from the *Orange Prince*, and the message communicated by the latter is vastly different from that of the original. In other words, the latter can sustain an interpretation that the former cannot, a mutual exclusivity of interpretation which suggests there is new meaning.

Here is a homemade example. The first is Wordsworth’s poem “A Slumber did my Spirit Seal.” The second is my version.

A slumber did my spirit seal;
I had no human fears;
She seemed a thing that could not feel
The touch of earthly years.

No motion has she now, no force;
She neither hears nor sees;
Rolled around in earth’s diurnal course,
With rocks, and stones, and trees.

Here is my alternative. The storyline is more or less the same, but I make some ostensibly-minor changes:

A slumber did my spirit seal;
I had no fear:
She seemed indifferent and immune
To the passage of time.

She lies still, enthralled;
Hearing and seeing nothing;

183. EDMUND WILSON, *THE TRIPLE THINKERS* ix (1976).

Turned with the earth's endless rotation,
 Along with concrete, cars, and parks.

There are some minor tweaks here, but the second version *could* be interpreted as a story about someone who took sedatives and is now in a stupor in a city flat, or even someone taking LSD. Given that LSD was not isolated until 1938,¹⁸⁴ that interpretation of the original is a historical impossibility. The original is one of Wordsworth's Lucy poems, but my Lucy is closer to the Beatles' "Lucy in the Sky with Diamonds." In short, the two interpretations are mutually exclusive, and, since the new version can sustain an interpretation that the original cannot, the presence of new meaning would be hard to deny.

Status and Novelty. According to the institutional theory of art, a work ought to be considered an artwork if the art world gatekeepers recognize it as such.¹⁸⁵ While gallery and museum imprimatur certainly should not mean the work should be ipso facto transformative—indeed, recently *Graham v. Prince* yielded precisely the opposite result¹⁸⁶—if art world principals *do* consider something a work of art, it is only reasonable to ask why. But the flip side of this question—novelty and lack of established critical discourse—is at least as important to consider.

While fair use disputes sometimes involve established artists—Jeff Koons, wrote the Second Circuit, "has been exhibited widely in museums and commercial galleries and has been the subject of much critical commentary"¹⁸⁷—often fair use defendants are not well known, and the challenged works have not been in circulation for long.¹⁸⁸ The *Orange Prince* itself has been in existence for decades, for example, but until 2016 Goldsmith did not even know it existed,¹⁸⁹ and it is not clear that the work had ever been publicly visible before ending up on the cover of *Vanity Fair*. Fair use, in this sense, is a conversation starter. Since absence of discourse might easily be confused with absence of meaning, new works with no established interpretive discourse are

184. Tom Shroder, 'Apparently Useless': The Accidental Discovery of LSD, THE ATLANTIC (Sept. 9, 2014), <https://www.theatlantic.com/health/archive/2014/09/the-accidental-discovery-of-lsd/379564/> [https://perma.cc/T5PD-KXCY] [https://web.archive.org/web/20231229033355/https://www.theatlantic.com/health/archive/2014/09/the-accidental-discovery-of-lsd/379564/].

185. GEORGE DICKIE, ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS 34 (1974) ("A work of art in the classificatory sense is (1) an artifact (2) a set of the aspects of which has had conferred upon it the status of candidate for appreciation by some person or some persons acting on behalf of a certain social institution (the artworld).").

186. *Graham v. Prince*, No. 15-CV-10160 (SHS), 2023 U.S. Dist. LEXIS 83267, at *30–31 (S.D.N.Y. May 11, 2023) (finding that work displayed at a well-established gallery in New York City was not transformative).

187. *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006).

188. See, e.g., *Kienitz v. Sconnie Nation LLC*, 965 F. Supp. 2d 1042 (W.D. Wis. 2013), *aff'd*, 766 F.3d 756 (7th Cir. 2014) (t-shirts with altered photographer were sold between April 2 and May 6, 2012, and service of process was filed on June 28, 2012).

189. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 518–19 (2023) ("Goldsmith did not know about the Prince Series until 2016, when she saw the image of an orange silkscreen portrait of Prince ("Orange Prince") on the cover of a magazine published by *Vanity Fair's* parent company, *Condé Nast*.").

particularly vulnerable to first factor misanalysis. A new work's susceptibility to judicial misunderstanding is precisely the risk that Holmes identified in *Bleistein* when he worried that courts simply might not get it: "[S]ome 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."¹⁹⁰ Absence of discourse around a work might easily be confused with absence of meaning and used as the basis for dismissing the whole work.

But lack of clear meaning or established discourse is not necessarily lack of meaning. When writing about Post-Impressionists, Roger Fry noted that a "charge that is frequently made against these artists is that they allow what is merely capricious, or even what is extravagant and eccentric, in their work—that it is not serious, but an attempt to impose on the good-natured tolerance of the public."¹⁹¹ But, Fry thought, the public simply needed more time to get used to the new aesthetic: "It is too early to be dogmatic on the point, which can only be decided when our sensibilities to such abstract forms have been more practised than they are at present. But I would suggest that there is nothing ridiculous in the attempt to do this."¹⁹² Leo Steinberg described the dynamic of the public's first encounter with a work of art that eludes clear interpretation: "The grooves in which thoughts and feelings will eventually run have to be excavated before anything but bewilderment or resentment is felt at all. For a long time the direction of flow remains uncertain, dammed up, or runs out all over, until, after many trial cuts by venturesome critics, certain changes are formed. In the end, that wide river . . . becomes navigable to all."¹⁹³

Because a reasonable-meanings approach to the first factor allows a multitude of reasonable readings, it provides more free speech protection to new works than does the single-meaning approach: The availability of some interpretations, even in the absence of a dominant one, will signal the presence of meaning, and courts will be less likely to dismiss the new work as non-transformative simply because, as Holmes feared, they cannot find a single, most persuasive explanation.

Most Persuasive Meaning. Courts could still simply pick the most persuasive meaning. Since the other interpretations will survive along with this one, free speech is not stifled, and there is no First Amendment harm, particularly if courts are clear that they are choosing one out of many, rather than insisting that they have found its "true" meaning.

In one way or another, courts have already applied some of these standards. Here, for instance, are the steps taken in a 1928 opinion tasked with deciding whether a sculpture was, in fact, a work of art. The opinion recognized the art movement, and removed its own preferences from the equation: "Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the fact of their existence and their influence upon the art world as recognized by the courts must be

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

191. FRY, *supra* note 73, at 238.

192. *Id.* at 239.

