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Fair Use as Resistance

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Making fair use of copyrighted material can, itself, be a form of resistance, upending traditional hierarchies and disrupting the creator-consumer dichotomy that copyright law otherwise presumes. Using the theoretical framework of Mikhail Bakhtin, one may frame the doctrine of fair use as enabling the “carnavalesque,” in which free expression facilitates interaction among disparate groups, eccentric behavior is permitted, participants are considered equal in a way that defies socioeconomic and political expectations, and transgressive or subversive behavior can occur without punishment. Fair use is a right, permitting all to resist the dominance of exclusive rights-holders, and marginalized groups often employ fair use practices to “talk back” to dominant culture and to establish communities of belonging that strengthen their identities and senses of self. However, framing fair use practices as carnivalesque also reveals underlying hierarchies implicit in copyright law. Indeed, discourse surrounding fair use often relies on hierarchical notions of authenticity and power, and fair use jurisprudence often reflects hierarchical assumptions regarding the corporate/personal divide and regarding race, class, and gender. This Article explores the theoretical and discursive implications of framing fair use as a mechanism for resistance.

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INTRODUCTION

Resistance may take many forms: marching; picketing; rioting; opening a window and yelling “I’m as mad as hell, and I’m not going to take this anymore!”¹ I suggest that making fair use of copyrighted material can be a form of resistance—specifically, resistance to the idea that there is such a thing as an “original” creator of expression and that “original” expression has greater value than expression based on what came before.²

The exclusivity provisions of copyright law are built, in part, around the idea that original expression is possible, and even more, that it is possible to incentivize someone to create original expression by giving them exclusive rights over the original expression they create. Many scholars have challenged this idea, pointing out the dialogic nature of all expression.³ Some of this scholarly challenge finds its roots in the theories of literary theorist Mikhail Bakhtin and feminist literary theorists who refined his work.⁴ Collectively, these theorists postulate that all expression exists in an ecosystem of dialogue, in which every speaker communicates by responding to other communications, bringing their own meanings to the words and forms that others have used before them.⁵ Thus, all expression exists in relation to other expression, and its meaning comes not only from its speaker, but also from its context and from its hearer.

This Article expands on that theory, with special attention to Bakhtin’s notion of the “carnavalesque,” a literary technique that temporarily upends traditional hierarchies without disrupting more permanent power structures. I suggest that copyright law’s fair use doctrine enables authors to engage in carnivalesque resistance to the hierarchies inherent in copyright law, permitting all to resist the dominance of exclusive rights-holders, to “talk back” to dominant culture, and to establish communities of belonging that strengthen their identities and senses of self. However, framing fair use as enabling the carnivalesque also reveals underlying hierarchies implicit in copyright law and even in the structure of fair use law itself. Although fair use provides a mechanism for creators to engage in certain forms of

1. NETWORK (Metro-Goldwyn-Mayer 1976).

2. This essay focuses predominantly on U.S. law. For the most part, however, the reasoning here is equally applicable to other common law systems. Although (U.S.) fair use and (other common law systems’) fair dealing doctrines are different from each other, they constrain creators in many of the same ways and the discourse surrounding them is very similar.

3. See generally, e.g., CARYS J. CRAIG, COPYRIGHT, COMMUNICATION, AND CULTURE: TOWARDS A RELATIONAL THEORY OF COPYRIGHT LAW 41 (2011).

4. See *infra* notes 25–29.

5. See *infra* notes 25–29.

expression based on preexisting works, it also makes those transformative creators and their works more vulnerable to legal challenge, and constrains them within an uncertainty-laden legal framework. Discourse surrounding fair use also often relies on and reinforces hierarchical notions about what sorts of creations and creators qualify as innovative.

It seems counterintuitive that fair use law would reinforce hierarchies, considering its potential and tendency to foster messages and speakers that copyright exclusivity alone would prevent. Fair use can enable marginalized speakers who would not be able to afford copyright licenses to speak without permission. It can enable speakers to express critical messages that copyright holders might not like. It enables access to information that might otherwise be out of reach. And yet, by using the framework of the carnivalesque, we can see how fair use, as a doctrinal structure, may ultimately reinforce hierarchical ways of thinking about methods of creation, genres of speech, and even speakers themselves.

Part I of this Article explores the hierarchy implicit in copyright law's originality requirements and idea/expression doctrine. It explores how copyright law can itself articulate a discourse on value, how the values articulated by copyright law's discourse are based on artificial distinctions, and how authors can resist and shape that discourse through their expressive choices. Part II of this Article ties this discourse to Bakhtin's theory of the carnivalesque, explaining what the "carnivalesque" is and why an author's decision to engage in fair use can represent carnivalesque resistance to the hierarchy of values that copyright law creates. Finally, Part III of this Article elaborates on the carnivalesque framework to demonstrate that while fair use law permits authors to resist hierarchy temporarily by engaging in fair use of preexisting works, the structure of fair use law ultimately reinforces copyright law's artificial hierarchy of values and creates additional, perhaps even more problematic, discourses regarding the value of fair-use creations and those who make them.

I. THE IMPLICIT HIERARCHY OF COPYRIGHT LAW

To understand how fair use activity can be a form of resistance, we must first ask, "resistance to what?" I suggest that copyright law implicitly defines a hierarchy that values certain kinds of creations and creators over others by deeming some expressions protectable and others not, and giving some creators exclusive rights to control the tools of discourse. This premise follows in the path of several scholars who have discussed the idea that law itself is discursive, and that copyright law in particular creates an artificial hierarchy among different kinds of speakers. That hierarchy is what fair use activities may resist.

The following sections explain how copyright law shapes a discourse regarding the value of different kinds of expression, how that discourse creates an artificial hierarchy that values certain kinds of expression over others, and how an author

can, by engaging in certain modes of expression, reinforce or resist that implicit hierarchy.

A. Copyright Law and Behavior as Discourse

Law, of course, governs behavior, but that is not the only thing it does. Law also defines and shapes the values of those it governs, by articulating “right” and “wrong” and assigning legal value to some activities and not others.⁶ As Rosemary Coombe explains, law provides “the official social text” that shapes activities and brands them as legitimate or illegitimate.⁷ Like every utterance about value, law is part of a discourse on value—and law is a particularly powerful voice in that discourse, because it speaks with the force of the state.

The copyright system, in particular, ascribes value to particular speakers and creations.⁸ Copyright law grants protection to those it deems “authors,” elevating authors above lesser contributors by operation of law.⁹ When a single work is created by multiple individuals, only the “master mind” receives the status of authorship and the ownership rights that status confers.¹⁰ Only authors’ “original” expressions are deemed worthy of protection; unauthorized creations derived from others will in fact infringe the copyright in the works from which they are derived, unless they fall into the category of valued “fair” uses.¹¹ Creations deemed to have been derived from preexisting work are not worthy of protection except as to the “original” contributions they make,¹² and even then, copyright in derived works “does not extend to any part of the work in which [previously copyrighted] material has been used unlawfully.”¹³ Therefore, a creator who is not the “master mind” of a work gains no authorship status, and a creator whose work is recognizably derived from another’s gains at most limited protection. The scope of protection available to derivers depends on a number of judgments regarding similarity and fair use, as well as a consumer’s ability to parse one contributor’s contributions from another’s: a deriver who engages in fair use of preexisting material gains limited protection over their own contributions, and a creator whose work is infringingly derived from

6. See generally Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141 (1997) (discussing discursive nature of legal doctrine).

7. See ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 29 (1998).

8. See CRAIG, *supra* note 3, at 41.

9. See 17 U.S.C. § 201 (1978) (granting copyright to authors).

10. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (photographer who arranges photograph is author, regardless of contributions of photographic subject and assistant); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231–36 (9th Cir. 2000) (contributor who makes significant or independently copyrightable contributions to a work, short of being “master mind,” is not an author).

11. See 17 U.S.C. § 106 (granting authors the exclusive right to prepare derivative works).

12. *Id.* § 103(b) (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work.”).

13. *Id.* § 103(a).

another's gains no protection at all. These are but a few of the value judgments copyright assigns.

One may assign any number of reasonable or practical justifications to these value judgments, but they are not inevitable truths. Although many have framed copyright as derived from "natural law" (such as the Lockean "labor desert" right or the Hegelian "personality" rights as formulated for copyright by Margaret Radin), copyright is actually a state construct and need not be conceptualized as a natural right.¹⁴ When divorced from a natural rights framework, the granting of property rights in works of authorship joins the larger universe of discourse regarding power relationships between people.¹⁵ Because copyright controls the assignment of value to particular expressions, it creates a power dynamic among those who engage in expression.¹⁶

B. Intertextuality and Relational Discourse

Copyright law defines at least three categories of participants in communicative discourse: an "original" speaker (author, creator, master mind) whose expressions are deemed original and protectable, a "derivative" speaker (copier, infringer, re-creator, fair user) whose expressions are derived from an "original" speaker, and an "audience" (consumer) who merely receives expression.¹⁷ But literary theory highlights important ways in which these categories are at best blurry, and at worst entirely artificial.

I begin with the premise that creative expression is, by its nature, communicative. The work of literary theorist Mikhail Bakhtin (1895–1975) is instructive.¹⁸ Bakhtin postulated, among other things, that expression does not exist in a vacuum. Until a speaker appropriates them by imbuing them with communicative intention, words and other communicative tools exist "in other people's mouths, in other people's contexts, serving other people's intentions: it is

14. See CRAIG, *supra* note 3, at 53, 67–97 (critiquing Lockean conception of copyright); *id.* at 137 (critiquing conception of copyright that ties copyright interest to the moral relation between the author and her work); ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011) (describing "natural law" theories of copyright); Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 453–59 and sources cited therein (2013) (same).

15. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 653 (1988).

16. See CRAIG, *supra* note 3, at 42; see also Kathy Bowrey, *On Clarifying the Role of Originality and Fair Use in 19th Century UK Jurisprudence: Appreciating 'the Humble Grey Which Emerges as the Result of Long Controversy,'* in THE COMMON LAW OF INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF PROFESSOR DAVID VAVER (Lionel Bently et al eds., 2010) (discussing the unintentional discursive impact of legal developments in copyright and fair use law).

17. See *supra* notes 8–12 and accompanying text.

18. See Tzvetan Todorov, *Mikhail Bakhtin: The Dialogical Principle*, in THEORY AND HISTORY OF LITERATURE, at ix (Wlad Godzich trans., 1984) ("[Mikhail Bakhtin] is the most important Soviet thinker in the human sciences and the greatest theoretician of literature in the twentieth century.").

from there that one must take the word, and make it one's own."¹⁹ For this reason, creative expression "lies on the borderline between oneself and the other,"²⁰ and all creative expression forms part of a web of discourse that connects speakers and hearers.²¹ All speakers have also been hearers; all hearers bring their own meaning to what they hear. The fact that meaning is created by a combination of the self and the other creates a constant struggle for meaning; because all communication relies on signs that have preexisting meanings, all communication in some sense reinforces, responds to, or resists dominant discourses.²²

Bakhtin's theories therefore incorporate concepts of intertextuality;²³ because all expression positions itself within or in opposition to preexisting expression, all expression incorporates what came before.²⁴ All hearers have developed expectations based on their own experience as hearers, and recognize those expectations in genres or modes of speech. We know that certain syntax and vocabulary signals the tone of "serious scholarship," a different syntax and vocabulary signals the tone of teen "text-speak," and yet a different syntax and vocabulary signals the tone of "hip hop music" (to name but a few). Expression incorporates, responds to, or subverts what came before, flowing in and out of various speech genres, to make meaning. Expression is therefore "another's speech" as well as the author's, and becomes "populated—overpopulated—with the intentions of others."²⁵ Indeed, Bakhtin suggests, "people talk most about what others talk about—they transmit, recall, weigh and pass judgment on others' words or agree with them, contest them, refer to them and so forth."²⁶

Recognizing the intertextuality of expression could, at its deconstructionist extreme, devalue the author, but we need not do so. Rather, feminist scholars have refined Bakhtin's work to reformulate the role of the author in meaning-making without denigrating her importance.²⁷ The resulting approach is "relational," and

19. Mikhail Bakhtin, *Discourse in the Novel*, in LITERARY THEORY: AN ANTHOLOGY 674, 677 (Julie Rivkin & Michael Ryan eds., 2d ed. 1998).

20. *Id.*

21. I use these terms broadly; "speaker" here includes creators of text, visual art, or any other expressive medium; "hearer" includes anyone who reads, hears, sees, (etc.) the expression. A work is communicative even if its creator never shares it; a work that is created and then discarded or shoved in a drawer for eternity is no less part of the web of discourse (albeit a "dead end" of its communicative thread), because its creator used the tools of discourse to make it.

22. See SIMON DENTITH, BAKHTINIAN THOUGHT: AN INTRODUCTORY READER 3 (Rick Rylance ed., 1995).

23. See JULIA KRISTEVA, DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART 66 (Leon S. Roudiez ed., Thomas Gora et al. trans., 1980) (defining intertextuality).

24. Bakhtin, *supra* note 19, at 679.

25. *Id.* at 677.

26. *Id.* at 681.

27. See, e.g., DALE M. BAUER, FEMINIST DIALOGICS: A THEORY OF FAILED COMMUNITY, at xiii (1988) (arguing that despite his lack of interest in gender theory or sexual difference and lack of an adequate theory of power, Bakhtin's work can be used as an "empowering" model in the combat against patriarchy because Bakhtin finds difference and multiplicity exhilarating rather than threatening);

recognizes that by acknowledging every speaker as, in essence, a re-speaker, we need not erase the speaker's own identity. In the copyright field, Julie Cohen relied on relational theory to formulate a "decentered" view of creativity as an "emergent property of social and cultural systems," incorporating the individual creator as well as the social and cultural context surrounding her.²⁸ The speaker/re-speaker is a meaning-maker, shaping and (re)contextualizing what came before,²⁹ but her contribution is never the only source of meaning. The process of authorship is thus always both derivative and original.³⁰ As Carys Craig has explained, the dialogic nature of authorship does not erase the author, but "reveals the cumulative nature of cultural creativity."³¹

By reframing creation as relational, "original" comes to mean something else. An author's work is no less of an accomplishment, but it is accomplished differently: the author creates something "original" by contextualizing or recontextualizing what came before, rather than by being independent from it.³² Likewise, the creator/consumer dichotomy becomes false.³³

Much of the meaning in any work derives from what it incorporates (explicitly, implicitly, or stylistically) from what comes before, which turns all creators into derivers. At the same time, much of a work's meaning derives from whatever context and experience the consumer brings to it, which turns all consumers into creators.³⁴ Yet, copyright law assigns authorial status to creators based on a finding that the creator's work is "original." As shown above, this legal framework depends on arbitrary line-drawing that artificially divorces the author and her work from much of what gives her work meaning.³⁵ The author of a copyrightable original work thus is "misconstrued as the isolated originator of meaning" in that work.³⁶

Patricia Yaeger, *Afterword to FEMINISM, BAKHTIN AND THE DIALOGIC* 240–45 (David M. Bauer & Susan Jaret McKinstry eds., 1991) (identifying relationships and synergies between Bakhtinian theory and feminism and describing feminist refinements of Bakhtinian theory).

28. Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151 (2007).

29. See CRAIG, *supra* note 3, at 3.

30. See Jennifer Nedelsky, *Citizenship and Relational Feminism*, in CANADIAN POLITICAL PHILOSOPHY 131, 133 (Ronald Beiner & Wayne Norman eds., 2001).

31. CRAIG, *supra* note 3, at 54.

32. *Id.* at 40.