193. LEO STEINBERG, *OTHER CRITERIA: CONFRONTATIONS WITH TWENTIETH-CENTURY ART* 23 (2007).

considered.¹⁹⁴ The court looked at the purpose of the statute and located the work's place in art history: "The object now under consideration is shown to be for purely ornamental purposes, its use being the same as that of any piece of sculpture of the old masters."¹⁹⁵ The opinion acknowledged the work's aesthetic impact: "It is beautiful and symmetrical in outline"¹⁹⁶ and "while some difficulty might be encountered in associating it with a bird, it is nevertheless pleasing to look at and highly ornamental."¹⁹⁷ Finally, the court considered the status of the artist: "[I]t is the original production of a professional sculptor."¹⁹⁸ All of which then led the court to conclude that the sculpture "is in fact a piece of sculpture and a work of art."¹⁹⁹

As with all else in fair use, the details will vary across disputes, and other categories of defects are likely to be identified. But a set of criteria are available for judges to apply in order to assess the validity of interpretation. All of these dimensions, moreover, will be useful even if courts insist on looking for the most persuasive meaning. The proposed formula thus provides objective criteria for courts to apply whether they are looking for a single interpretation or all reasonable interpretations.

B. TRANSFORMATION AND SOCIAL BENEFIT

The foregoing formulation provides a stable mechanism for detecting the presence of new meaning, but a key question remains: When is new meaning transformative? When Picasso put together a bicycle seat and handle bar he found and converted them into an artwork, he said that a "metamorphosis has taken place."²⁰⁰ In *Ways of Seeing*, his classic book on visual art, John Berger wrote that "[w]hen a painting is put to use, its meaning is either modified or totally changed."²⁰¹ The judicial process, however, takes a more conservative view of change: "A secondary work may modify the original without being transformative."²⁰² Under the first factor, not all new uses generate new meaning, which is fine, but what is often a bit confusing is that not all new meaning is legally sufficient new meaning. "Many secondary works add something new. That alone does not render such uses fair."²⁰³ Identifying precisely this vacuum, Judge Wallace wrote in dissent: "Indeed, while I admit freely that I am not an art critic or expert, I fail to see how the majority in its appellate role can 'confidently' draw a distinction between the twenty-five works that it has identified as constituting fair use and the five works that do not readily lend themselves to a fair use determination."²⁰⁴

The line between sufficient new meaning and insufficient new meaning remains unclear and arbitrary; courts have not found a "bright line marking the point at which

194. *Brancusi v. United States*, 1928 Cust. Ct. LEXIS 3, at *7–8 (Cust. Ct. Nov. 26, 1928).

195. *Id.* at *8.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. THE FABER BOOK OF ART ANECDOTES 444 (Edward Lucie-Smith ed., 1992).

201. JOHN BERGER, *WAYS OF SEEING* 24 (Penguin 1977).

202. *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013).

203. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 529 (2023).

204. *Cariou*, 714 F.3d at 713.

this change is sufficient to become ‘transformative,’²⁰⁵ and “whether a work is transformative is often a highly contentious topic.”²⁰⁶ When Justice Kagan says, in her dissent, that Warhol “reframed and reformulated—in a word, transformed,”²⁰⁷ she is not actually using legal synonyms. You can have the first two without the third, and it is not clear when the first two amount to the third.

The missing piece—the bridge between new meaning and transformative new meaning—is social benefit.

1. Social Benefit

Philpot v. Media Research Center Inc. reasoned that transformation occurs when a secondary work succeeds in “informing the public about a newsworthy event, providing commentary, or adding other social benefit,”²⁰⁸ and, according to the Second Circuit, the first factor “asks whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer.”²⁰⁹ The first factor, in other words, turns out not to be about new meaning per se, as much as it is about new meaning that generates a social benefit. Transformativeness, in this sense, is a question of meaning in conjunction with public welfare. Put another way, the first factor looks for new meaning that serves the public interest. If there is new meaning, and if it carries a social benefit, the legal transformation is complete.

Campbell, for instance, took the position that parody creates a “social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”²¹⁰ This approach squares with case law that recognizes the value in “adding a new, critical perspective,”²¹¹ and with secondary uses that allow us to see things in a “different light.”²¹² Book reviews fold nicely under this rubric, since they “serve the reading public as a useful guide to which books to buy”²¹³ by letting us see them in the light cast by the reviewers. As do historical references,²¹⁴ since they allow us to learn about our past by seeing what is being discussed. And the more meaning there is, the easier it is to determine what the social benefit might be, particularly in the context of new

205. *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 185 (D. Mass. 2007).

206. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013).

207. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 558.

208. *Philpot v. Media Rsch. Ctr. Inc.*, 279 F. Supp. 3d 708, 716 (E.D. Va. 2018).

209. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992).

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

211. *Arrow Prods. v. Weinstein Co. LLC*, 44 F. Supp. 3d 359, 368 (S.D.N.Y. 2014).

212. *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537, 545 (S.D.N.Y. 2019). The original article (read at your own risk) is Christian Gollayan, *Why I Won't Date Hot Women Anymore*, N.Y. POST (Apr. 12, 2017), <https://nypost.com/2017/04/12/why-hot-people-arent-worth-dating/> [<https://perma.cc/W3FP-LVTA>] [<https://web.archive.org/web/20231015150148/https://nypost.com/2017/04/12/why-hot-people-arent-worth-dating/>].

213. *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002).

214. *See Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 940 (4th Cir. 2013) (“[T]hese videos used the Flying B as part of the historical record to tell stories of past drafts, major events in Ravens history, and player careers.”); *see also* *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (“[C]ourts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects.”).

perspectives and understandings. What did a book reviewer say about a particular book? It will not be enough if I say, “This book is good. Check it out. Here is the first chapter.” That is a review in a purely formal sense, but it provides no social benefit whatsoever, since it communicates no useful information other than providing a copy of the original. In short, the meaning of the review is essential. Including copies of posters for Grateful Dead concerts, on the other hand, meaningfully illustrated how the band billed its concerts through its career.²¹⁵

In other instances, social benefit is primarily a question of access, or “the public’s interest in dissemination of information affecting areas of universal concern, such as art, science.”²¹⁶ This principle captures a vast array of activities: the creation of digitized content,²¹⁷ comparative advertising that enables customers to make informed decisions,²¹⁸ and the preservation of significant information.²¹⁹ More generally, it captures the “broad public availability of literature, music, and the other arts”²²⁰ and the First Amendment’s “positive right of public access to information and ideas.”²²¹ This second set of uses has a utilitarian as well as expressive purpose, but meaning is still significant, if only to assess the types of information being accessed. There is, after all, a difference between access to books,²²² which carries a social benefit, and access to information delivered via a hidden video feed, which is private gain at someone else’s privacy expense.²²³

In addition, social benefit captures all the uses that have been regarded as presumptively fair by virtue of their inclusion in legislation—commentary, criticism, and so on. Since the legislative list is not meant to be exhaustive, however, the social benefit standard creates a basis for assessing uses that fall outside the list, too. Social benefit also aligns with utilitarian purpose assessments—e.g., the social benefit of search engines—which provides nice doctrinal symmetry.

This approach also explains why in some cases there might be a lot of new meaning that is not actually transformative. I might write a sequel to *Gone with the Wind*,²²⁴ for example, but unless my sequel provides some social benefit—by, for instance, exposing dated values in the original—it likely will not be transformative, even though it might contain a lot of new meaning.

215. See *Bill Graham Archives*, 448 F.3d 605 (2d Cir. 2006).

216. *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977).

217. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015) (“In sum, we conclude that: (1) Google’s unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works are non-infringing fair uses.”).

218. See *Sony Comput. Ent. Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1027 (9th Cir. 2000) (“[C]omparative advertising redounds greatly to the purchasing public’s benefit . . .”).

219. *Pac. & S. Co. v. Duncan*, 572 F. Supp. 1186, 1196 (N.D. Ga. 1983) (“[U]nder Plaintiff’s present procedure, film of news events of possibly great import could be destroyed a week after the broadcast, with no useful copy being available thereafter. In such a case, Defendant’s systematic copying and sales could represent a modest social benefit.”).

220. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

221. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992).

222. See *Authors Guild*, 804 F.3d.

223. See *Powell v. State*, 605 S.W.3d 532 (Ark. Ct. App. 2020).

224. See *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

In effect, the social benefit standard implements the guiding principle that Judge Leval proposed in 1990—viz., any “activity that the fair use doctrine intends to protect for the enrichment of society.”²²⁵ In *Fitzgerald v. CBS Broadcasting, Inc.*, a use was infringing because it “primarily served defendant’s private interests rather than the public interest in underlying copyright law.”²²⁶ Social benefit is that concept in inverse; it is what serves public interest rather than a private interest, and advances the core imperative behind copyright. In other words, “[t]o promote the Progress of Science and useful Arts.”²²⁷ Its presence means transformative speech creates something that we as a society consider valuable. In *Authors Guild v. Google Inc.*, the Southern District of New York wrote that “[t]he more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright’s goal of enriching public knowledge”²²⁸ This formulation, if reversed, yields the useful axiom that the more the appropriator serves copyright’s goal of enriching public knowledge, the more transformative the use is.

2. First Factor Versus Fourth Factor

The first fair use factor pushes for fair use if the work is transformative. The fourth factor protects the copyright owner’s profits. The two factors exist in perpetual tension. If under the first factor the secondary use is deemed sufficiently transformative and therefore fair use, the copyright owner does not get paid for that secondary use, which is the adverse market impact that the fourth factor is meant to prevent. In this sense, the two factors seem hopelessly at odds. But the social benefit variable provides a simple theoretical *rapprochement*.

The profit motive that is embedded in copyright—i.e., the principle that people will create new works if copyright gives them property rights they can leverage to charge for access to those works—suggests that an unpaid use of copyrighted materials effectively deprives the copyright owner of due revenue. Put another way, copyright provides economic incentives to creators by allowing them to generate revenue from their works. Since a licensing fee is one of those sources of revenue, if someone uses the original on a fair use basis, the copyright owner misses out on that revenue.

But the social benefit variable shifts the analysis. From this perspective, a secondary use diverts the copyright owner’s profits only if the secondary user exploits the original for purely commercial gain. If, for instance, I use a copyrighted character in my own film because I know that it will tap into a loyal audience, all I am really doing is exploiting the market value of the original. If, however, I use a copyrighted character to reveal social biases inherent in the character, I generate a social benefit—i.e., social commentary. This is precisely the kind of use that the fair use doctrine protects. And because the value of the secondary work lies in the social benefit that the secondary work adds to the original, the revenue from that secondary work properly belongs to

225. Leval, *supra* note 13, at 1111 (1990).

226. *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 184 (D. Mass. 2007).

227. U.S. CONST. art. I, § 8, cl. 8.

228. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015).

me. In other words, there is no tension between the two factors if we insert the social benefit variable as a mediator between them. The key is simply to distinguish those uses that exploit the original work solely for commercial purposes, which is pure infringement, from those uses that leverage copyrighted materials in ways that provide a social benefit, which is fair use.

Here is another way of looking at it. The major economic harm that can befall the copyright owner is substitution. This is the cheap (or fancy, as the case may be) knockoff that altogether displaces the original from the market. A copy of a photograph is a simple example. Since my version can entirely replace the original, it can erode or even eliminate the copyright owner's profits. Another economic harm is misappropriation, or the incorporation of existing materials into a secondary work solely in order to capitalize on their commercial value.²²⁹ A burlesque version of a play, for instance, will not be fair use simply because superficial aspects of the work have changed. "The defense, 'I only burlesqued' the copyrighted material is not per se a defense,"²³⁰ or really any defense at all; "[a] burlesque presentation of such a copy is no defense to an action for infringement of copyright."²³¹ Neither of those uses makes it past the fourth factor's watchful eye, since each is merely exploiting the economic value of the original. For those same reasons, I might not be able to write a sequel to *Rocky*²³² if I am just free riding on its market strength any more than I can create a sequel to *Catcher in the Rye*²³³ or adapt *Dr. Seuss*.²³⁴ In those instances, there might be new meaning (it is hard to believe the fusion of two universes in a Star Trek and Dr. Seuss mash-up was actually meaningless),²³⁵ but because the new meaning lacks a recognizable social benefit, it is not transformative.

229. Courts differentiate between economic benefit and commercial misuse. The "appropriation of copyrighted material solely for personal profit, unrelieved by any creative purpose, cannot constitute parody as matter of law." *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 831 (S.D.N.Y. 1990). But the fact that a work generates a commercial benefit is not a strike against the secondary user for the simple reason that "nearly all authors hope to make a profit with their work." *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 840 (S.D.N.Y. 1995). And precisely because "many, if not most, secondary users seek at least some measure of commercial gain from their use, unduly emphasizing the commercial motivation of a copier will lead to an overly restrictive view of fair use." *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 921 (2d Cir. 1994). Making money, in other words, is not inherently a misuse of the copyright profit mechanism, even if you use someone else's copyrighted content. But using someone's existing copyrighted materials is an abuse of the profit mechanism if the original is exploited merely for its commercial benefit.

230. *Columbia Pictures Corp. v. Nat'l Broad. Co.*, 137 F. Supp. 348, 350 (S.D. Cal. 1955).

231. *Benny v. Loew's Inc.*, 239 F.2d 532, 537 (9th Cir. 1956).

232. *See Anderson v. Stallone*, No. 87-0592 (Gx), 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. Apr. 26, 1989).

233. *See Salinger v. Colting*, 641 F. Supp. 2d 250 (S.D.N.Y. 2009).