33. Cohen, *supra* note 28, at 1179.

34. See Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, the Unwritten Law, and Narratives of Criminal Responsibility*, 33 LAW & SOC'Y REV. 393, 403 (1999) ("[T]hrough a teller weaves a tale, she cannot control the interpretation her audience places on it; and though a listener in some sense becomes his own author, creating meaning from the story he hears, he cannot be said to produce that meaning out of whole cloth.")

35. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990) (highlighting the arbitrary nature of copyright's "originality" analysis: "If we eschewed [an examination process that separated authors' works from preexisting works] but nonetheless adhered unswervingly to the concept of originality, we would have to allow the author of almost any work to be enjoined by the owner of the copyright in another.")

36. CRAIG, *supra* note 3, at 155.

The law propertizes such original work (that is, work deemed to have originated with a particular author) and does not propertize works or work-aspects deemed “unoriginal,” predicated on this false dichotomy. This property rule feeds a narrative discourse with what Foucault describes as a “classificatory function,” wherein some individuals are “authors” and others are not.³⁷ By assigning authorial status to authors and their works, the law creates and reflects a power dynamic, in which some works are endowed with higher status than others, and the creators of higher-status works can “own” and therefore control access to the tools of meaning-making.³⁸ Copyright’s assignment of ownership is itself discursive, as it shapes discursive practice: when later creators reexamine works, they bring new meanings to those works, and yet copyright law sacralizes the earlier works and places boundaries on both the feasibility and the discursive value of that reexamination.³⁹

This theoretical framework has obvious implications for copyright theory. It rebuts a vision of “progress” that depends solely on exclusive ownership and control. It reveals the flaws in a system that purports to grant a single owner exclusive control over communicative tools,⁴⁰ and it highlights the importance of making room for speech that incorporates what came before.⁴¹ More importantly for the present project, a relational view of copyright also highlights the artificiality of copyright’s hierarchy of values. It reveals the problems created when a system assigns value only to one kind of speaker—the mythical “original” speaker—at the expense of downstream speakers.⁴²

C. Authorship as an Act of Discourse

Copyright law presumes that a “work” of authorship is a static object that can be “owned.” But, as Carys Craig has pointed out, to the extent that copyright law is designed to promote creation and dissemination of expression, it makes sense to

37. Michel Foucault, *What Is an Author?*, in 2 AESTHETICS, METHOD, AND EPISTEMOLOGY 211 (James D. Faubion ed., Robert Hurley et al. trans., 1998).

38. See Rosemary Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1866 (1991) (“By . . . freezing the connotations of signs and symbols and fencing off fields of cultural meaning with ‘no trespassing’ signs—intellectual property laws may enable certain forms of political practice and constrain others.”); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 232 (1996) (“[Law] reflects disparities of power among social agents depending on their ability to control access to sources of signification and dissemination.”).

39. See Foucault, *supra* note 37, at 219 (“The return [to a preexisting work] is not a historical supplement that would be added to the discursivity, or merely an ornament; on the contrary, it constitutes an effective and necessary task of transforming the discursive practice itself . . . [R]eexamining Freud’s texts modifies psychoanalysis itself, just as a reexamination of Marx’s would modify Marxism.”).

40. See COOMBE, *supra* note 7, at 85 (“What meaning does dialogue have when we are bombarded with messages to which we cannot respond, signs and images whose significations cannot be challenged, and connotations we cannot contest?”).

41. See CRAIG, *supra* note 3, at 5.

42. *Id.*

reframe “work” not as a noun, but as a verb: a “work” is an author’s *process* of creating and disseminating communication.⁴³ Once the term “work” is framed as a communicative act, it becomes clear that an author’s work—the act of creating expression, as well as the result of that creative process—can be an act that reinforces existing power structures or resists them. Work that depends on recontextualizing preexisting work can shape our understanding of merit and can do so in opposition to the prevailing concept of “originality.”⁴⁴ Thus, the very act of engaging in such creation can itself be an act of resistance independent of whatever “message” its content holds.

I suggest that certain kinds of work—work that engages in explicit re-expression—can act as overt resistance to copyright’s artificial “originality” hierarchy by (at least temporarily) elevating the “derivative” speaker to the status of “originator.” The act of derivative creation can therefore be “politically symbolic to the extent that it openly resists proprietary structures and ‘manifests a rejection of private property in favour of a more communitarian conception of society.’”⁴⁵

I also suggest that fair use law creates a “carnavalesque” framework for these acts of expressive resistance. Like the frameworks of power surrounding other acts of carnivalesque resistance, fair use provides a structure for resistance without revolt. While the fair use doctrine makes space for progress rooted in values other than exclusivity, and acts of fair use may temporarily upturn copyright law’s hierarchy of value, fair use law itself implicitly reflects and reinforces existing power structures.

The following section will explain the concept of the carnivalesque and why fair use functions as carnivalesque.

II. FAIR USE AND THE CARNIVALESQUE

Although a number of copyright scholars have explored copyright through a Bakhtinian lens, as described above, fewer have connected copyright to one of Bakhtin’s core concepts: the carnivalesque. The “carnavalesque” represents a mode of expression that upends usual hierarchies or defies established expectations. Bakhtin developed the theory of the carnivalesque to describe the historical development of humorous, grotesque, or unexpected elements in the literary form of the novel, but his theory captures a much broader idea—that elements of the “carnival,” and its altered rules for interaction, are part of the creator’s expressive toolbox and can form part of a larger discourse. The sections that follow describe Bakhtin’s carnivalesque and argue that fair use doctrine embodies elements of the carnivalesque.

43. *See id.* at 20–21.

44. *See* Cohen, *supra* note 28, at 1186–87 (noting the role of discursive constructions in shaping understandings of intellectual merit).

45. CRAIG, *supra* note 3, at 25 (quoting Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 23 (1989)).

A. Bakhtin's Carnavalesque

Bakhtin developed his theory of the carnivalesque in his 1965 book *Rabelais and His World*, in which he examined the works of the sixteenth-century French author François Rabelais. The carnivalesque was a literary form of “ambivalent” resistance to authority. It found its origin in Bakhtin’s conception of medieval European culture, in which the “folk”—ordinary people of the day—lived under strict (often Church) authority but were given opportunities to let off steam through officially-sanctioned revels such as pageants, festivals, and parodies. These revels, which Bakhtin describes as “carnival,” were distinct from other ecclesiastical and political rituals and, in Bakhtin’s words, “built a second world and a second life outside officialdom, a world in which all medieval people participated more or less, in which they lived during a given time of the year.”⁴⁶ Carnival embodied aspects of performance, but was not only “a spectacle seen by the people; they live in it, and everyone participates because its very idea embraces all the people.”⁴⁷

The medieval carnival brought together “clerics, schoolmen, students, and members of corporations” as well as others to engage in renewal and recreation, providing temporary release from a rigid ideological system.⁴⁸ During carnival “a special form of free and familiar contact reigned among people who were usually divided by the barriers of caste, property, profession, and age.”⁴⁹ Carnival thus created a temporary space for fantasy, radicalism, and criticism of the upper strata.⁵⁰ The temporary upending of hierarchy permitted communication across classes, and the familiarity facilitated “mutual mockery” among participants (rather than ordinary interaction, in which only third parties could be mocked).⁵¹ In modern terms, it allowed the ordinary folk to “talk back” to dominant culture without ill consequence.

Carnival time was festive and even transgressive, but not free of rules. Whereas the rules of ordinary life are infused with elements of “fear, weakness, humility, submission, falsehood, hypocrisy . . . violence, intimidation, threats, [or] prohibitions,” the rules of carnival incorporated “laughter, foolishness, improprieties, curses, parties, and travesties.”⁵² The modern American equivalent might be New Orleans’ Mardi Gras (a holdover from medieval tradition) or Nevada’s Burning Man Festival (a newer invention), which are not free-for-alls so much as parallel worlds that exist alongside the everyday and function by rules and traditions that are different from, and generally more libertine than, the everyday.⁵³

46. MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* 6 (Helene Iswolsky trans., 1984).

47. *Id.* at 7.