234. *See Dr. Seuss Enters. L.P. v. ComicMix LLC*, 983 F.3d 443, 448 (9th Cir. 2020) ("Enter *Oh, the Places You'll Boldly Go! (Boldly)*. Authored by *Star Trek* episodes author David Gerrold, illustrated by Ty Templeton, and edited by fellow Trekkie Glenn Hauman (collectively, *ComicMix*), *Boldly* is a mashup that borrows liberally—graphically and otherwise—from *Go!* and other works by Dr. Seuss, and that uses Captain Kirk and his spaceship *Enterprise* to tell readers that 'life is an adventure but it will be tough.'").

235. *See Dr. Seuss Enters. L.P.*, 983 F.3d.

If, however, my version is a commentary on the original—if, for example, I expose some key aspect of *Rocky* as playing into racial stereotypes²³⁶—I might well be able to write a sequel, just as rewriting *Gone with the Wind*²³⁷ and making a play about *Grease*²³⁸ qualified for fair use because of the social benefit each provided by virtue of exposing dated and problematic values in the originals. And here is the critical shift: The revenue generated by the secondary use is the monetary reward to the secondary user for creating the social benefit. It is true, of course, that the secondary use would not have been possible without the original work. But the value of the secondary work is in its social benefit, not the original. If the work did not contain the social benefit, then it would be merely infringing, since, to put it in more economic terms, it would be substitutional copying that merely replaces the original.

The Seventh Circuit expressed concern that the first prong will swallow up derivative works if the analysis moves away from economics and places emphasis on the transformative nature of a secondary use: “[A]sking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do no [sic] explain how every ‘transformative use’ can be ‘fair use’ without extinguishing the author’s rights under § 106(2). We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).”²³⁹

But the social benefit standard provides an explanation. The fair user who creates a secondary work with social benefit does not abuse the profit mechanism by exploiting the original solely for pecuniary gain or to create a substitutional work. The fair user adapts the work in a way that increases public welfare and promotes science and the arts, which is what fair use, like copyright law in general, aims to achieve. The profits that flow to the secondary user reward the social benefit conveyed by the secondary work. From this perspective, the fact that the copyright owner does not profit is not a loss; it is simply revenue that naturally belongs to the secondary user who is also a social benefactor. Indeed, if revenue from the secondary use were allocated to the copyright owner, it would be the copyright owner free riding on the work of the secondary user. Put more formally, cultural output that provides an identifiable social benefit rather than merely generating private gain ipso facto justifies unpaid use precisely because it increases public welfare.

The simple but potent principle can be phrased this way: Transformative speech—that is, new meaning coupled with social benefit—dovetails with copyright’s

236. See Frank P. Tomasulo, *Culturally Significant: Rocky*, CINEMA ST. LOUIS (July 14, 2021), <https://www.cinemastlouis.org/the-lens/culturally-significant-rocky> [https://perma.cc/G8MA-LX6E] [https://web.archive.org/web/20230928185221/https://www.cinemastlouis.org/the-lens/culturally-significant-rocky].

237. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

238. See *Sketchworks Indus. Strength Comedy, Inc. v. Jacobs*, No. 19-CV-7470-LTS-VF, 2022 U.S. Dist. LEXIS 86331 (S.D.N.Y. May 12, 2022).

239. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

constitutional imperative “to promote the Progress of Science and useful Arts.”²⁴⁰ The secondary user *should* be rewarded for creating a secondary use that generates a social benefit. Conversely, transformative speech should not be silenced unless the secondary user abuses the profit mechanism solely for private gain (e.g., misappropriation) thereby harming the original copyright owner (by siphoning off or displacing revenue).

3. Final Formulation

If we include social benefit as part of the formula, a work would be transformative if

- (a) the author, readers (reasonable person, experts, judges), and status analysis, either collectively or individually, point(s) toward a new persuasive meaning or a number of reasonable meanings (as measured, in part, by convergence and mutual exclusivity); and
- (b) the court cannot offer a reasonable basis for rejecting all meanings found under (a), which basis would be something other than a substantive disagreement with the interpretation—for instance, defects in interpretive sources or lack of legitimate purpose; **and**
- (c) **the secondary use has a recognizable social benefit.**

We can add two other criteria: the reasonable author²⁴¹ and reasonable use.²⁴² In that case, a work would be transformative if

- (a) the author, readers (reasonable person, experts, judges), and status analysis, either collectively or individually, point(s) toward a new persuasive meaning or a number of reasonable meanings (as measured, in part, by convergence and mutual exclusivity); and
- (b) the court cannot offer a reasonable basis for rejecting the meanings found under (a), which basis would be something other than a substantive disagreement with the interpretation—for instance, defects in interpretive sources or lack of legitimate purpose; **and**
- (c) **the secondary use has a recognizable social benefit, would be permitted by the reasonable author, and/or is used in a reasonable manner.**

240. U.S. CONST. art. I, § 8, cl. 8.

241. *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 839 (S.D.N.Y. 1995) (“In essence, therefore, the fair use inquiry is whether a reasonable author would consent to the use.”); *Jackson v. Warner Bros., Inc.*, 993 F. Supp. 585, 592 (E.D. Mich. 1997) (“The overall inquiry for analyzing the fair use doctrine is whether a reasonable author would consent to the use.”); *Love v. Kwitny*, 706 F. Supp. 1123, 1135 (S.D.N.Y. 1989) (“I have no difficulty finding that there was substantial unauthorized quotation beyond what any reasonable author would have expected . . .”).

242. *Weissmann v. Freeman*, 868 F.2d 1313, 1323 (2d Cir. 1989). The phrase is a shorter version of the definition offered by HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944) (“[A] privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. . .”).

III. WARHOL REASSESSED

Lynn Goldsmith, a photographer who has produced countless photographs of famous musicians over the decades, took a series of portraits of Prince in her New York City studio in the 80s. One of them ended up on the cover of *Vanity Fair*. Subsequently, and without Goldsmith's knowledge or permission, Warhol used Goldsmith's image as the basis for his *Orange Prince*, which is a silkscreen rendition of the original photograph.²⁴³ The litigation between the two sides raised the standard fair use inquiry: Did the *Orange Prince* transform Goldsmith's photo? What does Warhol's iteration mean, if anything at all? Was it fair use, or was it infringement?

The Second Circuit thought Warhol's adaptation of the original was nothing "more than the imposition of another artist's style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material."²⁴⁴ To the extent it considered meaning at all, in turn, the Supreme Court limited its analysis to style, too, and found that because the changes were minimal, so was the work's meaning.²⁴⁵ For both courts, it seems, the *Orange Prince* is little more than a photograph dipped in a jar of paint. Because both courts mistook their own inability to see new meaning as new meaning's absence, they found insufficient new meaning under the first factor. Had the courts applied a reasonable-meanings approach instead of forcing its own reading on the *Orange Prince*, the outcome would have been markedly different.

Goldsmith's side of the dispute consistently trivialized meaning. One of her attorneys joked in oral argument that she might prefer an air-brushed photograph of herself:

I guarantee the air-brushed pictures of me look better than the real pictures of me, and they have a very different meaning and message to me.

(Laughter.)

JUSTICE ALITO: What's your —

CHIEF JUSTICE ROBERTS: Well, I think that's not right. I mean, I think you would look at —

(Laughter.)²⁴⁶

Airbrushing might well be facile use of scissors, but it also might not be—imagine, for example, a series of photos of wounded victims airbrushed to look like a fashion

243. Warhol actually made several versions, but the *Orange Prince* was the one at issue in this litigation. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 518 (2023) ("In addition to the single illustration authorized by the *Vanity Fair* license, Warhol created 15 other works based on Goldsmith's photograph: 13 silkscreen prints and two pencil drawings.").

244. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 42 (2d Cir. 2021).

245. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 546 (2023) ("The application of an artist's characteristic style to bring out a particular meaning that was available in the photograph is less likely to constitute a 'further purpose' as Campbell used the term.").

246. Transcript of Oral Argument at 71–72, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869).

advertisement. While some instances of airbrushing might be meaningless, and while some visual adjustments in general could be meaningless, it is inaccurate to suggest that all visual changes are on the level of superficiality.

Notably, Justice Roberts, who signed on to Justice Kagan's dissent, resisted this line of reasoning:

CHIEF JUSTICE ROBERTS:—I think you would look at both of them, and one would say those are pictures of the same woman. This one may look a little better than that one, but it's the same woman, it's for the same purpose, it's to show what she looks like. But, if you had a picture, a photograph of you and then a Warhol, you know, it's just not the same thing. You look at the Warhol thing and you say, oh, that's—you know, that's —²⁴⁷

The Second Circuit, for its part, implied that style is, in fact, always meaningless. The court referred to Martin Scorsese and Ken Russell as examples of filmmakers with unique styles, but the court never asked how the directors' respective styles actually impacted the meaning of specific films.²⁴⁸ In effect, just as the Court looked to purpose to avoid an analysis of meaning, the Second Circuit looked to style to avoid the same question.

It is certainly possible, to adapt a phrase from T.S. Eliot that conveniently parallels copyright phrasing, that a change “alters the object, but never transforms it.”²⁴⁹ Picasso disliked frames,²⁵⁰ for instance, presumably because they ostensibly converted his art to dining room decoration. But no one would argue that framing a painting changed its fundamental meaning any more than a song means something different when you hear it on vinyl rather than a streaming service. In *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, the defendant “selected pages from the book, [and] mounted them individually onto ceramic tiles,”²⁵¹ which the Ninth Circuit thought was enough to create a derivative work.²⁵² Some ten years later, however, the Seventh Circuit took a less literal view of things and ruled that minor mechanical changes—such as mounting a work on a new physical medium—do not create derivative works.²⁵³ Small changes to the actual work might not create a derivative work either: “We asked at oral argument what would

247. Transcript of Oral Argument at 72, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869).

248. *Andy Warhol Found. for the Visual Arts, Inc.*, 11 F.4th at 42–43 (2d Cir. 2021) (“That is not to deny that the Warhol works display the distinct aesthetic sensibility that many would immediately associate with Warhol's signature style—the elements of which are absent from the Goldsmith photo. But the same can be said, for example, of the Ken Russell film . . . derived from D.H. Lawrence's novel, *Women in Love*: the film is as recognizable a ‘Ken Russell’ as the Prince Series are recognizably ‘Warhol.’ But the film, for all the ways in which it transforms . . . is also plainly an adaptation of the Lawrence novel. . . [T]he fact that Martin Scorsese's recent film *The Irishman* is recognizably ‘a Scorsese’ do[es] not absolve [him] of the obligation to license the original book on which it is based.”) (internal quotation marks omitted).

249. T. S. Eliot, *The Perfect Critic*, in *SELECTED PROSE OF T. S. ELIOT* 50, 53 (Frank Kermode ed., 1975).

250. *THE FABER BOOK OF ART ANECDOTES* 444 (Edward Lucie-Smith ed., 1992).

251. *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1342 (9th Cir. 1988).

252. *Id.* at 1343 (“What appellant has clearly done here is to make another version of Nagel's art works . . . and that amounts to preparation of a derivative work.”).

253. *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997).

happen if a purchaser jotted a note on one of the note cards, or used it as a coaster for a drink, or cut it in half, or if a collector applied his seal (as is common in Japan) . . . ”²⁵⁴

Courts apply similar reasoning in the context of fair use. A minor change²⁵⁵ in presentation is what Judge Story had in the nineteenth century called “the facile use of scissors.”²⁵⁶ Cropping a photo, for example, “is slicing things a bit thinly”²⁵⁷ for fair use purposes. In another case, “[t]he only obvious change Violent Hues made to the Photo’s content was to crop it so as to remove negative space. This change [did] not alter the original with ‘new expression, meaning or message.’”²⁵⁸ Merely mechanical changes, in other words, fail to convey new meaning. More, “[t]his kind of mechanical ‘transformation’ bears little resemblance to . . . creative metamorphosis accomplished by the parodists in the *Campbell* case.”²⁵⁹ The general principle is that “a derivative work that merely presents the same material but in a new form, such as a book of synopses of television shows, is not transformative”;²⁶⁰ since both contain the same information that is presented in a different way, there is no more new meaning than there is in verbatim copying. Since this is effectively substitutional copying, moreover, there is no social benefit, and therefore the use cannot be transformative.

While a small stylistic variation will be meaningless (and therefore likely infringing),²⁶¹ often style does carry significant meaning. In *What Remains*, for example, Sally Mann used old and flawed lenses to make her photographs of death, thereby accentuating the slow dissolution of physical objects.²⁶² In 1987, the Southern District of New York recognized that “style is one ingredient of ‘expression,’” which, in that case, was “the sketchy, whimsical style that has become one of Steinberg’s hallmarks.”²⁶³ Indeed, differences in style have been enough to withstand a claim of infringement. In one case, a district court focused on the grittiness of a photo, and its “sense of barely restrained chaos.” Compared to the original, the court noted, the “allegedly infringing images from the 2012 anti-Kony campaign are, by contrast, in color with a slight sepia tinge.” The opinion concluded that the “photograph and the allegedly infringing Kony 2012 images do not share any meaningful similarities.”²⁶⁴

254. *Id.* at 582.

255. *Ideal Toy Corp. v. Fab-Lu, Ltd.*, 261 F. Supp. 238, 242 (S.D.N.Y. 1966) (“To allow the defendant to escape legal liability because of a minor change or because of crude craftsmanship, which did not destroy the substantial similarity of its copies to the authentic, would permit unfair use of plaintiff’s copyrighted work.”).

256. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

257. *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 186 (D. Mass. 2007).