48. *Id.* at 82.

49. *Id.* at 10.

50. *Id.* at 88–89.

51. *Id.* at 16.

52. *Id.* at 94.

53. See generally Manuel A Gómez, *Order in the Desert: Law Abiding Behavior at Burning Man*, 2013 J. DISP. RESOL. 349.

In the modern world, people may experience the sense of carnival not only at these large-scale festivals, but may also create analogous experiences on a smaller scale: the bachelor or bachelorette party, the fan meetup, or the massively multiplayer roleplaying game.

Although carnival represented the temporary suspension of power roles, it did not undermine the persistent power of the authority or distort the larger framework of class and political structure. Bakhtin himself argued that carnival perpetuated hierarchy by creating a pressure valve that let participants rebel without engaging in open revolt; the “intolerant seriousness of the official church ideology made it necessary to legalize the gaiety, laughter, and jests which had been eliminated from the canonized ritual and etiquette.”⁵⁴ In another sense, carnival reinforced hierarchy by being the exception to the rule—an exception that existed only at the sufferance of the authority, which dictated when and where carnival activities could occur and policed their metaphorical gates. Carnival upturned hierarchy, but it did not create genuine equality: “In carnival, up may be down, and poor may be rich, but up is not reconceived as over or adjacent.”⁵⁵ Those situated outside the hierarchy, like women and religious minorities, were not elevated during carnival.⁵⁶ And at the end of the day, not only did hierarchy return, but the authority could characterize carnival as a demonstration of egalitarianism—“look, we let you be superior sometimes!”—while continuing to look down its metaphorical nose at the “baser” element for whom the carnival was necessary.⁵⁷ Thus, in Foucaultian terms, the carnival frames a power structure that reflects and transmits the relationship between dominant and dominated classes; even as the dominated classes resist the trappings of the power structure, the structure exerts pressure upon them.⁵⁸

Carnival was significant, in Bakhtin’s reckoning, less for its role in history (if, in fact, it ever actually existed) than for its metaphorical value.⁵⁹ Bakhtin theorized

54. BAKHTIN, *supra* note 46, at 74. There is considerable scholarly debate about whether carnival *actually* served the safety-valve function in society or literature. See, e.g., Mark Osiel, *Rights to Do Grave Wrong*, 5 J. LEGAL ANALYSIS 107, 171 (2013) (describing the “escape valve” theory of legalizing carnival as “still linger[ing] as an intellectual cobweb, at least, in the mustier corners of social thought[s].”). But that is unimportant for current purposes. It is more important that the carnivalesque reflects a natural human impulse toward ambivalent resistance to authority—the desire to act outside convention without violating law—and provides a mode for expressing that resistance.

55. Lolita Buckner Inniss, *A ‘Ho New World: Raced and Gendered Insult as Ersatz Carnival and the Corruption of Freedom of Expression Norms*, 33 N.Y.U. REV. L. & SOC. CHANGE 43, 75 (2009).

56. *Id.*

57. For further discussion of this phenomenon, see Slavoj Žižek, *Superego by Default*, 16 CARDOZO L. REV. 925, 927–28 (1995).

58. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 26–27 (Alan Sheridan trans., 1995).

59. See Chris Humphrey, *Bakhtin and the Study of Popular Culture: Re-thinking Carnival as a Historical and Analytical Concept*, in MATERIALIZING BAKHTIN: THE BAKHTIN CIRCLE AND SOCIAL THEORY 164, 166–70 (Craig Brandist & Galin Tihanov eds., 2000) (critiquing the tendency to employ overly-literal, binary comparisons to carnival and cautioning against treatment of Bakhtinian carnival as a historical phenomenon).

the existence of the “carnavalesque” as a literary technique that embraces humor, grotesquery, and physicality, and upends hierarchical expectations. Carnavalesque elements weave in and out of all expressive genres, although it may find a particularly easy home in genres such as parody, satire, grotesque, comedy, fantasy, and other creations that “consecrate inventive freedom, to permit the combination of a variety of different elements and their rapprochement, to liberate from the prevailing point of view of the world, from conventions and established truths, from clichés, from all that is humdrum and universally accepted.”⁶⁰ Expression of the carnivalesque offers both the creator and the consumer the opportunity “to have a new outlook on the world, to realize the relative nature of all that exists, and to enter a completely new order of things.”⁶¹ The carnivalesque “mock[s] power from a position of relative powerlessness,” based on the temporary suspension of authoritarian expectations.⁶²

Bakhtin observed that, like the medieval carnival he described, carnivalesque expression suspended hierarchy temporarily, but did not eliminate it in the permanent sense.⁶³ This was particularly true in the Romantic period as carnivalesque elements became increasingly enclosed in forms considered to be “lower” than serious literature, such as satire, fable, and burlesque rather than pervading or punctuating of all literature as it had in earlier eras.⁶⁴ The carnivalesque thus was not an “exterior, mechanical method of defense against censorship” but a way of expressing “hopes and aspirations. Freedom was not so much an exterior right as it was the inner content” of carnivalesque works.⁶⁵

B. Fair Use as Carnavalesque

I suggest that one way of conceiving of fair use is by analogy to the carnivalesque. Like the carnivalesque, fair uses employ the communicative tools of the establishment to convey a new, possibly contradictory meaning—a secular use of sacred symbols, so to speak.⁶⁶ The carnivalesque engages in dialogue by assigning a folk meaning to (religious or other authoritarian) signs, resisting a power structure that would assign a monologic meaning to those same signs.⁶⁷ Likewise, fair users of copyrighted work assign some measure of meaning-making function of those signs to the people, assigning new meanings to signs that would otherwise be locked

60. BAKHTIN, *supra* note 46, at 34.

61. *Id.*

62. Inniss, *supra* note 55, at 70.

63. See BAKHTIN, *supra* note 46, at 101 (describing the process by which carnivalesque became distinguished from more-respected literature).

64. *Id.* (referring to this enclosure process as the “descent” of laughter).

65. *Id.* at 269.

66. See Peter Johnson, *Can You Quote Donald Duck?: Intellectual Property in Cyberculture*, 13 YALE J.L. & HUMAN. 451, 453 (2001).

67. See COOMBE, *supra* note 7, at 85 (“For Bakhtin, the dialogic sphere is a fragile domain that remains in constant peril, threatened by forces of linguistic-ideological closure and centralization.”).

into the single meaning controlled by the copyright owner.⁶⁸ And both entail permission from authority to repurpose these symbols, but only within certain authority-defined parameters. For carnival, these parameters are festival days; for copyright, the conditions are defined by the fair use statute and cases interpreting it. The copyright owner has replaced the church as the authority *du jour*, but like carnival, these uses—while they may not be uses that copyright owners would otherwise tolerate—are protected by social and legal expectations.⁶⁹

I do not mean to imply that fair uses embody the grotesque or physically-explicit elements of carnivalesque literature. Although some fair uses certainly embrace those elements, they are neither inherent in fair uses nor particular to them. Rather, here I refer to the topsy-turvy upending of authority, wherein the consumer takes on the role of author and vice versa. The carnival of fair use is extraordinarily diverse and can include, for example, criticism, parody, satire, data-mining, fanworks, collage, and scholarship.⁷⁰

What these disparate genres have in common is that they involve expression by a non-owner using the language of the owner with a purpose or meaning different from what the owner intended.⁷¹ Fair use doctrine favors resulting works that use only part of an underlying work or transform the underlying work into data;⁷² in this way, like carnivalesque literature that uncrowns, dismembers, and exposes its subjects, fair uses dismember works and bring them closer so that they can be examined, experimented with, critiqued, laughed at.⁷³ Each of these genres “profanes” sacralized (here, copyrighted) symbols by playing with them. Like other acts of play, fair use is an inherently political act that “deactivates the apparatuses of power.”⁷⁴ Frequently, although not universally, fair uses involve expression by a relatively powerless speaker using the language of a dominant speaker. Regardless, they invert the power hierarchy inherent in the ownership aspect of copyright law

68. This process of freeing works’ meaning brings to mind Agamben’s *In Praise of Profanation*: “if ‘to consecrate’ (*sacrare*) was the term that indicated the removal of things from the sphere of human law, ‘to profane’ meant, conversely, to return them to the free use of men.” GIORGIO AGAMBEN, *PROFANATIONS* 73 (Jeff Fort trans., The MIT Press 2007) (2005).