258. *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263 (4th Cir. 2019).

259. *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1389 (6th Cir. 1996).

260. *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013).

261. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (“With the exception of minor variations in color and style, defendant’s card . . . is identical.”).

262. See *SALLY MANN, WHAT REMAINS* (2003).

263. *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987). Steinberg, the artist, is probably best known for his parodic New Yorker poster of the world as seen from the city, which was adapted, without permission, by the defendant movie studio.

264. *Gordon v. Invisible Children, Inc.*, No. 14 Civ. 4122 (PGG), 2015 U.S. Dist. LEXIS 129047, at *26–29 (S.D.N.Y. Sept. 24, 2015); see also *Croak v. Saatchi & Saatchi, N. Am., Inc.*, 174 F. Supp. 3d 829, 838

Style, in other words, can carry meaning—indeed, a whole range of meanings. An artist’s adherence to a particular style, which Meyer Schapiro defined as the “constant form—and sometimes the constant elements, qualities, and expression—in the art of an individual or a group,”²⁶⁵ shows fidelity to an art movement (it is how we know Warhol was a Pop artist, after all), and might also be a sign of a student’s loyalty: “[I]f Sasaki were to suggest that a person’s painting was in any way ‘disloyal’ to our teacher, this would almost always lead to immediate capitulation on the part of the offender—who would then abandon the painting, or in some cases, burn it along with the refuse.”²⁶⁶ On a group level, stylistic differences are the basis on which art history is segmented and the basis on which regional variation is identified. Style is what distinguishes Beccafumi’s *Descent of Christ into Limbo* from Bronzino’s version and places each at different spots on the mannerist bridge between the Renaissance and Baroque periods. Style is how we recognize specific musicians²⁶⁷ and gauge whether something might be literature²⁶⁸ or poetry. If you see the phrase “I inside the old year dying,” you might say “no one talks like that,” but in fact some people do—when they are writing poetry or lyrics.²⁶⁹ The unusual phrasing is a hint that we have stepped outside of ordinary conversation and outside of ordinary meaning. The alliterative phrases in *Lolita* remind us that we are in a novel not a law review article, whereas the absence of playful phrasing might indicate the converse. Word usage in *Ulysses* introduces shifts in meaning,²⁷⁰ as could the rhythm of language.²⁷¹ Think of proverbial pregnant pauses during political speeches, or silences in a film—these are not meaningless gaps any more than John Cage’s “4’ 33” is a temporary window of nothing.²⁷²

(S.D.N.Y. 2016) (“[T]he Pegasus in the Sculpture, while necessarily made of stuffing, is plainly designed to give the ‘feel’ of a living animal, whereas the stuffed quality of the animal in defendants’ advertisements is central to its depiction and message as a child’s toy.”).

265. Meyer Schapiro, *Style*, in ANTHROPOLOGY TODAY: AN ENCYCLOPEDIA INVENTORY 287, 287 (A.L. Kroeber ed., 1953).

266. KAZUO ISHIGURO, ARTIST OF THE FLOATING WORLD 140 (2012).

267. Bob Kenselaar, *Breakfast with Bill Evans*, ALL ABOUT JAZZ (Feb. 16, 2012), <https://www.allaboutjazz.com/breakfast-with-bill-evans-bill-evans-by-bob-kenselaar> [<https://perma.cc/EL8P-H48D>]

[<https://web.archive.org/web/20230926154502/https://www.allaboutjazz.com/breakfast-with-bill-evans-bill-evans-by-bob-kenselaar>] (“I never aimed to be a stylist or influence. I didn’t even aim to have an identity. I just play music the way I play it, putting it together my own way and trying to serve a certain kind of quality or beauty. I guess the end result of it all is that somehow my personality comes through.”).

268. See GEOFFREY LEECH, LANGUAGE IN LITERATURE, STYLE AND FOREGROUNDING 59 (2008) (“Deviation is especially characteristic of poetic language: the poet deviates from ‘expected norms’ of linguistic expression. In other words, he exercises, in the broadest sense, ‘poetic licence.’”).

269. Or album and song titles—this one is the latest album from PJ HARVEY, *I INSIDE THE OLD YEAR DYING* (PARTISAN RECORDS 2023).

270. See, e.g., C. W. F. McKenna & A. Antonia, *The Statistical Analysis of Style: Reflections on Form, Meaning, and Ideology in the ‘Nausicaa’ Episode of Ulysses*, 16 LITERARY AND LINGUISTIC COMPUTING 353, 353 (2001) (“The use of frequency counts of common words to distinguish styles has become a well-established technique.”)

271. MIEKE BAL, ON STORY-TELLING 139 (1991).

272. Indeed, one such silence in a documentary led to a defamation claim. See *Va. Citizens Def. League v. Couric*, 910 F.3d 780 (4th Cir. 2018); see also Lois Beckett, *Katie Couric Says Sorry for ‘Misleading’ Edit in Gun*

Julian Schnabel, in turn, “paints with oil, gesso, crayon, Rhoplex, and dirt on tarps, flags, rugs, cowhide, Chinese scrolls, vintage maps, hopsack, inkjet prints of surfers and or an old drop cloth bleached in a way that resembled the waterways of Venice.”²⁷³ He converts utilitarian materials into meaningful content: “Schnabel destructively hammers . . . familiar surfaces into raw ‘flesh’ that is erotically profound but also signifies a state of deep woundedness.”²⁷⁴ Seeing art in ordinary objects is counterintuitive, but consider Andy Goldsworthy’s *Drawn Stone* at the de Young Museum in San Francisco, which uses architecture and stone as its medium—it would be impossible for it to achieve its meaning without that base. Picasso’s *Old Guitarist* would not be nearly as poignant and heartbreaking if he were steeped in orange instead of blue. In *Traffic*, the drug neighborhood scenes are covered in a blue haze that conveys an other-worldliness, a distance, an inaccessibility, and the scenes in Mexico are shown in harsh, high-contrast yellow that conveys heat and anxiety. These are not meaningless affects, and style is not meaningless lacquer.

Here is a home-brewed example of an interplay between style and meaning, written in Python code:

```
def taylorSwiftRules(_taylorSwiftRules) {
    _taylorSwiftRules = True;
    if _taylorSwiftRules
        return _taylorSwiftRules
    return _taylorSwiftRules
}
```

The function returns true no matter what. If the intent were simply to return true, the function would be this:

```
def taylorSwiftRules() {
    return true;
}
```

Rights Documentary, THE GUARDIAN (May 31, 2016), <https://www.theguardian.com/us-news/2016/may/31/katie-couric-apology-misleading-edit-under-the-gun> [<https://perma.cc/CAE6-Q4N7>] [<https://web.archive.org/web/20230926155327/https://www.theguardian.com/us-news/2016/may/31/katie-couric-apology-misleading-edit-under-the-gun>] (“When I screened an early version of the film with the director, Stephanie Soechtig, I questioned her and the editor about the pause and was told that a ‘beat’ was added for, as she described it, ‘dramatic effect’, [sic] to give the audience a moment to consider the question,” Couric said. “When VCDL members recently pointed out that they had in fact immediately answered this question, I went back and reviewed it and agree that those eight seconds do not accurately represent their response.”).

273. Michael Slenske, *Julian Schnabel’s Latest Velvet Paintings Get the Star Treatment in New Pace LA Gallery*, L.A. MAG. (Apr. 14, 2022), <https://lamag.com/news/julian-schnabels-paintings-get-the-star-treatment-in-new-pace-la-gallery> [<https://perma.cc/9DRB-NL5H>] [<https://web.archive.org/web/20230926155357/https://lamag.com/news/julian-schnabels-paintings-get-the-star-treatment-in-new-pace-la-gallery>].

274. DONALD KUSPIT, THE NEW SUBJECTIVISM: ART IN THE 1980s, at 290 (1988).

The first snippet is clearly intended to be something more than code. First, it uses human-readable English to convey a specific message. Second, it uses logic to return—invariably—a value of true, which serves to convey, inescapably, that Taylor Swift rules and that there is simply no way around this outcome. Third, as a piece of code, it is silly: There is no practical reason to write a function that always returns true, and no practical reason for declaring a variable instead of simply returning the desired Boolean value. In short, it is a joke, a silly way to assert one's loyalty to a pop star.

Importantly, I can take the underlying form and create any version:

```
def justiceKaganRules(_justiceKaganRules) {
  _justiceKaganRules = True;
  if _justiceKaganRules
    return _justiceKaganRules
  return _justiceKaganRules
}
```

The form stays the same, and its meaning as an assertion of invariable truth stays the same, but the actual meaning changes since I have changed the identity of the person to whom it refers. In other words, meaning is connected to, but analytically separate from, the presentation. But adopting the same form in the second example creates an interaction between two independent pieces of expression. Here is an example that taps into a college football tradition:

```
def harvardSucks(_harvardSucks) {
  _harvardSucks = True;
  if _harvardSucks
    return _harvardSucks
  return _harvardSucks
}
```

and

```
def yaleSucks(_yaleSucks) {
  _yaleSucks = True;
  if _yaleSucks
    return _yaleSucks
  return _yaleSucks
}
```

In the Harvard/Yale example, the second work rejects the original message but, by embracing the form, engages in the conversation. The second work could just be:

```
def yaleSucks() {
  return true;
}
```

The second example does not engage in a conversation with the original, and that aspect of the message is entirely lost. The form used in the first example, in contrast, ensures that the message is inserted into the stream of discourse, just the way a style of art places the work in a particular movement. Removing the form removes the cultural locus of the content, and therefore removes it from the conversation, which impacts its meaning. Presentation, in short, is part of the message.

What if we just change the font?

```
def pepsiSucks(_pepsiSucks) {
  _pepsiSucks = True;
  if _pepsiSucks
    return _pepsiSucks
  return _pepsiSucks
}

def pepsiSucks(_pepsiSucks) {
  _pepsiSucks = True;
  if _pepsiSucks
    return _pepsiSucks
  return _pepsiSucks
}
```

The two are not the same since the font is different, but the meaning has not changed from one to the other since font itself communicates nothing new. In effect, the second one sends the same message, and the change is purely on the presentation level. But what if the font is changed to this?

```
def pepsiSucks( _pepsiSucks) {
  _pepsiSucks = True;
  if _pepsiSucks
    return _pepsiSucks
  return _pepsiSucks
}
```

Is the message there the same? No. The second message is not only condemning Pepsi, but also appears to be promoting Coke, and even suggesting that Coke is the one sending this message (which of course is what got the “Enjoy Cocaine!” folks in trouble).²⁷⁵ So, there is new meaning by virtue of the new font. Conversely, if we

275. See *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183 (E.D.N.Y. 1972).

remove the font, we remove Coke from the equation and change the meaning of the message.

What if we take Pepsi out of the equation?

```
def drink(_drink) {
  _drink = True;
  if _drink
    return _drink
  return _drink
}
```

This conveys nothing beyond a brand- and content-agnostic imperative to drink. But a specific font can introduce another concept:

```
def drink(_drink) {
  _drink = True;
  if _drink
    return drink
  return drink
}
```

So, in these examples, the font is not merely presentation, and it is not meaningless style. The game can go further:

```
def drinkPepsi(_drinkPepsi) {
  _drinkPepsi = True;
  if _drinkPepsi
    return drinkPepsi
  return drinkPepsi
}
```

This last example creates cognitive dissonance because it uses the recognizable Coke font to promote its competitor. We are told to drink two competing products, and there is no basis for deciding which one. Is it a commentary on the arbitrariness of branding, on the mutability of trademarks, or on a cultural practice? Does it matter that the last example does not use the red typically associated with Coke? Does it matter that it is the color of water? And does not the fact that we can ask reasonable questions about color indicate that color is not, after all, meaningless? What if this last iteration is

framed, and called Buridan's Pop?²⁷⁶ Could it be read to suggest that we as consumers struggle with choosing one product over another and that we need marketing to push us in a specific direction? It would be difficult to argue, in any case, that the font is nothing more than presentation, or that this is just a snippet of meaningless Python code. There is a lot of meaning here, whatever you think of it as an artwork or argument (or code), and the meaning is legible even though it is not entirely conveyed in text or standard English.

Once we recognize that style can be a valid source of meaning, it becomes clear that the Second Circuit pressed the point too far when it collapsed style into a presentation-layer category, and that the Supreme Court missed something important by concluding that meaning in the *Orange Prince* is at its lowest ebb. The *Orange Prince* is not just Goldsmith's photo wrapped in pretty Pop art cellophane. He might be doing so with "eye-popping"²⁷⁷ orange instead of text, but Warhol is clearly communicating a new message, as articulated by expert testimony. To see only meaningless color²⁷⁸ in the *Orange Prince* is to see words without reading them, and to miss the meaningful conversation between Goldsmith's Prince and the *Orange Prince*.

Indeed, Justice Thomas seemed to equate Warhol's work with nothing but its color when he asked during oral argument, "But let's say that I'm also a Syracuse fan and I decide to make one of those big blowup posters of *Orange Prince* and change the colors a little bit around the edges and put 'Go Orange' underneath. Would you sue me —."²⁷⁹ If, like Kandinsky, we take the absolutist approach that all form carries meaning,²⁸⁰ the first factor's utility collapses, since everything will have new meaning by virtue of a new form. But the suggestion that style inherently carries little or no meaning goes too far in the other direction. Justice Kagan tried to save the day and steer the court away from its near-exclusive focus on purpose and toward new meaning: Warhol's work "is miles away from a literal copy of the publicity photo," she wrote, and "the meaning is different from any the photo had."²⁸¹ All for naught: The majority disregarded the dissent along with the district court's opinion and expert analysis, apparently confirming Kandinsky's suspicion that "[t]o anyone who cannot experience the inner appeal of form, such composition can never be other than meaningless. Apparently aimless alterations in form-arrangement will make art seem merely a game."²⁸²

Warhol might have come out very differently if the Second Circuit and Supreme Court had adopted the proposed reasonable-meanings formula.