69. See Johnson, *supra* note 66, at 469–70.

70. See *id.* at 468 (including in carnivalesque: “children’s songs, satire magazines, fanzine writing, graffiti on billboards, bootleg T-shirts of cartoon characters smoking dope or having sex, or parody ads that make serious social commentary on corporate sins.”).

71. See Craig J. Thompson, *A Carnivalesque Approach to the Politics of Consumption (or) Grotesque Realism and the Analytics of the Excretory Economy*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 112, 116 (2007) (describing transgressive communities that “effect[] at least a partial resistance to corporate capitalism’s ideological hailings and, thereby, afford consumer experiences that are more intense, authentic, and librating”).

72. See 17 U.S.C. § 107 (2012) (identifying “amount and substantiality of the portion used” as a factor in analyzing fair use); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (holding that data-mining use of entire works constituted transformative fair use).

73. See MIKHAIL BAKHTIN, *Epic and Novel*, in *THE DIALOGIC IMAGINATION: FOUR ESSAYS* BY M.M. BAKHTIN 3, 23 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981).

74. AGAMBEN, *supra* note 68, at 76–77.

by recognizing that all expression (whether the law defines it as “original” or “derived”) depends on what came before. Even more powerfully, fair use gives the “deriving” creator a right to utter the last word (or more accurately, the next word) over the possible objections of the “original” creator.

Intertextual creative practices also subvert the law’s implicit hierarchy by inverting copyright law’s idea/expression dichotomy. As Richard Schur describes in the context of hip hop culture, works that incorporate the expressive speech genres of dominant culture can upturn the authority of that culture not only through their expression, but also through the form of that expression.⁷⁵ For example, N.W.A. incorporated the speech genre of the courtroom oath in its song “Fuck tha Police,” to highlight the unjust treatment of African Americans in the “War on Drugs,” and Jay-Z sampled the musical *Annie* in his song “Hard Knock Life (Ghetto Anthem)” to articulate an idea about race and society very different from the message of the musical.⁷⁶ These works upturn copyright’s presumed relation between idea and expression demonstrating that creation is not necessarily based on “one idea, many expressions” but may instead embody “one expression, many ideas.”

As carnival provided an escape valve from an authoritarian power structure and carnivalesque expression provides an escape valve from rigid literary structures, the fair use doctrine provides an escape valve from copyright’s exclusivity-focused paradigm, permitting people to communicate in dialogue with copyrighted works without defying or losing all respect for the copyright system. Like carnivalesque, fair use is resistance without rebellion. Engaging in fair use is a way for speakers to resist the discourse of value as derived from independence from prior text, and create a new one, one in which the line between consumer and author is blurred. Fair use is consistent with copyright’s goal of promoting discourse by allowing for meaning-generating use of preexisting texts, and recognizing the derivative nature of meaning.⁷⁷ For that reason, it challenges the justifiability of a copyright scheme that grants rights only to “original” authors, and to the power dynamic set up by such a system, which grants “original” authors exclusivity over the right to create derived works.

Fair use is a way for creators (as re-creators) to acknowledge and demonstrate the intertextual and relational nature of expression,⁷⁸ but at the same time, the framework of fair use is not a free-for-all. The U.S. fair use statute provides that derivative works are fair only when they embody the characteristics of fair use as defined by a multi-factor balancing test that considers the extent to which the derived work transforms the meaning or purpose of the work it is derived from;

75. See RICHARD SCHUR, PARODIES OF OWNERSHIP: HIP-HOP AESTHETICS AND INTELLECTUAL PROPERTY LAW 65 (2009).

76. See *id.* at 58–59, 65.

77. See CRAIG, *supra* note 3, at 162.

78. See *id.*

whether the derived work is commercial; how much of the original the derived work uses; whether the original work is expressive or factual, public or secret; and whether the derived work competes in the market with the original.⁷⁹ In this way, fair use law allows for derivative creation only within specific doctrinal boundaries, enclosing the relational nature of expression just as the carnival enclosed its challenges to authority within specific temporal boundaries.

Fanworks—new creative works created by fans based on existing media—demonstrate the carnivalesque nature of fair uses.⁸⁰ Fanworks “raid mass culture, claiming its materials for their own use, reworking them as the basis for their own cultural creations and social interactions.”⁸¹ Fan culture is, thus, a form of resistance to authorial authority and the proprietization of communication.⁸² Fans who create fanworks often belong to marginalized or subordinated social groups, and use their fair-use works to play with gender roles, sexuality, disability—physicalized forms, like the carnivalesque.⁸³ Even if their works were merely reviews, however, there would still be a carnivalesque element to fanworks: they not only create new meaning and a sense of belonging,⁸⁴ but they also engage in dialogic resistance to the proprietization of communicative signs. By incorporating “[i]rony, mockery, parody, pastiche, and even alternative modes of appreciation, [fans’] activities of creative appropriation enable fans to comment indirectly not only on gender ideology, but on law, culture, authorship, authority, and the commodity form.”⁸⁵ Although fanwork creation generally involves copying copyrighted materials (and thus could be infringing), fanworks frequently fall squarely within the fair use framework: they usually transform the meaning of the works on which they are

79. See 17 U.S.C. § 107 (2012); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–93 (1994) (elaborating on meaning of factors).

80. See generally Amanda L. Hodges & Laurel P. Richmond, *Taking a Bite out of Buffy: Carnavalesque Play and Resistance in Fan Fiction*, TRANSFORMATIVE WORKS & CULTURES (2011), <http://journal.transformativeworks.org/index.php/twc/article/view/265/231> [<https://perma.cc/WKH3-XBX3>] (characterizing fanworks and fan communities as embodying the carnivalesque in the context of *Buffy the Vampire Slayer* fandom); Rachel Shave, *Slash Fandom on the Internet, or, Is the Carnival Over?*, REFRACTORY (June 17, 2004), <http://refractory.unimelb.edu.au/2004/06/17/slash-fandom-on-the-internet-or-is-the-carnival-over-rachel-shave/> [<https://perma.cc/9HSC-RMGM>] (discussing carnivalesque in the context of *Harry Potter* “slash” fandom).

81. HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE 18 (1992).

82. See *id.*

83. See ORGANIZATION FOR TRANSFORMATIVE WORKS, COMMENTS OF THE ORGANIZATION FOR TRANSFORMATIVE WORKS TO THE USPTO/NTIA 29–38 (2013), https://www.uspto.gov/sites/default/files/documents/Organization_for_Transformative_Works_Comments.pdf [<https://perma.cc/8NN4-NLPU>]; see also Betsy Rosenblatt & Rebecca Tushnet, *Transformative Works: Young Women’s Voices on Fandom and Fair Use*, in *EGIRLS, ECITIZENS* 385, 389–92 (Jane Bailey & Valerie Steeves eds., 2015).

84. See Elizabeth Rosenblatt, *Belonging as Intellectual Creation*, 82 MO. L. REV. 91, 107–08 (2017).

85. See COOMBE, *supra* note 7, at 125.

based, are not created for profit, use relatively modest portions of those works, and do not compete with those works in the market.⁸⁶

Viewing fair use through the lens of the carnivalesque may also help explain what database projects like Google Books and the Hathi Trust database have in common with transformative fanworks, commentary, and other fair uses. At first glance, data-mining may seem a poor fit for the “transformative” prong of the fair use analysis. But it shares with other fair uses a dismemberment of the underlying work, a relational view of expression, and a resistance to the idea that expression is only for consuming (as opposed to analyzing, responding, or incorporating into other expression). Therefore, these databases upturn the primacy of the “original” author to give expressive power—here, the power to analyze expression across works through data analysis—to the consumer. Although they transform in different ways, both fanworks and book databases stand up to the dominant “original-author”-focused system with a message that the system *should* be promoting discourse, not maximizing exclusivity.

III. CARNIVALESQUE AND THE REINFORCEMENT OF AUTHORITY

Viewing fair use through the lens of carnivalesque also highlights some of the more hierarchical elements of copyright law, and in particular, the extent to which fair use law may reinforce those hierarchies as much as it subverts them. Courts have recently clarified what the fair use statute makes clear, namely that fair use is a right rather than a defense to infringement.⁸⁷ This framing would appear to place the “creator” and “user/re-creator” on equal footing. So it would be easy to think, especially after the discussion above, that fair use law erases the hierarchy between creator and consumer. But that would be a mistake. Rather, like carnival, fair use law inverts that hierarchy, but only temporarily, and only under certain circumstances. Outside the world of a particular work that qualifies as fair use, the copyright statute persists in generating a creator/user hierarchy, just as outside of the carnival, medieval hierarchies did not dissolve. Furthermore, fair use law permits the follow-on creator to express herself, but when paired with copyright law’s originality requirement, it places the follow-on creator in a role that will forever be subservient to that of the “original” creator both legally and as a matter of moral discourse.

First, like the temporary nature of carnival or the genre constraints imposed on carnivalesque in the Romantic period, the boundaries of fair use law do not create permanent or wide-ranging freedom. Instead, they create a “free zone” whose gates are policed by copyright owners. Fair use favors particular kinds of

86. See ORGANIZATION FOR TRANSFORMATIVE WORKS, *supra* note 83, at 5–7.

87. See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016) (“Fair use is not just excused by the law, it is wholly authorized by the law.”).

expression—expression that criticizes or comments upon the original work;⁸⁸ expression that is noncommercial; expression that uses small rather than large amounts of the original; expression that incorporates factual rather than fictional works; et cetera.⁸⁹ In addition, because the fair use analysis depends on weighing several often-subjective factors, depending on fair use in litigation is sure to be expensive and the outcome of such litigation is notoriously uncertain.⁹⁰ Thus, creators of works that depend on fair use have a narrower range of intertextual expressive tools at their disposal and take on higher uncertainty than those who can claim “originality.”

Second, the contours of copyright law’s “originality” requirement place derivative creators in a position that will forever be subsidiary to the authors whose works they have relied upon. Even the term “fair use” carries with it an inherent distinction between originator (owner) and deriver (user): “use is always a relationship with something that cannot be appropriated.”⁹¹ Transformative fair uses may recode or repurpose underlying works, but in doing so, they acknowledge and affirm the works’ underlying meaning or purpose.⁹² Although no author can make a complete claim of “originality” in an intertextual world, copyright law elevates authors whose works are deemed to be “original” by giving them rights

88. Although some courts have held satire (i.e., works that comment not on the original, but on some other aspect of society) to be fair use, some courts still value parody over satire. Thus, as Rebecca Tushnet has explained, “[i]f a work has an intelligible meaning and a creative re-use simply borrows the original to get attention, there is no favored parody, only satire [which courts are less likely to find to be fair use]. By contrast, if a work has multiple meanings, only some of which the copyright owner endorses, a re-use that exposes disfavored meanings is transformative and fair.” Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL’Y & L. 273, 275–76 (2007). This is true even though from the standpoint of intertextual discourse, satire and parody operate in virtually the same way.

89. See 17 U.S.C. § 107 (2012). This favoritism is even greater in jurisdictions with fair dealing statutes rather than fair use, as fair dealing requires that the use in question fit within an enumerated list of “fair” purposes such as (to use Canada’s list) research, private study, education, parody, satire, criticism, review, or news reporting. See Copyright Act, R.S.C. 1985, c. C-42, §§ 29–29.2 (1985) (Can.); see also *id.* § 29.21 (defining additional “non-commercial user-generated content” exception to copyright infringement).

90. Some scholars have identified predictable patterns in fair use litigation, but predictability and certainty are very different, and the prospect of litigation defense is expensive, which may discourage many potential fair users. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008) (identifying predictable patterns in fair use jurisprudence); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012) (assessing the predictability of fair use outcomes in litigation); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (identifying policy-based clusters in fair use jurisprudence).

91. AGAMBEN, *supra* note 68, at 83.

92. See Stefan Horlacher, *A Short Introduction to Theories of Humour, the Comic, and Laughter*, in GENDER AND LAUGHTER: COMIC AFFIRMATION AND SUBVERSION IN TRADITIONAL AND MODERN MEDIA 17, 30 (Gaby Pailer et al. eds., 2009) (quoting Frederic Jameson, *Postmodernism and Consumer Society*, in THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 111, 114 (Hal Foster ed., 1983), as construed in JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 138 (1990)) (describing theory that parody and satire are “haunted by ‘that still latent feeling that there exists something *normal* compared to which what is being imitated is rather comic”).

over their entire works, and denigrates authors whose works are deemed “derivative” by making them dependent upon a legal exception for their rights, and even then, giving them rights only as to the “new” increments they contributed.⁹³ As a practical matter, it makes sense that a later comer would not have rights as against the author from whom they derived their work. But the same rule puts “derivative” authors and “original” authors on very different footing as against third parties.⁹⁴ Combined with the fair use framework discussed above, an “original” creator gets not only enhanced rights, but also enhanced stability. The explicitly-derived work exists in a less-certain, risk-laden state, as the owner of copyright in the “original” work can challenge the legality of the derived work, subject to a flexible balancing test that makes no explicit allowance for the value of the transformative creator’s own contribution. If the owner of the original copyright prevails, an injunction may prevent dissemination of the entire derived work—not only the derived portions.⁹⁵ Thus, the “original” author (ironically, often a corporation) obtains functional control not only of its own expression, but also the expression of downstream creators (who are often individuals).

Third, like carnival, the doctrinal framework of fair use does not necessarily place speakers on the same footing as each other. While fair use activity holds tremendous potential to empower the socially or economically oppressed—allowing them not only to resist copyright exclusivity’s discourse of value, but also to “talk back” to oppression using the speech genres of dominant culture—fair use doctrine does not favor the powerless. For example, fair use favors noncommercial uses over commercial ones.⁹⁶ The privileged may have the luxury of creating expression without expecting to benefit commercially from their work, but the less privileged may not be able to, which heightens the gap between advantaged and

93. See *Silverman v. CBS Inc.*, 870 F.2d 40, 49 (2d Cir. 1989) (“[A] copyright affords protection only for original works of authorship and, consequently, copyrights in derivative works secure protection only for the incremental additions of originality contributed by the authors of the derivative works.”); see also Carys Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207, 215 (2007).

94. For example, the 1980 comedy *Airplane!* is based in significant part (often verbatim) on the 1957 disaster film *Zero Hour!*. See Mason Wood, *Side-by-Side Comparison: Zero Hour! (1957) vs. Airplane! (1980)*, YOUTUBE (Aug. 9, 2015), <https://www.youtube.com/watch?v=8-v2BHNbVcs> [<https://web.archive.org/web/20180726202007/https://www.youtube.com/watch?v=8-v2BHNbVcs>] (comparing footage from *AIRPLANE!* (Paramount Pictures 1980) and *ZERO HOUR!* (Paramount Pictures 1957)). Although *Airplane!* undoubtedly holds a much more prominent and respected place in public consciousness and discourse, it will never be afforded equal respect to *Zero Hour!* by the law, and will never be able to attain copyright protection on the dialogue or scenes it appropriated even though those scenes and dialogue hold a very different meaning in *Airplane!* than they did in *Zero Hour!*.