276. Buridan's ass is an old philosophical problem: The imagined animal could not choose between two equidistant sources of food and water, and starved.

277. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 558 (2023).

278. There are plenty of colors in the history of the world that carry potent meaning—from purple in classical antiquity to the bright red of a MAGA baseball hat.

279. Transcript of Oral Argument at 42, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869).

280. KANDINSKY, *supra* note 80, at 29 n.6 ("It is never literally true that any form is meaningless and 'says nothing.' Every form in the world says something. But its message often fails to reach us, and even if it does, full understanding is often withheld from us.")

281. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 563.

282. KANDINSKY, *supra* note 80, at 33.

1. Authorial intent. Not available, so this variable is neutral.
2. Reader interpretation. As Justice Kagan wrote in her dissent, “[i]t does not take an art expert to see a transformation—but in any event, all those offering testimony in this case agreed there was one.”²⁸³ Two Justices and the district court judge found new meaning, as did multiple experts. That is a plus for meaning.
3. Convergence/mutual exclusivity. The consumerist interpretation of Pop art, which subsumes the *Orange Prince*, is widespread,²⁸⁴ which indicates convergence. The way we read Warhol’s Prince is not the way we can read Goldsmith’s photo. The two are on the same thematic spectrum—the construction of celebrity—but they occupy different places within it: Prince’s vulnerability is key to the photo, and it has been entirely eradicated in the *Orange Prince*. The two readings are mutually exclusive, which also underscores the presence of new meaning.
4. Status. Unquestionable art world status. That is a plus for meaning.
5. Social benefit. A new perspective on the meaning of art and on popular culture. That is a plus for meaning.
6. Basis for rejection. Since the Court offered no explanation that would contradict any of the foregoing, the balance of the other factors should govern.

A reasonable-meanings approach that acknowledges style as a source of meaning would render the *Orange Prince* transformative under the first factor. On what grounds did seven “persons trained only to the law” override the interpretations provided by persons trained in the arts (and three other judges)? Which elements of the work did the Court consider? What interpretive sources? Which meanings were considered, which were discarded? How much weight was each meaning given, and, in each instance, on what basis? We have no idea.

Maybe the majority had a policy basis for suppressing meaning in the *Orange Prince*. If anyone can add a mustache to any painting and call it art, fair use could swallow up derivative works. Maybe, in other words, the majority artificially throttled the First Amendment safety valve to protect property interests and keep fair use separate from derivative works. But the fact that Warhol applied the same method to multiple works should not dilute or eliminate meaning: Prince (the visual artist) “transformed” twenty-five photos in a single batch,²⁸⁵ and, since Pop art is about mass production, almost by definition its aesthetics needs to apply on a mass scale. In other words, Pop art can capture vast swaths of culture because it is about vast swaths of culture, and its widespread applicability does not render it meaningless—on the contrary, Pop art’s wide application shows its efficacy as a visual vocabulary.

283. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 565.

284. *Consumer Goods, Mass Media, and Popular Culture*, THE MUSEUM OF MODERN ART, <https://www.moma.org/collection/terms/pop-art/consumer-goods-mass-media-and-popular-culture> [<https://perma.cc/79GL-JA2U>] [<https://web.archive.org/web/20230926155620/https://www.moma.org/collection/terms/pop-art/consumer-goods-mass-media-and-popular-culture>] (last visited Oct. 20, 2024).

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

Moreover, Warhol's use generated a social benefit by yielding potent new ideas about popular culture, about popular art, and, indeed, about art in general. Warhol's use of Goldsmith's photo, in other words, generated a social benefit that made his work transformative. That is categorically different from someone simply drawing a mustache on anyone's copyrighted content without aiming to convey a message.

If, in any case, this is the fear that drove the courts' decision to minimize meaning—if, in other words, both the Supreme Court and the Second Circuit refused to acknowledge new meaning simply because it would create a lax fair use standard—the courts misapplied the doctrine's first factor. Meaning should not be artificially suppressed in order to justify a policy outcome. Moreover, economic considerations belong in fourth-factor rather than first-factor analysis, and importing them into the first factor is a glaring procedural misstep.

The *Warhol* majority shows little doubt as to the validity of its conclusion—a fact underscored by the opinion's comment about the healthy state of American art²⁸⁶—but we should remember Jonathan Lethem's quip that “[i]n travesty, as in interpretation, only one's own effort is likely to seem wholly excusable.”²⁸⁷ Self-assurance is no replacement for a reasoned formula, and it is the latter that the doctrine needs. The majority's failure to provide a basis for its assessment of meaning gives the unfortunate impression of an interpretive coup and judges doing exactly that which Holmes warned against:²⁸⁸ evaluating art and choosing their interpretation over everyone else's, or failing to see a reasonable reading altogether. By offering no basis for its decision, moreover, the majority not only did exactly what Holmes worried courts might do (i.e., fail to see value in a work of art), but also refused to do what courts demand of the very works they analyze—viz., provide a reasonable explanation.

IV. CONCLUSION

Given the importance of the first factor for fair use, and given the importance of fair use for American creativity, courts need a stable and transparent methodology. If we recognize that the limit of one interpretation is not the limit of overall meaning—in the context of art, reasonable minds can freely disagree—the question of what a secondary work means can be replaced with the question of what reasonable interpretations the secondary work can sustain. Available interpretations would not be source material for courts to determine the single “best” interpretation, but a measure for whether, given available interpretations, there is new meaning. The proposed formula does not yield mathematical precision, but it is a much more precise approach than the intuitive and disparate readings courts apply at the moment, and the criteria it offers can be applied even in situations where courts look for a single and most persuasive meaning. By implementing an approach that utilizes predictable indicia, courts can articulate a clear methodology to determine whether a secondary use

286. *Andy Warhol Found. for the Visual Arts, Inc.*, 598 U.S. at 550 (“If the last century of American art, literature, music, and film is any indication, the existing copyright law, of which today's opinion is a continuation, is a powerful engine of creativity.”).

287. JONATHAN LETHEM, *MORE ALIVE AND LESS LONELY* 22 (2018).

288. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

conveys new meaning, which will generate doctrinal stability and accountability, and enable fair use practitioners to guide their clients with a greater degree of certainty than the doctrine currently permits.