95. See, e.g., *Anderson v. Stallone*, No. 87–0592 WDKGX, 1989 WL 206431, at *10 (C.D. Cal. April 25, 1989) (holding that derivator owned no copyright even in original elements of unauthorized derivative work, because copyrighted elements “tend[ed] to pervade” derivative work).

96. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583–85 (1994) (discussing role of commerciality in fair use analysis).

disadvantaged: those who do not rely on their expression to make a living are better equipped to invert the “speaker/listener” hierarchy than those who must sell their expression. For the same reasons, the fair use analysis disadvantages those who wish to advance their economic status by commercializing hierarchy-transgressing expression. To the extent that the framework does permit creators to profit from fair use, it does so more for large, established creators than small upstarts. Because the fair use inquiry is fact-intensive and uncertain, it is expensive to litigate, and fair use litigation is better suited to confident, well-resourced users than less-confident or less-resourced ones. Therefore, while creators of all resource levels may rely on fair use, its contours are often shaped by large players like Google who can afford to litigate.⁹⁷ In addition, courts tend to apply the fair use standard more favorably to more established artists than to less-established ones, a practice that fair use doctrine not only permits, but encourages, by relying on judicial judgment regarding what qualifies as “transformation” of an underlying work’s purpose or meaning.⁹⁸ Courts are more likely to find a derivative work to be transformative if they respect or admire the resulting work, or find the underlying work unrefined.⁹⁹ Thus, as Andrew Gilden has observed, the fair use doctrine has often “functioned in a stratified way, acting largely for the benefit of those who already enjoy a privileged cultural voice.”¹⁰⁰

Finally, as Carys Craig has observed, any examination of infringement that casts a copyright owner’s work as “original” automatically places a defending party on “the wrong side of a moral equation: she is the would-be free rider, playing opposite the meritorious producer of value.”¹⁰¹ Thus, even if a fair user is exercising a right, she is exercising it at the expense of someone who has been artificially crowned an “originator,” leaving the fair creator open to moral critiques of free riding, unoriginality, or laziness. One frequent critique leveled at fanworks, for example, is that they are unoriginal because they use others’ characters instead of coming up with their own. This critique belittles fans, who are often women and members of other marginalized communities;¹⁰² it belittles the high level of creativity embodied in many fanworks; and it belittles the core discursive intent of fanworks, which requires reliance on preexisting material to criticize, comment upon, augment, build community around, or celebrate that material. Just as the

97. See, e.g., *Oracle America, Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018) (fair use unsuccessfully asserted by defendant Google); *Katz v. Google Inc.*, 802 F.3d 1178 (11th Cir. 2015) (fair use successfully asserted by defendant Google); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (fair use successfully asserted by defendant Google); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (fair use successfully asserted by defendants Amazon and Google).

98. See Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 375–82 (2016) (discussing phenomenon in detail).

99. See *id.* at 382–88.

100. *Id.* at 378.

101. CRAIG, *supra* note 3, at 139.

102. See ORGANIZATION FOR TRANSFORMATIVE WORKS, *supra* note 83, at 29.

carnavalesque allowed the upper classes to justify their dominance by characterizing the lower classes as “a grotesque body of odors, boisterous laughter, drunkenness, and licentiousness, uniquely suited to life in the shop floor, the alehouse, and coarse conditions of poverty,”¹⁰³ the doctrinal relationship between fair use and originality allows the copyright holder to justify its dominance by characterizing the fair user as crude, unskilled, uncreative, or parasitic.¹⁰⁴

Indeed, the threshold question of whether or not a use must be judged to be fair or not may have different impacts on different kinds of intertextual expression in discriminatory and (no doubt) culturally informed ways. Although the two hip hop music examples discussed in the previous section (N.W.A.’s “Fuck tha Police” and Jay-Z’s “Hard Knock Life”) may function similarly from a literary theory standpoint, copyright law requires that they be analyzed differently, since the N.W.A. song copied only the “idea” of the courtroom oath, while the Jay-Z song copied the “expression” of the Broadway composition and sound recording. Courts have been inconsistent in their treatment of sampling, (that is, incorporating segments of existing sound recordings into new sound recordings) which is a practice that gained popularity in the predominantly African-American hip hop music genre.¹⁰⁵ In *Bridgeport Music, Inc. v. Dimension Films*, the Sixth Circuit Court of Appeals left open the idea that sampling may constitute fair use, but even the smallest sample does not qualify as “*de minimis*,” stating, “[g]et a license or do not sample. We do not see this as stifling creativity in any significant way When you sample a sound recording you know you are taking another’s work product.”¹⁰⁶ As a result, hip hop artists who wish to sample music expression must rely on the less-certain fair use doctrine to justify their intertextual expression. Much hip hop sampling has many of the hallmarks of fair use (as exemplified by the seminal fair use case, *Campbell v. Acuff-Rose Music, Inc.*),¹⁰⁷ so hip hop artists are likely to be able to make explicit reference to works that came before. However, the fact that hip

103. Thompson, *supra* note 71, at 116–17.

104. The author thanks Laura Heymann for pointing out that the “fair” in fair use could describe not only the concept of “fairness,” but also the relative disarray of the carnival “fair.”

105. Compare *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2004) (holding that there was no such thing as *de minimis* copying of a sound recording), with *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 879–80 (9th Cir. 2016) (holding that sampling of a sound recording was *de minimis* and thus not infringing).

106. *Bridgeport Music*, 410 F.3d at 801.

107. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The facts of the *Campbell* case highlight an interesting issue that may bear further exploration: the case involves hip hop artist 2 Live Crew’s transformation of Roy Orbison’s “Oh Pretty Woman.” *Id.* 2 Live Crew’s version has a carnivalesque spirit in its own right, transforming the crooner’s song of hopeful admiration (objectifying a woman, albeit in a comparatively mild way) into a much raunchier exploration of an (explicitly black) woman’s physical form, hair, and promiscuity. Beyond the carnivalesque message of the song’s lyrics, the song’s form—the fact that 2 Live Crew, a black and mixed-race hip-hop group with members from the inner city, was drawing on a classic work of corporate top-forty music to convey his message—is at least as carnivalesque, inasmuch as it inverts the power dynamic. Yet it does so at the expense of its female object, who is exploited even more by the fair use than by its “original” counterpart.

hop artists are boxed into the fair use framework, with its uncertainty and its potential for moral opprobrium (as shown starkly in the quotation above), demonstrates not only the manner in which fair use grants functions as a carnivalesque, but also the way in which the carnivalesque nature of fair use grants only temporary relief from copyright's inherent hierarchy.

Thus, the system lowers fair uses by enclosing them in the "fair use" framework just as, as discussed above, the medieval authorities dismissed carnival as the domain of the lower classes and the Romantics enclosed the carnivalesque in "lower" forms of literature. This derogation has social implications as well as more general implications for legal discourse. Fan-based fair uses and the communities that grow up around them are often dominated by women or seen as "women's" endeavors.¹⁰⁸ Traditional discourse surrounding intellectual property law focuses on exclusivity as a profit incentive, devaluing creation directed at purposes other than profit.¹⁰⁹ These two propositions frame a discourse that expects women engaged in relational expression to be more interested in the building of creative community than in creation-for-profit, while derogating them for those same presumed interests. As Rebecca Tushnet explains, "our cultural policy has expected women's endeavors to generate surplus creativity but has assumed that men's endeavors require compensation, just as our society has expected women to do the hard work of raising children and keeping house out of love and duty but has not expected men to show up at the factory for the same reasons."¹¹⁰ The discursive thrust of the fair use system reinforces a lack of cultural respect for a category of women's creations, and in turn feminizes the act of fair use.

The same can be argued for other "lowering" associations one might make with fair use. Take, for example, fair use's connection with adaptive technologies such as screen readers for the sight-impaired or captioning for the hearing-impaired. The fact that such technologies often depend on fair use may create or reinforce a harmful stereotype of the disabled as weak, dependent, or parasitic, and may also associate fair use with disability. The fact that the predominantly black community of hip hop music artists is forced to rely on fair use for sampling, as discussed above, may create and reinforce a harmful stereotype of black artists as engaged in free-riding, theft, or unoriginality, and in turn associates fair use with minority. Corporations own many of the "original" works on which fair uses are based, which gives corporations a moral high ground from which to reframe individual transformative authors as enemies of progress or usurpers of value.

The fair use framework therefore reinforces hierarchies regarding the content, profitability, availability, and respect afforded to intertextual speech. And yet, fair

108. See ORGANIZATION FOR TRANSFORMATIVE WORKS, *supra* note 83, at 31–33.

109. See Rebecca Tushnet, *Economics of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517–19 (2009).

110. Tushnet, *supra* note 88, at 303–04.

use is still regarded as among copyright law's chief safeguards of free expression.¹¹¹ This very perception may compromise freedom of speech by creating a façade of freedom that dulls the incentive for creators to engage in more radical opposition to exclusivity-based protection. Having recognized the necessity of derivative creation to promote progress, copyright law circumscribes that derivative creation within a hierarchical framework. The availability of fair use as “acceptable” copying places everyday fair users in the mainstream, downplaying the political potential of fair users' implicit (and often unintended) challenge to authority. Moreover, by legitimizing fair use as a permitted (albeit subordinate) activity, fair use doctrine further marginalizes more radical acts of copying, such as peer-to-peer file sharing and counterfeiting.¹¹² If fair use activity represents the play-transgression of carnival, copyright “piracy” represents a more serious and permanent transgression, the sort that leads to excommunication. Any acceptance of copyright piracy would imply an equivalence between communication and copying, suggesting that spreading information may be an act of progress or that violating the copyright hierarchy may be an act of meaning-making. By operating outside the allowable-copying framework altogether, copyright pirates pose a more genuine threat to copyright orthodoxy, and the legal discourse lowers them to the status of *persona non grata*, rejecting any notion that their activities could have worth. This discursive marginalization of infringers justifies more severe penalties and more intrusive techniques for detecting infringement.¹¹³

In this way, like Bakhtin's carnivalesque, fair use doctrine serves the interest of the status quo. To the extent that derivivers' works recode the works of copyright owners,¹¹⁴ fair use doctrine serves the interests of those owners not only by maintaining their upper hand in copyright's discourse of value, but also by marginalizing disfavored copiers and acting as a “safety valve” that keeps the metaphorical peasants from rioting.

111. See *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2002) (holding that copyright term extension does not implicate the First Amendment because the fair use doctrine protects free speech). *But see* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 *YALE L.J.* 535, 560 (2004) (discussing ways in which the increased focus on “transformativeness” in fair use cases potentially chills free speech).

112. See generally Kavita Philip, *What Is a Technological Author? The Pirate Function and Intellectual Property*, 8 *POSTCOLONIAL STUD.* 199 (2005) (describing how the discourse surrounding “piracy” imposes hierarchical sociocultural distinctions on different kinds of copying often reflecting the race, gender, or other status of the copier).

113. See Sonia Katyal, *The New Surveillance*, 54 *CASE W. RES. L. REV.* 297, 320–26, 361–62 (2003) (describing how rhetoric of “piracy” normalizes infringement-detection surveillance, with potentially speech-chilling results).

114. See generally Justin Hughes, *Recoding Intellectual Property and Overlooked Audience Interest*, 77 *TEX. L. REV.* 923 (1999) (identifying an audience interest in works' stability and arguing that the ability to “recode” meaning depends on such stability).

Just as it would be oversimplifying to characterize the carnivalesque as purely a challenge to the status quo or purely a reinforcement of authority,¹¹⁵ however, it would be oversimplifying to do so for fair use. Surely, the operation of copyright law represents not only the imposition of authority from above, but also the behaviors and priorities of its participants. While fair use may provide a discursive tool to denigrate fair users and their works, it also provides a mechanism for fair users to demonstrate their potential and gain authority outside of copyright's discursive hierarchy. When Google engages in fair use to transform copyrighted works into searchable data, it not only dismembers and plays with those works in carnivalesque fashion, it also it gains enough communicative power to generate a discourse of its own on the nature of "originality" and "progress." One might reasonably say, therefore, that while fair use *doctrine* often reinforces the copyright hierarchies, fair use *activity* can still pose challenges to that discourse, and even provide a path to power. Jay-Z and N.W.A. relied (at least in part) on fair use to transform themselves from "have nots" to "haves," both in financial terms and in a copyright sense. Many successful novelists, artists, and filmmakers found that their road to success started with fanworks.

But while fair use activity may permit creators to engage with dominant culture and may provide social or economic mobility for some creators, it does little to chip away at copyright's overall discourse of value. Those who create derivatively without relying on fair use principles must be well-enough resourced to pay and must be willing to accept content restrictions placed on them by copyright holders. Those who instead rely on fair use to advance themselves as creators must also make decisions governed by copyright discourse. For example, they must ultimately shift to a different mode of creation deemed more "original," or forever be deemed "derivative," makers of "lower" art. Fair users may garner success, but their works—even those deemed original—are more likely to remain cabined in the lower-brow, as less serious or artistically meritorious than their dominant-culture counterparts.¹¹⁶ While hip hop music generates massive sales, it still struggles to attain musical respect, and hip hop artists still sacrifice large portions of their income to those whose works they sample.¹¹⁷ Moreover, the legal hierarchy persists

115. See Humphrey, *supra* note 59, at 170 (critiquing such oversimplifications).

116. See Emma Whitford, *Lev Grossman, S.E. Hinton, and Other Authors on the Freedom of Writing Fanfiction*, VULTURE (March 13, 2015), <http://www.vulture.com/2015/03/6-famous-authors-whove-written-fanfiction.html> [<https://perma.cc/9XQA-9QKS>] (Authors Christina Hobbs and Lauren Billings describe: "At first we kept our fanfiction background a secret, because we had been told that it was a black mark in the publishing industry. If publishers knew where we were coming from, they wouldn't take us seriously.")

117. See *Showcase: Ways of Hearing, Episode #1 – Time*, 8:20 RADIOTOPIA (summer 2017), <https://www.radiotopia.fm/showcase/ways-of-hearing/> (Ali Shaheed Muhammad of hip hop band A Tribe Called Quest explains: Muhammad: "One of the biggest samples that we were able to clear was 'A Walk on the Wild Side' by Lou Reed. And—and by clearing that, he just took one hundred percent [laughs] of that song." Kelley: "Wait, really?" Muhammad: "He did." Kelley: "Wait, you're saying Lou Reed gets a hundred—" . . . Muhammad: "Yeah, that's—that's his song." Krukowski: "Ali, I always

even if the social one does not, because independent of popularity or respect, the so-called originator will always have legal dominion over part of the deriver's work. Therefore, while engaging in fair use is an act of resistance, it is dulled by the structural assumptions that underlie the fair use doctrine.

CONCLUSION

In this Article, I have identified the hierarchy implicit in copyright law, demonstrated how an author's decision to engage in fair use can represent carnivalesque resistance to the hierarchy of values that copyright law creates, and explored ways in which the framework of fair use law nevertheless reinforces copyright law's artificial hierarchy of values. Bakhtin's theory of the carnivalesque is a useful lens for understanding this potentially-counterintuitive aspect of fair use law.

The message of this Article is not that fair use law is bad. On the contrary, it is an essential aspect of copyright law, needed to promote discourse—much as the carnival, as Bakhtin conceived it, was an essential element of medieval European life. But through the lens of the carnivalesque, we can observe the artificial and potentially harmful value judgments that hide within the fair use framework. It is only by recognizing these value judgments that we can understand their impact on legal discourse and, when appropriate, combat them.

thought, you know, my band, Galaxie 500, we ripped off The Velvet Underground way more than you did, and we, we didn't have to pay them a dime!").